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Law and Linguistic Multiplicities

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**Sebastian McEvoy
Le Cheng**

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For electronic submission

Chief Editor: Le Cheng (ijlldchief@gmail.com)

Copy Editor: Jian Li (ijlldcopy@gmail.com)

Production Editor: Paul Robertson (editor@ijlld.com)

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Foreword

Comparative law usually compares different legal systems and more particularly, within those systems, rules of law over similar issues. In the double context of the several trends towards legal globalisation, unification or harmonisation and linguistic diversity, legal multiplicity is here put in parentheses, except as resulting from linguistic multiplicity. All the papers in this special issue on “Law and Linguistic Multiplicities” address questions related to the oneness of law (or adjudication) despite its multiple linguistic versions, the oneness of each language given its multiple categories, the oneness of law in each language despite its multiple possible interpretations. The terms, firstly, are not different legal systems and, across those systems, different rules over similar issues, but the formulations in different languages of legal principles or rules that should remain constant whatever the language and whatever its cultural specificity. Secondly, each language is multiple in that it includes multiple categories of that language (genres, branches, modalities, uses et cetera). Thus, the languages of litigation and AMDR (Alternative Modes of Dispute Resolution) are or were initially intended to be different. Indeed, legal language is so different from ordinary language that diverse attempts have been made within a single language to make legal language understandable for the layman. Moreover, within a single legal system, there are several branches of the law, for instance criminal law and civil law, with different categories, and correspondingly different languages with different terms. The issues that those intra-linguistic comparisons raise revolve around the effects of the categorisation and the interaction between the different categories. For instance, what is the effect of having the same professions operate in different linguistic or discursive categories or of shifting a relationship from one legal category to another? Thirdly and lastly, the terms of linguistic multiplicity are not only different languages, such as Chinese, English or French, and the different linguistic categories within a single language, for instance ordinary English and legal English, but also the different interpretations of the same principles or rules as expressed in one language. The questions that all those comparisons raise are whether legal oneness subsists otherwise than as a fiction in its linguistic or interpretative multiplicity

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and if not, how the differences are to be ordered for the legal principles or rules to operate pragmatically as guidelines for action. Such, then, are the several issues explored in this special issue on “Law and Linguistic Multiplicities”, with papers, written by linguistics, argumentation theorists and academic or practicing lawyers, on European Union, Dutch, English, Italian, South African or US law.

1 External linguistic multiplicity

Colin Roberston, a European Union lawyer-linguist and author of numerous research articles on the linguistic issues related to his profession, presents the multifarious linguistic difficulties that arise in setting down European Union law. European law is perceived from outside the Union and represents itself as being one and the same for the twenty-seven member states of the Union. Yet, it is formulated through legislative and judicial texts in twenty-three different languages. Each of those linguistic versions has equal standing. None is officially the translation of another. In other words, whatever the text at issue, any one of its twenty-three versions can be referred to as the original version. Moreover, even when two or more states share the same language, each member state has its own pre-existing and continuously developing domestic law. How then can European law be one and the same? Such is the question this first paper explores, with expert insights about how professional EU translators attempt to overcome the difficulties. It does so first in general terms and under Charles Saunders Peirce’s semiotics then through the study of a particular case, *Simutenkov* [2005]¹, on the occasion of which Advocate General Stix-Hackl stated six different approaches to the interpretation of a multilingual act and the reasons for choosing one approach rather than another.

2 Internal linguistic multiplicity

There is not only a multiplicity of languages, into which one and the same law, for instance European Union law, may be formulated, but

¹ In this introductory presentation, cases are cited in that minimal form (name, date in brackets). Unless otherwise stated, standard citation is found in the relevant papers.

also within each language a multiplicity of linguistic genres or context-dependent language uses, which may result in a single language becoming multiple and foreign to itself. Thus, English has progressively prohibited the use of foreign languages, Latin and French, for the formulation of English law and for court proceedings, but the “foreignness” of legal English itself subsists, as is acknowledged since 1998 by the adjunction to each statute of “explanatory notes”, designed, as the legislation.uk.gov website puts it, “to assist the reader in understanding the Act”. Legal English, however, remains foreign to the layman, which is a problem under the rule of law, if that constitutional principle means, among other things, that the law should be, not only understandable with training, but actually understood by all. Yet, can legal language be avoided to resolve disputes, even in AMDR? How else than through explanatory notes, can the law and legal language be made more palatable for the layman? More specifically, within legal language itself, there are several different languages: the languages of criminal law and civil law, the languages of torts and contracts et cetera. What, if anything, happens when the data of a case is translated from one of those languages to another? Grouped under the subtitle “internal linguistic multiplicity”, such are the main issues considered in the following four papers. The authors are linguists particularly interested in law as a specialized language or in adjudication as requiring a particular modality of argumentation, except one of the authors of the last paper, who is a practising lawyer.

Maurizio Gotti, director of the CERLIS (a research centre on specialized languages, based at the University of Bergamo), argues that AMDR have from a linguistic and discursive point of view become linguistically similar to litigation, as though the latter had “colonised” or “contaminated” the former. This phenomenon may be due to the arbitrators, who are often lawyers, but may also result from internal generic pressure for discursive homogeneity and a renewed response to the practical need for accuracy, all-inclusiveness and order, which accounts, arguably, for the characteristic features of legal language and discourse and their foreignness within ordinary, non-specialized language.

Martin Solly, an associate Professor of English language and translation at the University of Florence, who is involved in a nation-

wide Italian research project on “Tension and change in English domain-specific genres”, directed by Maurizio Gotti, analyses the several linguistic and literary devices (narrative, characterization, humour, ordinary language dialogue) used by the author of *BabyBarista*, a highly successful blog, to bridge the linguistic gap between the lawyer and the layman and so enable even the lay reader to have an understanding and fictional inner experience of the activities in the chambers where barristers work.

Ross Charnock, a senior lecturer at the University of Paris-Dauphine and a member of the CRCL (Centre for Research on Common Law, based at the University of Paris Ouest Nanterre La Défense), argues that in judicial argumentation, the factual premise is always conditioned by the legal premise, so that different legal premises result in different analyses of identical facts. In the three examples he examines, the facts were considered under both the law of tort and the law of contract. After showing how different views of the law allow different arguments on the same data, the paper concludes that legal reasoning is neither true nor false and that the availability of alternative justifications means that there can be no guarantee of sincerity. However, even when insincere, judicial argumentation can make a positive contribution to the law.

Considering a new disequilibrium in South Africa between landlord and tenant, to the disadvantage of the former, **Maureen and Tamara Klos**, respectively a senior lecturer in the Department of Applied Languages at Nelson Mandela Metropolitan University and a practising lawyer also in Port Elizabeth, South Africa, argue paradoxically that the law should complete the transplantation of landlord and tenant relations into the language of consumer law and include landlords in the category of consumers as it already does tenants. The effect of that re-categorisation within the several branches and languages of the law would be to provide landlords with consumer protection against abusive tenants.

3 Internal interpretative multiplicity

The rule of law, it has been said above, may be understood as requiring that the law should be, not only understandable with training, but

actually understood by all. Yet, each language is internally multiple for a second reason, which is that utterances, often, if not always, allow several interpretations. The next four papers focus on that second modality of internal linguistic multiplicity. The first two refer to a civil law system, the Dutch legal system. The second two refer to the common law systems of respectively the United Kingdom and the United States. It is to counter interpretative multiplicity that many legal systems have adopted the literal rule as the preferred approach for the interpretation of statutes. Such was the case in England, until recently, when the purposive approach to the interpretation of statutes and contracts enabled the courts to do away with the literal meaning. According to the first paper, such is the case in the Dutch legal system, although this approach can be rejected. It is also because unclear utterances are interpretatively multiple that the Dutch Supreme Court, according to the second paper, normally requires judgements to be clear or univocal and can quash judgements that are not. The two papers present models to explain why the courts can sometimes set aside respectively the literal rule or the clarity requirement. The next and last two papers further the inquiry on departures from the requirement of clarity, arguing that the interpretative multiplicity of a language and its terms can be exploited rhetorically, for instance by the courts, as support for a decision or the adaptation of a rule of law to new circumstances. The authors of the first three papers are argumentation theorists who are especially interested in judicial argumentation². The fourth is a lawyer.

Eveline Feteris, a senior lecturer in the Department of Speech Communication, Argumentation Theory and Rhetoric in the University of Amsterdam and a member of the ILIAS (International Learned Institute for the Study of Argumentation), extends pragma-dialectical theory (also called pragma-dialectics), originally elaborated by Frans van Eemeren and Rob Grootendorst, and “strategic maneuvering” (thus spelt), first defined and explored by Frans van Eemeren and Peter

² The first two papers indirectly continue the theme of the previous papers, in that, firstly, their theoretical framework has been formulated in several languages (especially, English and Dutch) and that, secondly, the theory and its concepts form a language within a language, the language of pragma-dialectics (which remains or should remain constant in all its linguistic versions, as though the language difference made no difference).

Houtlosser, to statutory interpretation and more specifically the “linguistic argument” (or literal rule argument). Pragma-dialectics has isolated and ordered rules for an ideal reasonable resolution of disputes. Here, the starting point rule (rule 6) and the burden of proof rule (rule 2) are particularly relevant. The concept of strategic maneuvering identifies strategies that balance dialectically reasonable and rhetorically effective discussion moves. When the balance is not observed and rhetoric prevails over dialectics, for instance because rules 2 and 6 are not observed, the strategic maneuvering “derails”, in other words argumentation becomes fallacious. Exploring statutory interpretation as from that double theoretical framework, the author distinguishes three forms of strategic maneuvering with the linguistic argument and defines the rules for their acceptability. The literal meaning can be referred to as (1) an independent argument, (2) a supplementary argument or (3) an argument overridden by others. In Dutch law, as opposed to English law, in which statute law provides countless statutory definitions that prevail over ordinary meaning, a condition for the correct use of linguistic arguments is that the meaning relied on should be the generally accepted meaning, or, in any case, should not be inconsistent with the generally accepted meaning. The analysis of two Dutch cases enables the author to verify the adequacy of the rules she has formulated for both the acceptable and the fallacious uses of linguistic arguments.

José Plug, also a lecturer in the Department of Speech Communication, Argumentation Theory and Rhetoric in the University of Amsterdam and a member of the ILIAS, examines the Dutch Constitutional requirement that judicial decisions must be justified (that is to say, supported by a *ratio decidendi*), which has been understood by the Dutch Supreme Court to mean, among other things, that the justification must be linguistically clear and unequivocal. She relates the requirement to the ideal pragma-dialectical model of dispute resolution, more specifically the language use rule (rule 10), following which unclarity, whether deliberate or not, amounts to a fallacy, that is to say, for pragma-dialectics, an obstacle to dispute resolution. Litigants, in the Dutch legal system, can appeal against a decision because it lacks clarity. However, the study of several cases suggests that the Supreme Court, the highest Dutch court, quashes a decision for

obscurity only if the language was actually obscure for the parties and third parties and if the obscurity has actually frustrated the resolution of the dispute.

Victor Ferry, a researcher of the Belgian Fonds National de la Recherche Scientifique (F.R.S- FNRS) and a member of the GRAL (research group on rhetoric and argumentation in language, based at the Free University of Brussels), addresses the perennial issue of the rationality of common law and argues that rationality or logic and rhetoric should be viewed, not as opposed, but as complementary in situations where no certainties can be found and yet a decision must be made, as is frequently the case in common law. He upholds, it appears, what one might call an “oracular” conception of adjudication, under which judgements on cases that admit arguably no rationally certain solution are handed down in terms, which are uncertain, but in that peculiar manner satisfy the requirement of “effability” or expressibility. To argue this point, he focuses on the dissociation of notions, a technique which exploits the ambivalence latent in lexical semantic indeterminacy. It was identified by Chaïm Perelman and originally, but negatively as a sophistic move, by Aristotle, in *Sophistical Refutations*, among verbal fallacies. Victor Ferry questions recent ILIAS analysis and evaluation of this technique as taking for granted that clarity, as it is in Aristotle, should be referred to as a standard. He illustrates the operation of this technique, in two leading and frequently commented cases on negligence, *Donoghue v Stevenson* [1932] and *Hedley Byrne v Heller* [1964]. In the first case, Lord Atkin, interpreting the principle of liability for negligence, dissociated moral and legal liability. In the second, interpreting the hypothetical principle that common law should develop logically, Lord Devlin dissociated surface logic and root logic. The two judgements resolved the issue of their respective cases, but their ratios remained uncertain and have therefore been debated repeatedly.

Although unconnected with the ILIAS or the GRAL, **Anne Richardson Oakes**, a senior lecturer at the school of law of Birmingham City University, revisits the issue of clarity in the law and can be understood to provide another instance of the dissociation of notions in her analysis of how as from *Brown v the Board of Education* [1954], the courts have interpreted “discrimination”. *Brown* struck out

the “separate but equal” doctrine, but was not clear as to whether it prohibited racial classification in itself or racial classification if and only if it resulted in racial subordination. At first, the difference between the two interpretations had no effect, because at the time classification generally resulted in subordination. However, the post-racial presumption, strengthened by Barack Obama’s presidency, is that subordination, in present society, has become distinct from racial classification. Accordingly, the courts now tend to prohibit only subordination and have even condemned attempts at desegregation or integration as unconstitutional discrimination. The dissociation of classification and subordination is said to rest on self-declared empirical research in the social sciences, but the social sciences have also provided contrary evidence that the dissociation of subordination and racial classification is not empirically founded.

The articles presented in this issue have been subjected to review and more or less rewritten, but were delivered in their original versions at the *International Law, language and literature* conference, which was held on 17 and 18 June 2011 at the University of Paris Ouest Nanterre La Défense (formerly, the University of Nanterre or Paris X) and organised around the CRCL by Christian Biet, Ross Charnock and myself. The conference brought together several European research units on law, language and literature, the AIDEL (the Italian Association of Law and Literature) and, mentioned previously, the CRCL, the CERLIS, the GRAL and the ILIAS. Most of the twenty-three speakers came from Europe, but some from other continents, North America, Africa and Asia. It is hoped that publication in the *International Journal of Law, Language & Discourse*, which is based in China (Hong Kong) and Australia, will be followed by further intercontinental research cooperation on law and language.

Sebastian McEvoy (Email: stmcevoy@gmail.com),
Professor at the University of Paris Ouest Nanterre La Défense,
Director of the bilingual undergraduate and postgraduate programme in
European laws/English law,
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The Problem of Meaning in Multilingual EU Legal Texts

Colin Robertson*

The European Union creates rules of law that bind member states and citizens. The EU, with 27 member states, is multicultural and, with 23 official languages, multilingual. Its institutions produce *inter alia* legislative and judicial texts, which are read and interpreted by many actors at many levels, within and outside the EU. A legal text is intended to create meaning. Its purpose is to make some change in the 'real world' of ideas and action in some way, within the context of legal system and policy domains, using language as a tool for communication. The EU legal text is subject to multicultural influences in negotiation and interpretation; it is created in a single text comprising 23 authentic language versions. This paper explores the problem of meaning in EU legal texts. It first introduces the EU context within which the texts are constructed. It then considers some approaches drawn from the semiotics of Peirce as tools for studying meaning across languages. Thirdly it proposes a case study of Case C-265/03 *Simutenkov* as an example of multilingual judicial interpretation

Keywords: EU, legal language, meaning, multilingualism, interpretation, semiotics, Case C-265/03 *Simutenkov*

1 Introduction

1.1 Purpose of the paper

The purpose of this paper is to explore some of the issues which arise in connection with creating, reading, interpreting and applying EU legal texts and ways in which meaning is created and derived from 23

* The opinions expressed are personal to the author.

language versions which all have the same legal status as ‘authentic’, or ‘source’ texts. The subject is complicated as it entails an exploration of legal as well as linguistic issues within a multilingual environment (Morgan, 1982; Robertson, 1999, 2009a, 2009b, 2010a, 2010b, 2010c, 2011). The law of the European Union is developing rapidly; old problems are being tackled in new ways and this involves close international cooperation by 27 member states (soon to be 28 with the accession of Croatia) within a legal and linguistic environment that is highly structured and carefully organised, using the methods of legal language and legal texts as an instrument for action and change on the ground. One of the advantages of using EU texts for linguistic research is that the materials are readily accessible in the EU languages from the <http://europa.eu> website. Thus, although this paper is in English, the substance can be studied in parallel in the other EU languages. Further, it is not just 23 or 24 EU languages that are involved, but more accurately 25 or 26 languages. This is so because many EU legal texts have also been translated into Icelandic and Norwegian, as a result of the European Free Trade Association (EFTA) and the Agreement on the European Economic Area (1993) between the EU and EFTA states. However, the focus here is on the EU context.

1.2 Structure of the paper

The substance of this Paper is divided into three parts. First, there is a brief introduction to the EU context and EU legal language. Meaning is created in context and when interpreting a legal text it is necessary to have a clear view of the particular legal context in which the text was created, as well as the background culture of philosophy, aims and ambitions and the wider intertextual web of relationships between legal instruments which also influence meaning and are drawn on when constructing an act, for example through references and incorporation of provisions of other acts.

Second, this paper takes a look at some ideas developed by the American philosopher and semiotician Charles Sanders Peirce: his concepts of ‘firstness’, ‘secondness’ and ‘thirdness’; his concept of the sign as comprising three elements: representamen, object and interpretant (as opposed to a binary Saussurean approach of signifier

and signified); his classification of signs as index, symbol or icon. These are placed in relation to EU legal language.

Third, a case study is presented as a practical example of methods of multilingual judicial interpretation of an EU legal text. This is Case C-265/03 *Simutenkov* brought before the European Court of Justice in Luxembourg. The Opinion by Advocate General Stix-Hackl is particularly clear in the analysis of different ways in which the European Court of Justice in Luxembourg interprets EU multilingual texts. It provides valuable insight into the Court's methods, the legal approach to interpretation, and the search for meaning.

1.3 Viewpoints

When studying meaning in EU legal texts, it is suggested that there are different viewpoints for approaching the subject, for example, linguistic, semiotic and legal and each is linked to purpose and the information being sought. These viewpoints are reflected in this paper. However, for legal texts two further viewpoints influence the creation, interpretation and application of legal texts which are not covered in this paper. These are the viewpoint of the (paying) client who wants a specific product or practical result from the text and for whom the text is created. Then there is the public, or persons, to whom the legal text is addressed. It must (or should) be written in a way they can understand. Their needs and opinions also have an impact on the drafting and interpretation of the text. Law is shared throughout society, so is EU law.

2 EU context

2.1 Meaning in context

Meaning is created within a context. For legal texts, there is the context of the legal system taken as a whole, with possible interaction with other legal systems, depending on the circumstances; second, there is the context of the branch of law, policy field, domain (family, commercial, agriculture, sport, competition, etc.); third, there is the context of language and of the specific text, how it is constructed and its relationship to other texts. The law of the European Union (EU law) uses legal language and it shares many features with the legal language

of domestic systems of law in the Member States (national law). Concepts, methods and approaches are borrowed from national law, for example French law as the original EU texts were drafted in French. One can see this from terminology, for example the expression ‘*aquis* of the Union’ used to cover all EU law to date, that is to say the whole EU patrimony. On the other hand, there is borrowing from international law. The foundation of EU law is in international treaties and, for example, the EU procedure for correcting errors is based on the method for rectifying international agreements.

2.2 EU treaties

The EU context (legal, policy domain and linguistic) is currently based on two main treaties: the Treaty on European Union (TEU) and the Treaty on the functioning of the European Union (TFEU). These treaties are international law treaties and have the purpose to change and align the domestic law of member states of the EU. Thus we find that EU law occupies a kind of middle ground between international law (the law concerning relationships between nations) and national law (internal domestic law of a state). Normally the internal domestic law of a nation prevails, since through its organs (legislature, courts, police) it has the ability to control and enforce its own rules, but for the EU system to achieve its objectives it is necessary for EU rules to take precedence over national law and for the national institutions to place it at a higher level than national law, subject to safeguards. This concept of precedence, established by the European Court of Justice in *Case 26-62, van Gend & Loos* involves identifying EU law not as ‘inter’ national but as ‘supra’ national, i.e. above national law. Further, because the EC/EU system does not match other existing legal approaches it is classified as a separate ‘legal order’. EU law is thus seen as constituting a specialised and separate legal order which creates its own context for the construction of meaning.

2.3 Matrix

The EU context exists alongside the context of international law, through which it was created and on which it depends for existence, on the one hand, and the national law contexts of 27 (28 with Croatia) domestic legal systems of the member states, on the other hand. These

contexts influence the creation of EU texts and their interpretation and application. They affect terminology, and through terminology they have an impact on meaning. Words are ‘mobile’. They move between contexts. As they do so, they may shift meaning. For example, words may start in a national context and move into an international context (United Nations (UN), Organisation for Economic Co-operation and Development (OECD), etc), then to the EU context through EU law implementing an international obligation, and then back again to the national context via implementation of an EU obligation into national law by ‘transposition’ of an EU directive. We can ask: does a word that has travelled this circuitous path come back to the national context with the same meaning as when it left it, and where it still remains? Do we have the ‘same’ word with different meanings? An answer in each case can be put forward through terminological and semiotic analysis. Thinking of words in terms of signs (representamen, signifier) can help to reveal the deeper levels of meaning attached to terms, firstly in terms of the object (signified) and secondly of the interpretant. We see that terms exist within a matrix of systems and texts (Robertson, 2011).

One example of the process is to be found in Copyright Law, where there are legal texts at the levels of international, EU supranational and national domestic law: (a) International: Berne Convention for the Protection of Literary and Artistic Works; (b) EU: Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights; (c) national: UK: Copyright, Designs and Patents Act 1988. Thus, one can search for terms that occur in each text and ask whether in each case those terms have exactly the same meaning as the same terms in the other texts. For example, expressions such as: “literary *or* artistic work”, “literary *and* artistic work”. Do these have the same meaning in each context?

We can note in passing that words such as “and”/”or” may be used differently in different languages. That seems to be the case between French and English and a question that regularly arises in EU texts is whether the word should be ‘and’ or ‘or’, often leading to ‘and/or’. So, in addition to reflecting on the meaning of words in each context within a single language, one must also reflect on the meaning of those words in relation to the equivalent terms in all the other language versions of

each text. Is the same, or similar, meaning conveyed across all the language versions of a text?

Further, since language and languages change and evolve over time the terminology used within the same language may also change over time. This can be a problem for legal texts, because laws are usually drafted so as to be continuously in the present tense once they are in force. As they travel through time in the continuous present other legal acts become connected to them in various ways and if the terminology changes over time and the new laws are expressed in a different way then the new forms of wording may not fit exactly with the older texts, unless particular attention is paid. Up till now the EU is still young, so this issue has not emerged to any significant extent. However, with older legal systems as in Scottish or English law, the differences are very marked if one makes a comparison with laws dating from the 15th or 16th centuries.

2.4 'Horizontal' and 'vertical' views

We can express the relationships between and within languages in spatial terms. If we imagine all the language versions laid out side by side like soldiers in an army marching in step, text by text, article by article, sentence by sentence, term by term, then we can look across the texts horizontally, as it were, and ask if they all march in step and whether the information contained in each unit of meaning is the same across all the language versions. We can call this a 'horizontal' view. On the other hand, we can step inside any language version and consider it exclusively from the point of view of being one text in a sea of other legal texts expressed in that same language code (English, French, German, etc). Then we look for consistency between the texts within the same language. We can call this a 'vertical' dimension to make a distinction or alternatively an 'internal' language-code bound view. The EU drafters, translators, revisers and legal-linguistic revisers must simultaneously view the texts from both a 'horizontal' and 'vertical' viewpoint and adjust them so that they align in both ways. Thus, when interpreting EU legal texts, one must look for meaning across all language versions of a text 'horizontally' and also 'vertically' within each language for consistency. Divergences are generally accidental, or incidental and difficult to avoid, but extremely rarely

they may also be intended. The problem is to find out what is intended and that is a task for legal interpretation.

2.5 Variation

EU texts are mainly translated texts and translators each have their own style and preferences, ironed out through conformity to established and standardised words and expressions and through the use of translation memory tools to enhance speed and accuracy. There may be slight translation divergences between similar texts where the meaning is substantially the same for each but the precise formulation differs. A later text may use a different term for the same thing compared to an earlier text. This may create a problem when interpreting ‘vertically’ or ‘internally’ within a language, if texts do not seem to match. However, if one examines other language versions, one may find the same terms being used consistently or alternatively that there are clear differences. Thus, no version can be read solely on its own. Each is a part of the whole, since each text exists only as a single strand of a multilingual text 23 languages wide.

To these considerations, we should add that the texts and wording may have been subject to judicial interpretation over time. The rulings determine the meanings to be given. However, do determinations of terms in one text carry over to other texts where the same words are used?

With EU multilingual legal texts, there are further dimensions that have a bearing on meaning. For example, one language version is generally taken as the base language to work on, draft, consult and negotiate the text; with translation into other languages following. However, there is no obligation to stay with the same language as base text throughout the process of preparation. The Commission may work in one language, say French, and the Council presidency may choose to work on the English translation as base, or vice versa.

2.6 Non-native speakers

Furthermore, base texts are frequently prepared by non-native speakers who may introduce concepts and syntax structures from their own language. It is against the foregoing background that the EU institutions employ lawyer-linguists to check and revise EU legal texts in all

languages and oversee their final preparation, as described by Šarčević and Robertson (forthcoming 2012). In this process of revision, the language versions are compared and adjusted, which gives rise to the concept of ‘co-drafting’ (Gallas 1999) but also, more recently with the collaboration between Council and European Parliament lawyer-linguists, there is the concept of ‘co-revision’ of the EU multilingual texts (Guggeis & Robinson, [forthcoming] 2012).

A picture of EU linguistic ‘reality’ starts to emerge which is complex. How does one cope with all this complexity? We can analyse the EU context, deconstruct texts, sentences and words using semiotic tools and see how they are put together. Legal analysis, interpretation and construction of meaning are not generally simple activities even for texts written within a national legal system in one language. It is more complex in the EU context, since the message is conveyed in the parallel language versions. However, as noted earlier, the EU texts are readily available on the internet.

2.7 Hierarchy of texts

EU law is organised hierarchically. EU primary law as expressed in the treaties provides the written foundation. EU meaning is created first by the EU treaties. They have a purpose, thrust and intention: action. That governs meaning as it points in a direction... towards results. The action is placed in each case within a policy context (agriculture, competition, environment) which provides a thematic context for meaning. The texts are constructed using legal concepts and methods adapted to EU context, needs and problems. The texts are created through language and languages (currently 23, soon to be 24 with Croatian) so as to enhance the EU system and deal jointly with problems that arise in the member states.

2.8 Creation of meaning

EU meaning is created in various ways: first, the foundation treaties (TEU and TFEU) specify the policy fields and lay down what is compulsory or permissible within the EU system and ways in which things are to be done. They provide for the organisation, institutions and allocation of funds that make everything possible. Second, the treaties provide for delegation of tasks to the institutions and empower

them to make legal acts as secondary-level legislation. Each type of act has a particular function and status and is prepared in ways that are set down in the treaties. Thus, there are legal acts adopted by ‘ordinary legislative procedure’ (Art. 289(1) TFEU) or by ‘special legislative procedure’ (Art. 189(2) TFEU). Under Article 288 TFEU the binding acts are ‘regulations’, ‘directives’ and ‘decisions’. A ‘regulation’ binds directly by itself. A ‘directive’ binds as to result but leaves the methods of implementation for the member states which must align, or ‘harmonise’, their national law on it. This involves ‘transposition’, that is to say the transfer of ‘EU meaning’ into a national law context, thereby creating ‘national law’ meaning, or rather a combined EU/national law meaning. The field of ‘transposition’ is a specialised domain of ‘meaning transfer’ which involves ‘intra-lingual translation’ within the multilingual context. It merits separate study. Thirdly, a decision binds the person addressed. There are other types of acts, but these are the main ones for the general EU system of law.

2.9 Type and structure of acts

The type of the EU legal act is significant for meaning as it sets the structural context in which meaning is created. Within each act there is a standardised internal structure that allocates roles to each part of the act and this structure is significant for the segmentation of the text into ‘units of meaning’. Each language version follows the same synoptic approach, that is to say, each language version contains the ‘same information’ in the same place (Interinstitutional Style Guide) so that the texts may be used interchangeably between the language versions and any reference to an article, paragraph or sentence will be valid for each and every language version. This can be checked by consulting any edition of the Official Journal on the EUR-Lex website. The synoptic approach is a vital tool for aligning meaning across languages and forms part of the translation, linguistic and legal-linguistic revision processes. Thus, each act is structured into parts; each part has a purpose and uses language to that end and meaning is connected to the part as well as the whole.

2.10 Drafting guidance

Guidance on the structure of EU acts is provided in the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (1999/C 73/01). It sets out how EU acts should be constructed: title; citations; recitals (setting out background facts, problems, purposes of the act); enacting provisions in the form of ‘articles’ as basic unit, with higher and lower levels of division of text (the ‘operative part’ comprising commands, norms, rules); annexes (containing technical, frequently non-legal, provisions). The parts function together: the articles create the primary meaning; the recitals indicate the general context and what the articles are intended to achieve and are pointers towards intentions behind the text and the wording of the articles; the annexes are an extension of the articles, separated off as a matter of convenience for setting out technical information. Other documents give guidance to drafters, in particular the Joint Practical Guide for persons involved in the drafting of legislation within the Community institutions, the Manual of Precedents for acts established within the Council of the European Union and the Interinstitutional Style Guide. Each of these exists in the EU languages.

From the point of view of controlling meaning across languages, one can note the adoption of essentially rigid formal structures and methods which compartmentalise texts and chop off segments of meaning so that the ‘same’ (or ‘equivalent’) information in each language is conveyed on the same page number, in the same article number, same paragraph, same sentence, down to the lowest level of unit; this is the synoptic approach.

2.11 Translation and terminology

There are many issues relating to translation and terminology, which touch on the most subtle levels of fine tuning as to meaning and intention. There is not space to go into detail, but one can make a couple of observations that touch on issues of meaning.

First, the use of standardisation has been mentioned in connection with the structure of texts. However, this extends to words and terms also. On the one hand, there are many EU concepts, such as the types of act (regulation, directive, decision), which are the same in spite of the

different labels used by different languages, so that we have a conceptual singularity that can be studied using semiotic tools, such as the Peircian tripartite concept of the sign discussed below. This standardisation extends to set wordings and patterns which are carefully constructed in all languages and then treated as being functionally and, it is hoped, semantically ‘equivalent’. One finds them for topics such as ‘subsidiarity’ in recitals, or where a text relates to the ‘Schengen’ area and cooperation. More examples can be seen in the Council Manual of Precedents which contains precisely such standardised wordings and expressions. The problem each time is to determine which ones are appropriate for which texts and contexts.

Second, there are terms in primary acts which must be retained for use in secondary acts with the same meaning in order to maintain consistency as to meanings and connect the lower-ranking texts to the higher-ranking ones that they are implementing. This is basic drafting practice and forms part of intertextuality inherent in legal texts.

A third topic that is relevant here relates to translation. It is frequently difficult for a target language to follow in exact synchronicity every syntactic and conceptual twist and turn and concept of a source language text. This stems from different linguistic structures and different ‘chopping up of reality’ conceptually and terminologically. These factors work against precise semantic equivalence, but by adopting smaller segments of text as the ‘units of meaning’ the degree of divergence is reduced; in this respect punctuation plays a role. Commas are useful to restrict ambiguity within sentences, but semicolons are also a device to split a sentence while remaining within the unit of the sentence. There is an example of this in the German text of Recital (9) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version) (Robertson, 2011).

The synoptic approach and need for standardisation and uniformity have consequences. Other languages are put into the ‘mould’ of the source language text and at the same time there is pressure to ‘bend’ the source text to suit other languages. This can extend to inventing new terms and altering the grammar or traditional meaning of existing terms (e.g. in English: “*actions*” to reflect French “*les actions*” and a “*good*” for “*un bien*”). New terms are created (“sheepmeat”, “goatmeat”,

“comitology”) (on Euro-English, see Mollin 2006). This double-direction pressure derives from the fact that each text is part of a single system of law. We can say that the language is ‘system bound’.

2.12 Equivalence of language versions

A key issue for the meaning of EU texts concerns the equivalence of language versions. Does the same meaning flow from each language version? Frequently a difficult question to answer in the abstract and on a narrow view usually answered by: “Well, not exactly, but does it matter?” This is the problem that arises for every word in every text. For example, does it matter that in Article 7 of Regulation No. 1 determining the languages to be used by the European Economic Community, as amended on each accession, which in English states: “The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.”

There are variations between language versions. The original base text was French and it refers to ‘*régime linguistique*’ which is rendered in different ways, such as “*languages to be used*” (EN); “*die Sprachenfrage*” (DE); “*system językowy postępowania*” (PL); “*používanie jazykov*” (SK). If one studies the language versions one can see patterns of proximity, but within the context of the article it looks as if they are all pointing towards the same thing. In the abstract the precise formulations differ, but the result seems to be the same in practice. If no one raises a problem then people take the meaning they interpret from the words and act as they think appropriate. However, if a divergence of opinion as to the interpretation of the words arises, one has to go deeper. This brings us to the role of the courts, in particular of the European Court of Justice, to determine the interpretation and meaning to be given to EU legal texts. We will consider how the Court handles such issues of interpretation in a study of Case C-265/03 *Simutenkov* but first it is proposed to reflect on some semiotic concepts of Peirce as tools for analysing texts and exploring meaning in multilingual EU texts.

3. Semiotic viewpoint

3.1 Semiotics of Peirce

All law-making can be thought of as arising according to a particular sequence of perceptions and actions. The EU itself is a creation of law, in this case of international law. The founding treaties are international law treaties which create the EU supranational legal order and the national legal systems confirm this supranational status through their laws and courts. The American philosopher and semiotician Charles Sanders Peirce (1839-1914) (see *inter alia* Chandler, 2002; Deledalle, 1978; Houser, 2010; Merrell, 2001; Scott, 2004) proposed certain concepts relating to the sign. Of these, three sets of concepts are mentioned here. The first set is that of ‘firstness’, ‘secondness’ and ‘thirdness’. The second is his classification of signs as index, icon, or symbol. The third is his conception of the sign as comprising three elements: representamen, object and interpretant. We can look briefly at these ideas and link them to the EU context and the problem of meaning.

3.2 Firstness, secondness, thirdness

In the beginning there was no word – no ‘EU word’. Only EU emptiness, bad historical experiences and a wish to do better (firstness). People, through their governments, came together and decided to act (secondness). They chose *inter alia* to create texts binding on them as law, to merge the technologies behind war (coal and steel), to create a customs union, to organise peaceful competition between themselves (thirdness).

Together they created words and concepts to express their ideas in texts. They used legal methods and language to express economic ideas and gradually extended the field of activity across numerous policy sectors, each time with the aim of securing particular action and changes on the ground in the way that people acted and thought. They did this initially in one language (French) which was translated into three languages (Dutch, German, Italian); later they did that in four languages, and the number of languages gradually increased in number over time as more states joined with them, until they reached 23, soon to be 24 (with Croatian) languages.

The texts were divided into categories, some higher ranking (treaties), others lower ranking (secondary legislation). The texts were read, interpreted and acted on (or not) by people in all the member states. It was the legislators who had the task of making the texts, but it was the courts that had the task of determining what the words meant in the context of specific cases and problems that arose. Among the courts, one court, the European Court of Justice was given a pre-eminent role to interpret and determine the meaning of the EU texts and their view was binding on everyone.

3.3 Questions

Now, we can ask questions: how is EU meaning created? How is it read? Who creates meaning: the drafter of a text or the reader? Without a text there is nothing to read and so no meaning is created, but with a text the ‘final’ meaning is that which is created in the mind of the reader. Each reader may create a different meaning in his or her mind from the same text. How does the drafter avoid a misreading? How does the drafter ensure that only one reading is possible – the one intended by the legislator? On the other hand, multiple meanings may actually be intended. Ambiguous wording may indeed be the only way to achieve agreement on a particular text; a small price to achieve a ‘greater good’ from the creation of the text. How do different languages cope? Control of meaning in one language is difficult; how does one control meaning in a text written in 23 languages? How does one ensure certainty, predictability and stability, which form part of the purpose of law, and by extension EU law?

3.4 Court cases

A court case can be viewed as a ‘struggle’ between litigants over ‘meaning’; if particular words are given meaning A, then one side may win; if the same words are given meaning B, the other side may win. There are different ways of looking, seeing and imagining, for example legal, linguistic, semiotic, sectoral (economic, competition, environment, human rights). These influence meaning as they place the focus of attention, and attach importance, to different matters. That is why when new laws are being made the draft texts are circulated as widely as possible and scrutinised and debated in parliaments, so that

they may be tested against as many viewpoints as possible, faults and weaknesses detected and remedied and the text gain acceptance as law. There is competition over meaning from differing interests, both in the creation phase and in the interpretation phase. Litigation in the courts over the meaning of words involves a struggle between parties over meaning and hence involves relations of power. Litigation involves competition over whose viewpoint or position should prevail. In a court case, the viewpoints and positions brought before the court are taken into account, but a court has a wider role, beyond the competing interests of the parties, and that is to uphold the 'Rule of Law', to exercise 'Justice' and to look at the whole context in which the competition for meaning takes place. And so it is for EU law.

3.5 Signs as index, icon, or symbol

Now we can turn to the concept of the sign, seen as something that stands for something else. The purpose is not to enter into a wide examination, but simply to mention a few ideas from Peirce that appear capable of being adapted as tools to reflect on meaning in EU multilingual texts. Three kinds of sign are proposed. One is the 'index', which is "a sign that signifies its object by a relation of contiguity, causality or by some other physical connection" (Cobley, 2001, p. 205). An example of an index might be a weather vane which points to the direction of the wind. Broadly speaking, we are not concerned with such types of sign in EU law. A second type of sign is the 'icon' which is "characterised by a relation of similarity between the sign and the object." (Cobley, 2001, p. 204). An example of this might be a map or a photograph. While maps do form part of certain EU legal texts, for example relating to transport matters, they are not significant for EU legal language.

The third type of sign is the 'symbol' seen as a sign "in consequence of a habit" (Cobley, 2001, p. 272). There is no necessary connection between the symbol and what it is taken to represent. We see this with letters of the alphabet to represent sounds and the large variety of alphabets that exist. We see it also in languages and the huge variety of languages in which to convey ideas and information. However, while the foundation points may be arbitrary, the signs become combined in ways and patterns which cease to be arbitrary and

it is that which enables meaning to be created and interpreted in the manner of codes. Thus, applying this to EU multilingual law we have language codes, each of them rooted ultimately in arbitrary symbols but all structured in complex ways to convey meaning. We have to learn the codes and the associations.

3.6 Representamen, object, interpretant

We can be helped in this task by reflecting on Peirce's concept of the sign, of whichever variety, comprising three elements: firstly the sign itself, also termed 'representamen' (that which stands for something else, the signifier). With language we can think of this as being a word or term, such as 'cheese'. Secondly, there is the 'object' that is represented, or signified, by the word, for example a piece of cheese. However, if the cheese is not in front of us, it is in our minds as an idea and that gives rise to the idea of 'semiotic object', the object in the mind, which we imagine. However, what are we imagining? Is it cheese from the milk of the cow, goat, sheep? Different cultures have different imaginings. One word may represent different objects. This leads to the third element of the sign, the 'interpretant'. This is the most difficult concept to grasp as it appears nebulous, but it is the link between the other two. However, if we use it to reflect on all the associations in the mind relating to representamen and object, we can use it as a tool to enquire not only about words and terms and what they refer to as object, but also to enquire about cultural associations attached to both of them. This is useful in the cross-language translation context where terms from different languages are being compared as to meaning and implications in order to select the optimal (least bad) solution from a range of words to insert in a text. From a legal point of view, the question asked each time concerns the practical implications and legal effects of selecting word A as opposed to word B and how the choice fits into the whole conceptual structure of the text, related texts and EU law as a whole. Another incidental consideration is how the term might fit into the national context in the event of the transposition of the EU text (directive) into national law. However, this raises the issue of transposition which cannot be discussed here.

3.7 Classifying EU terms

We can use this tripartite approach to the sign to classify terms in EU legal texts in certain ways which have an incidence on meaning. The broad concept of EU law is that within each treaty there is a certain singularity in that the rules are broadly to be the same for all member states and all languages (except where expressly derogated from). This is EU law seen as a single unified system, conceptually. On that view certain terms are terms of the EU system and therefore supposed to be uniform. We can use the Peircian concept of the sign to analyse this. For example the term 'regulation' is an EU concept and as such the 'object', an abstraction made real through a piece of paper, is the same regardless of language. Also, if the system is unified there should be only one set of associations that is to say a single interpretant. In this way two elements of the sign can be thought of as matching. That leaves the representamen as the element that is variable. This is the name used in each language (*regulation, règlement, Verordnung*, etc).

However, if a term is shared with another domain, it is not exclusive to the EU context. This is typically the case with policy terminology. Thus the word 'sheep' may appear in an EU text, but it also occurs in non-legal texts dealing with farming, agricultural markets or veterinary medicine. We can use the analysis of the sign to identify not only the object, the animal, but also the cultural context and associations attached to it wherever the sign appears. In this way it is possible to reflect on highly subtle aspects of meaning and variations in meaning across languages. Again, it forms part of the drafting, revision and legal-linguistic process.

With those words we can turn to a case study and reflect on legal methods for interpreting EU multilingual texts.

4. Case C-265/03 *Simutenkov*

4.1 Reference for a preliminary ruling

Without going into the complexities of EU law and EU case law, we can look at one case in which the approach that the European Court of Justice takes in connection with the multilingual interpretation of EU texts was set out particularly clearly by Advocate General Stix-Hackl. This is Case C-265/03: *Reference for a preliminary ruling from the*

Audiencia Nacional: Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol. The case involved a reference from a Spanish court in which it asked for a preliminary ruling on the ‘direct effect’ and meaning of Article 23 of the *Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part.* The background was that Mr Simutenkov, a footballer of Russian nationality, was prevented by the rules of the Spanish sports federation from playing in certain competitions and brought legal proceedings in the Spanish courts. He had moved to Spain and played in Spanish football teams but was not allowed to play in premier league games and claimed he was entitled to be eligible. He claimed that the EU/Russia Agreement gave him directly enforceable rights under EU law.

4.2 Opinion of Advocate General Stix-Hackl

In her Opinion to the Court, Advocate General Stix-Hackl, observed (original German):

“14. The starting point for assessing Article 23 of the Agreement in isolation must be its wording. In so doing it must be borne in mind that Community legislation is drafted in various languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.”

Article 23 stated in English (emphasis added below in bold):

“1. Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States **shall ensure that** the treatment accorded to Russian nationals, legally employed in the territory of a Member **State shall be free from any discrimination based on nationality**, as regards working conditions, remuneration or dismissal, as compared to its own nationals.”

And in Spanish:

“1. *Salvo lo dispuesto en la legislación, las condiciones y los procedimientos aplicables en cada Estado miembro, la Comunidad y sus Estados miembros **velarán por que** el trato que se conceda a los*

nacionales rusos, legalmente empleados en el territorio de un Estado miembro, no implique ninguna discriminación por motivos de nacionalidad, por lo que respecta a las condiciones de trabajo, la remuneración o el despido, en comparación con los nacionales de ese mismo Estado.”

A comparison of the language versions revealed that in Art 23(1) of the Agreement the wording and meaning did not correspond in all of the language versions. Seven languages, including Russian, pointed to an ‘obligation’ (“*shall ensure ... shall be free*”) and three pointed to ‘endeavours’ (“*velarán por que ... no implique ...*”) (Opinion, paragraph 15.).

A G Stix-Hackl discussed possible methods of interpretation. One approach was to take the **common minimum of all languages** as starting point (i.e. “endeavours”); but there were no convincing arguments for this approach and it was not supported by practice in the case law (Opinion, paragraph 16). A second method was to determine the **clearest text**, eliminate texts which were not typical, or contained a translation error. This approach was possible and was to be found in the Court’s case law (Opinion, paragraph 17), but:

“in the **circumstances of the present case**, in which it is not just one text that diverges from all the others, the approach **does not permit a convincing solution**”.

A third approach was that the “**language versions forming the majority prevail**” (preference in favour of language versions laying down “obligation”). The approach was possible and to be found in Court’s case law (Opinion, paragraph 18) but:

“That may ... be countered by the Court’s line of argument under which, **in certain circumstances, a single language version is to be favoured** over the majority.”

A fourth approach was to take the **original text** which served as source for the translations (Opinion, paragraph 19). Here the text had been negotiated in English (“*shall ensure*”: obligation). A fifth approach was to consider the intention of the parties and the object of the provision to be interpreted (Opinion, paragraph 20).

“The **intention of the parties is of decisive importance** for the interpretation of Article 23(1) of the Agreement. The documents which have been submitted by the Commission that were used in preparing for the negotiations on the Agreement support the view that the **parties wanted to lay down a clear obligation** going beyond the obligation merely to use endeavours.” (Opinion, paragraph 22.)

There were arguments in support of this last and fifth approach regarding interpretation: comparison with other similar agreements which say clearly “*shall endeavour to ensure*” (Opinion, paragraph 23), since different wording could imply a different meaning and intention; circumstances, revealed by the negotiating documents (“*Russia expressed a wish to that effect.*”) (Opinion, paragraph 24.). So the intention seemed clear, but did the Agreement have **direct effect**? If not, then national law, discriminating against Simutenkov, could prevail. If yes, then the wording of the Agreement, as part of EU law, should prevail.

4.3 Comment

The issue here was in effect one of power relations between national law and EU law over the effects of an international agreement. We see three legal orders in play, namely EU law, national law and international law. Can the inferred intention of the parties be defeated in practice? The introductory words in Article 23(1) “Subject to the laws, conditions and procedures applicable in each Member State...” suggest freedom by national law to disregard the inferred obligation, but then the provision could become meaningless and without practical effect (*effet utile*). Why bother making the text? Non-discrimination on the grounds of nationality is a core concept of EU law enshrined in the TFEU Treaty (Article 18) and to be upheld.

An interesting question raised by the *Simutenkov* case concerns the extent to which the meaning of certain words in terms of practical results depends on the meanings given to other words. Thus, if the meaning of the words ‘*shall ensure ... shall be free from any discrimination based on nationality...*’ is to create an obligation not to discriminate, can this meaning be ‘defeated’ by other words: “**Subject to the laws, conditions and procedures applicable in each Member State...**”? We see here how there is a ‘web’ of terms and their

meanings, and the resulting decision as to what to do, or what is ‘right’ or ‘wrong’ in terms of law and legal obligation depends on a complex manoeuvring between different parts of the text and drawing an Ariadne thread through a semantic labyrinth in which words in legal texts (at different levels) are matched against behaviour and actions in the real world and set against standards as to how one ‘ought’ to act (i.e. non-discrimination). The process of giving meaning in law becomes a complex process that draws on different strands, both linguistic and non-linguistic (intention, behaviour). It is not just one word, but a web of words, and often also a web of texts.

4.4 Influence of international law

In the context of the *Simutenkov* case, rights given at EU law were restricted or taken away by national law, so we can see a link between EU and national law. But A G Stix-Hackl drew on international law to support the arguments:

“29. The Court, referring to Article 31(1) of the Vienna Convention of 23 May 1969 on the Law of Treaties, has stated with regard to the interpretation of international agreements that ‘a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose’.”

One can add some further personal comments. In this reference to the Vienna Convention there is not a mention of intention, but it is perhaps implicit in the idea of “object and purpose.” If one has an ‘object’, or a ‘purpose’, that implies an intention to do something. Intention is a key concept in legal texts: the intention, or ‘will’, of the legislator, or contracting parties, as revealed by the text upon close analysis in the light of all the circumstances. The *Simutenkov* case concerned an international agreement and so background papers created during the initial negotiation phases could also be looked at in order to determine intention and meaning but that is generally not the case with legislative texts, which fall to be read and interpreted themselves as they stand. In EU legislation the intention of the legislator is drawn from the different parts of the text, including articles, annexes and recitals. Cases are brought between parties who argue for meanings in line with their interests; outsiders’ interests and views on meaning tend

not be represented in a case since no one is present to argue for their point of view. This, it may be commented in passing, is a problem for litigation relating to the environment where there is no one to present the point of view of nature. Hence the question: should trees have standing? (Stone, 2010).

4.5 Institutional context

In the organisation of the European Court of Justice, the Advocate General has the status of a judge under the Protocol on the Statute of the Court of Justice of the European Union and has the role to make a detailed and reasoned analysis of each case to assist the Court. He or she proposes an answer to the Court on the reference from the national court, but the Court makes its own decision and issues its own judgment which may follow or depart from the viewpoint and analysis of the Advocate General. This underscores that the ‘allocation’ of meaning in law is not automatic or deterministic; there is an element of choice and this choice can be seen as having a political dimension as it determines the course of future action, and future law. For that reason the Court itself is composed of judges coming from different member states and different legal and linguistic cultures. The Court makes its decisions first in French and the language of the case, here Spanish. Translation is made into the other EU languages. Contrast this with the Advocate General who writes the opinion in his or her tongue. (On the European Court of Justice, see the Court’s website *Curia* at <http://curia.europa.eu/>.)

4.6 Court decision

The Court’s Ruling in *Simutenkov* was as follows (emphasis added): “Article 23(1) of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, signed in Corfu on 24 June 1994 and approved on behalf of the Communities by Decision 97/800/ECSC, EC, Euratom: Council and Commission Decision of 30 October 1997, **must be construed as precluding** the application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State

which provides that clubs may field in competitions organised at national level only a limited number of players from countries which are not parties to the Agreement on the European Economic Area.”.

The Court observed in its judgment:

“40. Finally, as has been stated in paragraph 24 of the present judgment, the words ‘[s]ubject to the laws, conditions and procedures applicable in each Member State’, which feature at the beginning of Article 23(1) of the Communities-Russia Partnership Agreement, and Article 48 of that Agreement **cannot be construed** as allowing Member States to subject the application of the principle of non-discrimination set out in the former of those two provisions to discretionary limitations, inasmuch as **such an interpretation would have the effect of rendering that provision meaningless and thus depriving it of any practical effect.**”

4.7 Problem of meaning

From the point of view of the problem of meaning in EU legal acts, the *Simutenkov* case is interesting for several reasons: A G Stix-Hackl made a detailed analysis of different possible methods of multilingual interpretation. The case involved a national from a third country and an international Agreement, so it applied the protection against discrimination for EU nationals to third country nationals. The judgment is worded in a special way: it does not specify what particular words mean; so there is no literal interpretation of any particular words. Instead, it goes to result: "Article 23(1) ... must be construed ...". Interpretation is teleological, but also searches for intention; methods of linguistic interpretation that do not make it possible to arrive at the (desired) result are rejected. The Court is rendering ‘Justice’ in the case; the path to arriving at the ‘just’ result may vary, according to the circumstances of each case, since the facts of a case influence the interpretation and application of a text. It may also be argued that the needs of ‘Justice’ and to arrive at a just result also have an impact on the meaning of a text; for example, courts will not give effect to a contract to do something illegal. This in turn implies that every legal text is being expressly or tacitly compared against wider and deeper reference points. These may be embedded in a constitutional text, as in

a civil law system, or embedded in the case-law of the legal system as in a common-law system, and they may be of a moral or ethical nature. Yet, regardless of the system, there is a complex legal background that is always in play. The Court in *Simutenkov* made an interpretation; but at the same time it laid down a rule of law, valid for cases with similar facts. For these cases, the decision is a prediction as to how the court will decide in future cases.

For the EU context, there is another aspect. Spanish law did not confer the right *Simutenkov* claimed. The Court's decision leaves Spanish national law out of line with EU law. Spain could choose to leave it like that and rely on EU law overriding national law, but better is to adapt the national law and make it have the same results as EU law. And all other Member States who took the same approach as Spanish law have to take note that they too must review their national laws. This is 'harmonisation' of law. So EU meaning and national meaning are intimately bound together.

5 Conclusion

This Paper has explored some of the issues in creating meaning in multilingual EU texts. Needless to say, more could have been said. In terms of the EU context, one could mention the steps and processes by which EU legal texts are created, the policy environment for each text and the legal environment. One could also dwell on particular methods and styles of drafting and problems of translation and terminology. One could enter into the whole domain of legal texts and legal language as a class of applied linguistics, legal linguistics and analyse them according to different theories and approaches. These things can be undertaken from any of the 23 or more languages of the EU, as well as languages (Icelandic, Norwegian) of EFTA states which incorporate EU law into national law via the Agreement on the European Economic Area (EEA). One can enter into a broader linguistic and semiotic analysis of legal texts taken as a whole, of which EU texts are just one class, and if one does so, one will encounter different methods and techniques used by courts to extract meaning from legal texts through judicial interpretation.

That said, it is possibly the case that such linguistic research places the focus at the ‘microscopic’ level whereas the everyday environment in which lawyers work with language functions simultaneously at all levels of law and language, from microscopic to macroscopic, and there is a constant shift of attention, according to immediate needs, between every level. Thus, for example, when drafting attention must be paid to spelling and syntax at the lowest level of detail, but also to the way in which a text fits into the total intertextual discursive environment at national, international and supranational EU level. This ability requires years of training and experience.

With the study of meaning the work of lawyer and linguist come close together. The problem of meaning lies at the heart of legal work. It can be explored through the case law where judges take it on themselves to analyse every argument and give reasons for their decisions. Within the EU legal order, there are additional factors: multiculturalism, multilingualism leading to hybridity and a certain degree of ‘fuzziness’ or lesser degree of precision in the meaning of words at times (countered by the use of definitions). However, a study of the case law of the European Court reveals another key issue: at times the legal interpretation departs from the actual wording of texts. There is a gap, a jump to the end result. This is the teleological approach, functionally necessary. It is based on the language versions, but it reveals that the correlation between law and language is not absolute. There is clearly an extra-linguistic dimension to law and the *Simutenkov* case helps us to understand why that is the case and how the process of reasoning functions.

We can conclude this paper by listing a few factors that contribute to the control of meaning in multilingual EU legal texts. These include (1) clear thinking in policy making and having clearly defined objectives when drafting the text; (2) expert knowledge as regards the policy domain, on the one hand, and the legal context and legal methods to create specialised meaning, on the other; (3) using relevant technical terms correctly according to standardised usage; (3) good terminology work to establish term equivalences which are agreed on by experts and fixed across languages; (4) drafting that is clear, concise and as simple as possible; (5) units of meaning that are broken into segments (through punctuation) and with all languages aligned

together; (6) co-drafting, whereby the source, or base, language takes account of translation problems and syntax is adjusted where possible to improve clarity across all languages; (7) avoidance (where possible) of ambiguity, since among other reasons German and Slavic languages have difficulty in following as they are inflected languages and must frequently choose for meaning, so unity of message may be lost; (8) discussion of meanings attached by different cultures and languages to terms and concepts at the outset of the preparation of a text. For example, if we ask “What is ‘cheese? Is it milk from cow, goat, sheep, buffalo, camel, horse...?” Different cultures give different answers and if an EU text is to be constructed relating to ‘milk’ this issue must first be clarified. Next comes the question of what term to use in each language for the concept and if a language lacks a term, a new term must be invented; consider EU terms ‘goatmeat’ and ‘sheepmeat’ in English; (9) the use of definitions of terms to increase precision, (e.g. ‘cheese’ means ...); (10) control by the EU Commission, aided by national experts, to align readings and interpretations of EU texts and the implementation and transposition of EU obligations into national law; (11) care by national authorities to observe the letter and spirit of EU law; (12) rulings on meaning by the European Court of Justice which fix the meaning for all languages; (13) revision of EU legislative texts in the light of European Court judgments to maintain consistency, but with a risk of creating uncertainty as to whether past rulings of the Court on a particular revised matter remain as key reference points or have been overtaken by the revised legislation.

Lastly, lawyers use language as a tool for legal purposes and to achieve specific results. The text is a legal product, that seeks to achieve particular effects in the ‘real’ world of human relations. Thus law is goal-oriented and linked to behaviour and conduct, whether active or passive, and the language of its texts is constructed accordingly. It is this link to the real world and real effects which is perhaps the most important criterion for determining meaning in legal texts. It is the ‘acid test’ for making legal decisions and since it is linked to intention and behaviour, law ultimately goes beyond language.

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Colin Robertson holds a Law Degree from Aberdeen University and is a member of the Law Society of Scotland. He works as legal-linguistic reviser (lawyer-linguist) at the Council of the European Union. He has knowledge of several languages, including English, French, German, Italian, Czech, Slovak and Bulgarian. Previously he worked as lawyer in UK government service and the Legal Service of the European Commission; and as legal translator in the Court of Justice of the EU. He is interested in legal language, especially EU legal language and terminology. In his spare time he participates in workshops and seminars and has published recently *inter alia* on *multilingual law, LSP and EU legal language, EU law and semiotics*. He has publications in Scots dialect in Lallans, a Scots language publication: *inter alia* on *lawborrows, maills an duties, the Scots leid an Europe, British Union an European Union, eurojargon, and Croatia jynin the EU*. He is married with two children. Email: colin.robertson@pt.lu.

The Litigational ‘Colonisation’ of ADR Discourse

Maurizio Gotti

The paper reports on the investigation concerning the possible colonisation of Alternative Dispute Resolution discourse by litigation practices, by assessing the situation in the Italian context. Drawing on documentary data, the paper investigates the extent to which the integrity of arbitration discourse is maintained, pointing out phenomena of contamination from litigation practices and exploring the motivations for such an inter-discursive process. An additional issue investigated concerns the relationship between the professional identity of the arbitrators and the kind of language used in their texts; for this purpose the analysis focuses on arbitration discourse both by legal and non-legal experts.

Keywords: Alternative Dispute Resolution, litigation, professional identity, arbitration discourse

1 Introduction

This paper takes into consideration the main features of the discourse commonly used in Italian commercial arbitration. As this method of settling commercial disputes is commonly considered an efficient, economical and effective alternative to litigation (Berger, 2006), the language used in arbitration documents is usually deemed to differ from that of litigation texts. However, in recent years there has been a narrowing between the two practices as litigation processes and procedures have increasingly been seen to influence arbitration practices, with the result that arbitration discourse itself has become ‘colonised’ by litigation practices. Nariman remarks that “modern International Commercial Arbitration [...] has become almost indistinguishable from litigation, which it was at one time intended to supplant” (2000, p. 262).

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Marriott (2000, p. 354) also complains about the unfortunate influence of litigation techniques on arbitration, which has led to an increase in the cost of settling disputes, thus damaging the arbitration process. Indeed, to better protect their interests, parties often have recourse to legal experts as arbitrators, which has the effect of encouraging the importation of typical litigation procedures into the arbitration practice. This in turn leads to an increasing mixture of discourses, thus threatening the integrity of arbitration genres.

This process of colonisation is also visible in the Italian context. A recent reform (Legislative Decree 40/2006) clearly specifies that in case issues are not deemed arbitrable, the proceedings are terminated and, consequently, parties have to involve the courts in order to have a final decision (Cutolo & Esposito, 2007). As a consequence, local Chambers of Commerce strongly invite the parties to appoint legal experts as arbitrators. The reason is that the majority of awards delivered up to 2006 had been challenged before the Court of Appeal on legal grounds. So now, although theoretically any professional can be enrolled at the Board of Arbitrators of the local Chamber of Commerce, in practice only legal experts are appointed as arbitrators in an arbitration procedure, whereas all the other experts are appointed as consultants. Therefore, if parties are strongly recommended to have recourse to legal experts as arbitrators, arbitration practices are very likely to adopt litigation features.

Drawing on documentary data, this paper – which is part of a more general project¹ – investigates the nature and the extent of the colonisation of commercial arbitration discourse by litigation language in the Italian context, and aims to identify the main reasons for such a hybridizing process. An additional issue to be investigated concerns the relationship between the professional identity of the arbitrators and the kind of language used in their texts; for this purpose the analysis will focus on arbitration discourse both by legal and non-legal experts.

¹ The project referred to here (led by prof. Vijay Bhatia of the City University of Hong Kong) is an international research project entitled *International Commercial Arbitration Practices: A Discourse Analytical Study*. For further details of this project cf. the webpage at <http://enweb.cityu.edu.hk/arbitrationpractice/>. Some of the results of this project are presented in Bhatia, Candlin & Gotti (2010).

2 The language of awards

The analysis of a corpus of Italian arbitration proceedings² has shown that arbitrators display a certain level of awareness of the importance of following the common linguistic conventions of this genre. Indeed, the lexical and stylistic differences between various arbitrators are nearly imperceptible; in these texts a personal style is overcome by the need to respect the textual conventions that belong to the tradition of arbitration. This may also be due to the fact that Chambers of Commerce organise training courses for both new and experienced arbitrators in order to guarantee uniformity and homogeneity in the procedure. Our corpus shows a very standardised layout and a highly restricted set of linguistic expressions commonly adopted. The general frame of the award is often identical, and standard clauses are used throughout. This not only allows the arbitrator to make savings in drafting time and costs, but also ensures that the clauses used are precise and correct.

In spite of the fact that arbitration is a procedure that is simpler and quicker than litigation, the language used in awards still presents the complexity that is typical of legal language. The linguistic differences between awards written by lawyers and non-lawyers are extremely subtle; as lawyers comprise the vast majority of arbitrators, other practitioners choose to adopt the same style in order to ensure the homogeneity of the genre. Moreover, before awards are actually issued, the Chamber of Commerce often checks that they comply with all the formal requirements. Consequently, all awards present a style typical of the legal tradition, which uses a highly complex type of language.

2.1 Lexical features

As arbitration was conceived as an alternative way to solve disputes avoiding the recourse to lawyers and courts, one would expect the texts of the awards to be written in a language which is more like ordinary discourse than legal discourse. Instead, from a lexical point of view, there are remarkable similarities between the language of awards and

² The corpus taken into consideration consists of 22 arbitration awards written in Italian, available in the archives of different Chambers of Arbitration in Italy, specifically in Reggio-Emilia (Awards 1-10), Piedmont (Awards 11-15), and Bergamo (Awards 16-22). These awards are mainly concerned with disputes that have arisen in business and private contexts.

that of legal documents. One of the typical features of legal style is the use of doublets or longer synonymic strings of words often referred to as 'binomials or multinomials' (Bhatia, 1993). In legal discourse multinomials are much more common than in general discourse, and this statistical significance makes them a definite style marker of the language of the law. Binomial expressions have a long tradition in legal texts and their main function is to guarantee technical accuracy, greater precision and all-inclusiveness. These expressions are very frequent also in awards, as the following quotation shows:

- 1 L'attore chiedeva che il Collegio Arbitrale *accertasse e dichiarasse* la società convenuta tenuta a versare il compenso pattuito
 [The claimant requested that the Arbitral Tribunal should *ascertain and state* that the respondent was liable to pay the compensation agreed upon] (Award 14)

Another characteristic of legal documents is its intense conservatism. Indeed, in the field of jurisprudence, fear that new terms may lead to ambiguity favours the permanence of traditional linguistic traits, which are preserved even when they disappear from general language. Old terms are preferred to newly-coined words because of their century-old history and the availability of highly codified, universally accepted interpretations. The reverence for tradition observed in legal language leads to the use of archaic spellings or obsolete forms. As regards the former, there are instances of archaic spellings also in the corpus of awards analysed here, such as *denunzia* instead of the usual *denuncia* [denouncement] and *denunziare* instead of the more common *denunciare* [denounce]. As regards the use of obsolete forms, the reading of the Italian awards has confirmed the presence of terms such as *erroneo* [wrong] instead of the common adjective *sbagliato*, or *sito* [located] preferred to the usual past participle used in an adjectival position *situato*. Most of the typical obsolete forms commonly used in legal texts and avoided in general language have been found in awards, as is the case of *addì* [on this day], *all'uopo* [to the purpose], *altresì* [moreover], *ancorché* [although], *atteso che* [inasmuch as], *d'altronde* [on the other hand], *nel caso di specie* [in this specific case], *nella specie* [in particular], *onde* [whence], *orbene* [hence], *posto che* [given that], *siffatto* [such], *talché* [thus], *testé* [just].

Very frequent is also the use of technical phrases typical of legal discourse, in which words occurring in general speech collocate with other common words to form expressions that are used only in legal contexts (Dardano, 1994), such as *espletare un incarico* [perform a task], *prestare il proprio consenso* [to give one's consent], *produrre un documento* [produce a document], *rigettare la domanda* [to deny a request], *stipulare un contratto* [to enter into a contract]. Similarly, awards contain verbs with meanings that are different from the usual ones and that instead are only found in legal contexts, such as *dedurre* ['argue', instead of the common meaning 'deduce'] or *lamentare* ['denounce', instead of 'complain'].

The influence of the discourse of litigation on that of arbitration is also clearly visible in the many legal expressions that occur in the awards taken into consideration. Here are a few examples: *adire il giudizio arbitrale* [resort to arbitral proceedings], *caducazione di un contratto* [annulment of a contract], *escussione di testi* [witness examination], *impugnare una sentenza* [appeal against a sentence]. Very frequent in awards is also the use of prepositional phrases typical of legal language (Cortelazzo, 2006), such as: *a carico di* [to be borne by], *a norma di* [according to], *a seguito di* [as a consequence of], *a titolo di* [by way of], *ai sensi di* [according to], *in sede* [during].

Yet another typical characteristic of Italian legal lexis is zero derivation, which allows specialists to omit affixes when deriving a noun from a verb (Gotti, 2011). Examples of this word-formation structure have also been found in arbitration awards as in the case of *convalida* [validation] from *convalidare*, *notifica* [notification] from *notificare*, *proroga* [extension] from *prorogare*, *ratifica* [ratification] from *ratificare*, *rimborso* [reimbursement] from *rimborsare*, *saldo* [settlement] from *saldare*, and *utilizzo* [utilization] from *utilizzare*.

One of the most evident features of Italian legal discourse is the use of Latinisms, which are derived from the long tradition of jurisprudence dating back to Roman times (Fiorelli, 1998). Several Latinisms are also found in awards, which strengthens the impression of 'colonization' of arbitration from the legal field. Here are a few Latinate forms found in our corpus: *ab origine* [from the beginning], *causa petendi* [the grounds of the claim], *contra legem* [against the law], *de facto* [according to facts], *dominus* [the owner of a right], *ex*

ante [since then], *ex nunc* [since now], *in toto* [as a whole], *inter alia* [amongst others], *ope legis* [by law], *par condicio* [the same condition], *petitum* [the claim], *potestas judicandi* [judicial power], *ratio legis* [the spirit of the law], *una tantum* [once and for all].

2.2 Syntactic features

A comparison between court judgements and arbitration awards also shows great similarities from a syntactic point of view. One of the main features of legal documents is the great length of their sentences which is much higher not only than those found in general texts but also of those used in other specialised domains (Cavagnoli & Ioriatti Ferrari, 2009). Even the recent reform of legal drafting promoted by the Italian branch of the Plain Language Movement (*Italiano Chiaro*) recommending that sentences in legal and administrative texts should contain no more than 25 words has not attained its goal, as sentences in legal texts commonly contain an average of twice as many words. The considerable sentence length of legal texts is due to the heavy information load required not only to minimise ambiguity and misunderstandings, but also to bring in all-inclusiveness (Bhatia, 1993). Each mention is supported by specifications that clarify its status and identity. The awards contained in our corpus contain long sentences with an average sentence length of 43 words per sentence. Moreover, each sentence is subdivided into a number of embedded clauses. The following quotation exemplifies the typical structure of a sentence in the awards analysed:

- 2 Con tale domanda, come del resto ha esposto nella propria memoria conclusiva, la convenuta ha fatto valere la garanzia per i vizi della cosa che l'art. 1490 c.c. le accorda nella sua qualità di compratore e, lamentando l'inesatto adempimento nel quale a suo avviso sarebbe incorsa l'attrice consegnando cose affette da vizi, ha reclamato il suo diritto di non adempiere richiamando il precetto *inadimplenti non est adimplendum* di cui all'art. 1460 c.c.

[With that request, as she also expressed in her conclusive statement, the respondent has asserted her right to a guarantee for the faults of the thing that art.

1490 c.c grants her in her role of buyer and, bemoaning the inaccuracy that according to her the claimant would have incurred delivering faulty things, she has claimed her right not to comply, referring to the principle *inadimplenti non est adimplendum* formulated in art. 1460 c.c.] (Award 15)

This sentence, comprising 72 words, contains two main clauses coordinated by *e* [and] to express two legal actions carried out by the claimant (*ha fatto valere la garanzia* [has asserted her right to a guarantee] / *ha reclamato il suo diritto di non adempiere* [has claimed her right not to comply]). The two main clauses are then integrated by a series of specifications concerning the modalities of the request (*Con tale domanda, come del resto ha esposto nella propria memoria conclusiva* [With that request, as she also expressed in her conclusive statement]), while the legal grounds of her claim are asserted with appropriate reference to specific articles of the Civil Code (*l'art. 1490 c.c.* [art. 1490 c.c.] / *di cui all'art. 1460 c.c.* [formulated in art. 1460 c.c.]) and the quotation of a principle in Latin reported in one of them (*inadimplenti non est adimplendum* [he who fails to fulfil his part of an agreement cannot enforce that task against the other party, i.e. there is no duty to perform for the other side when they are in breach]). From a cognitive point of view, all these specifications and justifications lead to an increase in terms of information density; from a syntactic point of view instead, they give rise to the insertion of a series of embedded secondary and prepositional clauses, which makes the syntactic level of the whole sentence highly elaborate, relying on very complex coordination and subordination structures.

Another syntactic feature which characterises Italian legal language is that it is highly formal and impersonal in style (Mortara Garavelli, 2001). Indeed, the legal text aims to present facts and opinions in an objective and depersonalised way. A typical device used to obtain this style is the use of the impersonal particle *si*:

3 *Si* ritiene opportuno decidere.

[It is considered appropriate to decide.] (Award 15)

A peculiar legal usage of this particle is found in those periphrastic forms where the *si*-particle is attached to the infinitive of the main verb rather than being put before the modal expression (such as *può*

procedersi [one may proceed], *è da ritenersi* [it is to be believed], *deve trascriversi* [it must be transcribed]). This postposition is very frequent also with the verb *trattare* [be about, concern] > *trattasi*:

- 4 *Trattasi* di una prospettazione a tal punto generica da non consentire neppure l'instaurazione di un serio ed effettivo contraddittorio.

[This is such a vague hypothesis that it is not to be held sufficient to start a serious and effective investigation.]

(Award 6)

Several other expressions are used to make the style impersonal, such as the verb *essere* [to be] + adjective (e.g. *è chiaro* [it is clear], *è evidente* [it is evident], *è noto* [it is well-known], *è possibile* [it is possible]) or impersonal expressions such as *appare* [it appears], *occorre* [it is necessary], *sembra* [it seems]. Here is an example found in the corpus analysed:

- 5 *Occorre* verificare se sono state eseguite le prestazioni contenute nel contratto

[It is necessary to verify whether the services mentioned in the contract have been performed] (Award 14)

An impersonal style is also characterised by its above-average use of passive forms, especially whenever there is a need to emphasise the effect or outcome of an action rather than its cause or originator. Significantly, in these cases the agent is normally omitted in order to strengthen this depersonalising effect. Here is an example:

- 6 La domanda della società attrice di pagamento, in proprio favore, del compenso nella misura del 20% dell'importo del finanziamento approvato e, dunque, di €20.000,00 *può essere solo parzialmente accolta.*

[The claimant's request of the payment in its favour of a compensation corresponding to 20% of the amount of the approved funds and therefore of €20,000.00 can only partially be granted.] (Award 14)

Yet another typical linguistic device used in awards to make the style less personal and more objective is the use of third-person pronouns or noun phrases even when the author refers to himself, such as *l'arbitro* [The arbitrator], *il Collegio arbitrale* [the arbitral tribunal] or *il Collegio* [the Panel] in expressions like the following: *l'arbitro*

ritiene [the arbitrator believes], *il Collegio arbitrale così provvede* [the arbitral tribunal decides as follows], *il Collegio ha così deciso* [the Panel has decided as follows]. A high degree of objectivity is also attained by the suppression of the human element and the depersonalisation of the arbitrators' activities. In expressive terms, this phenomenon is realised by the adoption of inanimate subjects denoting documents or facts for typical argumentation-process verbs such as *confermare* [confirm], *dimostrare* [demonstrate], *indicare* [indicate], *ritenere* [believe], *suggerire* [suggest], as if to indicate that the validity of such conclusions was self-evident and unquestionable, resulting from the analysis of the facts and documents analysed in the arbitral proceedings. In this way conclusions are presented as a state of affairs which is analysed by the arbitrators in an impartial way and reported objectively as matters of fact. Here is an example found in the awards corpus:

- 7 *Le motivazioni già indicate nell'ordinanza [...] hanno portato il Collegio Arbitrale a respingere l'eccezione.*
 [The motivations already reported in the decree [...] have led the Arbitral Tribunal to reject the objection.]
 (Award 17)

Another area in which the adoption of a legal style can be detected in awards is that of word order. Indeed, in arbitration documents one can find phrasal structures that are common in court documents, such as the positioning of qualifying adjectives before their respective nouns rather than after them (as would be more common in general usage) in such cases as *contestuale esercizio* [simultaneous exercise], *espressa richiesta* [express request], *legale rappresentante* [legal representative]. A much more evident modification of the standard word order at sentence level is the positioning of the verb in the initial position (VS(O)) rather than after its subject as is common in general speech (SV(O)): *Ritiene [V] il Collegio [S]* [The Panel believes]; *Rileva [V] la resistente [S] che [O]* [the defendant claims that], *Sono stati ultimati [V] i lavori [S]* [Work has been completed].

Another typical characteristic of Italian legal discourse is the omission of the article before a noun in specific technical sentences (Rovere, 2002). A few instances have also been found in the awards in the corpus, as in the expressions *avere diritto* [to have the right],

depositare denuncia [to lodge a complaint], *far pervenire memoria* [to present a statement], *presentare ricorso* [to file an appeal], *rigettare istanza* [to reject a request]. Similarly to what occurs in legal discourse, the article is frequently omitted before a noun phrase introduced by *a mezzo di* [by means of], *a seguito di* [following up], *con* [with], *mediante* [by means of], like in the following example:

- 8 *Con atto* introduttivo depositato alla Camera Internazionale di Arbitrato di Parigi il [...] R.G., società di diritto francese conveniva in procedura arbitrale la società di diritto italiano [...] S.p.A.
[With a preliminary deed filed with the International Arbitration Chamber in Paris on [...] R.G. a French company started arbitral proceedings against the Italian company [...] S.p.A. (Award 6)]

Very common in legal documents are also elliptical forms used to make sentences more compact. In the awards corpus these elliptical forms often correspond to past or present participles used to avoid complex active or passive verbal clauses:

- 9 *Sentito il teste*, si deve concludere che la società attrice fosse a conoscenza dell'esistenza dei vizi dei beni acquistati.
[After hearing the witness, it must be concluded that the claimant was aware of the faults in the goods that had been bought] (Award 15)

Typical of legal discourse is also the frequent use of present participles as nouns. The examples found in the awards examined are several, such as *l'accettante* [the acceptor], *l'alienante* [the alienating person], *il delegante* [the delegant], *il dichiarante* [the declarant], *l'istante* [the petitioner], *il mandante* [the mandator], *la somministrante* [the supplier], *il rivendicante* [the claimant], *lo stipulante* [the stipulator]. Nominalization too is a characterising feature of legal discourse, which is particularly evident in deverbal abstract nouns commonly based on suffixes such as *-anza* (*istanza* [petition], *ordinanza* [injunction]), *-enza* (*decadenza* [lapse], *soccombenza* [loss]), *-ità* (*configurabilità* [configurability], *inammissibilità* [inadmissibility]), *-mento* (*accoglimento* [acceptance], *procedimento* [proceedings]), -

sione (*escussione* [examination], *estensione* [extension]) and *-zione* (*risoluzione* [resolution], *stipulazione* [stipulation]).

2.3 Inclusion of legal references

A further element that characterises a lawyer's style is the constant citation of other legal documents. This intertextual aspect is another very typical feature of legal discourse. Indeed reference is often made to relevant documents as well as to statutes, norms and rules of the legal system that are applicable to the dispute. In the following example the contract from which the dispute originated and the Code of Civil Procedure are clearly cited:

- 10 il contratto di compravendita del 19 dicembre 1998, siccome integrato dall'accordo transattivo dell'1-3 dicembre 1999, deve essere dichiarato risoluto di diritto con effetto retroattivo, ai sensi e per gli effetti dell'art. 1457 Cod. civ. (Award 1)
[The Sales Contract of 19 December 1998, as completed by the Agreement of Sale dated 1-3 December 1999, must be declared legally invalid, under the terms of Section 1457 of the Civil Code.]

It is unsurprising that the most frequently quoted legal text in the awards analysed is the Code of Civil Procedure, the main legal text used to rule the world of arbitration in Italy. Another text often referred to is the Arbitral Code applied by the Chamber of Commerce involved in the proceedings.

3 The discourse of proceedings

The influence of litigation on arbitration practices can also be detected in oral proceedings, particularly in those cases in which the arbitrators belong to a legal profession. In order to analyse this issue, a few examples, drawn from real cases, are examined in this section. The data analysed derive from five arbitration proceedings held in Italy between 2004 and 2008 concerning business-related disputes.³ The events

³ The cases analysed here are part of the project presented in note 1. The analysis is based on the official transcripts of the arbitral panel sent to the parties' counsels. The examples reported here are drawn from 'Language and Power in Arbitration: the Italian Context', paper presented

analysed took place in an office, a setting completely different from a courtroom trial. Although the setting and atmosphere of the arbitration proceedings are more friendly than in court, they remain formal, as the arbitrators fear that an informal attitude might reduce the degree of detachment which is required by the situation and thus hinder their willingness to show great independence and impartiality. The role played by the arbitrator to guarantee compliance with the rules of the whole procedure is crucial, and is very similar to the role played by a judge in court. Indeed, it is not unusual for arbitrators to remind participants of the need to proceed in an orderly way:

- 11 A⁴: un momento. Adesso noi dobbiamo procedere con ordine
[A: one moment. Now we must proceed in an orderly way]

Although the atmosphere is more friendly than in court, arbitrators play a very powerful role as they are the ones who assign the allocation of turns, clearly selecting the next speaker by calling him/her by name:

- 12 A: Chiedo ora al dott. P se vuole precisare quando è giunto a conoscenza dell'attività che il sig. D svolgeva.
[A: Now I'd like to ask Mr. P if he would like to specify when he learnt about Mr. D's activity.]

One similarity with court proceedings is the fact that participants are expected to ask the arbitrators for permission to take their turn:

- 13 DL: io avevo solo da fare dei quesiti per precisare l'oggetto delle prime domande. Li facciamo adesso o dopo?
A: assolutamente sì, io direi di seguito, se voi siete d'accordo.
[DL: I wanted to ask some questions regarding the subject-matter of the first

by Patrizia Anesa at the 4th CERLIS Conference on Researching Language and the Law (Bergamo, 18-20 June 2009) and 'Arbitration in Action: the Display of Arbitrators' Neutrality in Witness Hearings', paper presented by Stefania Maci at the same conference. Dr. Patrizia Anesa and Dr. Stefania Maci are members of the Bergamo Unit of the project.

4 A: arbitrator (sole arbitrator or president of the panel) / AB: arbitrator (member of the panel) / D: defendant / DL: defendant's lawyer / P: plaintiff / PL: plaintiff's lawyer.

questions. Shall we ask them now or later?

A: Absolutely. I would say now, if you agree.]

Another similarity with trial proceedings can be seen in those cases in which the parties interact directly without asking the arbitrator for permission to take their turns; in such cases, the arbitrator immediately intervenes, pointing out that this is not the procedure to be followed:

- 14 DL: * disponeva di una propria rete di agenti?
 P: no, non disponeva di una propria rete di agenti
 DL. di agenti per la vendita [...]?
 P: No, [...]
 A: Ecco, io chiedo ai colleghi però, per il buon andamento, che le domande le rivolgete al collegio, dopodiché il collegio valuta se darvi corso oppure no, e dopo la persona risponde. Quindi prego, collega, se ha delle altre domande a chiarimento da chiedere su questo fatto dell'attività.
 DL: grazie Presidente. Se può chiedere qual era la forma contrattuale [...]
 [DL: did * have their own network of agents?
 P: no, they didn't have their own network of agents
 DL: sales agents [...]?
 P: No, [...]
 A: Well, for the good running of the proceedings I'll ask the colleagues, though, to address their questions to the panel, then the panel decides whether to accept them or not, and then the person answers. So, please, my colleagues, if you have any more questions about this point.
 DL: thank you, President. If you can ask what the contractual form was [...]]

Indeed, the typical turn-taking sequence is similar to that used in court (Goodrich, 1988): it starts with a party's request to the chair to intervene in the interrogation; the chair then addresses the question to the other party, without repeating the question but simply asking the party to answer it:

- 15 A: Bene, qualche chiarimento?
DL: Sì, Presidente. Se vogliamo chiedere al dott. D se in questa sua attività ha utilizzato materiale o qualsiasi altro elemento proveniente da o comunque appartenente a *
A: Prego, il dott. D risponda
D: allora, [...]
[A: Good, any questions?
DL: Yes, President. We would like to ask Mr. D if he has used any material or other element coming from or belonging to * for his business
A: Mr. D, please answer
D: Well, [...]]

The similarity between a trial and arbitration proceedings is sometimes explicitly underlined by the arbitrator, who makes a direct reference to procedures commonly used in court. In the following extract the arbitrator clearly refers to the principle on which the hearing is based, i.e., the right of cross-examination, which guarantees that both parties have an equal possibility of taking their turn:

- 16 A: Allora adesso, per diritto di contraddittorio, chiederei a * di riproporre la domanda di prima.
[A: Now, owing to the right of cross-examination, I would ask * to ask the previous question again.]

As we can see, these instances confirm a great similarity between the role of the arbitrator and that of the judge in court. Transcripts of proceedings frequently show cases in which arbitrators signal their belonging to the legal profession, often underlying the membership of the same professional community to which the parties' lawyers also belong. This expression of commonality of experience is visible in the following quotation, where the arbitrator confesses his limited

competence in technical matters, which he considers typical of legal professionals:

17 A: questi documenti francamente sono di quelli che sono in lingua greca per noi arbitri e avvocati, quindi bisognerà poi rivederli [...]

[A: frankly, these documents belong to that category of papers which are all Greek to us arbitrators and lawyers, and therefore they need to be examined again [...]]

In this quotation, solidarity is increased by the adoption of the first plural personal pronoun in the expression *per noi arbitri e avvocati* [to us arbitrators and lawyers] used to underline the same kind of technical background. In other cases the belonging to a common professional community sharing the same legal competence is explicitly emphasized by the arbitrator:

18 A: Questo non per anticipare nessun giudizio, ma perché siamo tra avvocati e quindi è inutile fare come il giudice che sta muto ecc. La mia opinione è, a meno che poi voi mi dimostrate che è sbagliata, che l'insegnamento più recente della Cassazione sembrerebbe non applicare neppure all'Arbitrato rituale queste scansioni dolenti del processo civile.

[A: what I am going to say does not anticipate any judgment, but since we are among lawyers and therefore there is no point in behaving like a judge who doesn't open her/his mouth, etc. My opinion is - unless you can demonstrate that it's wrong - that it may seem that even the most recent lesson learnt from the Court of Cassation does not allow these inappropriate interpretations of the civil process.]

This insistence on commonality is adopted by the arbitrators in order to promote the establishment of a more cooperative context in

which their work with the counsels can be carried out smoothly and guarantee the achievement of a successful outcome in a friendly atmosphere.

4 The influence of professional identity on arbitration discourse

In writing awards, arbitrators seem to display a certain level of awareness of the importance of respecting the textual conventions that belong to the arbitration tradition. It is interesting to note, however, that while an impersonal style is commonly adopted, the professional identity of the arbitrator is often made evident in the text. For example, in an award written by an accountant, the arbitrator's profession is clearly stated at the very beginning of the text:

19 Il sottoscritto, Dottore Commercialista arbitro unico per la soluzione della controversia insorta tra:

- Società – Procedente (o Parte Procedente)
 - Ditta individuale – Convenuto (o Parte Convenuta).
- (Award 10)

[The undersigned, qualified business and accounting consultant, Sole Arbitrator for the settlement of the dispute that has arisen between:

- Company – claimant (or claimant party)
- Individual company – defendant (defendant party).]

In another case an engineer was chosen as an arbitrator because of the technical nature of the dispute. Here also the profession of the arbitrator is clearly indicated at the beginning of the award:

20 Il sottoscritto dott. Ing. [...] libero professionista iscritto all'Ordine degli Ingegneri della Provincia di [...] al n. [...] e parimenti iscritto all'albo dei Consulenti tecnici del Giudice ed all'Albo dei Periti presso il Tribunale civile e penale di [...]. (Award 12)

[The undersigned [...], free-lance Engineer member of the Engineers Register of the province [...] no. [...], included in the Register of Technical Judicial Consultants, and of the Register of Expert Witnesses of the Civil and Penal Court [...].]

In this case, the qualification of the arbitrator, clearly stated at the opening of the award, not only stresses the fact that he is a qualified engineer, but also draws attention to his judicial background, and his role as an expert witness in legal procedures. The obvious intention is to emphasise the combined technical and legal expertise of the arbitrator, and establish his dual credentials as a figure of authority.

In some cases the choice of the arbitrator, especially if the appointee is not a lawyer, is explicitly justified. For example, the choice of an engineer as an arbitrator is stressed by the following sentence:

- 21 E' dunque indubitabile la competenza dell'arbitro in relazione al quesito proposto. (Award 21)
[The competence of the arbitrator in this matter is undeniable.]

An expression of this type might sound redundant as the arbitrator's expertise is an intrinsic element to his/her appointment, but it was deemed important to affirm the appropriateness of the choice in such an explicit way.

In spite of being deliberately written so as to conform to a well-established format and language, awards sometimes contain minor elements that are suggestive of a particular professional identity derived from the arbitrator's background. As seen above, texts written by lawyers are the most representative of the colonisation of awards by standard legal language. Also the awards written by other professionals show similar legal influence and tend to conform to the linguistic practices used in litigation. However, the arbitrator's different background may surface, albeit in minor stylistic details. For example, the practice of writing figures in both numerals and letters is a strategy that is used exclusively by accountants in the corpus analysed:

- 22 Il Contratto prevede un canone d'uso pluriennale indivisibile di € 15.000,00 (*quindicimila/00*), oltre ad iva, meglio individuato nell'allegato D1 al contratto, corrispondente ad un canone annuo di € 2.500,00 (*duemilacinquecento/00*) più iva, da pagare in 4 rate trimestrali da € 625,00 (*seicentoventicinque/00*), sempre oltre iva. Oltre a tale canone il Contratto prevede anche

il pagamento di una 'quota di adesione' una tantum di € 3.000,00 (*tremila/00*), oltre ad iva. (Award 10)

[The contract includes an indivisible rent of € 15,000.00 (*fifteen thousand/00*), plus VAT, better identified in Appendix D1 to the contract, corresponding to an annual rent of € 2,500.00 (*two thousand five hundred /00*) plus VAT, to be paid in four quarterly instalments of € 625.00 (*six hundred and twenty-five/ 00*), plus VAT. In addition to the rent, the contract includes the payment of a one-off 'membership fee' at the sum of € 3,000.00 (*three thousand/00*), plus VAT.

This interest in the precision of numerical data is clearly a sign of professional allegiance. As regards awards written by engineers, all the structural elements required of an award in order to reinforce its legal validity are present, as shown in the previous sections. However, it is also possible to perceive their professional background emerge from their linguistic choices, such as the use of specific technical terms and acronyms related to the world of Information Technology (*CDN, ISP, I.P.*) or to business vocabulary (*contratto Interbusiness, start-up*). This kind of lexicon belongs to the arbitrator's professional background and also derives from his/her need to use the most appropriate and unambiguous terms. A peculiarity of an award where the arbitrator is an engineer is the use of mathematical formulae:

23 Al fine di valutare i giorni lavorativi necessari ad eseguire le opere in variante, sia di natura civile che impiantistica, si opera secondo lo schema indicato nell'espressione seguente: $TV = \sum_i (D_i + V_i + R_i - P_i)$. (Award 21)

[The days that are necessary to carry out the variations, both of civil and plant engineering structure, are calculated according to the following expression: $TV = \sum_i (D_i + V_i + R_i - P_i)$.]

The formula is used to calculate the number of working days needed to carry out the work. Every variable is then explained and the value calculated. Such a mathematical approach has not been observed in other awards. The aim of this process is to establish, in a very accurate and precise way, how the decision was made. Implicitly it also

aims to reduce the scope for any possible challenge to the decision, because a value reached through a mathematical process is hardly debatable.

The corpus also presents an award written by a surveyor. This type of professional category is rarely appointed as an arbitrator; this happens mainly in cases where the amount of money involved is not particularly high. As regards this award, the dispute derived from re-surfacing the courtyard of a block of flats. Even though all formal elements of the award were obviously respected, the issue did not present a high legal complexity; for this reason the award was particularly brief (four pages). The professional expertise is however identifiable, thanks to features such as the use of technical terms that refer to the process of re-surfacing, as well as the techniques and tools involved.

5 Conclusion

The analysis carried out in this paper has shown that arbitrators have their own discursive resources which are typical of their profession, and any accomplished arbitrator will skilfully exploit such resources to achieve their institutional goals and realise their communicative actions. However, it appears as if the options available to arbitrators are considerably constrained by the fact that most of the arbitrators by virtue of their also being members of the legal community find it difficult to dissociate and distinguish themselves from their parent discipline, i.e., litigation. Hence, they continue to appropriate discursive resources that have been part of their profession for a long time. There is sufficient evidence in the corpus analysed here that arbitrators, in general, are significantly influenced by what they are quite used to doing in their litigation practice.

Indeed, arbitration awards and proceedings appear to follow the legal practice in several respects, especially in the use of technical lexico-grammatical and formulaic expressions, impersonal style, and also in the use of expressions relating to legal procedures, which are very similar to what one may find in litigation judgments. Moreover, the Italian arbitration awards in our corpus contain excessively long sentences, binomial and multinomial expressions, predominant use of nominalisations, impersonal style, and many other rhetorical features

typical of legal discourse. In spite of the fact that arbitration is a procedure that is meant to be simpler and quicker than its much more complex and slow counterpart litigation, the language used in awards still presents the complexity that is typical of legal language.

Also the recent reform in arbitration practice in Italy seems to have strengthened this process of colonization, as large samples of legal discourse are present in the texts used in recent procedures too. Even the awards written by other professionals show similar legal influence. Although the arbitrator's different background may surface in some interesting stylistic details, the style adopted tends to conform to the linguistic practices used in litigation. This trend derives, at least in part, from the need to emphasise crucial characteristics and qualities of the award, first and foremost its legal validity and enforceability. A different and less standardised approach would lose the advantage of consolidated meaning-making, and, consequently, would be more likely to be controversial and thus run the risk of arousing further disputes.

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Maurizio Gotti is Professor of English Language and Translation and Director of the Research Centre on Specialized Languages (CERLIS) at the University of Bergamo. His main research areas are the features and origins of specialized discourse (*Robert Boyle and the Language of Science*, Guerini, 1996; *Specialized Discourse: Linguistic Features and Changing Conventions*, Peter Lang, 2003; *Investigating Specialized Discourse*, Peter Lang, ³2011). He is a member of the Editorial Board of national and international journals, and edits the *Linguistic Insights* series for Peter Lang. Address: Università di Bergamo, Piazza Rosate 2, 24129 Bergamo, Italy. Email: m.gotti@unibg.it.

Communicating with the Wider Audience: The case of a legal blog

Martin Solly

Domain-specific texts are usually intended for a specific academic and / or professional community and can often be impenetrable to those from outside that community or without the relevant genre knowledge. This can be especially true with legal texts. This paper presents a study of a legal blog, *BabyBarista*, a fictional account of a junior barrister practising at the English Bar, in order to show how the author, a barrister and therefore a legal expert, tailors the discourse of the blog in such a way that it can be appreciated by insiders and outsiders alike.

Keywords: legal blog, discourse community, genre, identity

1 Introduction

This paper focuses on a key area of concern to applied linguists interested in domain-specific discourse: how members of a professional community communicate successfully to both insiders and outsiders, that is, to both specialists in their field and to the world at large. Since the seminal work by Swales (1990) and Bhatia (1993) much important research has been carried out by scholars investigating academic and professional discourse. Recent studies emphasise the importance of the socio-professional contextualization of genres, as well as their dynamic and unstable nature (see, for example, Bhatia, 2007, 2008), and the need for genre research to take into account the diachronic dimension (Berkenkotter, 2007) and the advent of the new media (Giltrow & Stein, 2009). Flowerdew and Wan suggest an ethnographic approach that will focus on “the activities, attitudes, beliefs, values and patterns of

behaviour of the *discourse community* engaging in the genre or genres which is / are the focus of study” (2010, p. 81, my emphasis). However, together with the concept of ‘discourse community’ (Swales, 1990), comes the notion of ‘community membership’ and therefore that of ‘non-membership’ (Giltrow & Stein, 2009, p. 7). Community (non)membership can be dependent on communicative and discursive competence (Hymes, 1996; Bhatia, 2004) and is closely connected to uncomfortable issues of inequality and exclusion (Hymes, 1996), of gate-keeping and marginalisation (Esch & Solly, 2012). Indeed, Bhatia argues for “an integration of discursive practices and professional practices [...] to facilitate a more comprehensive understanding of accessibility and creativity in professional genres” (2008, p. 321). Despite this, few previous studies have had as one of their central aims the analysis of the discourse’s accessibility to both insiders and outsiders, and therefore of the reasons underpinning its success (or lack of success) in communication terms.

The paper looks at a comparatively new genre, the blog, some of whose salient characteristics have been mapped by scholars. Crystal (2006), for example, noted that blogging has introduced a new era of interactivity to websites and anticipated their vast and rapid proliferation as well as the uncertain and precarious future of many blogs. Many of his observations were confirmed by Myers (2010) who commented on the rapidity of change in the blogosphere and on the difficulty of keeping track of that change. The blog genre will be discussed in more detail in section 2 in relation to what is often considered a highly conservative and traditional domain, the language of the law, one which can sometimes be impenetrable to those from outside the professional community or without the relevant genre knowledge (see, for example, Solan, 1993; Gibbons, 1994; Tiersma, 1999; Gotti, 2005). The paper will then use a case study approach to examine a legal blog, *BabyBarista*, a fictional account of a junior barrister practising at the English Bar, in order to show how the author, a barrister and therefore a legal expert, tailors the discourse of the blog in such a way that it can be appreciated by insiders and outsiders alike. In section 3 the paper will consider various aspects of the blog texts, such as the setting, authenticity, topicality, characters and humour, in order to see how the interplays orient the reader to the stories. Finally,

in section 4, it will analyse and comment on the aims, significance, and possible repercussions of the use of language in the blog, taking into account the way the narrative shapes and is shaped by the context in which it is embedded. It would seem that the highly specific contextualization of the blog determines its rhetorical and linguistic requirements and that the negotiated narratives are central to the creation of a sense of community.

2 Blogs, blawgs and *BabyBarista*

2.1 Blogs

Blogs have become increasingly popular over the last decade: according to *BlogPulse*¹, over 169 million were in existence on 2 September 2011. The term ‘blog’ comes from the shortening of ‘weblog’ and originally referred to online diaries. However, the literature on blogs (see for example Crystal, 2006; Miller & Shepherd, 2004, 2009; Myers, 2010) reveals the genre to have become complex, highly diversified and in constant evolution. These days the term blog is used very widely and some blogs have distanced themselves considerably from the original online diaries, now sometimes referred to as personal blogs. For example, many journalists have their own blogs (often maintained by host newspapers), as do a lot of politicians, and many blogs have taken the step of migrating to the social networks (like *Twitter* and *FaceBook*) while still retaining their own websites and/or availability through newspapers, political parties and so on. For Berkenkotter (2011) the genre differentiation should not be confused with the software through which the differentiation is produced. Indeed it needs to be remembered that the technological innovations and affordances underpinning the development of software have, in their turn, a direct, often rapid, impact on the evolution of Internet genres (Miller & Shepherd, 2009). Nonetheless, blogs on the whole conform to a number of genre features. Given their origin as online diaries, blogs should be available on the Internet. “The personal home page and blog genres are the classical examples of web genres whose existence cannot be imagined outside the web” (Mehler, Sharoff, & Santini, 2010,

1 <http://www.blogpulse.com>

p. 13). Blogs should also be personal and in fact they are usually posted by an individual, with regular postings of commentary, descriptions of events, or other material such as text, graphics, images, podcasts and links (to other blogs, webpages and other media related to the topic). Blogs should have their own websites and most blogs are interactive, in that visitors can usually post comments, although these might well be subject to moderation. Blog posts are also specifically dated (like entries in a diary or a log), usually in reverse-chronological order, which differentiates them from many webtexts in that they are frozen in time. Moreover blog posts, due to their diary format, are not usually long.

2.2 Blawgs

Legal blogs, sometimes termed ‘blawgs’, are also numerous and popular, and also much diversified. A U.S. site² even exists offering to help web users choose which to read on a regular basis from the top hundred law and lawyer blogs which it has selected.

Whether you are a lawyer, [...] or merely interested in the subject, we’ve attempted to cut through the chaff and provide you with what we regard as the top 100 law and lawyer blogs listed below. It was very difficult to choose only 100 blogs from the myriad of successful law blogs. (Peterson, 2011)

Among the legal blogs the one examined in this paper is *BabyBarista* (henceforth BB), which is available both on *The Guardian* newspaper’s website³ and on its own website⁴. The postings on *The Guardian* website are the main focus of this paper, as BB’s own website contains additional features, including the regular ‘Monday morning with Alex Williams’ cartoons’, the ‘Weekend video’ and the ‘Book recommendation’, not discussed here.

2 <http://www.criminaljusticedegreesguide.com/library/the-top-100-law-and-lawyer-blogs.html>

3 <http://www.guardian.co.uk/law/baby-barista-blog>

4 <http://www.babybarista.com>

2.3 BabyBarista

The BB blog was launched in October 2006 and the early postings are still available at the original site⁵. At first the blog was anonymous and quite soon (April 2007) it was taken up by *The Times*. In March 2009 the author's identity was revealed by the newspaper as barrister Tim Kevan. Not long after BB moved from *The Times* to *The Guardian*, the author rejecting the setting up of a paywall by *The Times* which would have altered the public's free access to the site and thus reduced the size of the potential readership. In a BB post on 28 May 2010, Tim Kevan explains:

I have today withdrawn the BabyBarista Blog from *The Times* in reaction to their plans to hide it away behind a paywall along with their other content. Now don't get me wrong. I have absolutely no problem with the decision to start charging. They can do what they like. But I didn't start this blog for it to be the exclusive preserve of a limited few subscribers. I wrote it to entertain whosoever wishes to read it.

A blog's success can be measured quantitatively through the number of visits, citations and affiliations, by its presence on the site of a famous newspaper, by the positive reviews it receives, and also by its transformation into book or film form. BB can be considered successful on most counts: "Tim Kevan and his BabyBarista are a successful part of the legal blogging world" (Gledhill, 2011). Moreover as well as being published first by *The Times* and then by *The Guardian* it has joined the ranks of a number of blogs which have been transformed into books.⁶ In August 2009, a book based on the blog was launched with title *BabyBarista and The Art of War* by Bloomsbury, and later published in paperback (August 2010) as *Law and Disorder*. In May 2011 a second volume based on the blog came out, entitled *Law and Peace* and also published by Bloomsbury. BB can also be followed on social networks *Facebook* and *Twitter*.

⁵ <http://babybarista.blogspot.com>

⁶ Other examples are Julie Powell's blog *The Julie/Julia Project*, which was first transformed into a book and then made into the successful film *Julie & Julia*, and *A Don's Life*, by classicist Mary Beard, which appears in *The Times Literary Supplement* as a regular column and entries from which were published by Profile Books in 2009 as *It's a Don's Life*.

It is quite difficult to measure the exact size and typology of a blog readership. In the case of BB the readers obviously include readers of *The Guardian* (and perhaps of *The Times* who might now read the blog on the free webpage). Despite the interactive nature of the blog, the readers are mostly silent in their appreciation. A quick look at the BB site on 12 June 2011 revealed that relatively few comments had been posted during the previous two months. There are however exceptions. For example, going to a key moment in the history of the blog, 27 May 2010, the day BB was relaunched in *The Guardian*, we can see that 53 comments are still currently posted with that entry. Of these comments, a number are by Tim Kevan thanking those who have sent in comments, and a number are clearly from members of the legal community, such as the postings by the following: ‘young black barrister trying too hard to fit into chambers’, ‘Charon QC’ (a non practising lawyer who has his own UK law blog), ‘from the Singapore Bar’, ‘from the Sydney Bar’, ‘a solicitor who will miss the free *Times Law Reports* online’, ‘from the Inner Temple’. Some of the postings are links to newspaper articles reporting the story. In any case the comments would suggest a blog readership containing both insiders (legal professionals) and outsiders. The book readership would be much more difficult to measure and no attempt is made to do so by this study.

2.4 Fiction?

As diaries blogs might be expected to contain fact rather than fiction. But this is not always the case. An example which created a furore in June 2011 was the anonymous blog, *A Gay Girl in Damascus*, apparently based on reality, but which turned out to be the fictitious creation of an internet hoaxer (Tom MacMaster, a married, 40-year-old American male studying at Edinburgh University) masquerading as a lesbian blogger in Damascus, and not the 35-year-old woman called Amina purportedly kidnapped by Syrian security forces (Addley, 2011).

BB takes great care to state that it is a work of fiction. Indeed the website specifically announces: “*BabyBarista* is a fictional account of a junior barrister practicing at the English Bar, written by barrister and writer Tim Kevan”. Certainly the disclaimer should free the author from any possible legal liability. Nevertheless it needs to be remembered that for its first three years BB was published

anonymously (its author was a practising barrister at the time⁷) and that the boundary between fact and fiction is often hazy and blurred. As *The Lawyer* wrote about BB on 26 February 2007 in its weekly commentary on legal activity on the web: “If this is a fictional account it is genius”.⁸ For Tim Kevan is an insider to the English Bar and, as we will see, it is precisely his expert inside knowledge and experience which makes the blog so authentic and informative as well as entertaining.

3 Community and identity

BB’s success is due to various factors, including its authenticity, its humour, its characters, its topicality, the quality of the illustrations, the length of the texts⁹, its use of language, and its technological user-friendliness¹⁰.

3.1 Setting

The setting of the BB blog is in what can be described as an unusual legal space, in that it is not a public legal space. In England the lawyers who generally present cases in court (at the Bar) are barristers, self-employed lawyers who operate within the framework of a set of chambers. The chambers is responsible for their practical training (pupillage), as well as for the administrative and clerical side of their work. BB is set in a fictitious legal chambers and opens up a world from which outsiders are usually excluded: the closed environment of barristers communicating together within their chambers. It is therefore contextually embedded in a private legal space, albeit one that is fictitious and virtual.

7 Tim Kevan, as the profile on his website (www.timkevan.com accessed on 12/06/2011) informs us, “practised as a barrister in London for ten years during which time he wrote or co-wrote ten law books, appeared regularly on TV and radio and co-founded two legal businesses”.

8 <http://www.thelawyer.com/web-week/124423.article>

9 The length of the posts usually ranges from 150 to 450 words: they are not ‘heavy reading’.

10 The blog is also technologically dynamic: on 3 September 2011 BB introduced a new feature ‘the first of a series of Skypecasts’ to its own website. Such an innovation would have been considered less user-friendly in 2006.

3.2 Authenticity and topicality

As we have seen BB's author is an English Bar insider and the blog's credibility is dependent on the authentic flavour of its various components: its setting, characters, topics and language. Coupland points out that "authentic things are 'properly' constituted in significant contexts" (2007, p. 181). And there can be no doubt that the blog does (re)create the atmosphere of a group of barristers working in a London chambers extremely successfully: indeed this authenticity is one of the main reasons BB appeals to readers. In her legal blog 'Legal Resources in the UK and Ireland' Delia Venables, reviewing *Law and Peace* in May 2011 suggests that it is an excellent present for barristers to give to others:

Note to barristers: this is an excellent book to give to parents, children, other loved ones and anyone who is not quite sure what you do all day when you are not standing up in court with a wig on.

The blog's subject matter (conforming to the diary tradition) is often highly topical. Excerpt 1 is an example; its success is only possible because of the topicality at the time of posting of the superinjunctions controversy which was front page news in the English press in spring 2011 and whose details would have been very familiar to BB's *Guardian* readership. Briefly, under the Human Rights Act 1999 which made the European Convention on Human Rights part of English Law, the English courts had begun to issue injunctions (court orders) prohibiting the publication in the press of details relating to certain legal cases, including the identities or actions of those involved, in order to protect their privacy. In early 2011 the English press began to publish potentially scandalous stories about the anonymous celebrities who were protected by these injunctions, which they termed 'superinjunctions', taking care to omit the details that could not legally be published. In April and May however some of these details, including the names of those involved, were posted on social media websites such as *Twitter* and also published in the foreign press where the superinjunctions had no legal force. A Member of the British Parliament had even used his right of parliamentary privilege to name a footballer featuring in one of the cases. The superinjunctions

controversy had therefore drawn public attention to a number of wider issues, including freedom of the press, freedom of speech and online censorship, as well as constitutional issues such as parliamentary privilege, the effect of European treaties on English law, and the relationship between the judiciary and parliament. This provides the background to excerpt 1.

Excerpt 1

Upholding the rule of law (BabyBarista 24 May 2011)

“Is it just me or has the whole legal world just been turned upside down by the press?” said TheBusker. “I mean, I don’t give a fig about the privacy issue. But when there’s a court order in place, surely that should mean something?”

“And instead it’s undermined by the use of parliamentary privilege right under the nose of the attorney general, the very person responsible for enforcing that order,” said BusyBody.

“But what’s he meant to do. He can hardly start proceedings against every over-excited user of Twitter who forwarded it on,” said TheVamp.

“So, what? That’s it. Laws now count for nothing? Judges are powerless to enforce their own judgments? Come on,” said BusyBody.

“I don’t know what you’re all so worried about,” said OldSmoothie. “We spend our lives trying to twist and turn judges and orders in our clients’ favour. We can hardly now start carping on about the sanctity of justice and all.”

“I’d be extremely disappointed if I thought that my barristers weren’t prepared to stand up to the judiciary,” said HeadClerk.

“Yes, but there are ways to do that and ways not to,” said BusyBody.

“What you really mean,” said OldSmoothie, “is that there are very expensive ways to bend the law through hiring the services of a lawyer and then there are much cheaper ones which bypass them altogether.”

“Which is exactly why we all need to uphold the rule of law,” said HeadClerk.

In excerpt 1 the specific remarks on the superinjunctions issue by the BB characters are interspersed with shrewd humorous insider comments on the legal profession as a whole: “We spend our lives trying to twist and turn judges and orders in our clients’ favour”; “there are very expensive ways to bend the law through hiring the services of a lawyer and then there are much cheaper ones which bypass them altogether”. These comments might be considered slightly shocking by outsiders but they have a timeless universal appeal which underpins their success, after all they could be true. Excerpt 2 (reproduced below, in section 4) is timeless too: the comments by the members of the chambers require no recent topical knowledge and would also have been appreciated by readers five, twenty or fifty years ago.

3.3 Characters and humour

The characters are another reason for the blog’s success. All the protagonists are typical members of the legal community, in particular the legal community of a chambers of the English Bar. The characters are carefully crafted to represent different aspects of the legal community, including its hierarchy and its conservatism, but they also have universally recognisable traits. As the author points out:

It’s a fictional caricature of life at the Bar and includes characters that probably exist in most workplaces such as *UpTights*, *OldRuin*, *BusyBody*, *Worrier* and even *JudgeJewellery* with her penchant for stealing cheap jewellery. (Kevan, 2010, p. 35)

Intrinsically linked to the characters are their short presentations on the blog’s own website, for example: *HeadofChambers* ‘Well-meaning, pompous and completely out of touch’, who should not be confused with *HeadClerk* ‘The real power in chambers. All seeing, all knowing.’ Some of these characters, the females in particular (*TheVamp*, *BusyBody*...), might seem somewhat out of date caricatures to the outside observer. Yet the stereotyping probably reflects what the author has observed in his professional experience since the English Bar is a comparatively conservative environment and its higher echelons are still largely dominated by male colleagues.

The lead character in the blog is of course *BabyBarista* himself. As the author explains, the name was carefully chosen:

I called him BabyBarista which was a play on words based on his first impression being that his coffee-making skills¹¹ were probably as important to that year as any forensic legal skills he may have. (Kevan, 2010, p. 34)

The fact that BB is starting out on his career lends a didactic aspect to the blog: BB as a learner (from pupil to junior barrister) is like many of the readers interested in learning more about the Bar, about current legal topics (excerpt 1), about what makes a good barrister (excerpt 2) and so on. This device enables the other members of the chambers to respond to his ingenuous questions and to provide explanations and advice. As regards this didactic aspect it is worth noting the author's experience as a writer of law books (see footnote 7). In actual fact however BB has changed considerably since its first launch in 2006. In terms of content the first year was all about BB himself and his progression as a pupil at the Bar. These days BB himself appears less frequently on the blog – if we look at excerpt 1 we can see that he is not one of the participants – although his name dominates (it is the name of the site and the blurb describing the blog strictly refers to him). He is still the narrator and he is now presented as a 'junior barrister'. In Excerpt 2 BB's role as a pupil is replaced by the introduction of another ingenuous learner, 'one of the mini-pupils', but BB still features in the illustration on the blog homepage wearing an L plate like a learner driver, emphasizing his position as a learner, thus still an incomplete insider and still conforming to the role envisaged by his creator:

As the author explains about the second of the two volumes based on the blog he could not keep exactly the same format. Nonetheless it is still the characters who drive the stories.

Having written my first BabyBarista novel *Law and Disorder* a little while back, last year I was faced with the task of writing book two. This came as more of a challenge than the first given

11 'Barista' in Italian means someone who is working behind a bar; the word has come into English since the 1980s to mean someone who makes and serves coffees to the public, typically in an Italian style coffee bar. Because the pronunciation is similar to the English word 'barrister' the name *BabyBarista* plays on the two words.

that I couldn't simply use the stresses and strains of pupillage to drive the plot along and instead had to look to other themes and stories. In the end, I did just what I'd done in book one and let the characters loose to tell their own stories. (Kevan, 2011)

The characters are also visually displayed on the BB site in the excellent cartoon illustrations, which are, as the BB blurb informs us, the work of another legal insider: Alex Williams “who just happened to qualify as a barrister in his youth”.¹² They too are an integral part of the humour that permeates the blog. Indeed BB's success is highly dependent on its use of humour, which is situational and closely linked to the characters, as we see in excerpts 1 and 2. “The humour behind the blog and the book is the caricatures of London barristers, solicitors, and judges. [...] It is successful humour in part because it has a kernel of truth to it” (Gledhill, 2011).

4 Language

The demarcation between those who hold power in court and those who do not (thus between the powerful and the powerless) is closely linked to the use of language and has been much discussed in the literature (see, for example, Conley & O'Barr, 1998). In the case of BB the discourse is not the language barristers use in court, but the language barristers use between themselves outside of the courtroom, but within the legal setting of the chambers. BB therefore fulfills its claim to provide a ‘worm's eye view of the English Bar’ (the blog's secondary heading), at the same time enabling the culture bound discourse of the English Bar to be accessed by outsiders without losing the contextual authenticity of the language.

The language of the BB blog has also undergone a certain metamorphosis over the years. The early blogs, narrated by *BabyBarista* himself, contained narrative, descriptive texts interspersed

¹² It is also interesting to note that some of the most important names in language of the law studies (Lawrence Solan and Peter Tiersma for example) also have a strong legal background (they are both qualified lawyers as well as senior linguists). Which suggests that membership of both the domain-specific professional or academic community (in this case the law) and also of the linguistics community enables those with this dual insider role to straddle both communities successfully.

with dialogue between the main characters. These days the language of the BB blog consists more of conversational exchange and there is less narrative description. BB himself features less although he is still the narrator. Much of the discourse is spoken dialogue, the kind of rapid interchange that underpins the successful dialogue in radio and television sitcoms (see, for example, Quaglio 2009 for an analysis of the language of the sitcom *Friends*), but also the written dialogue of the fictional writing of Henry Cecil and John Mortimer, both of whom used their experience as barristers to entertain generations of readers with their humorous short stories set in the English Bar. The authenticity of the discourse is dependent on the author's ability to create and maintain the plausibility, albeit caricatured, of the legal characters, and of the situations and issues presented. In the case of BB the postings are usually set within the 'virtual' chambers, thus outside the court, but also outside the public domain of the world at large. BB's success is also linked to its authenticity and plausibility – the characters use exactly the kind of language the legal professionals could be expected to use in the context of the blog. Oral language in the public sphere of the courtroom generally sticks to set patterns, routines and formats; as Coupland observes "most social situations will have a pre-existing social architecture and a genre structure within which social meanings can be negotiated" (2007, p. 26). In BB the language used by the characters respects the social, hierarchical and interactional dynamics of the English Bar, but also those of the informal private space of the chambers.

Indeed the language is often extremely informal. Excerpt 1, for example, contains the following expressions: 'I don't give a fig', 'So, what?', 'Come on' and 'We can hardly now start carping on'. At the same time there is also considerable deployment of specific legal terminology: 'the privacy issue', 'a court order in place', 'parliamentary privilege', 'attorney general', 'uphold the rule of law'.

Riley points out the strong connection between language use and social identity, noting that it is a strikingly prominent characteristic of professional discourses:

With the possible exception of accent, nothing could demonstrate more powerfully the iconic relationship between language variation and social structure than the close and

systematic correlations to be found between technical terms, slang, passwords, localisms etc. and categories of social identity. (Riley, 2006, p. 309)

However he also observes that the active use of domain-specific terminology, rather than passive knowledge or recognition, is a significant marker of proficient ‘insider’ membership of a social or professional discourse group:

Using domain-specific terms (which is not the same as simply knowing or recognising them) constitutes in itself a claim to a specific body of knowledge and experience. By definition, such terms can also be used to exclude from the social group or category in question individuals who fail to establish their credentials, and outsiders trying to use insider terms are usually swiftly rebuffed by being forced to abandon the discursive position concerned and are very often subject to derision. (Riley, 2006, p. 309)

Thus BB bristles with the use of legal terms, concepts and jargon which the addressees (the blog readers) are expected to recognize but which are used by insiders talking together, and on occasion explained by the experts to the less proficient BB. As regards first person pronouns, ‘I’ usually expresses the individual character’s opinion and position; ‘we’ however is often used to refer to the professional community, both those present but also the Bar as a whole. This is interesting as it reveals the implicit sense of corporate belonging deployed by the barristers.

The BB blog posts usually contain the main elements of narrative structure identified by Labov (1972): abstract (here the entry titles), orientation, complicating action(s), evaluation, the result or resolution, and the coda (signalling that the story has finished). Nevertheless, the blog posts also fit into the category of oral narratives which for De Fina:

[...] do not involve much reproduction of conventions, like artistic performances or traditional tellings, but rather represent interactional achievements that reflect the work of the people involved in social encounters. (2009, p. 238)

The conversational dialogues in the BB blog posts are not of course spontaneous, but carefully crafted social encounters shaped by their creator, where the seemingly improvised exchanges between the characters provide the mechanism for the writer to articulate the plot in each post as the oral narrative is constructed and negotiated by the (fictional) legal professionals in a defined context. The posts can therefore be examined in terms of De Fina's interactional approach to the genre, one where the interaction also involves the readership, who have come to form a part, albeit a mostly passive part, of the contextualized BB community, and thus are party to the negotiated narrative.¹³

At a discourse level, the negotiated narrative is carefully structured: there are questions and linkers, narrative and lexicogrammatical devices. In excerpt 1 the nine exchanges are all marked by the 'said the' structure, as in "said TheBusker", six of them at the end of the intervention. This is repetitive but efficient. The same structure is used five times in excerpt 2, which also contains the variations 'she smiled... and added', 'asked' and 'replied'.

Excerpt 2 is more specifically about language, in particular language used by barristers. Entitled 'Never say what you mean' it opens with a trainee (minipupil) asking *UpTights* about the secret of being a successful barrister. This enables *UpTights* to introduce the concept of the 'disingenuous comment'; at which point various other members of the chambers give examples.

Excerpt 2

Never say what you actually mean (BabyBarista 3 August 2011)

One of the mini-pupils crept into chambers tea today and innocently asked UpTights what was the secret to being a successful barrister.

"It all boils down to the art of the disingenuous comment." She smiled at the pupil and added, "With the greatest of respect, naturally."

13 On 13 May 2011 the blog readership was interactively invited to take part in a competition to choose a new character. The winner, announced on 7 July, was *PanicStricken* who duly appeared on 12 July.

“I like: Your Lordship is, as always, ahead of me in this matter,” said BusyBody.

“Or: My Learned friend has earned himself quite a reputation in this area of law,” said TheVamp.

“This victory had nothing to do with my hard work as your junior and everything to do with your brilliant advocacy,” said TheCreep in a rare show of honesty.

“I really can’t believe I’m worth the ludicrous sums they pay me these days,” said HeadofChambers.

“My huge fees are simply down to the genius negotiating skills of my clerk,” said OldSmoothie looking over at HeadClerk with a smile.

To which HeadClerk replied, “Sir is worth every penny.”

Both excerpts 1 and 2 are highly interactive. For example they open with questions ostensibly addressed to the group of lawyers in the chambers. The use of the interrogative runs through the first part of excerpt 1, also with the repeated ‘can hardly start...’ structure which takes the listeners’ agreement ‘No, he can’t’ and ‘No, we can’t’ as understood. Yet the questions raised are also questions that the general public (in this case *The Guardian* readership) might also be interested to know about. The interactivity works also at the sitcom level: over the years the addressees have become familiar with the characters and setting of the blog, and with the ongoing storying. Each blog post tells its own story but is also part of the ongoing BB story. The dialogic negotiation of the narrative by the characters (caricatures) enables the writer to reshape and recontextualize narrative detail producing an altered reality that orients the readers to the dynamics of the (fictional) professional community portrayed, helping them to understand and make sense of that community and of the legal content (and comment) presented: the narrative structure functions as a textual means of constructing identity and continuity.

5 Conclusion

The communicative difficulties which occur at the legal - layperson interface (Cotterill, 2002, p. xv) are a constant feature of research studies conducted on the language of the law. Drawing on the notion of communicative competence (Hymes, 1996) and the relationship between language and literacy in context-dependent language use (Bhatia, 2004) this paper suggests that the BB blog is an excellent example of how an expert writer can bridge the gap between insiders and outsiders, in this case successfully overcoming the barriers between the linguistic and discursive spheres of the lawyer and the layperson. The careful crafting of the vignette-like stories intersperses the technical terminology with informal language and humour in such a way that it enables the reader to enjoy the discourse of the professional community. At the same time BB provides a rich and well-informed source for the analysis of the law and especially of the English legal community.

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Martin Solly is Associate Professor of English Language and Linguistics at the University of Florence. His main current research interests concern language learning in higher education and specialised discourse in academic and professional settings. He is particularly concerned with the relationship between language and context (institutional, disciplinary, intercultural), as well as with how language choice impacts on the construction and representation of identity. Co-editor of *Verbal/Visual Narrative Texts in Higher Education* (Peter Lang, 2008) and *The Sociolinguistics of Language Education in International Contexts* (Peter Lang, 2012), his recent publications include ‘Implementing the Bologna Process in Italy’ in *ESP in European Higher Education* (John Benjamins, 2008) and ‘Using language to shape identity’ in *Commonality and Individuality in Academic Discourse* (Peter Lang, 2009). In the 2011-2012 academic year he was a visiting scholar at the University of Cambridge. Email: Martin.Solly@unifi.it

Alternative Justifications and the Argument from Demystification in the English Law of Obligations

Ross Charnock

Although legal judgments often appear complex, a dissenting judge occasionally adopts a simpler view of the case in the hope of reaching a clearer and more acceptable result. In such cases, judicial disagreement concerns alternative categorisations of the facts rather than the facts themselves and the dissenting judge may use an argument based on ‘demystification’. The different judgments are reached by taking alternative views of the law. Legal adjudication thus appears to involve a choice between different available perspectives. To the extent that the result depends on the view taken of the facts, rather than the facts themselves, legal judgments cannot be said to be true or false, though they may be insincere. Such insincerity is sometimes clearly apparent. As in other fields of public life, it may constitute the normal case. Yet, in the common law, the reasoning given, rather than the result, is fundamental to the operation of the rule of precedent. Paradoxically, on occasion, the divergence between the justification proposed and the judge’s true motivation may make a positive contribution to the development of the law.

Keywords: alternative conceptions, categorisation, constructive insincerity, demystification, legal argumentation, rhetorical simplicity.

1 Introduction: rhetorical simplicity in legal argumentation

Judicial opinions have acquired a reputation for complexity. The erudite and learned approach is often found persuasive in legal debate,

not just because logical demonstration is a powerful form of argument but also because of its reassuring impression of expertise. However, the purely formal approach remains problematic where (as always) the result depends on value judgments rather than on objective truth or falsity. Even where valid logical arguments are available, they are rarely convincing on their own. Being essentially tautological, they cannot create new knowledge or impose new beliefs. As Lewis Carroll (1895) convincingly showed, no one can be obliged to believe the logical implications of even of valid propositions.¹

Indeed, the law cannot always be strictly applied, and sometimes appears absurd when taken to its logical conclusion. For this reason, judges inevitably resort to rhetorical arguments in addition to formal analysis. The claim of the American judge, Justice Holmes (1881, p. 1), according to which “[t]he life blood of the law is not logic but common sense”, is often cited even in English cases in order to justify a departure from strict logic.

Legal judgments are prototypical examples of argumentative texts. It would be wrong, however, to analyse them in terms of dialectics. In the legal field, once the arguments have been made before the court, there is no further opportunity for collaborative debate, in the hope of reaching an ideal conclusion, acceptable to all. If the parties are not satisfied, their only option is to appeal to a higher court.

This point is especially clear in the English common law system. Even in the higher courts, where a panel of judges is likely to hear a case, they will normally give their opinions individually. Although they may participate in informal discussions with their colleagues, they are under no obligation to do so. Indeed, when they do defer to others’ opinions, they commonly say so explicitly in their judgments, stating for example that they have “had the advantage of reading in draft” the speech prepared by their “noble and learned friend”. Their individual judgments must therefore be seen as *a posteriori* justifications of decisions which have already been made, rather than as a basis for negotiation or discussion.²

1 Logic would take you by the throat and *force* you to do it!” (Carroll, 1895, p. 279)

2 The practice is somewhat different in the civil law countries, where the judges are normally required to prepare a unanimous judgment, and where dissenting opinions are rarely published. Nor is it true to the same extent in the US Supreme Court, where a majority judgment,

Nevertheless, the judges are typically aware of opposing arguments and able to give sympathetic presentations of them. This explains how they are apparently able to adopt diverse points of view simultaneously, in a way which, taken out of context, may appear contradictory. In *A (FC) v Secretary of the Home Department* (2005), for example, Lord Bingham said:

“[...] is not a negligible argument, and a majority of the Court of Appeal broadly accepted it. There are, however, in my opinion, a number of reasons why it must be rejected. (*A (FC) v Sec Home Dept* HL 2005, *per* Lord Bingham)]

In *Jones v Whalley* (2006), the same judge said, in rejecting a strong argument:

“I see very considerable force in this argument [...] I would not, therefore, reject this argument. But nor do I think the House should in this appeal accept it, for reasons which I find, cumulatively, to be compelling.” (*Jones v Whalley* HL 2006, *per* Lord Bingham)

The sometimes elaborate justifications given by the judges may thus be analysed as trace evidence of internal argumentation within the mind of the individual judge. Common law judges should not therefore be seen as embodying contradictory views, even where they obtain diametrically opposed results.³ Judicial reasoning is more a matter of balance between opposing arguments.

In this sense, judicial disagreement does not depend merely on the analysis of agreed facts. Not only may the judges analyse the facts differently, so as to tell different ‘stories of the case’ (Llewellyn, 1930, p. 28), they may also adopt different conceptions of the facts themselves. The justifications given then depend not on empirical observations, but on the view taken of the law. Arguments based on

established through confidential discussion, frequently attempts to refute the counter-arguments made in dissenting opinions. Even the English tradition may be changing, as since the creation of the United Kingdom Supreme Court, there has been a tendency for a greater proportion of judgments to be prepared in collaboration and co-signed than was the case in the old House of Lords.

³ The US case of *Texas v Johnson* ((1989) is exceptional in this respect, as Justice Brennan and Renquist CJ. do appear to have been arguing at cross-purposes.

alternative conceptions of the facts are surprisingly common, but have attracted little attention either from rhetoricians or legal theorists.

The simplest manifestation of this phenomenon occurs when a dissenting judge explicitly adopts a different conception of the facts in order to reach a different, more acceptable conclusion. In such cases he may be said to be using an argument from ‘demystification’ or, to use a variant on the terminology of John Locke (1690, B4, Ch. 17, s.19-22), the *argumentum ad demistificationem*).⁴ In this case, for the purpose of refutation, the judge adopts a simpler view of the law, a view which may be defended through a variety of rhetorical devices. For the purpose of exposition it is therefore convenient to introduce the problem of alternative justification through the analysis of three celebrated cases in the English law of obligations.

2 Legal argument and alternative conceptions of the law

The celebrated cases taken as examples here combine features of the law of tort and of contract, to the extent that the judges disagreed amongst themselves about which area of law should apply. In each case, one judge found the questions raised needlessly complex and the result unsatisfactory. In order to reach a more acceptable solution, he preferred to adopt a simpler basis for the ruling. In *Lumley v Gye* and in *Olley v Marlborough Court*, facts originally considered in terms of tort were re-analysed in contract, while *Candler v Crane Christmas* the argument concerned the possibility of recovery for economic loss following negligent statements acted on by third parties.

2.1 *Lumley v Gye* (1853)⁵

Lumley, a well-known concert promoter, had persuaded the celebrated soprano Johanna Wagner to sing exclusively at his theatre for the entire season. The plaintiff, Gye, a rival promoter, maliciously persuaded her to break this contract, thus causing Lumley financial loss. The previous year, in *Lumley v Wagner* (1852), Lumley had failed to obtain an

4 Hart’s (1973) discussion of “demystification” is less concerned with rhetoric or argumentation than with Jeremy Bentham’s propositions for the clarification of the overly complex vocabulary of the law.

5 Full case references are given later in a separate section.

injunction for specific performance against the singer, and now hoped instead to obtain compensation from Gye. Although the judges agreed that Gye was morally blameworthy, it was difficult to see on what legal grounds he could be made liable for the financial loss. The theoretical point was therefore whether a malicious intent could make illegal an act which was otherwise legal, or alternatively whether the act of procuring a breach of contract should in itself be considered as a civil wrong.

According to the report, the case was originally argued before the court by the lawyers in terms of ‘action on the case’ the precursor of the modern law of tort. It raised questions of great complexity, involving anomalous statutes of doubtful applicability, and exceptions created by the common law. The first question to be decided was whether a 14th century statute, the *Statute of Labourers* (1348),⁶ was applicable. This statute, adopted after the great plague, was originally directed to menial labourers, who were then in short supply, and functioned as a type of primitive wage-freeze. Its re-interpretation by judges of the late 19th century concerned both the scope of the Statute, and the definition of the master-servant relation.

The majority of the judges took the conventional view that the law should provide a remedy for all wrongs. Wightman J noted, referring to recent common law precedents, that the law now applied not just to agricultural labourers, but also to other workers in trade and industry.⁷ He also mentioned those in domestic service.⁸ Erle J suggested that the statute should now be interpreted to include theatrical performers, like

6 “Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we considering the grievous incommunities, which of the lack especially of ploughmen and such labourers may hereafter come, have ordained. [...] that every person within the age of sixty, not living in merchandise, nor exercising any craft, nor having of his own whereof he may live, nor proper land which he may till himself, [shall] serve whoever might require him at such wages as were paid in the twentieth year of the King’s reign or five or six other years before.” (Preamble, *Statute of Labourers* 1348)

7 “[...] the remedies given by the common law are not in terms limited to any description of servant or service. The more modern cases give instances, and contain dicta of Judges, which appear to warrant a more extended application of the right of action for procuring a servant to leave his employment than that contended for by the defendant.” (*Lumley v Gye* 1853, per Wightman J)

8 Readers of P.G. Wodehouse will remember how difficult it was for English landed gentry to secure the services of reliable servants, especially gifted cooks and chefs. The problem also gave rise to cases in defamation (see *Sim v Stretch*, 1936).

Miss Wagner; in his opinion, once it was established that a contractual right had been violated, the nature of the service contracted for should be immaterial.

In dissent, Coleridge J preferred to take a simpler view, in accordance with elementary logic, even though this led him to the conclusion that the common law was unable to provide a suitable remedy. He adopted a different characterisation of the facts, arguing that the case did not depend on a new form of tort but could be disposed of under the elementary rules of contract. Although his language is far from simple, whether on the level of terminology or of syntax, his argument is one of demystification.

Coleridge J started by reducing the question to its constituent parts, and by analysing the resulting disjunctive propositions. For Lumley to succeed, it must be true either that procuring a breach is always actionable, in whatever field, or alternatively that the precedents applying to domestic servants could be extended to opera singers:

“In order to maintain this action, one of two propositions must be maintained; either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action, for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner.” (*Lumley v Gye* 1853, *per* Coleridge J)

In the judge’s opinion, neither of these propositions was acceptable. The first was clearly in contradiction with the basic rule of contract which excludes actions by third parties. The second, purporting to extend the application of the old statute to new categories of employees, including opera singers, must also be rejected. In its preamble, the statute referred specifically to “the lack especially of ploughmen and labourers”. In this context, the word ‘servant’, therefore, could only be understood as referring to manual workers.

In order to reinforce his point, Coleridge J also made use of other forms of rhetorical argument. In a classic example of the argument

from ignorance,⁹ he affirmed that his own ignorance of any exceptions to the general rule was evidence that there were no such exceptions in the books.¹⁰ He also used the argument from the absurd, suggesting that the proposed extension to the rule would lead to the absurd conclusion that, once a great artist like Joshua Reynolds had accepted a commission to paint a portrait, he would be considered a mere servant until the task was completed. From a practical point of view, it would also be difficult if not impossible for the judges to decide exactly why a party decided to abandon his contractual obligations.¹¹

Coleridge J further invoked the slippery slope argument, insisting that it would be wrong to take the dangerous first step of declaring hitherto lawful acts unlawful, simply in order to obtain the desired result in this particular case; to create new remedies not provided for by the existing law would be to resort to judicial legislation and to risk weakening the institution itself.¹²

His reasoning is convincing precisely because it is simple and direct, and because his conclusion follows inevitably from his premises. He failed, however, to convince the majority, who found for the plaintiff. Coleridge's prescient prediction of regrettable and unfortunate consequences was soon confirmed in *Allen v Flood* (1895-9).

In *Allen v Flood*, an employment dispute, strict union rules prevented boilermakers from working with the non-unionist woodworkers Flood and Taylor. In order to preserve good relations with the boilermakers' union, the employer dismissed the two woodworkers, by the simple - and perfectly legal - device of refusing to

9 Or the argument *ad ignorantiam* (Locke, 1690: B4, Ch. 17, s. 20).

10 "None of this reasoning applies to the case of a breach of contract : if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it." (*Lumley v Gye* 1853, *per* Coleridge J)

11 "There would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act." (*Lumley v Gye* 1853, *per* Coleridge J)

12 "It seems to me wiser to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited; and that, if you go beyond this, you strain and weaken it, and attain but imperfect and unsatisfactory, often only unjust, results. But, whether this be so or not, we are limited by the principles and analogies which we find laid down for us, and are to declare, not to make, the rule of law." (*Lumley v Gye* 1853, *per* Coleridge J)

renew their contracts. There was no evidence of conspiracy, intimidation or coercion, and therefore no legal grounds for action against the employer. Instead, the newly redundant workers claimed, following *Lumley*, that Allen, representing the boilermakers' union, had acted maliciously in inducing the employer to discharge them from their employment.

The Court of Appeal followed the authority of *Lumley*. However, by a majority of 6-3, the House of Lords overruled. Lord Herschell considered that the union could not be held liable for the actions of the employer, especially as these actions were not illegal in any case. Like Coleridge J in the earlier case, he considered that any other decision would lead to unfortunate consequences.¹³

The question arises frequently in the law today, especially in cases where a trade union organises a strike, yet the rule remains of doubtful application.

However, Lord Halsbury, dissenting, continued to claim that the common law should provide a remedy for all wrongful acts. He succeeded in imposing his point of view a short time later in *Quinn v Leatham* (1901), in which the principle stated in *Allen v Flood* was rejected and *Lumley v Gye* reinstated. Lord Halsbury accepted that he was bound by the authoritative decision of the House of Lords in *Allen v Flood*; however, like the Tortoise in Carroll (1895), he continued to reject the logical implications of that ruling, on the grounds that the law was not a logical code.¹⁴ For this reason, while admitting that it was difficult to “resist the Chief Baron’s inflexible logic”, he simply refused to follow it: “I cannot concur.”

In spite of Lord Coleridge’s proposal for common sense solution following the ordinary rules of contract, the majority in *Lumley v Gye* preferred a more complex solution, based on the law of tort. As predicted by Lord Coleridge himself, this resulted in new problems when similar questions came to be decided in the later cases, for example in *Allen v Flood* or *Quinn v Leatham*.

13 “I regard the decision under appeal as one absolutely novel, and which can only be supported by affirming propositions far-reaching in their consequences and in my opinion dangerous and unsound.” (*Allen v Flood* HL, per Lord Herschell)

14 “[A] case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.” (*Quinn v Leatham* HL 1901, per Lord Halsbury)

2.2 *Candler v Crane Christmas* (1951)

Candler was originally presented as a contract case, in which the plaintiff was refused relief because as a third party, he had no contractual rights. Even if the facts revealed negligence, as it was a case of purely economic loss, the plaintiff would still be denied relief. Denning LJ treated the case as one of tortious negligence, using common sense arguments in an attempt to reject certain well-established precedents and to impose a more natural intuition of justice. His judgment is all the more convincing as it is expressed in remarkably clear and simple language.

A clerk working for the accountancy firm Crane Christmas prepared the accounts for a client company, according to instructions, knowing that they would be shown to potential investors. The results were misleading. The plaintiff, Candler, invested £2,000, only to lose all his money shortly afterwards, when the company went into liquidation. He attempted to claim compensation from the accountants.

Following the nineteenth century precedents of *Derry v Peek* (1889) and *Le Lievre v Gould* (1893), no remedy was available for economic loss caused by negligent statements acted on by third parties. Recovery was only allowed if the statement complained of was not just negligent but actually fraudulent. Denning LJ argued that these precedents had been wrongly interpreted and should no longer be accepted as part of the law.

Denning LJ made his conclusion clear even before stating the facts of the case, presenting the basic question as rhetorical, so that the answer followed naturally: “I come now to the great question in the case: Did the defendants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said they clearly did owe a duty of care to him”. His view was that any interpretation of the law which failed to achieve a just result must be mistaken.

He presented the failures of the company with exemplary clarity: the accounts gave an “altogether false picture of the position of the company; [...] there was no verification whatever by the defendants of the information which they were given [...] The defendants had entirely failed to use proper care and skill in the preparation and presentation of the accounts.”

The accounts as presented by the junior clerk were clearly misleading in that they claimed as company assets freehold cottages which in fact belonged to the owner-director in his personal capacity, as well as leasehold buildings for which the leases had been forfeited for non-payment of rent. Denning LJ defended the concept of vicarious liability in particularly clear terms, concluding that the firm of accountants should be held liable for the actions of its employee.¹⁵

Knowing that the other judges considered themselves bound by authority to come to the opposite conclusion, Denning LJ simply affirmed that their view was mistaken. Two “cardinal errors” were involved. The first was that of Bowen LJ in *Le Lievre v Gould*, who had remarked that “the law of England [...] does not consider that what a man writes on paper is like a gun or other dangerous instrument”. According to Denning, that principle had already been overruled (in *Donoghue v Stevenson*, 1932).

The second error concerned the supposed misinterpretation of *Derry v Peek* (1889). Denning could not accept that where damage was caused by negligent statements, such negligence should not give rise to legal action. The mere fact that no such action had previously been allowed should not prevent the court from doing justice in the new case.

His strongly argued opinion was nevertheless rejected by the majority, who preferred to follow the existing law. Asquith LJ accepted without question the authority of *Le Lievre v Gould*, which Denning had denied,¹⁶ and considered that certainty in the law was more important than justice in the individual case.

On the rhetorical level, like both Coleridge J and Lord Herschell in the cases discussed above, Asquith LJ also used a slippery slope argument. He pointed out that the introduction of a new rule would lead inevitably to unfortunate and sometimes absurd consequences. If

15 “Practical good sense demands that, even though the master is not at fault himself, he should be responsible if the servant conducts himself in a way which is injurious to others. He takes the benefits of the servant’s rightful acts and should bear the burden of his wrongful ones, and he is, as a rule, the only one who has the means to pay”. (*Candler v Crane Christmas* 1951, per Denning LJ)

16 “[The defendants] rely in support of this contention on *Le Lievre v Gould*, a decision binding on this court. I agree with the learned judge in considering that authority to be conclusive in their favour unless it can be shown to have been overruled or to be distinguishable.” (*Candler v Crane Christmas* 1951, per Asquith LJ)

liability for negligent statements was extended as proposed to allow claims by third parties, then a marine hydrographer who carelessly omitted to indicate on his map the existence of a reef would be potentially liable to the owners of the 'Queen Mary', if that ocean liner should come aground, for millions of pounds.

Denning had replied in advance to a similar argument proposed by the American judge Cardozo CJ, according to which an accountant could not be liable to third parties because he would then be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultra Marine Corp v Touche* 1931, *per* Cardozo CJ). His opinion was that this result could be avoided by the good sense of the judges, who would be able to limit the damages to what was reasonable in the particular circumstances. More aggressively, in the course of his judgment, Denning LJ suggested that those who persisted in slavishly following outdated precedents instead of taking the bold step of rejecting them should be considered as "timorous souls", reluctant to allow improvements in the law.¹⁷ In giving his subsequent judgment, Asquith LJ stoically accepted this accusation of timidity, thus creating a rare impression of judicial dialogue.¹⁸

Denning LJ's demystification argument appeared persuasive not just because it was expressed in simple language but also because it cut through the purely technical problems and appealed directly to common sense. However, it failed to convince the majority. His opinion was nevertheless approved some years later by Lord Devlin in *Hedley Byrne Co v Heller & Partners* (1964).¹⁹ In the new case, in 1964, the House of Lords accepted the view first expressed by Lord Denning in

17 "On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed." (*Candler v Crane Christmas* 1951, *per* Denning LJ)

18 "I am not concerned with defending the existing state of the law or contending that it is strictly logical. It clearly is not - but I am merely recording what I think it is. If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command." (*Candler v Crane Christmas* CA 1951, *per* Asquith LJ)

19 "I am prepared to adopt any one of your lordships' statements as showing the general rule; and I pay the same respect to the statement by Denning LJ in his dissenting judgment in *Candler v Crane, Christmas* about the circumstances in which he says a duty to use care in making a statement exists." (*Hedley Byrne Co v Heller & Partners* HL1964, *per* Lord Devlin)

his dissenting judgment in the Court of Appeal, thus discreetly departing from the old rule.

2.3 *Olley v Marlborough Court* (1948)

Like *Lumley v Gye*, *Olley* was concerned with the interpretation of old statutes. The case was argued by the parties in terms of tortious negligence. The question raised was that of liability for the loss of Violet Olley's belongings, including a fur coat, a hatbox and some jewellery valued at £50, stolen from her hotel room on 7 November, 1945. The hotel managers had been negligent in not keeping a closer watch over the room keys. On the other hand, the problem would not have arisen if Mr and Mrs Olley had availed themselves of the safe deposit box offered by the hotel as a service to clients.

The question was complicated by the fact that according to the existing law, the result depended on whether the establishment should be considered a common law inn or as a simple boarding house. If Marlborough Court was a common law inn, then the *Innkeeper's Liability Act* (1863) applied, and liability would be limited.

The *Innkeepers Liability Act* was passed at a time of horse-drawn transport, when travellers were frequently obliged to interrupt their journeys overnight. Innkeepers were required to display a notice informing clients that the inn was liable for "loss of or injury to horses or other live animals or any gear appertaining thereto, or any carriage". However, liability for other property was limited to £30, which now seems very low. An exception applied in cases of "wilful act, default, or neglect" on the part of the innkeeper, in which case the limit on liability would not apply.

Although the owner-managers displayed the notice imposed by the Act of 1863, they nevertheless denied that they were operating a common law inn, claiming that they were in fact running a private hotel. They preferred to rely on another notice displayed behind the door in the individual rooms, according to which: "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained." If this notice succeeded in excluding liability altogether, then the question of limitation was no longer relevant.

In the Court of Appeal, Bucknell LJ pointed out that the two notices displayed were in contradiction with each other, and that guests would find it difficult to reach a clear understanding of their rights and obligations. Singleton LJ, concurring, considered it unnecessary to take a decision as to whether or not the hotel was a common law inn, as once negligence had been proved, the proprietors would be liable for the loss in any case. The question nevertheless remained as to whether the notice behind the bedroom door succeeded in avoiding liability for negligence. Singleton LJ found this question difficult: "But there ought to be some certainty in a matter of this kind, and there is none." Nevertheless, the court confirmed the order for payment of £329 2s.0d. by the hotel.

Denning LJ, speaking last, concurred in the result, but proposed much simpler reasoning. In his view, the case did not depend on liability in tort, but could be disposed of under the basic rules of contract. On this view, it was unnecessary to decide whether Marlborough Court was a common-law inn or a private hotel, or indeed to prove negligence at all.

He admitted that the couple could hardly deny having read the notice displayed in their room, as they had taken up residence in May 1945, six months before the theft took place. However, this made no difference. In contract, no clause can be introduced after the agreement has been made. It followed that the exclusion clause would only be valid if it had been properly communicated at that time. Here, the agreement was originally made in the reception office before the couple saw the notice in their room upstairs. The notice therefore afforded no protection to the owner-managers. That was enough to dispose of the case. The complex questions raised on the subject of tortious liability could simply be ignored.

Denning's argument in *Olley v Marlborough Court* was given in terms of contract rather than tort, and was based on failure of communication. However, even if it is accepted that the exclusion clause behind the bedroom door could only be valid if the couple were aware of it before the date of the contract, rather than before the date of the theft, it could nevertheless be argued that the contract had been tacitly renewed, probably weekly, over the previous six months. If the exclusion clause had not been properly communicated the first time an

agreement was made, the couple would naturally have been aware of it on the subsequent occasions.

However, as Denning LJ's was a concurring judgment, it made no difference to the result of the instant case. He may have seen *Olley v Marlborough Court* primarily as an opportunity to clarify legal policy regarding exclusion clauses in general. Indeed, if the general principle applied even in such extreme circumstances, must be considered as a rule of law, no longer subject to judicial discretion. Because of this, it is now more difficult for unscrupulous companies to impose unfair contractual terms on consumers. As well as helping to establish the result of the particular case, Denning's alternative justification thus had the effect of deciding the law itself as it would apply subsequently. His judgment in *Olley v Marlborough Court* is now cited as a landmark case in contract law.

3 Alternative justifications and constructive insincerity

The examples discussed above examples show that different judges may take different views of the facts in order to analyse the case under a different area of law. Where a simpler view is taken, in order to refute a more complex approach which has led to an unsatisfactory result, this gives rise to a specific form of argumentation, here called 'demystification'. However, this is merely a particular case of a more general phenomenon, which arises wherever the legal debate concerns the rule to be applied and the result depends on the perspective adopted.

Such alternative categorisations of the facts are surprisingly common in legal opinions. The phenomenon may be observed not just in English but also in contemporary American cases, for example in the recent Supreme Court case of *Sorrell v IMS Health* (2011). In this case, Vermont's "prescription confidentiality" law, prohibiting the use of records of confidential medical prescriptions for marketing purposes, was struck down by the US Supreme Court. The majority argued that such a prohibition was an unacceptable restriction on free speech. Justice Breyer, dissenting, considered on the contrary that it was merely an instance of justifiable commercial regulation. It will be remarked that the alternative conceptions of the facts presented by the different judges cannot be explained in terms of rhetorical simplicity.

A further problem is raised by the fact that each individual judge must be assumed to be potentially aware of the different available conceptions of the facts. Adjudication must then be taken to involve a choice between alternative conceptions of the applicable law, which may not have been explicitly introduced. However, once it is admitted that a plurality of justifications is possible, then it is clear that the reasoning presented in the final judgment given need not necessarily correspond to the true motivation. If the judge is conscious of making a deliberate choice among the available viewpoints, then his judgment may not always be sincere. Nevertheless, as it depends on the conception of the law adopted, the justification proposed cannot be rejected as false or invalid.

The availability of alternative conceptions of the facts is in itself unsurprising as, contrary to popular assumption, 'facts' are strange entities which are not directly observable. Indeed, no one has ever seen a fact. As Austin (1961) pointed out, although they are normally classified as empirical, facts are not like handkerchiefs, and cannot be put in your pocket. Even in physics, the facts to be explained are normally defined relative to a dominant scientific paradigm (Kuhn, 1962). By questioning the distinction between analytic and synthetic statements, Quine (1951) showed more generally that meaning, and therefore thought itself, was theory-laden. All reasoning must therefore depend to some extent on the categorisation of the facts under consideration. However, this gives rise to a potential lack of identity between the given justification and the original motivation.

This problem is clearly apparent in many areas of public life. Indeed, the problem is so common that it may constitute the normal case. If so, the concept of an idealised "deliberative discourse", proposed by Habermas (1996, p. 4) as a prerequisite for dialectic analysis, may be so unreal as to have no genuine function in public debate.²⁰ Indeed, in ordinary, everyday situations, when required to give retrospective justifications, speakers are rarely sincere. On the

20 "[Communicative reason] has a normative content only insofar as the communicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. That is, they must undertake certain idealizations - for example, ascribe identical meanings to expressions, connect utterances with context-transcending validity claims, and assume that addressees are accountable, that is, autonomous and sincere with both themselves and others." (Habermas, 1996, p. 4).

contrary, their justifications are normally rationalised, usually to the advantage of the speaker. In politics, justifications often amount to no more than a pretext put out for public consumption. Examples may be multiplied. President Sarkozy of France justified his sudden 2008 decision to discontinue advertising on public service television by reference to the improved quality of the viewing experience. However, many suspect that his real purpose was to increase revenue for the private stations, owned and run by his rich supporters. His 2011 decision to increase tax on fizzy drinks was presented by his government as motivated by concern for the nation's health; however it seemed clear to taxpayers that his main purpose was to maximise revenue. More seriously, Tony Blair, former Prime Minister of the United Kingdom, unguardedly let slip in a television interview (with Fern Brittan) that if it had been discovered before the event that Saddam had no weapons of mass destruction, he would still have thought it right to invade Iraq - he would simply have found a different justification for public consumption.²¹

In situations like this, the justification proposed cannot be said to be true or false, and cannot therefore be easily refuted. This problem is sometimes mentioned explicitly. After the referendum in which the Irish rejected the proposed European Constitution (or Constitutional Treaty), it was proposed, for example, by members of the House of Lords in London, to abandon the process of ratification in the United Kingdom. To the objection that the Irish referendum was a mere pretext, suggested by those who had intended to vote against ratification in any case, Lord Howell replied in a BBC interview: "It may be a pretext but it is also true".

A similar problem occurs in legal judgments. In its simplest manifestation, this may be illustrated by reference to the "hunch theory" of law, according to which cases are often decided initially by intuition (Llewellyn, 1930, p. 98). Those who subscribe to this view of adjudication see the judgment as an *a posteriori* legal justification for a

21 Q (F. Brittan): "If you had known then that there were no WMDs, would you still have gone on?" A (T. Blair): "I would still have thought it right to remove him. I mean, obviously you would have had to use ... um, deploy different arguments, about the nature of the threat, but I find it quite ... I mean I've been out there for so many years..." (T. Blair interview, BBC1, 11/12/2009)

decision originally based on the judge's intuitive notion of justice. However, in this case, the technical justification proposed may include reasons which the judge did not have in mind when he made his original decision. Conversely, if, for rhetorical reasons, he prefers to present a simplified, and therefore more persuasive version of a complex legal argument, then this may not correspond to the true legal grounds on which the decision was based. In either case, it is possible to distinguish between the justification given and the true reason for the decision. Clearly, where there is no agreement on the nature of the facts under discussion, or on the question to be asked, the alternative viewpoints proposed may potentially affect the result of the case. Yet it is fundamental to the rule of precedent that the judge's reasoning is more important than the result of the particular case.

The fact that no legal justifications can be totally objective may go some way to providing a partial theoretical explanation for persistent suspicions of unconscious bias on the part of judges. There are many cases in which such suspicions appear legitimate. It is common, for example, for a judge to claim that he is bound to come to a particular decision, which others may find regrettable. He may claim to find it regrettable himself. Yet the very fact that he feels obliged to insist on this point means that it is unlikely to be true. His choice of perspective in such cases is likely to be constrained not by the law, but rather by convenience. One such case is Lord Mansfield's judgment in the manifestly political case of *R v Wilkes* (1770), when, in the face of a popular uprising (explicitly mentioned in the judgment itself), he found an excuse to reverse an earlier declaration of "outlawry". He denied that the problem raised was anything other than a purely technical question of law, and claimed that he was objectively bound to reach that particular result. Yet his justification was highly artificial, being based on forgotten, irrelevant and unpersuasive precedents.²² Assuming the judge did not tailor his conclusion to the popular will, it is more likely that this was simply a pretext in order to avoid a direct declaration that the earlier decision was taken in error. Lord Mansfield must have been

22 "I beg to be understood, that I ground my opinion singly upon the authority of the cases adjudged; which, as they are on the favourable side, in a criminal case highly penal, I think ought not to be departed from : and therefore I am bound to say that, for want of these technical words, the outlawry ought to be reversed." (*R v Wilkes*, 1770, *per* Lord Mansfield)

naturally reluctant to overrule a decision which had been taken in deference to the King himself.

Numerous more recent examples may be proposed. *Bromley LBC v GLC* (1982) also concerned a political question. Ken Livingstone, the newly elected Mayor of London, had promised to reduce the cost of underground transport by 50%. Mrs Thatcher attempted to prevent the adoption of this policy by reducing funding from central government. (In order to prevent control of the city by the Labour party, she later abolished the Greater London Council altogether.) The new mayor hoped nevertheless to raise the necessary funds from local taxation. This went against the interests of those living in the richer suburbs, including Bromley, whose inhabitants rarely travelled on the underground. In the subsequent judicial procedure, the Court of Appeal, whilst claiming to be impartial, ignored any possible external benefits to the city, and held that because the new Mayor was obliged to ensure that the Underground network was run in a “businesslike” manner, he did not have the right to keep his campaign promise.²³ This decision was confirmed, again unanimously, by the House of Lords. Although there was no relevant precedent, both Courts claimed, unconvincingly, that politics was irrelevant to the decision, that the law was clear and that they therefore had no choice in the matter.²⁴ Even assuming the judges were not influenced by the fact that they themselves did not habitually travel on the tube, and were therefore unlikely to benefit from the measure, it is nevertheless difficult to refute the suggestion that they were instinctively opposed to this socialist and egalitarian policy.

23 “In giving such weight to the manifesto, I think the majority of the council were under a complete misconception. A manifesto issued by a political party - in order to get votes - is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed and delivered. ... My conclusion is that the actions here of the G.L.C. went beyond their statutory powers and are null and void”. (*Bromley LBC v GLC* 1982, per Denning LJ)

24 “Accordingly, I accept the Bromley submission that the Act requires that fares be charged at a level which will, so far as practicable, avoid deficit. I do not discuss the difficult problem of what is meant by ‘so far as practicable.’ For it is plain that the 25 per cent. overall reduction was adopted not because any higher fare level was impracticable but as an object of social and transport policy. It was not a reluctant yielding to economic necessity but a policy preference. In so doing the G.L.C. abandoned business principles. That was a breach of duty owed to the ratepayers and wrong in law.” (*Bromley LBC v GLC* 1982, per Lord Scarman)

In *Mandla v Dowell Lee* (1983) a unanimous Court of Appeal found, in a case of indirect discrimination, that the terms of the *Race Relations Act* (1976) did not provide any protection to Sikhs, as this was a religion rather than a racial or ethnic group and, as the judges supposed, there was no relation between religious and racial discrimination. It was claimed, on shaky etymological grounds, notably concerning the meaning and origin of the word 'ethnic', that there was no alternative to this decision. Lord Denning went so far as to regret that the Commission for Racial Equality had brought the case in the first place.²⁵ Yet, although none of the judges could be accused of racism, it is probable that they were instinctively opposed to any extension of the RRA which would allow turbans to be worn instead of conventional school uniforms. Some support for this view may be derived from the fact that, when the case was heard on appeal the following year, the House of Lords, again unanimously, came to the opposite conclusion.

In many cases, some form of unconscious bias appears inevitable, leading to a divergence between the legal justification proposed and the true reason for the decision. However, this may be to the advantage of the legal institution. Given that the judge's personal preferences cannot be excluded, it would be unfortunate if they were stated explicitly in the form of binding precedents, and become decisive in subsequent adjudication. An unquestioning insistence on sincerity for its own sake would in such circumstances be detrimental to the rule of law. A case in point is *Hadley v Baxendale* (1854), in which the contradiction between the justification and the result appears particularly clearly.

Hadley is cited in modern textbooks as authority for the rule of reasonable foreseeability governing the measurement of damages payable for breach of contract. However, as generations of students have been too polite to notice,²⁶ that rule was not followed in the case itself. It was admitted in evidence, and it is clearly stated in the report, that the carrier, Pickford's, had been explicitly informed of the lack of a

25 "Even though the discrimination may be unfair or unreasonable, there is nothing unlawful in it ... I cannot pass from this case without expressing some regret that the Commission for Racial Equality thought it right to take up this case against the headmaster." *Mandla v Dowell Lee* CA 1982, *per* Denning LJ

26 Scalia (1977, p. 6) had no such scruples.

replacement for the crank-shaft taken for repair. The risk of loss of profit was therefore not just foreseeable but actually known. If the judges had respected their own rule, they would therefore have reached the opposite result, and the miller, Hadley, would have won the case. Further suspicions are aroused by the fact that Baron Parke, an acknowledged expert in cases involving common carriers, and therefore a principal contributor to this particular decision, must have known Baxendale, at least by reputation. Baron Parke's brother was Baxendale's predecessor as manager of Pickfords Movers (Danzig 1975, p. 267, n 72).

An official judgment drafted to justify the actual result, although possibly more sincere, would have been unfortunate for the development of the law.

4 Conclusion

The result of the case frequently depends on the legal categorisation of the facts. In the law, as in other fields, the facts can only be defined relative to the view taken of the applicable law. Where the different theories of the case are introduced explicitly into the judgments, this gives rise to a specific form of legal argumentation, often based on rhetorical simplicity. In using an argument from demystification, one judge attempts to refute a complex conception of the case, which he sees as leading to an unsatisfactory result or possibly to logical contradiction, by adopting an alternative view. He proposes a simpler solution which corresponds better to his intuition of justice. It is notable that, while the reasoning and logical structure of his judgment may be clearer and more convincing than those of his opponents, the same need not be true of language used, either on the level of syntax or of vocabulary. In *Lumley v Gye* (1853), Coleridge J used a demystification argument whilst preserving a certain complexity of style. Other judges, however, including notably Lord Denning in *Candler v Crane Christmas* (1951) and in *Olley v Marlborough Court* (1948), are celebrated for their clarity of expression.

Even where competing views of the case do not figure explicitly in the judgment, they may nevertheless play an important role in the thought processes of the individual judges. Their availability in any

given case means that adjudication always requires a choice between the conflicting views, even where these remain implicit.

The fact that different viewpoints can be adopted in a single case shows that there is always room for disagreement and debate concerning the legal characterisation of the facts. Indeed, the availability of alternative conceptions is a source of indeterminacy in law. As the ‘facts’ depend on alternative conceptions, they cannot be the basic starting point of any analysis. Even in France, where the “categorisation” of the facts (or ‘qualification des faits’) is a fundamental part of legal training, such problems remain fundamental (see Cayla, 1993 and Rigaux, 1999). However, disagreement amongst judges on this point is rarely disclosed in French judgments (‘arrêts’), partly because dissenting judgments are rarely published, and partly because such fundamental decisions are in any case unlikely to be reconsidered during the procedure.

As in other fields where decisions are justified retrospectively, the justification need may not necessarily correspond to the true reason for the decision. Yet, because alternative justifications depend on different conceptions of the facts, rather than the facts themselves, they cannot be evaluated as true or false, although they may be insincere. This means that there can be no clear distinction between a legal justification and a mere pretext. However, there is a sense in which insincerity may have a positive effect. Given that personal bias can never be totally eliminated, it is preferable for judgments to be motivated in conformity with the best interests of the law, even in cases where the actual decision may have been arrived at in a questionable way. This conclusion is relevant both to our understanding of legal judgments and to the development of the law.

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Ross Charnock is *Maître de Conférences hors classe* in the University of Paris Dauphine, specialising in the language of the law. After first degrees in Exeter, UK, he took his doctorate in linguistic pragmatics in Paris during the early 80s, under O. Ducrot. His research articles concentrate mainly on the rhetorical and semantic analysis of common law judgments. He also has research interests in pragmatics and argumentation as applied to language testing, and publishes regularly on classical music for strings. Email: charnock@dauphine.fr.

The Landlord's Right to Consumer Protection

Maureen. L. Klos and Tamara. A. Klos

In this article, the authors discuss how the meaning of the term “consumer” can influence the controversial legal ramifications of the use of this term in the particular situation of the South African rental housing market. Semantic knowledge may provide understanding of a term like “consumer” that is embedded in a specific law such as the South African Consumer Protection Act 68 of 2008. The interpretation of a term can enter the realm of specialist knowledge, like that of particular legal domains for example. However, the legal meaning of “consumer” has connotations in a South African context that differs from its general denotative legal meaning. Thus, the authors contend that the general legal meaning should be scrutinized with a view to enriching the legal meaning of the term as it is particularly interpreted in a South African context. This analysis may benefit landlords, whose rights as consumers are currently not acknowledged in the context of the South African rental housing market. In fact, in the context of the South African Rental Housing Act 50 of 1999, only the tenant is viewed as a consumer. An analysis of meaning of the term may reveal that the landlord may also be defined as a consumer.

Keywords: legal semantics, landlord and tenant, consumer, economic good, protection

1 Introduction

The semantic interpretation of the term “consumer” in South African rental housing legislation is currently only applied to tenants, as opposed to landlords. In the context of the South African rental housing

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market, landlords need to be considered as consumers in order to be afforded legal protection. Consumer protection legislation for the rental housing market is provided by the South African Rental Housing Act 50 of 1999 (the RHA). However, the RHA has only so far identified the tenant as a consumer owing to conditions in the rental housing market at the time of promulgation, when the tenant was identified as the weaker bargaining position in the landlord-tenant bargaining relationship. Therefore, although the South African Consumer Protection Act of 2008 (“the CPA”) safeguards consumer rights, it is only the tenant who is protected. The authors contend that the landlord needs to be also identified and protected as a consumer. An analysis of the meaning of the term may lead to the classification of the landlord as a consumer and thus, establish his or her right to protection.

In the current rental housing market situation in South Africa there is an oversupply of rental housing stock. Therefore, there is an unequal bargaining relationship between landlord and tenant in favour of the latter. Thus, the landlord now needs protection as the tenant did in the past, and this could be done paradoxically as it was for the tenant, by categorizing the landlord as a consumer.

The advantage for landlords in being classified consumers is that they would be entitled to legal protection. In order for landlords be classified as consumers by the same criteria as tenants were classified, understanding of the concept needs to be explored to prove that landlords should be perceived as consumers as tenants have always been.

In this article, the authors will analyse the term “consumer” to establish whether the criteria currently applied to tenants as consumers can be also be valid in the classification of landlords as consumers in the context of the South African residential rental housing market.

2 Legal interpretation of the term “consumer”

Bloomer, Griffiths and Merrison (2010) state that the understanding of a legal term such as “consumer” belongs in the realm of specialist and encyclopaedic knowledge. Cartwright (2001) supports this notion, but adds that there is no internationally recognized legal definition of the word “consumer” and its meaning and significance varies. However,

the specialised legal meaning of the term “consumer” as defined in the Merriam-Webster’s *Dictionary of Law* (2011) is “one who utilises economic goods”. In other words in legal terms, a consumer is basically an individual who buys hires or uses goods or services (McQuoid, 1997).

A definition of the term “consumer” can also be found in relevant South African legislation. The repealed Consumer Affairs (Unfair Business Practices) Act 71 of 1988 defined a consumer as “any natural person to whom any commodity is offered, supplied or made available” (*Consumer Affairs*, 1988). The CPA (Act 68, 2008) the latest South African legislation on this topic, contains essentially the same definition as that of the Merriam-Webster’s *Dictionary of Law* (2011). The former states: “that a consumer is a person to whom goods or services are advertised, offered, supplied, performed or delivered in the ordinary course of business”. The definition of the term “goods” in the Consumer Affairs (Unfair Business Practices) Act 1998 is broad and covers all movable and immovable, corporeal and incorporeal property, including any service (*Consumer Affairs*, 1988). The definition of “goods” in the Consumer Protection Act is similar in that it covers all types of goods and services offered in the ordinary course of business (Act 68, 2008). Thus both Acts view the consumer as a user of facilities and property including personal property.

The legal definitions explained above generally interpret the term “consumer” as a user of goods involving business transactions. The consumer is thus, a user of economic goods, a term that will be thoroughly investigated later in this article as part of the analysis of the term “consumer”. The authors maintain that the definition of a consumer as a user of economic goods could be applied to landlords as well as tenants, as both make use of rented or leased property such as an apartment or house in different ways. However, in the context of the South African residential housing market as well as the RHA, the above legal meaning of the term “consumer” as one who utilizes economic goods is generally applied only to the tenant who makes use of a landlord’s property. In other words, the denotative (explicit and literal) legal meaning has taken on a connotative meaning (associations and overtones).

The term should denote as well as connote the notion of the landlord as a consumer who also utilizes economic goods. Foreign, but highly relevant here, the Indian Consumer Protection Act 68 of 1986 clearly differentiates a consumer as consuming a commodity or service either for his personal domestic use or to earn his livelihood. This particular legal interpretation clearly points to the landlord who uses his property for financial gain and is like the tenant, a user of economic goods

According to Levy, Bayley and Squire (2004), semantic knowledge is long-established knowledge about objects, facts and word meanings. This knowledge can be found beyond legal spheres, particularly the South African rental housing legislative sphere. Thus, an exploration of the semantic interpretation of “consumer” will provide the first steps to a deeper understanding of the concept (Grundy, 1987).

United States President John F Kennedy made general use of the term “consumer” during a declaration to the US Congress in 1962. According to Kennedy (1962), the word “consumer” could actually “include us all”. Kennedy added that consumers make up “the largest economic group, affecting and affected by almost every public and private economic decision” (Kennedy, 1962).

In light of Kennedy’s interpretation, the term “consumer” generally delineates any individual who could be labelled as a user of goods and services generated within the economy (Oxford, 1984). Thus, the legal meaning of the term is general and should include the landlord, who is not regarded as a consumer in the context of the South African rental housing market.

The tenant as a consumer does indeed make use of a landlord’s property that is rented for a price. However, the landlord makes use of the same property to generate an income. Both parties “utilize economic goods”, which is in fact both the denotative legal and general meaning that goes beyond the narrow connotative tenant-oriented sense that is implied in the South African rental housing market.

In fact, one could maintain that the landlord is more a consumer than the tenant as the former may utilize the goods over a longer period with many tenants, whilst the latter utilizes the goods only for the duration of a specific lease period (Backman, 1980).

The landlord is a user of goods such as housing that generally can be obtained or exchanged for money in the form of rent. As Backman (1980) points out, the landlord is using his/her property over and over again to generate rental income. The landlord may be a supplier of goods for the use of the tenant but he/she is also a user of the same goods and therefore should be viewed as consumer.

Whatever the semantic interpretation of the definitions discussed, the authors propose that one clear criterion stands out in describing a consumer, and that is that the term delineates a user of economic goods. The term “economic goods”, however, needs to be thoroughly analysed and its constituent elements examined in order to truly understand the term “consumer” that signifies the user of these goods. An exploration and explanation of the term “economic goods” will provide more detail in understanding how both the landlord and tenant can be defined as a consumer and legally protected as such in the South African rental housing market.

3 Economic goods

In an analysis of the concept “economic goods”, the following questions need to be answered: What in fact, is an economic good? When is a good not economic? And how does the use of economic goods delineate the circumstances pertaining to both the landlord and tenant as consumers as being in need of legal protection by means of the RHA.

The seventeenth century English philosopher John Locke (in Robbins, Medena, & Samuels, 2000) viewed an economic good as a “tangible item produced with society's limited resources for the purpose of satisfying wants and needs”. According to the eighteenth century English economist Sir James Stewart (1996, p. 343) adding the word “economic” before the word “good” signifies that “a good has limited availability relative to desired use and is exchanged through a market. Buyers pay a price to obtain the good and sellers give up the good in exchange for payment.” Moreover, the Nobel Prize winning American economist Paul Anthony Samuelson (in Marshall, 1920) links the notion of utility of goods to that of their limited availability or scarcity.

Thus, an economic good is more specifically a good with limited availability relative to desired usefulness. The two concepts utility and scarcity are thus closely related with respect to economic goods. Scarcity is the general problem underlying the study of economics and an economic good is a specific good that reflects this general scarcity of condition. According to Hayek (in Menger, 2007, p. 18), Menger was the first economic philosopher to distinguish between free and economic goods based on the idea of scarcity. The contrasting notion to an economic, or scarce, good is a free good. A free good is one that is plentiful enough to satisfy all desired uses, often with some left over.

An economic good, therefore, is one that involves the presence of cost in the sense of effort (Menger, 2007, p. 18). On the other hand a good that is not economic points to an absence of value or scarcity, although Menger himself did not use the term “scarcity” and instead used the German for “insufficient quantity” (Menger, 2007, p. 18)

Menger (2007, p. 48) elaborates on the notion of an economic good as being determined by conditions where “a thing is useful... (and) ... possesses value ... (according to) ...the measure of this value”. Thus according to Menger (2007, p. 48), a good will be economic “if there are conditions for an economic exchange of goods between two economizing individuals, and the limits within which a price can be established if an exchange does occur”. The circumstances surrounding the economic exchange will determine which economizing individual will be in a higher or lower bargaining position. However, both parties using the economic goods need legal protection by definite laws regarding the phenomena that condition the outcome of the economic activity of men and are entirely independent of the human will (Menger, 2007, p. 48).

Menger (2007, p. 104) refers to goods that have “economic character” for consumers who use them in an economic chain of events. Menger (2007, p. 237) writes of consumers who use goods that have value and are not free goods and then produce goods that in turn become economic goods consumed by yet another consumer. He gives the example of a cottage craftsman who is a consumer of an economic good such as the raw wool that he obtains from a farmer. But then, the cottage craftsman becomes a producer in his own right of another economic good which is the yarn that is in turn consumed by the

weaver who makes cloth who is thus, also a consumer and producer and so on. At the root of all these economic transactions lies the economic good that is continually consumed or produced.

In the example above, the consumer can thus be also perceived to be the producer, a notion that may be applied to the proposition of this article: that the landlord commonly viewed as a producer or supplier of economic goods can, in fact, be also perceived as a consumer who uses the economic goods of immovable property during the economic exchange between the landlord as consumer and tenant as consumer in the rental housing market.

4 The landlord as a consumer

As stated above, although it is implied in South African Law that a tenant is a consumer who uses economic goods, namely the rented property supplied by the landlord in exchange for rent, the landlord can also be perceived as an individual who utilizes economic goods – his own property to gain a livelihood.

Ritchie (1994) contends that the landlord is a consumer who buys (invests in) property to produce or generate an income. This is, in fact, just like the craftsman who purchases raw wool to make yarn as discussed by Menger (2007) referred to above. In other words, as the craftsman (the consumer/producer) sells the yarn to the weaver, so the landlord obtains rent according to the circumstances determining the value of his property as the economic good (Bradbook, 1998). Thus, a landlord is a consumer and user of an economic good in the shape of immovable property whilst in an economic relationship with the tenant who is also a consumer of the same property, the only difference being that the landlord also supplies the economic goods. The tenant has a right to be protected with regard to service delivery and maintenance of the property for which he/she is paying money. On the other hand, the landlord has a right to be protected with regard to income and reasonable upkeep of the economic goods that he/she lets to the tenant in the financial transaction. In fact, the landlord has even more need for protection because he also uses the economic goods, time and time again, namely the immovable property, for an income.

Friedman (1962) points out the need for legal protection for consumers as well as for producers or suppliers. Both are entitled to economic freedom that the law should provide for this. Both the landlord and the tenant as consumers are involved in financial transactions that focus on the use of particular immovable property and the landlord is also a supplier. They are both according to Friedman (1962), therefore, entitled to consumer legal protection, but this is not provided in current South African RHA that does, however, provide for the tenant's protection. Yet, as Menger (2007) points out, laws are the only ways of providing protection to parties involved in an economic exchange who are of equal rights if not equal bargaining power that in the case of landlords and tenants varies according to circumstances.

5 Consumer protection legislation and the landlord

One of the aims of consumer protection legislation is to correct unequal bargaining relationships between a more powerful party and a less powerful consumer (*South African Draft Green Paper*, 2004). The tenant is usually considered to be the less powerful consumer. However, the authors argue that the landlord is today the less powerful consumer in the rental housing market. Therefore the consumer protection legislation should in fact protect the landlord against tenants who are not adhering to their side of the bargain between them and the landlord. The landlord, being a less powerful consumer, should have a right to legal protection.

According to the Western Cape Rental Housing Tribunal (2006) annual reports, unscrupulous tenants are on the increase. Complaints relating to rental arrears, failure to vacate the premises at the end of the lease and claims for damage to property, amongst others, are being lodged with the Tribunal in larger numbers each year since the commencement of the Tribunal. The landlord is, thus, becoming more and more a victim in the landlord/tenant relationship and the tenant by victimizing the landlord is changing the usual power relationship in favour of the tenant.

The basic reason for this reversal of power in the landlord/tenant relationship is to be found in the oversupply of rental stock. Since the inception of the RHA on 1 August 2000 the overall housing sector has

had a limited increase in the number of households living in rented accommodation, as more households are living in owned accommodation (Shisaka, 2004). The fact that there is a limited increase in the number of tenants is the result of the 2004/2005-property market boom. Shisaka (2004) maintains that the buy-to-let investment trend, which characterized the property boom, resulted in an oversupply of rental stock. This is a very different situation compared to the one that prevailed at the time when the RHA was enacted.

Although the buy-to-let market has slowed down somewhat during 2008 and 2009, the market is predicted to increase once the current slowdown has worked itself out during 2010 and beyond again triggering an oversupply of rental stock (Shisaka, 2004). D'Alton (2009) affirms that such an oversupply of rental stock causes an imbalance in the relationship between landlord and tenant in that the tenant is in a stronger bargaining position than the landlord, as the supply of stock is greater than the demand. Muller (2009) points out that tenants are shopping around for better rentals and contract terms before renewing or entering into a lease. Thus, landlords are forced to reduce their rentals to retain or attract tenants and the weaker parties in the landlord/tenant relationship.

A landlord with property as an asset will seek to maintain its value is a consumer in need of protection from unscrupulous tenants who do not pay rent or abuse the landlord's property. Therefore the position of the landlord in the landlord/tenant relationship needs to be addressed through South African legislation, based on the consumer protection principles.

6 Conclusion

Since the promulgation of the RHA, the rental housing market has shifted. There is currently an oversupply of rental housing stock and this means that the tenant is now the party in a stronger bargaining position than the landlord. Consumer protection principles dictate that a party in a weaker bargaining position must be protected by legislation. In South Africa, the tenant was in a weaker position, but the situation has changed. Now, the landlord needs protection from exploitation by tenants. Thus, the authors have positioned the landlord as a consumer in

the rental housing market and argued this point in order to alter conventional methods of thinking that the tenant is the only party worthy of protection as a consumer.

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Dr Maureen Klos is a lecturer in the Applied Languages Department (Nelson Mandela Metropolitan University, Port Elizabeth, South Africa). She has published journal articles and chapters in books as well as presenting many international conference papers on applied linguistic topics. These include: English literacy support systems and the construction of socio-cultural identity via language educational situations. Her research has also explored gender based affective issues in learning in general.

Ms Tamara Klos is a practising attorney at the firm of Friedman Scheckter (in Port Elizabeth, South Africa). She was awarded the LLM cum laude and received the award for best Masters Dissertation at the Nelson Mandela Metropolitan University in 2010. The title of her dissertation is *The Recognition and Protection of the Landlord's Rights and Interests within the Framework of the Rental Housing Act 50 of 1999*. She has also presented international conference papers on *Landlords as Consumers*.

Strategic Manoeuvring with Linguistic Arguments in Legal Decisions: A disputable literal reading of the law

Eveline T. Feteris

In this contribution, pragma-dialectical theory and its complement, strategic manoeuvring theory, two theories of the Amsterdam school of argumentation, are used to explain the linguistic argument, that is to say statutory interpretation under the literal rule, and how this argument can fail.

Keywords: fallacies, interpretation methods, legal interpretation, legal justification, linguistic argumentation, rational discussion, strategic manoeuvring, teleological argumentation

1 Introduction

Participants to a legal process often use linguistic arguments to support their claim. With a linguistic argument it is shown that the proposed interpretation of a rule is based on the meaning of the words used in the rule in ordinary or technical language. The reason why a linguistic argument is chosen as a support for a legal claim is that linguistic arguments are considered to have a preferred status in justifying a legal decision. This preference is grounded on the concept of the rule of law (implying legal certainty and predictability of decisions) and the democratic principle of the separation of powers (implying that there is a separation of tasks between the legislator who formulates the law and the courts who apply the law). It is the respect for the meaning of the legislator which makes the linguistic argument so important. The legislator normally uses the linguistic conventions and it is expected that interpreters of statutes will invoke the linguistic conventions

governing the standard meaning of those words. For this reason, linguistic arguments have a presumptive status in legal interpretation theories.¹

However, this preferred status can also be “misused” for rhetorical reasons. A particular reading of the rule can be presented as the accepted standard reading, although other interpretations of the rule are possible from a legal point of view. In addition, reference to the presupposed standard meaning of the rule can be presented as a sufficient justification, although it is not possible to establish the meaning on the basis of the formulation of the rule alone, because other considerations must be taken into account. In such cases, if linguistic arguments are used in a wrong way, higher judges criticize the linguistic argument. In the first case because it is based on a disputable literal reading of statute law and in the second case because it is based on a misunderstanding of the law as the legislator had it in mind and intended it when enacting it.²

Although higher judges give a negative evaluation of certain uses of linguistic arguments, no clear norms for the use of linguistic arguments are specified in the literature on legal interpretation and the justification of legal decisions. To clarify how the use of those arguments can be analysed and evaluated, I shall use the theoretical tools of the pragma-dialectical theory as developed by van Eemeren en Grootendorst (1992). From the point of view of the “pragma-dialectical” norms for the use of arguments, the aim of my contribution is to develop an instrument to analyse and assess the use of linguistic arguments in legal discussions about the application of a legal rule. I analyse the use of linguistic arguments in terms of “strategic manoeuvring”. I establish when the strategic manoeuvring with linguistic arguments is acceptable from this point of view and when it derails.

The theory of “strategic manoeuvring” was developed by van Eemeren and Houtlosser (2002a, 2002b, 2003, 2006), and van Eemeren (2010). The concept of strategic manoeuvring implies that an arguer tries to reconcile the dialectical aim of resolving the difference of

1 See for example the model for legal interpretation formulated by MacCormick and Summers (1991).

2 See for examples of those forms of critique the examples I discuss in section 3.

opinion in a reasonable way with the rhetorical aim of resolving the difference in a particular direction that is desirable from the perspective of the arguer. When reconciling these two aims, arguers make a selection of the topical potential and presentational means that are adequate to convince the intended audience of their point of view. The strategic manoeuvring derails when the rhetorical aim to convince prevails over the dialectical aim. If the dialectical reasonableness norm is violated, the party, in pragma-dialectical terms, commits a fallacy.

I consider strategic manoeuvring with linguistic arguments in the justification of legal decisions as an attempt to convince a legal audience by showing that the decision is in accordance with accepted legal starting points without violating openly the dialectical norms of reasonableness. The strategic manoeuvring implies that the parties try to reconcile two, often conflicting aims, the rhetorical norm of convincing the legal audience and the dialectical norm of resolving the difference of opinion in a reasonable way.

To be able to assess strategic manoeuvring with linguistic arguments first, in (2), I specify the dialectical norms for the use of linguistic argumentation. I do this by specifying the conditions under which linguistic argumentation forms an adequate means of justifying a legal decision about the application of a legal rule in a concrete case. Then, in (3), I analyse and evaluate a form of strategic manoeuvring with linguistic arguments that often occurs in discussions about the application of legal rules and I explain on the basis of the norms specified in (2) how the strategic manoeuvring derails. I explain that the strategic manoeuvring with linguistic arguments in these cases amounts to a complex form of strategic manoeuvring that combines two manoeuvres.

2 Legal theoretical norms for the use of linguistic argument

If we look at the discussion in the literature about the use of linguistic arguments in the justification of legal decisions we find, generally speaking, a consensus about the functional use of linguistic arguments.³ In *clear cases* in which there is no difference of opinion about the

3 Cf. Groenewegen (2007), Soeteman (2007) and van den Hoven (2007).

interpretation of a legal rule, linguistic argumentation can function as a justification of the decision, although a justification is not necessary in such cases because there is no difference of opinion. In *hard cases* in which there is a difference of opinion about the correct interpretation of the rule, a linguistic argument cannot function as a decisive argument because there are different views as to the exact meaning of the rule.⁴

The reason why a linguistic argument may suffice as a justification in an easy case is that, from the perspective of legal certainty, reference to the clear intention of the legislator as it appears from the wordings of the law, must, in principle, be taken as the starting point for the application of the law. In hard cases in which there is a difference of opinion about the meaning of the law for the concrete case because the intention of the legislator cannot be deduced from the wording, other sources are necessary to establish the intention of the legislator. Linguistic arguments can have a “demarcating” function by showing that the judge has remained within the interpretation space he has on the basis of the formulation of the rule.⁵

When a case can be considered as an easy case in which there is no difference of opinion about the meaning of the legal rule, a linguistic argument can suffice to justify the decision. In law, people tend to use a linguistic argument if such an argument is available because a linguistic argument is supposed to have a “presumptive” status from the perspective of legal certainty because it is held to reflect the intention of the legislator. But there is a problem where a case is presented as an easy one when it is in fact a hard one. If the case is a hard case the presentation of the linguistic argument as the only argument that would suffice as a justification is misleading because other arguments based on the legal system, the intention of the legislator, the goal of the rule, et cetera are required to give an adequate justification. If these arguments are not given, the justification is not sufficient and the party evades the burden of proof by not mentioning and substantiating these other considerations.⁶

4 Cf. Groenewegen (2007), Soeteman (2007) and van den Hoven (2007).

5 Judges often refer to linguistic arguments when they balance the requirements of legal certainty and the requirements of justice and fairness in the concrete case. See also Feteris (2005 and 2008a) on the balancing of legal certainty and fairness.

6 See also Vranken (2004) about the technique of “veiling argumentation” in legal decisions and the comments by Feteris (2004).

Given the different functions of linguistic arguments in different legal discussion contexts, the question arises which uses of linguistic arguments can be distinguished and which norms apply for an acceptable use of linguistic arguments in the context of these clear and hard cases from the perspective of a rational critical legal discussion.

From an argumentative perspective, the uses of linguistic arguments have three forms. The distinguishing criterion is the relation between the linguistic argument and the standpoint: in form (1), a linguistic argument is presented as an *independent justification*; in (2), a linguistic argument is *supplemented with other arguments*; in (3), a linguistic argument is *overruled by another argument*.

To establish the norms for an acceptable use of linguistic arguments in these three forms from a pragma-dialectical perspective, a further distinction can be made between two types of norms or justificatory conditions. The first type of norm (a) concerns the adequacy of linguistic argumentation as a means to justify a legal decision: whether linguistic argumentation can, in a particular discussion context, constitute an adequate and sufficient justification. The second type of norm (b) concerns the correctness of the application in the concrete case: whether the linguistic interpretation of the rule in the concrete case is correct.

2.1 Form 1: a linguistic argument is presented as an independent justification of the application of a legal rule

From a legal perspective, in an easy case where there is no difference of opinion about the interpretation of the rule and if the formulation of the rule can give a clear and uncontested indication for establishing the meaning of the rule in the concrete case, single argumentation consisting of a linguistic argument can constitute an independently sufficient justification. In such a case, it is not necessary to mention that other arguments, such as systematic arguments or teleological arguments, do not point to a different solution.

When a linguistic argument is presented as an independent justification, it is acceptable if:

(1a) the argumentation is put forward in a context of an easy case in which there is no difference of opinion with respect to the interpretation of the rule in relation to the facts of the concrete case

(1b) the linguistic argumentation refers to the accepted standard meaning of (a term used in) the rule

Norm (1a) concerns the adequacy of linguistic argumentation as an independently sufficient argumentation in a legal context and (1b) concerns the acceptability of the propositional content of the argumentation.

This form of using linguistic argumentation does not occur very often in legal practice because judges do not tend to justify their interpretation if it concerns a clear and uncontested case. If it is used, judges tend to do this for strategic reasons to anticipate possible doubt with respect to the acceptability of the decision and use linguistic argumentation for rhetorical reasons to convince the audience that the decision is coherent with common legal starting points, i.e. the linguistic meaning of (a particular expression in) the rule.

Sometimes a linguistic argument is supported by so-called *subordinate* argumentation referring to the “common understanding of the term” or reference to the description in the dictionary.

Sometimes, for rhetorical reasons, the linguistic argumentation is supplemented with coordinative arguments such as systematic or teleological arguments to show that the decision is also in line with other rules of the relevant part of the legal system and/or the intention of the legislator.⁷

2.2 Form 2: a linguistic argument is presented as a supplementary argument in addition to other argumentation

In hard cases where there is a difference of opinion about the correct meaning of the rule and the formulation of the rule does not give a clear and uncontested indication for establishing the meaning of the rule in

⁷ Van den Hoven (2007) considers this form of using linguistic arguments as the 'positive form' of linguistic argumentation. In this form judges claim that no adaptations of the legal system are necessary to include the decision in the concrete case. From the perspective of strategic manoeuvring you could say that the judge puts forward the linguistic argument and sometimes supplementary arguments to take away possible doubt with respect to the acceptability of the decision from the perspective of the starting points of the legal system.

relation to the concrete case, linguistic argumentation cannot constitute a sufficient justification and must be supplemented by other forms of argumentation. In such cases systematic argumentation or teleological argumentation must form a necessary part of the argumentation, while linguistic argumentation can only function as a supplementary coordinate or subordinate argument.

When a linguistic argument is presented as a supplementary argument, it is only acceptable if:

- (2a) the linguistic argument constitutes a support for the same interpretation of the (term used in) the rule as the other arguments that are put forward as a justification
- (2b) the linguistic argument is not inconsistent with the meaning of (a term used in) the rule

One finds this form of using linguistic argumentation in cases where the legal rule contains a vague or evaluative term so that the rule must be interpreted to establish the meaning of the rule for the concrete case. In such a case, linguistic argumentation can never constitute an independent justification because it is not possible to establish in abstract what the meaning is by checking the literal meaning or the technical meaning of the term.

The second form may also occur in cases in which there is no discussion about the interpretation of a vague or evaluative term but there is still a difference of opinion about the exact interpretation that must be given of a rule on the basis of the question whether in the context of a specific case (and similar cases) a particular formulation used in the rule must be given a particular meaning or not.

In both types of cases, the meaning will have to be established by looking at the legal system and/or goal of the rule. Systematic or teleological argumentation then forms a necessary part of the argumentation and the linguistic argumentation can only function as supplementary coordinative argumentation. Linguistic argumentation of this form is often presented in the form of a statement that the formulation of the rule supports also this interpretation or that the

formulation of the rule does not form an objection to application in the proposed interpretation.⁸

Since linguistic arguments have a “preferred” status, judges tend to use this form of argumentation as supplementary argumentation for rhetorical reasons to increase the acceptability of their decision for the legal audience. The linguistic argument must increase the acceptability by showing that, also on other grounds, it can be asserted that the decision is coherent with common starting points. In terms of van den Hoven (2007), who calls this use of linguistic arguments, the “negative use” of linguistic argumentation, strategic manoeuvring implies that the judge tries to show that it is not necessary to change the legal system for the concrete case but that the concrete decision was already (implicitly) included in the legal system.

2.3 Form 3: a linguistic argument is presented in a context in which it is overruled by another argument

In hard cases linguistic arguments can also be used in a context in which it is asserted that the rule must not be applied in the literal meaning because such an application would be unacceptable from the perspective of the goal of the rule as intended by the legislator.⁹

In such a context, the linguistic argument is “overruled” by other arguments such as systematic arguments, teleological arguments, or arguments from reasonableness. These arguments are a necessary part of the argumentation as pro-arguments to justify that the rule must be applied in a broader or more restricted meaning in the concrete case.

Normally, if there were no reason to question the applicability because the concrete case belongs to the standard range of application of the rule, the argumentation would consist in form (1) of linguistic argumentation. However, for the concrete case, the judge may argue that there are overriding reasons not to apply the rule in the strict literal

8 For example: when a judge argues for an *a contrario* application of a rule, he will put forward a linguistic argument if the formulation of the rule contains a verbal indicator that gives an uncontested indication that the rule is meant as a limitative enumeration of the conditions for applying the rule.

9 In Dutch civil law, this use of linguistic arguments in a context in which the linguistic argument is overruled by other arguments often occurs when it is argued that a 'billijkheidscorrectie', an exception for the concrete case on the basis of fairness, is necessary. See Feteris (2007).

meaning but in another meaning including an exception for the concrete case.

When a linguistic argument is presented in a context in which it is overruled by another argument, it is acceptable if:

(3a) the linguistic argument is put forward in the context of a case in which there are other arguments that overrule the linguistic argument on the basis of the weight attached to them

(3b) the linguistic argumentation refers to the accepted standard meaning of (a term used in) the rule

This form of linguistic argumentation is often used when someone argues in favour of an exception to a rule about which there is no discussion about the correct interpretation of the rule, but where it is argued that, on the basis of the unacceptable consequences of a literal interpretation from the perspective of justice and fairness, an exception to the rule must be made for the concrete case.¹⁰

3 Analysis and evaluation of two examples

On the basis of the distinction between the different forms of using linguistic arguments in the different discussion contexts and the norms for an acceptable use, in this section I discuss two examples of strategic manoeuvring with linguistic arguments from Dutch civil law. In these cases the Supreme Court, in pragma-dialectical terms, gave a ruling in which it gave a negative evaluation of the strategic manoeuvring of one of the parties with linguistic argumentation.¹¹ Using the distinctions and norms defined in section (2), I specify how the examples can be analysed in terms of the different forms of using the linguistic argument and I explain how the norms can be used to determine when the strategic manoeuvring with the linguistic argument is acceptable and when it derails. I do this by explaining how the evaluation of the Supreme Court can be translated in terms of derailing strategic manoeuvring.

¹⁰ For a discussion of this form of complex argumentation see Feteris (2005, 2008).

¹¹ Both examples are given by Smith (2007).

Parties in a legal dispute often present a linguistic argument as an independently sufficient justification. As we have seen, in easy cases if the conditions for the first form are met, it is a perfectly sound way of justifying a legal decision. However, the strategic manoeuvring with linguistic argumentation may derail because one or two of the conditions for an acceptable use of a specific form of using linguistic argumentation is not met.

Sometimes parties in a legal dispute present a particular interpretation of the rule as the accepted standard interpretation of the rule although this is not the case and condition (1b) of the first form is not met. In such a case, the strategic manoeuvring derails because in doing so the party violates the pragma-dialectical rule that relates to the use of common starting points, since a particular meaning of the rule is wrongly presented as a common starting point in the legal community.¹²

Starting with a particular interpretation and presenting this interpretation as the accepted standard interpretation, a party may claim that the linguistic argumentation based on the formulation of the rule may serve as an independent justification. As we have seen, in cases in which the conditions of the first form are met, this is a perfectly sound way of justifying a legal standpoint. However, if the interpretation of the formulation of the rule is not the accepted standard interpretation, the linguistic argumentation can never function as an independent justification and other arguments are required to justify the application of the rule. In such cases, a linguistic argument cannot constitute an independently sufficient argument. For this reason, if a party or a judge presents the formulation of the rule as an independent justification in a case that does not meet condition (1a) for the first form, the strategic maneuvering derails. In such a case the “preferred” status of linguistic argumentation is misused by presenting the argumentation as an adequate justification although it does not meet condition (1a) of the first form but must be reconstructed as argumentation of the second form which would have been the correct form. By doing so, someone evades the burden of proof for the necessary supplementing coordinative argumentation referring to the legal system and/or goal of

¹² For a description of the starting point rule see van Eemeren and Grootendorst (1992, pp. 149-157).

the rule (that form a necessary supplement of the linguistic argumentation of the second form) and the strategic manoeuvring constitutes a violation of the pragma-dialectical rule concerning the burden of proof.¹³

In what follows I discuss two examples of this complex form of strategic manoeuvring that both consist of a combination of these two forms of strategic manoeuvring that both derail because two discussion rules are violated: the “starting point rule” and the “burden of proof rule”. (Since the third form is not applied in the examples I have selected I will not discuss strategic manoeuvring with this third form.)

3.1 Hoge Raad 25 oktober 1996

The first example (see for the relevant passage of the text A at the end of this contribution) is from a decision of the Dutch Supreme Court about the correct interpretation of the term 'finding'. In this case, *Hoge Raad 25 oktober 1996*, RvdW 1996, 207 the discussion was about the question whether the activities of a professional car hunter who had found a stolen car, had a right to a reward for finding the car and to compensation for the expenses he has incurred in taking care of the car on the basis of the legal regulation for finding lost and unattended objects of clause 5:5 of the Dutch Civil Code.

In this case the plaintiff, the owner of the car, denies the right of the defendant, the car hunter, to compensation for his expenses. The plaintiff is of the opinion that the rule does not apply to this case because the acts of the defendant cannot be considered as 'finding'. In his view, the term finding must be interpreted in the narrow sense, excluding the activities of a professional car hunter. Here the plaintiff presents linguistic argumentation referring to the meaning of the word 'finding' as independently sufficient justification.

However, the District Court, the High Court and the Supreme Court are all of the opinion that the rule is applicable to the concrete case in the broad meaning of 'finding'. This broad meaning also includes the activities of a professional car hunter who has been looking for the car. The Supreme Court is of the opinion that the interpretation of the word 'finding' must be based on a combination of

13 For a description of the burden of proof rule see van Eemeren and Grootendorst (1992, pp. 116-123).

teleological argumentation (supported by argumentation based on the discussion about the rule in parliament) and linguistic argumentation. The Supreme Court is of the opinion that the meaning of the rule (which is of a relative recent origin) must be established on the basis of the purpose, the legal ratio, of the rule that can be found in the parliamentary documents. The purpose was to promote that a lost object is returned to its right owner as soon as possible, in any case is brought back as soon as possible in circulation or is used again. According to the annotator, HJS, the idea of the Supreme Court is that the ratio of this rule is served by such a broad interpretation that is also linguistically correct. So, in this case, according to the Supreme Court the ratio of the rule must be considered as the main argument in support of the decision to apply the rule (in the broad meaning of 'finding') in the concrete case. This argument is supplemented by the consideration that the linguistic meaning of finding does not form a counter-argument against application in this broad sense.

From our perspective this case forms an example of a case in which the strategic manoeuvring by the party derails. First, it constitutes an instantiation of derailing strategic manoeuvring because condition (1b) is not met. The proposed literal meaning of 'finding' in a narrow interpretation is wrongly presented as the accepted standard meaning of the term 'finding' in clause 5:5, because the term must be interpreted in a broader sense that also includes the activities of a professional car hunter. Second, it constitutes an instantiation of derailing strategic manoeuvring because condition (1a) is not fulfilled. The linguistic argument in favour of a narrow interpretation of the term 'finding' cannot constitute an independently sufficient justification. The Supreme Court argues that the intention of the legislator (which supports a broad interpretation of 'finding') must be taken also into account. In the view of the Supreme Court the teleological argument referring to the goal of the rule constitutes a necessary element of the argumentation. The Court points to the fact that the intention of the legislator to promote that the object is brought back into circulation is also in accordance with the meaning of the term 'finding' in the broad sense as used in the rule. The burden of proof rule is violated because the party, by only presenting an argument in support of the literal meaning of the term 'finding' evades the burden of proof for the

supplementary argumentation referring to the intention of the legislator that is necessary to make the argumentation complete.

3.2 Hoge Raad 19 oktober 1990

The second example of strategic manoeuvring with linguistic argumentation can be found in the discussion in Dutch law in a case about the application of the old article 1.33 of the Dutch Civil Code, which says that a man can only marry a woman and a woman can only marry a man.

In this case a civil servant who was responsible for marriages refused to marry a female homosexual couple on the basis of this article (for the relevant part of the text of this decision see B at the end of this contribution). However, the parties state that the text of this article does not forbid a marriage between two women because it only says that one man can only marry one woman with the stress on the formulation 'a' interpreted as 'one' and hence must be interpreted as a prohibition of polygamy.

The judge of first instance, the judge in appeal and the Dutch Supreme Court (Hoge Raad 19 oktober 1990, RvdW 1990, 176) decide that the claim is based on a disputable literal reading of several articles and misunderstands the purpose of the law as intended by the legislator.¹⁴

From our perspective it is an interesting example of a case in which the strategic manoeuvring by the party derails. Firstly, as in the previous example, it constitutes an instantiation of derailing strategic manoeuvring because condition (1b) is not fulfilled. The proposed literal reading of 'a man' and 'a woman' in clause 1.33 is wrongly presented as the only possible reading because there is also another reading, i.e. the accepted standard reading. The Supreme Court states

¹⁴ In this case the lower judges and the Supreme Court also put forward additional argumentation in which they react to other arguments put forward by the plaintiff in which they discuss the argument by the plaintiff that the views in society about same-sex relations have changed since the enactment of the law. The courts make clear that in certain matters, such as the present one that concerns the public sphere where legal certainty plays an important role, it is not the task of the judge to change the meaning of a rule by departing from the goal of the rule as intended by the legislator on the basis of changing views in society. The Supreme Court argues that it is not the task of the judge to decide against the clear meaning of the rule about marriage, since abolition of the prohibition to marry for same-sex couples would have far-reaching consequences.

that the other reading implies that the article must be read in the standard reading as forbidding a same-sex marriage so that the given interpretation is incorrect.

Furthermore it constitutes an instantiation of derailing strategic manoeuvring because condition (1a) is not fulfilled. The linguistic argument can never be the only argument because, according to the Supreme Court, in establishing the meaning of a rule also the legislative history of the rule and the goal of the rule as intended by the legislator must be taken into account, so the argument could never serve as an independent justification. With the formulation 'miskent de strekking van de wet' (ignores the purpose of the rule) the Supreme Court indicates that the purpose of the rule as it is based on the legislative history is a necessary element of a justification of the interpretation of the meaning of a rule. The burden of proof rule is violated because the party evades the burden of proof for the arguments referring to the legislative history of the rule and the goal of the rule as intended by the legislator.

3.3 Comparison

In both examples the combination of the violation of the starting point rule and the violation of the burden of proof rule can be considered as a specific form of derailing strategic maneuvering. The derailment consists of a combination of two violations. The first violation implies that a particular interpretation of the meaning of the rule is wrongly presented as the only correct interpretation. Starting from this incorrect interpretation the second violation implies that certain information (the goal of the rule as intended by the legislator) is wrongly ignored and is not included in the argumentation so that the burden of proof for this information is evaded. In the evaluation of the Supreme Court we see that both mistakes are assessed individually as mistakes in the context of a rational discussion about the application of legal rules. The violation of the starting point rule is characterized as departing from a 'disputable literal reading of statute law' (gaat uit van een aanvechtbare letterlijke lezing). The violation of the burden of proof rule is characterized as a 'misunderstanding of the law as the legislator had in mind when enacting it' (miskent de strekking van de wet zoals men die

bij haar totstandkoming voor ogen heeft gehad).¹⁵ The combination of the two forms of strategic maneuvering can be considered as a complex form of strategic maneuvering in which the second builds on the first form so that the combination can be considered as subordinate.

4 Conclusion

In my contribution I have made a first attempt to reconstruct the strategic manoeuvring with linguistic arguments in a discussion about the application of a legal rule in a concrete case in the context of a court of law. I have explained how the legal norms can be translated in pragma-dialectical terms to explain why certain forms of strategic manoeuvring with linguistic arguments in this activity type are acceptable and when the strategic manoeuvring derails.

By distinguishing three forms of the use of linguistic argumentation I have tried to give a systematic and precise description of the various ways in which linguistic argumentation can be used and on the basis of the translation of the norms I have shown how it can be explained why certain forms of strategic manoeuvring with a particular use are acceptable and other forms derail.

In the analysis of some examples from Dutch law I have demonstrated how the framework for evaluating the soundness of strategic manoeuvring can be used in explaining why certain ways of using linguistic argumentation in a particular context are unacceptable and constitute a derailment of strategic manoeuvring. I have explained that the strategic manoeuvring with linguistic argumentation often takes the form of a complex of strategic manoeuvres that are mutually dependent and each form a violation of a discussion rule.

15 In the discussion about 'finding' the Supreme Court claims that the High Court has not departed from a wrong conception of law ('heeft niet blijkt gegeven van een onjuiste rechtsopvatting'). This is a specific legal expression used to indicate that a lower court has made a mistake in giving a wrong interpretation of the law. In this context the Supreme Court refers to this kind of mistake because the party that has asked the Supreme Court to correct the decision has put forward as a reason for the necessity of correcting the decision (as 'cassatiegrond') that the Court has departed from a wrong conception of the law in giving a broad interpretation of the term 'finding'.

Appendix: CASES EXAMINED IN SECTION 3

1. HOGE RAAD 25 oktober 1996, nr. 16074 RvdW 1996, 207

'3.3.1 Bij de beoordeling van onderdeel 1, dat de vraag aan de orde stelt wat moet worden verstaan onder "vinden" in art. 5:5 moet het volgende worden vooropgesteld. De strekking van art. 5:5 e.v., zoals deze uit de geschiedenis van de totstandkoming van deze bepalingen naar voren komt, laat zich aldus samenvatten dat daarmee beoogd is te bevorderen dat degene die de zaak verloren heeft, haar zo veel mogelijk zal kunnen terugvinden, en voor het geval de verliezer niet meer komt opdagen een oplossing te geven, welke mogelijk maakt dat de zaak binnen afzienbare tijd weer in het rechtsverkeer wordt gebracht of in gebruik genomen (Par. Gesch. Boek 5, Inv. 3, 5 en 6, p. 1008). Met die strekking strookt het begrip vinden in art. 5:5 in overeenstemming met zijn taalkundige betekenis, in ruime zin uit te leggen. Daarmee zou slecht te verenigen zijn dat zou moeten worden aangenomen dat niet van vinden sprake is, indien de zaak niet bij toeval is ontdekt, maar daarnaar is gezocht en handelingen zijn verricht die als het opsporen daarvan kunnen worden beschouwd.'

English translation:

HOGE RAAD October 25, 1996, nr. 16074 RvdW 1996, 207

'In the evaluation of part 1, that introduces the question of the exact meaning of "finding" in clause 5:5, the following must be assumed. The purport of clause 5:5 ff., as becomes clear from the history of the enactment of the rule, can be summarized as follows: the intention of the legislator was to promote that someone who has lost an object will, as much as possible, be capable of finding the object, and in case the person who has lost the object does not show up, to provide a solution that makes it possible to bring the object in circulation within the not too distant future or make it possible that the object can be used again (Parliamentary History, Book 5, 3, 5, 6, p. 1008). It is consistent with this purport to interpret the concept of finding in clause 5:5, in accordance with its linguistic meaning, in the broad sense. It would be

inconsistent with this purport to assume that the rule would not be applicable if the object would not be discovered by accident, but when the person who has found the object would have been looking for it and would have developed actions which can be considered as tracing/hunting the object.

2. HOGE RAAD 19 oktober 1990, rek.nr. 7649 NJ 1992/129

'Die stelling (de stelling dat de tekst van de Nederlandse wet een huwelijk tussen twee vrouwen niet verbiedt en dat die tekst in het licht van de maatschappelijke ontwikkelingen zo moet worden uitgelegd dat zo'n huwelijk toelaatbaar is EFHK) kan niet als juist worden aanvaard. Zij gaat uit van een reeds op zichzelf aanvechtbare letterlijke lezing van een aantal wetsartikelen en miskent de strekking van de wet zoals men deze bij de totstandkoming van Boek 1 BW, mede in het licht van de daaraan voorafgaande wetgeving, voor ogen heeft gehad. Ook indien latere maatschappelijke ontwikkelingen steun zouden geven aan de opvatting dat het niet openstaan van de mogelijkheid van een wettelijk huwelijk tussen twee vrouwen of twee mannen niet langer gerechtvaardigd is, zou dit niet een van de onmiskenbare strekking van de wet afwijkende wetsuitlegging wettigen, te meer niet nu het hier gaat om een onderwerp dat de openbare orde raakt en waarbij de rechtszekerheid een belangrijke rol speelt'.

English translation:

SUPREME COURT OF THE NETHERLANDS October 1990, no. 7649 NJ 1992/129

This claim (the claim that the text of the Dutch law does not forbid a marriage between two women and that this text must be interpreted in the light of the developments in society that would support the view that such a marriage is allowed EFHK) cannot be accepted as correct. This claim departs from a reading of various articles that is in itself already wrong and it ignores the purpose of the law the legislator had in mind when formulating the rules of Book 1 of the Civil Code, also in the light of the preceding legislation. Also if later developments in

society would support the opinion that the impossibility for two women or two men to marry is no longer justified, this would not justify an interpretation of the law that departs from the clear purpose of the law, also because it concerns a subject matter that concerns the public order where legal certainty plays an important role.

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Eveline T. Feteris received her Ph.D. in Humanities at the University of Amsterdam. She is an Associate Professor at the Department of Speech Communication, Argumentation Theory and Rhetoric and a member of the research programme Argumentation and Discourse and the research school of the International Learned Institute of Argumentation Studies (ILIAS). She is director of the research masters's programme Text and Communication. She is a member of the editorial board of the journal *Argumentation*, the journal *Argumentation in Context* and the journal *Language, Law and Interdisciplinary Practice*. She is a member of the editorial board of the series *Argumentation in Context* of John Benjamins. Among Feteris's key publications are *Fundamentals of Legal Argumentation: A Survey of Theories of Justification of Judicial Decisions*, Dordrecht: Springer Netherlands 1999; E.T. Feteris, H. Kloosterhuis, H.J. Plug, *Argumentation and the application of legal rules*, Amsterdam: Sic Sat, 2009. Address: Department of Speech Communication, Argumentation Theory and Rethoric, Spuistraat 134, 1012 VB Amsterdam, Netherlands. Email: e.t.feteris@uva.nl.

Obscurities in the Formulation of Legal Argumentation

H. José Plug

The Dutch Supreme Court hears grievances against motivations of judicial decisions that are based on the ground that formulations in a motivation of a decision are obscure. It is, however, difficult to determine if such an appeal against the decision will be successful. From a pragma-dialectical perspective, the use of obscure or ambiguous language may be considered fallacious if it obstructs the resolution of a dispute. In this contribution I will discuss the way in which the Dutch Supreme Court decides on differences of opinion about the obscurity of the motivation of a legal decision. I will demonstrate how insights provided by argumentation theory may be used to clarify criteria that are used in Dutch legal practice to evaluate complaints about obscure and ambiguous language in motivations.

Keywords: legal argumentation, legal language, fallacy of unclarity

1 Introduction

Judges are expected to convey the justification underlying their decisions as clearly as possible. If a party to the proceedings is of the opinion that the argumentation of a (lower) judge is obscure, it can submit its complaints to the Dutch Supreme Court referring to justification requirements. It is, however, unclear what criteria are decisive when the Supreme Court evaluates justification complaints. When it comes to assessing justification complaints, literature refers to the Supreme Court employing ‘considerable margins making it very hard for the lawyer lodging the appeal in cassation, to predict the outcome of the procedure.’ The precise nature of defective justification is even called ‘one of the best kept secrets of the chambers.’

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In non-legal, everyday discussions too, language users may be expected to make an effort to express their argumentation as clearly as possible. Van Eemeren and Grootendorst (1992, 2004) state that parties in a discussion making use of unclear or ambiguous language are guilty of the fallacy of unclearness. By using unclear formulations, they violate one of the rules for critical discussion: the language use rule (2004, pp. 195-196).

This discussion rule, although never explicitly referred to in these terms, seems to play an important role in legal procedures as well. One of the legal parties may, for example, complain about the unclear formulation of the arguments, rendering an adequate reaction impossible.¹

In my contribution I will discuss the way in which the Dutch Supreme Court decides on differences of opinion about the obscurity of the justification of legal decisions. By analysing (legal) discussions on the formulation of the justification, I will try to find evaluative criteria that reach beyond the specific case at hand. First I will indicate what type of complaints concerning the justification of judicial decisions may be submitted to the (Dutch) Supreme Court. Then I will discuss a number of exemplary cases of complaints concerning the formulation of the justification that have been dismissed or have been upheld. Finally I will discuss the way in which the Supreme Court may ‘repair’ the formulation that is subject of a complaint and is subsequently dismissed.

2 Requirements regarding clearness

Ambiguity and vagueness can lead to problems in communication. But when should these problems be considered as fallacies? This question is closely connected with the definition of the concept of a fallacy.² In the pragma-dialectical argumentation theory a fallacy is defined as a speech act which frustrates efforts to resolve a difference of opinion,

1 Veegens (2005, nr 121).

2 In handbooks on fallacies (e.g., Hamblin, 1970, Woods & Walton, 1982, and Walton, 1995) and in textbooks (e.g., Johnson & Blair, 1994), fallacies are divided into two groups: those dependent on language and those independent of language. When dealing with linguistic fallacies, or fallacies of language and meaning, most authors discuss at least the fallacy of equivocation and the fallacy of amphiboly.

and the term fallacy is thus systematically connected with the rules for critical discussions. By making use of unclear or ambiguous language, parties to a difference of opinion can make the resolution of a dispute difficult or even impossible. In doing so they violate the language use rule, which runs as follows:

Discussants may not use any formulations that are insufficiently clear or confusingly ambiguous, and they may not deliberately misinterpret the other party's formulations.

It is a misunderstanding to assume that only deliberate violations of the language use rule result in a fallacy. This misunderstanding could be a result of van Eemeren and Grootendorst (1992, pp. 197, 202) stating that the language use rule is broken if unclearness or ambiguity is 'misused' 'to improve one's own position'.³ However, in *Argumentation* (2002, p. 110) the authors emphasise that parties do not always violate the discussion rules on purpose.

Van Eemeren, Grootendorst and Snoeck Henkemans (1996, 2002) discuss linguistic fallacies in which unclarity may occur from: the structuring of the text, implicitness, indefiniteness, unfamiliarity, and vagueness. They also demonstrate how syntactic ambiguity may be caused by the structure of the sentence and how semantic and referential ambiguity may occur if words have more than one meaning.

Analysing unclarity in legal argumentation as a potential violation of the language use rule presupposes that a legal process can be regarded as a critical discussion. In a pragma-dialectical approach legal procedures are considered as specific, institutionalised forms of argumentative discussions (Feteris, 1999; Plug, 2000). Although several rules in legal procedures differ from the rules for critical discussions, this does not seem to be the case for the requirement of comprehensibility of the justification of legal decisions.

The Dutch constitution, under Section 121, prescribes that all judicial decisions shall contain their underlying grounds. If parties to the proceedings are of the opinion that the justification of a judicial

³ If this would indeed imply intention, there would be an extra difficulty for the party who accuses the other party of a fallacy. The accuser would not only have to make clear that the resolution of a disagreement is frustrated, but also that this was done deliberately. This would obviously render the burden of proof almost impossible.

decision is defective, they can appeal to the Supreme Court for the quashing of the decision. The Supreme Court will then decide whether the grievance against the motivation of the lower Court is sustainable. The Supreme Court distinguishes between three categories of defective justification: incomprehensible motivation, disregard of essential arguments put forward by the parties and manifest errors in establishing the facts.⁴

Among these defective justifications incomprehensible motivation takes a prime position. Within this category five subcategories are distinguished:⁵

1. The requirement of clarity has not been met:
 - ‘neither head nor tail’ can be made from considerations
 - ambiguous motivation
 - internal inconsistency
2. The conclusion does not follow the judge’s argument in any way.
3. The argument allows for only one conclusion and this conclusion is not drawn.
4. It is wrongly assumed that a certain argument excludes a certain conclusion.
5. A train of thought may be incomplete or fail to mention certain relevant facts or may lack logical coherence: ‘the argument is incomprehensible without further motivation’.

These subcategories originate in a great number of judicial decisions. The way in which these justification defects have been formulated may vary considerably. It is hard to find a common denominator or to establish to what extent the requirement of clarity differs from other motivation requirements. By taking these five subcategories as a point of reference it is possible, however, to identify the character of the grievance regarding the comprehensibility of the motivation and to establish what precisely the criticism is aimed at.

In the first place the criticism may be aimed at the *correctness* of the contents of the argumentation. If someone claims that the argumentation is ‘internally inconsistent’, the criticism refers to the

4 HR (Supreme Court), 1 July, 1977, *NJ* 1978, 73.

5 Korthals Altes (1993, pp. 98-103).

correctness of the contents of the argumentation in relation to the contents of other arguments that have been put forward. It is true for both judicial as well for non-judicial argumentation that logical and pragmatical inconsistencies should be avoided.

A second form of criticism may be aimed at the *argumentative relationship* between the arguments and the (sub) standpoint. In cases like these the criticism is not aimed at the contents of the arguments, but rather at the argumentative or logical relationship between the argument(s) and the standpoint. This is the case when someone puts forward that ‘the conclusion cannot be drawn from what the judge has said’, that ‘a certain argument allows for only one conclusion (which then has not been drawn)’ or that ‘it is wrongly assumed that a certain argument excludes a certain conclusion’.

In the third place the criticism may focus on whether or not the argumentation is *complete* or *sufficient*. If the Supreme Court is of the opinion that ‘a certain train of thought is incomplete’, that ‘the Court fails to mention certain relevant facts’, that ‘it lacks logical coherence’ or that ‘the argument is incomprehensible without further motivation’, nothing is said about the correctness of the argumentation itself. Since the argumentation is incomplete, it lacks sufficient argumentative strength to justify the standpoint.

Finally it may be the *unclear* of the verbal presentation of the argumentation that is criticized. If it is said of the considerations that ‘neither head nor tail’ can be made from them or that ‘the motivation is ambiguous’, it is impossible to ascertain the correctness of the contents of the argumentation since it is not clear what the argumentation actually boils down to.

When a party to the proceedings submits to the Supreme Court a complaint about an incomprehensible justification, he may claim that, in pragma-dialectical terms, the lower judge violated the language use rule. Within the scope of this particular rule, only grievances as to unclarity of the formulation of the motivation of a lower judge are relevant. On the basis of a number of examples I will demonstrate the position of the Supreme Court in cases like these.⁶

⁶ Some of the examples that are discussed in this contribution were presented at the ISSA conference in 2002.

3 Successful complaints about unclearness

The first example concerns a dispute between Mr Finkenburgh, who manufactures safety belts and children's seats for cars, and Mr van Mansum, who designs these belts and seats.⁷ The designer claims to have sustained damage because of non-performance on the part of the manufacturer since the latter failed to ensure that his products met the usual safety and quality standards. The designer requests rescission of their contract as well as damages. Following the Court's dismissal of the request, the designer decides to appeal. The Court of Appeal rules in the plaintiff's favour and sets aside the judgement of the Court. The contract is rescinded and the manufacturer is ordered to pay damages. The argumentation of the Court of Appeal runs as follows:

In view of the contents of the documents submitted by both parties, considered in mutual connection and conjunction (italics by HJP), it has been proven conclusively that Finkenburgh has been in breach of contract in respect of van Mansum.

Finkenburgh has not produced any evidence on the matter.

Consequently it has been established that Finkenburgh has been in breach of contract in respect of van Mansum.

The manufacturer, Finkenburgh, appeals before the Supreme Court, claiming the Court of Appeal's justification of its decision is incomprehensible. He is of the opinion that the Court does not sufficiently provide an insight into which documents of the extensive case file it refers. Moreover, the Court, he says, gives insufficient insight into its line of thought because it does not become clear why the contents of 'the documents submitted by both parties' leads to judicial finding of the facts. The documents that have been submitted do not only support van Mansum's standpoint but contain elements that, according to Finkenburgh, support his standpoint as well:

the Court of Appeal was not in a position to consider van Mansum's claims proven, solely referring to the documents that had been submitted, adding 'considered in mutual connection

⁷ HR (Supreme Court), 16 October 1998, *NJ* 1999, 3.

and conjunction'. The Court should, however, have indicated precisely which grounds, originating in these documents, were found by the Court to have decisive evidential value.

The Supreme Court agrees with Finkenburgh and, in its judgement of this justification complaint, refers to the fundamental principle of proper judicial procedure:

that every judicial decision should at least be justified in such a way that sufficient insight is given into the underlying line of thought to render the decision verifiable and acceptable for both parties to the proceedings and third parties alike. In this particular case the Court did not meet this justification requirement. Not even in view of the debate between parties does the Court's judgement make clear on the grounds of which of the many documents it was found proven that Finkenburgh has been in breach of contract in respect of van Mansum.

The Supreme Court is, in pragma-dialectical terms, of the opinion that the Court of Appeal has violated the language use rule and is guilty of the fallacy of unclearness. The unclearness, caused by referential indefiniteness, frustrates the effort to arrive at a solution of the dispute, or may at least make it more difficult. Since it is unclear which arguments support the decision, it is impossible to ascertain whether the decision of the judge is correct. The consequence is that parties cannot contest the argumentation and that the Supreme Court is prevented to verify whether the decision is the result of a proper application of the law.

In the following judgement a similar case of unclear reference was considered.⁸ The Supreme Court is very plain in its rejection of this way of justifying judicial decisions:

Even in view of the debate between parties, the Court's reference to a procedural document – without specifically indicating which passages therein are of relevance – which in its turn refers to yet another procedural document in which reference is made to statements made in an official report,

⁸ HR (Supreme Court) 29 June 2001, *NJ* 2001, 494.

provides insufficient insight into the line of thought resulting in the decision of the Court.

In his conclusion of the same judgement the Advocate General provides a possible explanation for this type of justification, but goes on to point out its disadvantages.

We may assume that it usually originates in a desire to work efficiently. In the dispensation of justice too, however, penny-wise is usually pound-foolish, in this case because it necessitates a detour by way of the Supreme Court to the same or a different judge. Is this efficiency?

In both judgements the Supreme Court uses the expression ‘even in view of the debate between parties’. In this way the Supreme Court, in reference to the fundamental principle of proper judicial procedure, seems to indicate that the considerations underlying the decision should, in principle, find their way into the judgement. If, however, considerations are not made explicit in the motivation, this does not automatically lead to a breach of the language use rule. In such a case the arguments that have been exchanged by the parties to the proceedings in other stages of the legal procedure could still be taken into consideration. In doing so, the Supreme Court seems to adopt the same position as the pragma-dialectical theory: all pro- and contra-arguments that are relevant to the evaluation are taken into account.

In the examples presented so far it is virtually impossible to establish by which arguments the decision is actually supported. As a result of the great number of arguments which do, in principle, qualify and all possible combinations in which these arguments could operate, the number of possible interpretations is almost unlimited. In the following example about a grievance as to the obscurity of the justification the number of interpretative possibilities is much more limited.

The judgement of the Supreme Court of 17 May 1974 (*NJ* 1975, 307) deals with a request to review the amount of alimony a man has to pay his ex-wife. The ex-husband is of the opinion that the amount stipulated by the Court is too high. The Court of Appeal denies the man’s request on the following ground:

(...) that the ex-husband's arguments come down to his claim that the (...) total of the woman's living expenses was determined on too high a level, because the judgement was based on incorrect or incomplete data; that the ex-husband, however, failed to show the plausibility of *this* (italics by HJP).

The ex-husband lodges an appeal in cassation and, in his criticism on the Court's decision, brings forward that:

[it is] not clear what it is the Court is referring to using the word 'this' when it considers 'that the ex-husband failed to show the plausibility of this'. It is not clear whether the petitioner, in the Court's line of thought, has (only) failed to show the plausibility of his view that the (earlier) decision was based on incorrect and incomplete data or failed to show the plausibility of his standpoint that the total (of his ex-wife's) living expenses was determined on too high a level (as well).

In its judgement of this justification complaint the Supreme Court states:

that the justification of the Court does not meet the requirements as laid down by the law, as it is not clear what the word 'this' refers to; that the Court fails to make clear whether, in its opinion, no other data have come to the fore than those already known or that the data that have come to the fore have not been properly established, or that the data provided do not convince the Court that a revision of its original decision is called for.

The Supreme Court indicates that the demonstrative pronoun 'this' can refer to three different statements. First of all, it is possible that the Court could have meant that there are no new data. Secondly, it could have meant that there are new data but that these have not been established. In the third place the Court could have meant that these new data are available but that they do not lead to a revision of the original decision.

Unlike the first cases of referential indefiniteness, in this case no less than three possible interpretations are suggested as to the Court's intentions. The Supreme Court, nonetheless, decides that it is not possible to choose between these three possible interpretations. The central problem seems to be that the Supreme Court cannot ascertain if the Court of Appeal has taken the new data into account. If it failed to do so, the ex-husband could have contested the decision by arguing that the Court of Appeal disregarded essential arguments.

Unclearness in judicial decisions caused by referential indefiniteness seems to be a recurring phenomenon. In 2004 the Dutch judiciary started a large-scale project, *PROMIS*, as a response to criticism by both laymen and professionals on the transparency of criminal sentences.⁹ The aim of the project was to come to a better and clearer formulation of judicial decisions. However, from the evaluation of the results of the project by van den Hoven and Plug (2008), it appears that even in the criminal sentences that were explicitly focussed on improving clarity in the formulation of the argumentation, referential indefiniteness occurs.

Several American authors on legal language, such as Mellikoff (1990), Solan (1993) and Tiersma (1999), offer explanations for this phenomenon. They found that one of the devices lawyers and judges have developed to make legal language more precise, is to use reference words like 'such', 'said' or 'aforesaid'. The function of these words supposedly is to limit the class of possible referents to a noun phrase.¹⁰ The first point of criticism of the authors is that words like 'aforesaid' and 'said' used in this way are archaic. Their second, more important, point of criticism is that they are useless in reducing ambiguity and may even cause unclarity. Mellinkoff (1990, pp. 306, 318) says:

If there is only one possible reference for *aforesaid*, it is usually unnecessary – as when an answer refers to the only action there is, “the action aforesaid.” If *aforesaid* can by any chance refer

⁹ Project *Motiveringsverbetering Strafvonnissen (PROMIS)*.

¹⁰ Tiersma (1999, p. 89) provides the following example: 'Lessee promises to pay a cleaning deposit of 200\$ and a damage deposit (...). *Said* deposit shall accrue interest at a rate of five percent per annum.' Tiersma observes that 'said deposit' can refer to the first mentioned deposit, the second, or perhaps even both.

to more than one thing, or to nothing, its long history of uncertain reference marks it as dangerous. In either case, no aid to precision.

4 Unsuccessful complaints about unclearness

Apparently unclearness caused by referential indefiniteness or referential ambiguity may result in successful justification complaints. Sometimes, though, complaints about the obscurity of the justification are not recognised, as the following cases demonstrate.

In the first case there is a difference of opinion between van der Vlies, the purchaser of a stretch of land, and Spanish Water Resort, the original owner of the plot. One of the questions that need to be answered by the Court is whether or not there is an actual agreement between the two parties.¹¹ In order to be able to address this question, the Court assesses the six arguments (a through f) with which van der Vlies justifies his claim. The Court of Appeal concludes that there has never been an agreement between the parties. In his appeal to the Supreme Court van der Vlies argues that:

[...] in answering the central question the Court of Appeal has, unjustly, limited itself to the assessment of the separate arguments, thereby ignoring their mutual correlation and connection, or so it seems judging by the Court's decision. Moreover, it is, in the absence of any justification whatsoever, unclear why arguments a, c and e do not play any part at all in the relationship between Spanish Water Resort and van der Vlies: even if one or more of these arguments did not play any part when judged on their own merits, it is unclear whether they may play such a part when considered in mutual correlation or connection.

In other words, van der Vlies is of the opinion that the Court of Appeal, in so far it interpreted the arguments as coordinate argumentation, failed to indicate this clearly in its judgement which, in the end,

11 On this case, HR (Supreme Court) 5 June 1992, NJ, 1992, 539, see also Plug (1999)

resulted in a negative assessment of the dispute. This complaint was rejected as follows:

It has not become clear from the decision that the Court failed to judge the arguments of van der Vlies in conjunction. Apart from that, van der Vlies did not indicate in what way the total of his arguments exceeds the sum of the parts.

This rejection comes down to the opinion that van der Vlies is committing the fallacy of the straw man¹², or that, if he is not, he fails to present convincing proof that the solution of the dispute has been negatively influenced by unclearness on the part of the Court.

In the second case too, the obscurity in the phrasing was not found to have influenced the assessment of the dispute.¹³ This dispute between a hospital and the works council of this hospital is about a difference of opinion on whether the travelling allowance scheme should be considered as a set of regulations or merely as information for those it concerns. The Court is of the opinion that the hospital intended this scheme to serve as information for the people concerned (about the purport of the results of collective bargaining). Two arguments are presented in support of this ruling. The interrelationship between these arguments, however, is obscure. It is not clear whether these arguments were intended to function as multiple or in as coordinative argumentation. The Advocate General summarises the problem thus:

The Court supports its judgement on two grounds, introduced in the challenged judgement by the words ‘on the one hand’ and ‘on the other hand’. These introductory words do not contribute to the lucidity of the ruling since they suggest that the successive elements may lead to different conclusions, whereas, on the contrary, these elements can only lead to one and the same conclusion.

12 A party who misrepresents the opponent’s standpoint (or arguments) or attributes a fictitious standpoint to him or her, commits the fallacy of the *straw man* (See van Eemeren, Grootendorst and Snoeck Henkemans, 2002, p. 117). In this example, van der Vlies (would have) misrepresented the interpretation of the relation between the arguments as being multiple (independent arguments).

13 HR (Supreme Court) 22 May 1992, *NJ* 1992, 607.

Also in view of the fact that both grounds operate completely separately, I assume that the Court did not intend to communicate that its judgement was founded on both grounds in conjunction but, more likely, that the Court intended to formulate two separate grounds which, each on its own, would be able to support the judgement. Both parties, apparently, were under the same impression. This becomes clear from the first ground of appeal in cassation (...) ('referring to on the one hand') and part 3 (referring to 'on the other hand'). Both will have to be valid in order to make cassation feasible.

One could imagine a different ruling if parties in cassation had not understood that the argumentation could be interpreted as multiple and would have limited their challenge to only one of the grounds. In this case the phrasing did not hinder the solution of the difference of opinion, since the parties anticipated the ambiguity. Obscurity, in other words, did not result in a violation of the language use rule.

5 The apparent intention

Veegens, Korthals Altes en Groen (2005, nr 167) observe that when assessing justification complaints, the Supreme Court presumes the correctness of the decision and that 'minor problems may be ironed out, considering that the judge had 'apparently' meant to rule in the vein of the Supreme Court.' Research by Bruinsma (1988, p. 18) portrays a member of the Supreme Court elucidating this approach as follows: 'when a decision is correct in itself, but its defective justification is brought to attention by means of a clever ground for appeal, it is the Supreme Court that 'dresses' this decision with the phrase that 'the Court of Appeal apparently had the intention of wanting to put forward that ...'. There is absolutely no point in quashing a perfectly good decision.'

More or less standard phrases such as 'The Court of Appeal apparently judged that ...' indicate that the Supreme Court is 'ironing out minor problems'. A clear example of this approach is a case in which an appellant in cassation put forward that the Court of Appeal

had presented an incomprehensible clarification of its position. The Supreme Court, in its turn, puts forward the following:

The court has apparently judged that (italics by HJP) Mr. Bakker assumed, and under the circumstances was correct in assuming, that Hartman employing Cuiper as construction supervisor entailed that Hartman had indeed been granted sufficient authority to conclude that arrangement (...)

Since the Supreme Court clarifies the intentions of the Court of Appeal, it appears that the Supreme Court employs a usage declarative, a speech act that explains or specifies unclear or ambiguous language use, to present an optimal interpretation of the considerations of the Court of Appeal.¹⁴ This interpretation strategy has, however, met with some criticism. Barendrecht (1998, p. 113), for example, brought forward the following:

Instead of completing defective justifications by means of veiled phrases such as ‘the court has apparently judged that ...’ one could choose to state that the justification is indeed defective but that this nonetheless offers insufficient ground for cassation since the Supreme Court can complement the justification based on the records and in a way that does meet the required standards.

Phrases such as ‘the judge has apparently argued that..’, according to the author, should be considered as an indication of defective justification which nonetheless should not result in cassation since the Supreme Court could complement the defective justification in question. He is of the opinion that the Supreme Court should be entirely open as to why the lower judge’s decision is maintained and that these considerations should not be hidden in the account of the lower judge’s decision. These objections, in pragma-dialectical terms, boil down to the Supreme Court not just limiting itself to employing a usage declarative, clarifying the judge’s apparent intentions. Employing a

14 Usage declaratives, such as specifications, amplifications and explanations are a sub-category of declaratives. The purpose of usage declaratives in a critical discussion is to make clear how a particular speech act is to be interpreted (see van Eemeren and Grootendorst 2004, p. 66).

usage declarative is, after all, unacceptable precisely in the case of a difference of opinion as to the interpretation of the judge's considerations. In view of the justification obligation, the Supreme Court may be expected to justify the interpretation of a defective justification on the grounds of arguments that are made explicit.

6 Conclusion

In judicial contexts the evaluation of justification complaints relies heavily on the circumstances of the case. This is also true of justification complaints that are motivated by the obscurity of the motivation. In my analyses of some decisions on complaints about unclear motivations from a pragma-dialectical perspective I set out to find criteria to evaluate these complaints. This perspective may provide an explanation as to why complaints about unclear, vague or ambiguous formulations are not always allowed.

The party that complains about obscurity of the motivation has the obligation to provide evidence in support of his standpoint. This burden of proof means that it has to be specified what it was exactly that was unclear and what caused this unclarity. In the case of referential indefiniteness, for example, it is specified how the use of certain referential words makes it impossible to decide which arguments justify the legal decision.

Moreover, the party laying down the justification complaint has the obligation to show that the unclarity, ambiguity or vagueness in the argumentation had its repercussions on the resolution of the dispute. The relationship between the arguments may be vague but that vagueness need not be of any influence on the position of the party laying down the complaint. Ambiguity too need not influence the resolution of a dispute in a negative way if the plaintiff anticipated both meanings. This means that complaints about the unclarity of the formulation of argumentation in a legal context may, just as accusations of linguistic fallacies in a non-legal context, only be successful if it has become clear what exactly makes the argumentation obscure and, moreover, how this frustrated the resolution of the dispute.

When unclear or ambiguous formulations do not frustrate the resolution of a difference of opinion, it can be said that, in pragma-

dialectical terms, the language use rule has not been violated. It is however undesirable that the Supreme Court, in these cases, limits itself by indicating ‘what was apparently intended by the (lower) judge’. The Supreme Court should rather justify why the unclear or ambiguous formulation is of no influence on the settlement of the dispute.

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H. José Plug is lecturer and researcher at the Department of Speech Communication, Argumentation Theory and Rhetoric of the University of Amsterdam. Since 2005 she has also been the director of education of the Department of Dutch studies. Until 2002 she was lecturer at the Law faculty of the Erasmus University of Rotterdam (EUR). Plug obtained her PhD doing interdisciplinary research on argumentation in legal decisions. In addition to legal argumentation, her research interests are political argumentation and the theory of debate. Email: h.j.plug@uva.nl.

The Dissociation of Notions as a Tool for Justification: A study on practical reasoning in common law decisions

Victor Ferry

As an instance of the typical interaction between general argumentation theory and judicial argumentation practice, this paper uses the dissociation of notions, a concept elaborated by the former, possibly as from observations on the latter, to reexamine two well-known common law cases, in which the judges justify an interpretation grounded on the spirit of the law as opposed to a narrow interpretation of precedents. The author compares two current rival theoretical perspectives on the dissociation of notions. The first is inherited from Aristotle's *Sophistical Refutations* and the second from Aristotle's *Rhetoric*. It is argued that choosing Aristotle's *Rhetoric* as a standpoint offers a better insight into the rationality of common law decisions. The two cases are *Donoghue v. Stevenson* (1932), in which moral liability and legal liability are dissociated, and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963), in which apparent logic and deep logic are distinguished.

Keywords: rhetoric, common law, dissociation of notions, Aristotle, Perelman, rationality

1 Introduction

General argumentation theories have often been developed as from the study of legal or, more specifically, judicial argumentation: the latter inspired Toulmin's Model (Toulmin, 1964, pp. 7-8) and, as Kennedy puts it, "it was the needs of the democratic law courts in Greece that created the discipline of rhetoric as taught and practiced in the West" (Kennedy, 1998, p. 208). Likewise, Perelman and Olbrechts-Tyteca

(1969 [1958]) defined several of their concepts, as from an analysis of legal argumentation. This paper examines one of those concepts, the dissociation of notions, and argues its relevance for the study of judicial argumentation.

It has often been noted that, at some stage of their argumentation, judges reflect on what the law “ought to be” instead of setting out what the law is (Stevens, 1971, Symmons, 1971, Smith & Burns, 1983, Weaver, 1985). It is argued here that, in *Donoghue v. Stevenson* (1932) and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963), Lord Atkin and Lord Delvin, respectively, use the dissociation of notions to depart from the letter of precedents and to uphold what they believe should be the law.

The purpose of this article is not only to show that the concept of the dissociation of notions is descriptively useful for case law analysis. It is also to participate and take a stand in the debates within the theory of argumentation on the standard of argumentative clarity and within the theory of law on rationality. Concerning in particular the dissociation of notions, there are two rival approaches: a normative, rationalistic approach, derived from Aristotle’s *Sophistical Refutations*, which imposes a standard of clarity on the use of the technique, and a rhetorical approach, inherited from Aristotle’s *Rhetoric*, which considers that the standard of clarity obscures the very purpose of the technique.

The paper is divided into two parts. I shall first present and justify the theoretical framework from which I shall study the dissociation of notions. In the process, I shall explain the idea of a necessary link between rationality and rhetoric in common law argumentation. I shall then turn to my case studies.

2 Theoretical framework

The dissociation of notions can be studied from different theoretical perspectives, engaging different epistemological viewpoints. After briefly presenting the concept of dissociation, I will turn to the theoretical debate.

2.1 The concept of dissociation

First of all, as it is argued by Perelman & Olbrechts-Tyteca (1969 [1958], p. 412) the dissociation of notions is an argumentative technique that concerns the premises of argumentation: “The dissociation of notions brings about a more or less profound change in the conceptual data that are used as the basis of argument”. With the use of dissociation, an orator will redefine the standpoint of argumentation by changing the hierarchy of values associated with a given notion.

Secondly, the authors present the need for an orator to dissociate a notion as “always prompted by the desire to remove an incompatibility arising out of the confrontation of one proposition with others, whether one is dealing with norms, facts or truth” (Perelman & Olbrechts-Tyteca, 1969 [1958], p. 413). A telling example of this technique can be found in Barack Obama’s speech¹, when receiving the Noble Peace Prize. He pointed out the ambiguity about receiving the award while being “Commander-in-Chief of the military of a nation in the midst of two wars”. Then, he dissociated between some aspects of war that “do have a role to play in preserving the peace” and some other aspects “that promise(s) human tragedy”. In other words, the notion of war, which is, in the context of a celebration of peace, consensually negatively valued, is dissociated between just and unjust aspects. In doing so, Obama can temporarily solve the incompatibility of being the head of a state engaged in wars while receiving Nobel Peace Prize.

The third and last element I would like to borrow from Perelman and Olbrechts-Tyteca concerns the argumentative effects of the dissociation of notions (1969 [1958], p. 415): “once the concepts have been dissociated and restructured, compromise tends to appear as the inescapable solution”. This reveals an interesting aspect of dissociation: it not only redefines the terms of the discussion, it also supports a representation of reality in accordance with an orator’s argumentative purpose. It is worth stressing on this point because the issue of the persuasiveness of the dissociation of notions is at the heart of a controversy between specialists of argumentation. I will now argue that both positions in this debate are inherited from Aristotle’s work.

1 <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>

2.2 Studying dissociation

I now turn to the different perspectives from which the dissociation of notions can be studied. I will present two theoretical frameworks, both having their roots in Aristotle. Indeed, it can be argued that Aristotle followed two distinct paths in the study of argumentation. The first one is illustrated by the *Sophistical Refutations*. In this work, Aristotle was concerned with the identification of fallacies (i.e. arguments that appear to be valid while not being genuinely valid). In his *Rhetoric*, Aristotle chose a different perspective. Indeed, he defined his work as an inquiry “to determine, in each case, the available means of persuasion” (Rhet., I, 2, 1356a).

Following Kock (2009), I would like to argue that the difference between those two distinct paths for the study of argumentation is better understood if one takes into account the respective fields of the two surveys conducted by Aristotle. In *Sophistical Refutations*, Aristotle was concerned with dialectical discussion, and an ideal of philosophical inquiry, which involved a clarification of the arguers’ standpoints. In his *Rhetoric*, Aristotle was rather concerned with the functioning of institutions: celebrating and revivifying common values (epideictic genre), discussing and deciding policy guidelines (deliberative genre) and implementing the law (forensic genre). Considering this, the evaluation of an argumentative technique has to be balanced with the issue of its suitability for specific institutional goals. In the field of forensic argumentation, an argument offering an efficient justification of a legal decision can be said to be relevant. The challenge is that the efficiency of an argumentative technique cannot necessarily be assessed in terms of validity.

I will now argue that the duality in Aristotle’s work is still relevant to understand the way current argumentative theories study the dissociation of notions. Notably, the dissociation of notions has been studied by Agnes van Rees, in a comprehensive book published in 2009, in the light of “a normative ideal of rational resolution of conflicts of opinion” (van Rees, 2009, p. 93). Such a theoretical standpoint appears to be close to Aristotle’s purpose in his *Sophistical Refutations*. Indeed, the main question Agnes van Rees tries to answer is: “whether and when dissociation is a sound argumentative technique” (van Rees, 2009,

p. 94). In the last section of her book, she gives her conception of a sound dissociation of notions:

As long as the dissociation is put up for discussion and, if not accepted at first hand, is conclusively defended by showing that the distinction not only can be made, but must be made for reasons of greater conceptual clarity, there is no problem. Then dissociation can contribute to creating clarity about standpoints, to generating shared starting-points for presenting and attacking arguments, and to ensuring that the conclusions drawn from the discussion are optimally precise, while at the same time creating a position for the speaker that is rhetorically advantageous. (van Rees, 2009, p. 121)

From this perspective, dissociation is considered as a useful argumentative technique if it aims at creating a “greater conceptual clarity” and as far as it leads to conclusions that are “optimally precise”. I would like to argue that such a normative approach to dissociation (while it may be useful in the context of philosophical debate) is of little help when trying to seize the complexity of argumentation in common law decisions.

In order to understand the limits of a normative approach as far as legal argumentation is concerned, we will have to consider the situation of a judge in higher judicial institutions (for example a judge of the former House of Lords or the Supreme Court that has replaced it). Such a judge must decide cases that have found no resolution in the lower courts. Therefore, two hypotheses emerge: (1) The absence of resolution of cases is due to an incomplete knowledge of the law by the judges of the lower courts or to the limits of their reasoning abilities; (2) The absence of resolution is due to the fact that, in some cases, there are no certainties to be found. Choosing this second hypothesis might require one to abandon the idea that the usefulness of an argumentative technique is related to its capacity to bring more clarity or to lead to conclusions that are optimally precise.

It is the reason why, in this paper, I will rather embrace the theoretical perspective inspired by Aristotle’s *Rhetoric*, that is, an inquiry into the means of persuasion in relation with the functioning of institutions. This was Chaïm Perleman’s view on argumentation.

Throughout his work, Perelman underlined the limits of formal logic when the resolution of practical problems in the institutional sphere is concerned. If we agree that the decisions of judges have to do with the resolution of practical problems, then their decisions may not be entirely justified in logical terms and even in philosophical terms. In this context, I shall argue that the dissociation of notions is one of the tools that a judge can use in order to justify his/her decision while the principle on which it is based cannot be wholly expressed. Following the theoretical approach developed by Danblon (2002, 2012a), I will try to show that the study of such an argumentative technique gives an insight into the rationality of human decisions in circumstances where there are no certainties to be found.

3 Case studies

3.1 *Donoghue v. Stevenson*²: moral liability/ legal liability

The first example I should like to study is an instance of dissociation between moral liability and legal liability in *Donoghue v. Stevenson*. This case was about a woman who having been offered a drink, drank it and fell ill, because there was, allegedly, a decomposed snail in the bottle. The question the judges had to answer was whether in the absence of a contract of sale, the manufacturer owed the consumer a duty to make sure that no elements within their product might be harmful. The House of Lords gave a positive answer to this question. This decision was of great importance because, as a consequence, “the foundations of liability in the law of negligence have shifted from that of a negligent causing of harm to a duty to prevent harm” (J.C. Smith and Peter Burns, 1983).

The dissociation I shall now study comes from Lord Atkin’s judgment. It may be argued that this dissociation originates from a feeling of inconsistency between closely following precedents and the feeling of justice. Indeed, Lord Buckmaster interpreted the precedents as requiring the appeal to be dismissed: “with the exception of *George v. Skivington*, no case directly involving the principle has ever succeeded in the Courts, and were it well known and accepted much of

² *Donoghue v Stevenson* [1932] UKHL 100: <http://www.bailii.org/cases/UKHL/1932/100.html>

the discussion of the earlier cases would have been waste of time". In Lord Atkin's view, a narrow interpretation of precedents was contrary to the sense of justice: "My Lords, I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong".

But, at the same time, Lord Atkin could not reshape the legal scope of the notion of liability and, therefore, had to present his judgment as if it were nothing but an application of a general principle contained in precedents: "At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances".

The problem is that the "general conception of relations" on which Lord Atkin sought to base his judgment is not a notion that can be clearly identified nor demonstrated. This is what, in my opinion, explains the use of the following dissociation:

The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa" is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

In his statement, Lord Atkin dissociates between, on the one hand, an ethical level in which the liability for negligence is "based upon a general public sentiment of moral wrongdoing for which the offender must pay" and, on the other hand, the practical world, in which acts or omissions, even though they may be morally reprehensible, cannot "be treated so as to give right to every person injured by them to demand relief". In other words, by the means of this dissociation, Lord Atkin reasserts the distinction between a conception of liability that has to do with morality and a legal conception of liability. On this ground, Lord Atkin can present a pioneering interpretation of the liability for

negligence (i.e. the “neighbour principle”³) as an implementation of a legal definition of negligence.

However the validity of the distinction between the field of law and the field of ethics would be hard to demonstrate, especially in this case. Indeed, based on the remarks quoted above, it can be claimed that the judge’s decision was in fact guided by an ethical feeling. In order to solve this paradox, I would therefore argue that the dissociation entails a “fiction”. Following Perelman (1976, pp. 63-65), I do not use the term “fiction” as a misrepresentation of reality but as a manifestation of the dilemma faced by the judge: he does not have the ability to modify the law and, at the same time, he feels that strictly following it would lead him to take an unjust decision.

The operation of dissociation in this case could also be understood using the concept of discursive evidence, that is, a justification relying on the speaker’s rhetorical skills. Nevertheless, from a normative perspective (i.e. a research of criteria to assess the validity of arguments), discursive evidence might be perceived as a weak justification. This is notably the opinion of Rettig (1990, p. 67): “discursive forms of evidence are less stable and less credible than either scientific or legal constructions”. But, in our case, discursive evidence has to be related with the need to solve the following problem: the judge’s decision has to be justified while the principles on which it is based cannot be wholly expressed. Following Danblon (2012b), I would argue that such a paradox reveals an inversion of the traditional perspective on rationality (i.e. a conception of rationality according to which *effability*⁴ is a criterion of validity). Now, the point is not that Atkin’s justification is ineffable: the point is rather that it would be useless to express it. Indeed, notions such as “the spirit of the law” or “the principles of common law” would appear as empty concepts if they were just mentioned and not experienced. I would therefore argue that the actual criterion of the rationality of Atkin’s decision is his ability to dissociate between the letter and the spirit of

3 Later in his judgement, Lord Atkin gives a legal definition of liability by distinguishing it from the Christian duty to love your neighbour “The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer’s question ‘Who is my neighbour?’ receives a restricted reply.”

4 According to this concept, any rational idea must be “effable” (i.e. expressible) in at least one proposition in natural language. See Dominicy (1990, pp. 751-753).

the law. In this sense, the use of the dissociation of notions appears to be a relevant way to “justify” a decision relying on ethical evidence.

3.2 *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁵: apparent logic/ deep logic

The second case of dissociation I shall now study concerns the notion of logic in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. In this case, the Appellants, advertising agents, questioned the Respondents, merchant bankers, about the creditworthiness of another firm (Easipower Limited) they wanted to do business with. The bankers assured the Appellants of Easipower’s creditworthiness. Relying on this information, the Appellants started doing business with Easipower but this firm went bankrupt. The problem the judges had to answer was whether the bank could be held responsible for the financial loss related to the information they had given.

I shall here focus on one of the arguments for dismissing the appeal put forward by Mr Foster, counsel for the Respondents, and its refutation by Lord Delvin. According to Mr Foster, a plaintiff cannot recover from financial loss caused by a negligent misstatement unless he can show that the maker of the statement was under a special duty to him to be careful. This special duty should, according to Mr Foster, fall under one of three categories: it must be contractual; it must be fiduciary; or it must arise from a relationship of proximity and the financial loss must flow from physical damage done to the person or the property of the plaintiff. Lord Delvin, in his judgment, rejects the idea that there should be an exhaustive list of situations offering a ground for legal action. His point relies on the dissociation between an “apparent logic” that may lead to an exhaustive definition of the causes for action and a “deep logic”, understood as the foundation of the system of common law.

I shall explain why I think that the law, if settled as Mr. Foster says it is, would be defective. As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical. The common

⁵ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4: <http://www.bailii.org/uk/cases/UKHL/1963/4.html>

law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it.

In the first part of his statement, Lord Devlin accuses Mr. Foster of practicing illogical reasoning. His accusation is supported by a dissociation of the notion of logic. This notion is separated into apparent logic (logic “on the surface”) and deep logic (the logic at the roots of the system). This dissociation relies on an underlying opposition between the expert, who strictly follows the letter of precedents, and the wise man, who can understand the spirit of the common law.

It is, however, impossible to demonstrate that there is a deep logic at the root of the system. The idea is therefore stated with the use of dissociation that creates discursive evidence. As discussed above, I would not define this notion as a mean to persuade in the absence of a more valid argument. I would rather argue that the persuasiveness of dissociation could be studied as an indication of the complementarity between rationality and rhetoric, which is required by the practice of common law. Indeed, it can be argued that the need to dissociate between an apparent logic and a deep logic originates in the feeling by the judge that a fair decision should depart from a narrow interpretation of the law.

In other words, the use of dissociation may be seen as a way for the judge to turn an ethical feeling into a legal justification. This is, in my view, particularly clear in the following extract: “As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical”. By dissociating between an apparent and a deep logic the judge can interpret the law as if its fairness was a condition of its legal validity.

The two cases of dissociations we have studied have in common that they are not merely used to identify the more precise meaning of a notion. Indeed, the use of dissociations seems to be related to a need to justify an interpretation that is based on what could be called the spirit of the common law as opposed to narrower interpretations of

precedents. But since the spirit of the law is a confused notion⁶ (i.e. a context-dependent notion that changes depending on socio-historical developments), the rhetorical efficiency of the justification becomes a criterion of its relevance. With this in mind, I would like to conclude on the question of the rationality of common law judgement.

4 Conclusion

The question of the rationality of common law decision has been at the heart of a debate between great theorists and practitioners of common law such as Thomas Hobbes, Edward Coke and Matthew Hale.

As explained by Harold Berman (1994) in his comprehensive article on the origins of historical jurisprudence, this debate has to be related to the paradoxical identity of common law that can be summed up as an unbroken continuity despite change. Indeed, the problem is to justify the adaptation of common law to continuously changing historical and social contexts while the solution of new cases is supposed to be found in more or less remote precedents. Thomas Hobbes gave a radical answer to this theoretical problem stating that justice does not originate in reason but in the will of the sovereign. For their part, Edward Coke and, later, Matthew Hale, addressed the issue of the identity of common law by questioning the notion of reason. Hale, in his *Reflections on Hobbes' Dialogue of the Law*, distinguishes between two sides of this notion: on the one side, the faculty of reason, which refers to an ability, common to all men, to connect cause and effect, to understand phenomena and, on the other side, artificial reason, which is the result of the application of the faculty of reason to a particular domain. This artificial reason can be trained and improved by habituating, exercising and accustoming to a particular practice⁷. In making such a distinction, Hale can justify his claim that common law judgements may be grounded on rationality (and, therefore, not the

6 See Perelman (1980). The Use and Abuse of Confused Notions in *Justice, Law and Argument*.

7 "And upon all this that have been said it appears that men are not born common lawyers, neither can the bare exercise of the faculty of reason give a man a sufficient knowledge of it, but it must be gained by the habituating and accustoming and exercising that faculty by reading, study and observation to give a man a complete knowledge thereof", Matthew Hall, quoted by Berman (1994).

product of the sole will of the judge) while not being fully understood by common man.

This also explains, from my point of view, that such judgements must be presented using rhetorical resources to be seen as acceptable. This is the necessary complementarity I wanted to show between rationality and rhetorical resources required by the practice of law.

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Victor Ferry is a Ph.D. student in rhetoric and argumentation at the Université Libre de Bruxelles (ULB) and at the Fonds National de la Recherche Scientifique (F.R.S- FNRS). He is a permanent member of the Groupe de recherche en Rhétorique et en Argumentation Linguistique (GRAL) directed by Emmanuelle Danblon. He has written several papers on the use of rhetorical proofs in historical narratives, political speeches and forensic argumentation. Address: Campus du Solbosch, CP175, avenue F.D. Roosevelt 50, 1050 Bruxelles. Email: vferry@ulb.ac.be.

Schools and Race in the Language of the Law: Precision or Meaningless Jargon?

Anne Richardson Oakes

The decision of the United States Supreme Court in *Brown v. Board of Education* inaugurated the desegregation of the nation's public schools, but the rationale was not clear and the Court's interpretation of what the decision required has changed over time. Most recently the Court has refused to engage with the issue of so-called "resegregation," so that the divergence between legal language and that of lived experience on matters of schools and race has become more pronounced. This paper explores that divergence in the context of the Court's affirmative action jurisprudence and considers what might be the consequences when the language of the law and the language of the people whom it serves fail to coincide.

Keywords: equal protection, anti-subordination, colorblind constitution, post-racialism

1 Introduction

In the story of race in the United States, the decision of the Supreme Court in *Brown v. Board of Education*¹ has iconic status but a linguistic dilemma lies at its heart. The ruling that heralded the desegregation of the nation's public schools now bears responsibility for the apparent inability of the Constitution to respond to the reemergence of schools that are racially identifiable. Fifty years after *Brown*, the Civil Rights Project of Harvard University (Orfield & Lee, 200, pp. 21-20) reports that growing numbers of black, Latino and Asian-American students

¹ *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

attend “intensely segregated” schools, or those where students of color make up more than 90 percent of the student body, but the Supreme Court will not recognize “resegregation” as a constitutional problem and school boards that use race for integrative purposes risk a federal court ruling that they themselves commit acts of unconstitutional racism.² Racial discrimination, it seems, has now been redefined. Where once it meant segregation, now it means integration (Adams, 2011, p. 883).

This paper considers a tension between the language of classification and the language of racial subordination in U.S. Supreme Court equal protection jurisprudence by reference to three themes discussed in three main sections. In the first section, I examine the Court’s latest response to attempts to achieve a racially diverse student population in the context of the opacity of a *Brown* mandate which used the language of discrimination but did not make clear whether this was always objectionable. In Section II, I consider the view that the Court’s interpretations of the requirements of equal protection reflect models of racial justice or fairness which must resonate with those of contemporary popular intuitions. From this perspective, I suggest, the current Court’s preference for the language of classification reflects the view that in twenty-first century America race is no longer a sufficiently significant factor to justify a departure from a model of formal neutrality requiring equal treatment for all. In the final section, I consider the extent to which the language of post-racialism now echoes the language of the Court and consider what might be the implications for those who seek to argue that for many Americans today it is still the case that matters of race and racial discrimination can and should be conceptualized in anti-subordination terms.

2 Discrimination: Subordination or Classification

“In the field of public education the doctrine of ‘separate but equal’ has no place.”³ So asserted the *Brown* court and the conclusion that separate educational facilities deprived the black plaintiffs of the constitutional guarantee of the equal protection of the law was clear.

² *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701 (2007).

³ *Brown I*, 347 U.S.483, 495 (1954).

The rationale, however, was not. To support its ruling, the Court gave three reasons. A dual system of education which separated children on the grounds of race violated the Equal Protection Clause of the Fourteenth Amendment because: a) state-mandated separation of black from white children offends the Constitution *per se*;⁴ b) governmental discrimination by race causes psychological damage to black children⁵ and c) governmental discrimination by race deprives black children of the educational benefits of mixing with white children.⁶ What the Court did not make clear was the mischief to which the constitutional guarantee is addressed. Specifically, it did not spell out whether the Constitution prohibits race-based classifications *per se* or merely those classifications that are invidious because they are mechanisms of racial subordination.

In the context of *Brown* itself, it did not need to do so;⁷ the separate provision of education required by Southern states in the first half of the twentieth century was part of a caste system which assigned subordinate status to African-Americans on the basis of their race or color. (Vann Woodward, 2001). From this point of view a dual system of education was necessarily invidious. For *Brown* supporters, this hardly needed stating (Ryan, 2007, p. 152). Racial equality could not be accomplished whilst the races were separated, so to prohibit discrimination was to promote integration (Wilkinson, 1995, p. 994). As Thurgood Marshall later judicially explained, “unless our children

4 *Id.* “Separate educational facilities are inherently unequal.”

5 *Id.* “To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

6 *Id.* (citing *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) regarding the “intangible” benefits for a law student of mixing with white students, i.e. “his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession”).

7 Technically there were four cases which were consolidated on appeal to the Supreme Court: *Gebhart v. Belton*, 87 A.2d. 862 (Del. Ch. 1952) (on appeal from Delaware); *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951) (on appeal from Kansas); *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951) (on appeal from South Carolina); and *Davis v. School Bd. of Prince Edward County*, 103 F. Supp. 337 (E.D. Va. 1952) (on appeal from Virginia).

Following the Supreme Court’s ruling that the provision of ‘separate but equal’ education was a violation of the Fourteenth Amendment, the case was adjourned for the Court to hear argument concerning the remedy. The remedial ruling came one year later in *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (hereinafter *Brown II*). In this text, references to ‘*Brown*’ should be taken as references to both *Brown I* and *Brown II*.

begin to learn together, there is little hope that our people will ever learn to live together.”⁸

After *Brown*, wrote civil rights attorney Robert L. Carter, (2005; 1993, p. 885), it seemed certain that the civil rights fight had been won but now he fears his confidence may have been misplaced. The latent ambiguity in the reasoning sustains a different court with a new vision and a different language for the relationship between race and social justice and constitutes a fault line in the narrative of racial progress that was the promise of *Brown*. What the Constitution requires, the court now claims, is not integration but a society free from official and intentional classification on the grounds of race.

The problem was apparent in the conceptualization of the *Brown* remedy. Twelve months after the Court handed down its decision, *Brown II*⁹ directed federal courts to supervise the implementation of the remedial process but was deliberately vague as to how this was to be done, and gave little guidance as to how judicial discretion was to be exercised. Significantly, the words “segregation,” “desegregation” and “integration” were not used. Instead, the formulations of the Court underwent a significant shift. What was at stake, said the Chief Justice, was “the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis.”¹⁰ The earlier ruling, he claimed, asserted “the fundamental principle that racial discrimination in public education is unconstitutional.” All legal provisions “requiring or permitting such discrimination must yield to this principle.”¹¹

For more than ten years, Southern states, in opposition, relied upon these words to offer black students facially neutral “freedom of choice” plans producing only minimal changes in the racial composition of the public school population until 1968 when the U.S. Supreme Court in effect acknowledged that “desegregation” required race-conscious integrative action.¹²

8 *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

9 *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

10 *Brown II*, 349 U.S. at 300.

11 *Id.* at 298.

12 See *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (noting that 10 years after *Brown*, a “freedom of choice” policy had made virtually no changes to the racial composition

Nearly sixty years later, however, a Supreme Court of a very different political persuasion relies upon the same words to justify its commitment to a symmetrical “color-blind constitution” which protects both white and blacks from racial classification.¹³ The effect is to separate equal protection jurisprudence from its contextual link with racial subordination and to define the current attempts of school districts to achieve an integrated student population as the pursuit of racial balance for its own sake, tantamount in Justice Thomas’s terms to mere “classroom aesthetics” or the desire to have a classroom that looks a particular way.¹⁴

In *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007), the Court considered challenges to the admissions policies of two school districts, both of which used race to allocate places in over-subscribed schools.¹⁵ The Seattle district had never operated legally segregated schools or been subject to court-ordered desegregation; the Jefferson County, Kentucky district had been subject to a federal court desegregation decree but this was dissolved in 2000. The Seattle plan classified children as white or nonwhite, and used the racial classifications as a “tiebreaker;” the Louisville plan classified students as black or “other” in order to make certain elementary school assignments and to determine transfer requests.¹⁶ Both plans were “racial balance” plans, i.e. they aimed to produce school populations that were reflective of the racial composition of the school district as a whole. Both school districts claimed that their goal was to achieve the educational and social benefits of racially integrated schools but the Court was unimpressed.

Applying a strict scrutiny standard¹⁷ which he said was “well-established when the government distributes burdens or benefits on the

of the schools of New Kent County, VA and quoting *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 234(1964): “[t]he time for mere ‘deliberate speed’ has run out”).

13 *Parents Involved in Cmty Sch. v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

14 *Id.* at 750 n.3 (Thomas J. concurring).

15 *Parents Involved in Cmty Sch.*, 551 U.S. 701(2007).

16 *Id.* at 710-18.

17 Strict scrutiny is part of a hierarchy of standards employed by federal courts to balance governmental goals against constitutional rights or principles. It requires the asserted governmental interest to be “compelling” and means which are “narrowly tailored” or “the least restrictive” to achieve it. It is the most stringent level of review (the others being the lower

basis of individual racial classifications,” Chief Justice Roberts ruled that the Court’s precedents recognized only two state goals as sufficiently compelling in this context: reversing the effects of prior de jure discrimination and the pursuit of diversity in the context of higher education.¹⁸ The plans in question, being insufficiently narrowly tailored to target the claimed educational and social benefits, pursued racial balance for its own sake. This might be a “worthy goal,” but did not “mean the school authorities were free to discriminate on the basis of race to achieve it.” The Equal Protection Clause of the Fourteenth Amendment, said the Chief Justice, “protect[s] *persons*, not *groups*;” “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁹

The decision split the court 5-4. For Justice Breyer in dissent, the plurality had distorted precedent, misapplied the relevant constitutional principles, and announced legal rules that would obstruct efforts by state and local governments to deal effectively with the growing resegregation of the nation’s public schools. The effect, he said, was to undermine “*Brown’s* promise of integrated primary and secondary education that local communities have sought to make a reality.” This could “not be justified in the name of the Equal Protection Clause.”²⁰

3 The Search for Underlying Principles

Debates concerning what is, or should be, the relationship between the language of the law and ordinary language generally assume the greater precision of the law. For James Boyd White (1973, pp. 6-7), legal language is “a linguistically separate dialect, with a peculiar vocabulary and peculiar constructions.” “Inherited” and “traditional,” it is a “technical language” with “precise terms” for expressing “precise ideas” so that when ordinary language is “vague, ambiguous and loose,” the lawyer has a “finer, keener, sharper instrument.” (Eisele, 1976, p. 367). Whether that is so on matters of race is a theme of this

standards of rational basis review and exacting or intermediate scrutiny), and its adoption is nearly always fatal.

18 *Parents Involved in Cmty Sch.* 551 U.S. at 720-725.

19 *Id.* at 743-748 (emphasis in the original).

20 *Id.* at 803 (Breyer J. dissenting).

paper and a matter that I consider further below, but it is, I think, incontrovertible that when the lawyer's precision becomes the layperson's meaningless jargon the result can be mutual frustration and alienation. As Justice Breyer (2008, p. 139) has remarked, "the judicial system [...] floats on a sea of public opinion" and the Court has always understood that its role as the guardian of the nation's constitutional rights depends upon its ability to explain itself in a way which can capture "the community consensus that defines [its] sphere of competence." It is also true, as Professor Deutsch (1968, p. 259) has observed, that "the general public cares not only about the reasoning of opinions but about the results." From this perspective, ambiguities in the way in which the Court conceptualizes its explanations are problematic only to the extent that they enable the Court to avoid engagement with the material issues that represent the social reality of people's lives.

According to his biographer (Schwartz, 1983, p. 97), Chief Justice Warren had been determined that the opinions he had authored for the Brown Court should be "short [and] readable by the lay public" but as James Boyd White argues (2011, p. 381), and this paper now considers:

[t]he law is a not an abstract system or scheme of rules, as we often speak of it, but an inherently unstable structure of thought and expression. It is built upon a distinct set of dynamic and dialogic tensions, which include: tensions between ordinary language and legal language; between legal language and the specialized discourses of other fields; between language itself and the mute world that lies beneath it.

From this perspective, the language that the court uses to conceptualize equal protection issues is both reflective of and contributive to a larger conversation concerning the meaning of racial equality and the significance, if any, of race and racial identity in political and social life. If the court has explained what constitutes the nation's most iconic decision in two distinct ways the question now must be: which best resonates with popular intuitions on these matters in the age of Obama? As Professor Fiss (1976, pp. 107-08) has pointed out, the Equal Protection requirement that no state shall "deny to any

person within its jurisdiction the equal protection of the laws,”²¹ until mediated by an understanding of what equality might mean, is simply text without meaning.

With his Seattle and Kentucky formulations, Chief Justice Roberts²² tied equal protection jurisprudence to a model of equal treatment and a “color-blind” Constitution with guarantees that are symmetrical; the clause protects whites from affirmative action policies that favor blacks just as much as it protects blacks from state policies that deny to them the privileges that are accorded to whites. The language is that of classification and the premise is that of formal equality defined in negative terms, i.e. equality means equal opportunity, and the constitutional promise which “ranks among the most deeply entrenched tenets of American political ideology” (Rosenfeld, 1986, p. 1687), is considered secured when the legal obstacles that prevent citizens from accomplishing their goals are removed. This is a model which sees equality in terms of neutrality or even-handedness between competing issues. In Douglas Rae’s (1981, pp. 65-8) terminology it is “means-regarding” i.e. concerned with mechanisms: “[t]wo persons, j and k, have equal opportunities for X if each has the same instruments for attaining X,” as opposed to “prospect-regarding,” which is concerned with outcomes: “[t]wo persons, j and k, have equal opportunities for X if each has the same probability of attaining X.” It uses metaphors of the playing field, fair play and a uniform set of rules to ground its opposition to affirmative action but, as Professor Rae (1981, pp. 65-8) suggests, it is concern with prospects that gives the opportunity concept an emotional driving force and, in a situation where success depends upon talents, characteristics or circumstances which are unequally distributed, the application of common standards to all will operate to “systematize and legitimate unequal prospects of success.”²³ Nevertheless, as Professor Rae (1981, pp. 65-8) also points out, it is the means-regarding model, with its rhetoric of neutrality, that resonates both with the practical

21 *U.S. Constitution, Amendment 14, § 1.*

22 *Parents Involved in Cmty Sch. v. Seattle School Dist. No. 1, 551 U.S. 701 (2007).*

23 “ [The] power of equal opportunity [...] lies [...] in the wish and hope that the children of yesterday’s losers may become tomorrow’s winners, or, more exactly, in the belief that their birth-date prospects may become equal to those of other infants who are luckier in their choice of parents.”

imperatives of a competitive market society and with the individualism of an Enlightenment tradition which prioritizes the value of each individual in abstract terms.

This is also a rhetoric for those who are critical of the “activism” of the Warren Court because they seek to refute the view that judicial adjudication is simply politics by other means. In the aftermath of *Brown*, ninety-six U.S. congressmen from eleven southern states issued a “Southern Manifesto,” describing *Brown* as an exercise of “naked judicial power” by which the Court had substituted its “personal political and social ideas” in place of “the established law of the land.”²⁴ The controversy prompted Professor Herbert Wechsler’s (1959, pp. 15-34) now well-known paper calling for a principled explanation for the *Brown* decision which he required to be “neutral” in the sense that it should not depend upon the identity of the individuals involved. In order to avoid “the *ad hoc* in politics, with principle reduced to a manipulative tool” he claimed “[...] the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”²⁵ For Professor Wechsler, the constitutional issue presented in *Brown* was not discrimination but rather of freedom of association, with the unpalatable result that “if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant.”

Whilst the explanation that he sought eluded him, there were others²⁶ who responded to his call (Friedman, 1997, pp. 507-520). The anti-subordination principle which was the result is premised on the view that equality has a social dimension and is as much a matter of status as it is of treatment. In Rawlsian terms, (Rawls, 1971, p. 73) if the concept of equality of opportunity is to be fair, then “those with

24 *Southern Manifesto*, 102 Cong. Rec. 4460 (1956).

25 “To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?”

26 Notably Louis H. Pollack in a paper entitled *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

similar abilities and skills should have similar life chances [...] irrespective of the income class into which they are born.” What is required is not simply the elimination of the legal obstacles, such as racial classifications which constitute the formal barriers to equal opportunity but also that differences which are directly attributable to inequalities in social conditions be addressed. On this view, the target of the Equal Protection Clause would not be classifications per se but rather those laws or practices which perpetuate the subordination of a specially disadvantaged group.

This is an interpretation that speaks to the view expressed by Justice Stone in *Carolene Products*²⁷ that the focus of judicial inquiry should be those “situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities.” It is a “neutral” principle, in Professor Wechsler’s terms, in the sense that it is capable of transcending the immediate interests of the parties to the case (although he himself did not recognize it as such) (Friedman, 1997, pp. 515-16) and, as Justice Breyer’s dissent indicates, it could have legitimated the integrative attempts of the Seattle and Kentucky school boards. In Professor Fiss’ terms, (1976, p. 157) however, this model requires a theory of “status harm,” which will show how the challenged practice “aggravates the subordinate status” of the group. It is in this respect that we might expect constitutional adjudication to become a fact-finding exercise and a matter of expertise; on a race matter the Court might consider it helpful, or indeed necessary, to take advice concerning the implications of racial identity or groupings for the formation and implementation of social policy goals and it is here that we might expect to see the Court disclose the social vision that is to ground its moral compass.

It is true that the use of the social science amicus curiae brief to inform the Court on social and economic matters has had some success in equal protection cases. This kind of brief was first filed by future Supreme Court Justice Louis Brandeis in the case of *Muller v. Oregon* (1908).²⁸ The brief containing only two pages of legal argument was accompanied by approximately 100 pages of sociological and

27 *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4. (1938).

28 *Muller v. Oregon*, 208 U.S. 412 (1908).

economic data intended to convince the Court of the link between long working hours and adverse effects on women's health, and thereby persuade the Justices to uphold the constitutionality of Oregon legislation restricting the number of working hours for women. In *Brown* itself, a social science amicus curiae brief replicating the style and testifying to the adverse psychological effects of segregation upon African-American children²⁹ apparently hit its mark when Chief Justice Warren's opinion for the Court referred in a footnote to some of the research, including the work of Professor Kenneth Clark (Clark, 1950, p. 259) whose so-called "doll studies," carried out with his wife and fellow psychologist Mamie, claimed that black children in a segregated school system suffered from a sense of self-rejection and loss of self-worth.³⁰ Since then the methodological assumptions of the *Brown* research have been challenged and the effect of the footnote much debated (Brooks, 2005, p. 70; Kluger, 1975, pp. 317-18) while the shifting focus of the Court's equal protection jurisprudence has itself made new demands which social science has struggled to satisfy (Oakes, 2008; Oakes, 2010).

Most seriously, however, the fact that the practice has become routine on both sides of the adversarial divide has generated a perception on the part of some members of the Court that the science itself is politicized to such an extent that its value has become undermined. (Oakes, 2008, pp.91-2; Frankenberg & Garces, 2008). In *Parents Involved* (2007) out of a total of 64 amicus curiae briefs, 27 made reference to or relied upon social science research (Linn & Welner, 2007). Of these the majority, including one filed by 553 social scientists, supported the school respondents with research documenting the educational benefits of racial diversity and the harms of racially isolated minority schools (Frankenberg & Garces, 2008).³¹ In the plurality opinion, the evidence was more or less completely ignored³² but in the dissent of Justice Breyer and the concurrence of Justice

29 Brief for Appellants at 5, *Oliver Brown, et al., Appellants, v. Bd. of Educ. of Topeka, KS et al.*, 347 U.S. 483(1954) (No. 1).

30 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n.11 (1954)(*Brown I*).

31 *Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, Parents Involved in Cmty. Schs.*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079.

32 Roberts C.J., Scalia and Alito JJ.. Thomas J. filed a concurring opinion. Kennedy J. filed opinion, concurring in part and concurring in the judgment.

Thomas we see two very different views of the extent to which questions of racial justice can be conceptualized in empirical terms. For Justice Breyer, the Louisville and Seattle plans needed to be seen in a context of attempts to tackle racial justice conceptualized in terms of “segregation”, “integration” and then “resegregation.” From this point of view, what he termed the “educational element” (“overcoming the adverse educational effects produced by and associated with highly segregated schools”) and the “democratic element” (“producing an educational environment that reflects the ‘pluralistic society’ in which our children will live”) were not only intended to “improve the conditions of all schools for all students, no matter the color of their skin,” but were integral to the “historical and remedial” attempt to overcome “the adverse educational effects produced by, and associated with, highly segregated schools.” Citing to the empirical evidence of researchers in support of the educational and democratic enhancements of integrated schooling, Justice Breyer noted that there were competing views but concluded that the evidence was sufficiently weighty (“well established”, “firmly established” and “strong”) to permit a school board to make its own evaluative judgments without interference from the Court.³³

For Justice Thomas, however, the absence of consensus on the part of the researchers was fatal. Noting that the claimed educational and democratic benefits of the race-conscious policies were not only not substantiated but in some cases positively controverted by the evidence, he reprised the oppositional stance that he had demonstrated in the precedent case concerning the admissions policies of the University of Michigan Law School.³⁴ The school boards, he said, were engaged in “classroom racial engineering.” This might be a fashionable solution to a particular social problem but constitutional adjudication could not depend upon “the mercy of elected government officials evaluating the evanescent views of a handful of social scientists.” “[T]he Constitution”, he claimed, “enshrines principles independent of social theories” and those involving race were particularly suspect: “[if] our

³³ *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 551 U.S. 701, 838-40 (2007).*

³⁴ *Grutter v. Bollinger, 539 U.S. 306 (2003).*

history has taught us anything, it has taught us to beware of elites bearing racial theories.”³⁵

Ostensibly an argument about social science, the issue that divided the Seattle plurality and the dissent and specifically Justices Thomas and Breyer is, I suggest, really about race, and whether the Court uses the language of subordination or the language of classification tells us something about its members’ attitude towards the relationship between race and equality in the twenty-first century. This is important because as I suggested earlier, the relationship between constitutional adjudication and popular perceptions of justice should not be seen in passive terms. The Court may like to claim that it acts merely as a conduit for the political values that the Constitution enshrines³⁶ but, as Professor Fiss (1976, pp. 173-74) suggests, the relationship is more correctly seen as reflexive and to that extent more complicated. In the context of equal protection, the Constitution “provides the Court with a textual platform from which it can make pronouncements as to the meaning of equality”. In so doing “it shapes the ideal.” The pronouncements of the Justices “are viewed as authoritative, part of the ‘law’”, and to that extent their role goes beyond the reflective; “[l]aw is a determinant, not just an instrument, of equality.”(Fiss, 1976, pp.173-74).

4 The Significance of Race in a Post-Racial Era: Symbolism versus Social Facticity

Professor Fiss’s article (1976, pp.147-51) was written in 1976 and reflected a specific view of the meaning of race and its social significance at that time. The conceptualization of race in terms of subordination requiring compensation corresponded with social fact because, as he claimed, blacks represented a natural class or social grouping which in material terms was “very badly off.”

35 *Parents Involved in Cmty Schs.*, 551 U.S. 701, 780-81(Thomas J. concurring).

36 There are many examples but *see eg. Grutter v. Bollinger* 539 U.S. 306, 858 (2003) (O’Connor J.): “The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality’s approach, as measured against the Constitution’s objectives.”

There are natural classes, or social groups, in American society and blacks are such a group. Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives.[...] [...] In a sense they are America's perpetual underclass.

Thirty-five years later, however, the emergence of an African-American professional and middle class, which affirmative action programs have done so much to bring about, suggests that the connection between race and subordination can no longer be relied upon (Adams, 2011 p.882 n.25). More fundamentally, the foundational assumption, that the concept of race has a meaning that is independent of context, must itself now be called into question.

In an influential lecture, Professor Stuart Hall (1996) has reminded us that although "one of those major concepts which organize the great classificatory systems of difference which operate in human society,"³⁷ in the absence of any sustainable biological or genetic account, race must be regarded as a "floating signifier." By this he means that it operates like language; it is a discursive construct, part of the "systems and concepts of a culture," of its "making meaning practices" which because they are culturally determined can never be "finally or trans-historically fixed." Like all signifiers, that of race will be subject to what he describes as

the constant process of redefinition and appropriation, to the losing of old meanings, and the appropriation and collection on contracting new ones, to the endless process of being constantly re-signified, made to mean something different in different cultures, in different historical formations, at different moments of time.³⁸

The election in 2008 of a black President is said to have inaugurated a new era - a post-racial era - in which the association of blackness with victim status no longer pertains and the role of race as

³⁷ See transcript available at www.mediaed.org/wp/transcripts).

³⁸ *Id.*

an organizing social force has become much more nuanced so that the language of subordination is no longer required. In this new era, as Barack Obama (2004) proclaimed, “[t]here’s not a black America and white America and Latino America and Asian America; there’s the United States of America.” If this is the language of post-racialism, it is remarkably close to that of the Roberts Court. In *Parents Involved* the Chief Justice cited with approval the words of Justice O’Connor : “[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals.”³⁹ Recognition by the Court of racial balancing or proportionality as constitutionally acceptable mechanisms of formulating and implementing social policy goals, he continued, “would ‘effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decision-making such irrelevant factors as a human being’s race’ will never be achieved.”⁴⁰ With these formulations, the message of the Roberts court is only thinly veiled: the time for remedying past social ills, if not yet completely over, soon will be and the nation and the Court must move on. To date only Justice Scalia has been direct on this point:

[T]here can be no such thing as either a creditor or a debtor race [...] To pursue the concept of racial entitlement – even for the most admirable and benign of purposes, is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred. In the eyes of government, we are just one race here. It is American.⁴¹

The *Grutter* court was more circumspect⁴² but the negative view of the relevance of race-based remedies, and the centrality of race as an organizing principle of social justice, which underpins them, clearly

39 *Parents Involved in Cmty Schs v. Seattle School Dist. No. 1*, 551 U.S. 701,730 (2007) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor J. dissenting)).
40 *Id.* (internal citations omitted).

41 *Adarand v. Constructors, Inc. v. Pena*, 515 U.S. 200, 438 (1995) (Scalia J. concurring in part and concurring in the judgment).

42 *Grutter v Bollinger*, 539 U.S. 306, 343 (2003)(O’Connor J.: “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interests approved today”).

now resonates with state voters whose support, in Michigan, of a 2006 election ballot initiative banning the consideration of race in higher education, effectively neutralized the impact of the Court's decision. (Beydoun, 2007, p. 510).⁴³

President Obama, the nation's first African American president, has faced criticism for his refusal to use the language of race (Cho, 2009, p.1604 n.35).⁴⁴ When the reality is that of white racial dominance, "color-blindness," it is said, (López, 2010, p. 1061; Bonilla-Silva, 2003, p.28), becomes a legitimating ideology. Post-racialism is dangerous not just because "it obscures the centrality of race and racism in society," and "serves to reinstate an unchallenged white normativity" (Cho, 2009, pp. 1592-93). More problematic for those who challenge an unqualified narrative of racial progress is the issue of consensus; post-racialism "more effectively achieves what the Racial Backlash movement sought to do over two decades ago – forge a national consensus around the retreat from race-based remedies on the basis that the racial eras of the past have been and should be transcended." (Cho, 2009, pp. 1592-93). If this is so, and the language of legal conservatism is indistinguishable from that of post-racialism, what should we say about the current Court's moral vision? Is the Court colluding in a denial of a legacy of Jim Crow which continues to make race a social reality in the United States or, in the same way as the jurisprudence of Earl Warren's court resonated with a racialized experience whose time for recognition had come, has it simply captured and given legal voice to the differently but now equally socially situated intuitions of ordinary people? And if the latter, how do we respond to Justice Breyer and those who use the language and principles of anti-subordination to advance the view that race and racism still function as key obstacles to equality in contemporary society?

43 A similar initiative had succeeded in California in 1996 (Proposition 209) and in Washington State in 1998 (Proposition I-209). In 2008, however, Connerly's "Super Tuesday for Equal Rights" campaign, a "nationwide thrust" to dismantle affirmative action programs in five states collapsed when proposals failed to make it onto the ballot in three of those states, and Colorado voters rejected Amendment 46 by a narrow margin, leaving Nebraska the only state to approve the proposal. *See* Naomi Zeveloff, *Colo. Independent* (Aug.11 2008).

44 E.g. the criticism that followed President Obama's renunciation of his former pastor, Reverend Jeremiah Wright.

In a recent analysis of the role of race in the criminal justice system, critical race theorist Ian Haney López (2010, pp. 1064-69) has commented on a lack of receptivity on the part of white Americans to empirical evidence of racial injustice. He concludes that “partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral so that the inequalities that they are prepared to recognize are regarded not so much a function of race but “a legitimate feature of social reality.” He calls for “a countervailing narrative about race as a form of social stratification [...] to explain how racism actually functions in today's society.” He faces the problem that to an audience intuitively committed to the standpoint that society is constructed upon principles that are fundamentally fair, no kind of explanation or factual evidence is likely to be persuasive.

The problem for the Court is similar. Whilst a view of social reality is a necessary component of constitutional adjudication, as Professor Dworkin (1977, pp. 20-31) has suggested, the importance of empirical evidence is always constrained by the underlying normative assumptions. In *Parents Involved*, Justice Breyer called on the empirical findings of social science research in effect to substantiate the continuing effects of race in the context of education but, if Professor López is correct, then this evidence will do little to overcome a basic intuition that the concepts of racism and racial injustice have outlived their usefulness in 21st century America. New types of research into “implicit” or unconscious bias will face the same problem (Greenwald & Krieger, 2006, p. 951). “Rightly or wrongly,” observes Barack Obama, (2006, p. 247) “white guilt has largely exhausted itself in America,” and the automatic association of race with victim status now offends liberals and conservatives alike.

As I noted earlier, the preference for formal neutrality resonates strongly with values that are dear to the national psyche. When the popular assumption is that race is no longer an issue that needs to displace the default position of formal neutrality, then the Court’s reconceptualization of equal protection jurisprudence represents a recognition of the need to reconnect with its wider audience which was

arguably the message of its former Chief Justice. Justice Thomas⁴⁵ has dismissed the pursuit of racial diversity as the “faddish slogan of the cognoscenti.” This might translate into the vernacular as “so much meaningless jargon”. The Court is vulnerable to the criticism that its ability to avoid the conclusions of inconvenient empirical research is tantamount to disingenuity but if popular acceptance is the key to its legitimacy, the Court must be able to justify its decisions in language that not only people can understand but also in a way that is responsive to popular standards.

There is however, a deeper problem for those who seek to persuade the justices to confirm a reality to the connection between race and the opening of the doors of opportunity. Professor López (2010, p. 1069) has commented that minorities experience racism but “struggle to explain cogently how race continues to function so deleteriously in American life.” If an African-American is now the most powerful man in the world and race is no longer to be an automatic badge of victimhood, what then can we say about what it might mean and how can we conceptualize a connection between race and racialized inequalities in a way of which the Court can take note?

In February 2011, a three-judge panel of the Fifth Circuit upheld the affirmative action plan used by the University of Texas for its undergraduate admissions. *Fisher v. Texas*⁴⁶ is the first federal litigation challenging the use of race in university admissions since the Supreme Court’s 2003 decision upholding the University of Michigan Law School’s race-conscious admissions process in *Grutter v. Bollinger*.⁴⁷ The panel found that the plan was modeled on that upheld by the Supreme Court in *Grutter*, used race as only one factor, looked at applications as a whole in order to achieve the educational benefits of racial diversity and for these reasons satisfied the requirements of strict scrutiny. In a lengthy special concurrence, Circuit Judge Emilio

45 *Grutter v. Bollinger*, 539 U.S. 306,350 (2003) (Thomas J. dissenting).

46 *Fisher v. University of Texas*, No. 09-50822 (5th Cir. Feb.11 2011). On 23 February 2012, the U.S. Supreme Court agreed to review this decision which is now widely predicted to be reversed. The case will be heard in the next Term, starting 1 October 2012.

47 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Garza,⁴⁸ agreeing with the result though not with its reasoning, commented as follows:

The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races. A world war was fought over such principles. Each individual is unique. And yet, in 2010, governmental decision-makers are still fixated on dividing people into white, black, Hispanic, and other arbitrary subdivisions [...]

As Stuart Hall (1996) reminds us, the loss of faith in a biological explanation of race has serious political implications; the disappearance of the reality of race as a “foundational guarantee” is “a very difficult truth to come to terms with amongst those people who feel [...] the reality of race gives a kind of guarantee or underpinning to their political argument and their aesthetic judgments and their social and cultural beliefs.” It is, of course, true, as Linda Nicholson (2010, pp. 71-2) has observed, that social meanings are not confined “in the head only” but find reflection in the laws and institutions of the nation. This means that even in its symbolic/linguistic conceptions, there can be an issue of “social facticity” about race that might ground a constitutional inquiry. If this is to be conceptualized in equal protection terms and the Court is to be persuaded that racism and racist practices still constitute the lived experience of people’s lives, then, I suggest, it can only do so as part of a national conversation still to be addressed on the relationship between racial identity in its various manifestations and those no-go areas for American political discourse, the twin issues of poverty and class (see Michaels, 2006, pp. 75-70). Professors Barnes and Chemerinsky, (2009, pp.100-25), have commented on the “improvised and largely impoverished” nature of constitutional jurisprudence in the area of socioeconomic class. However, when, as they observe, “society overall seems to have lost interest in the problems of the poor” and the desirability of conceptualizing affirmative action in terms of class is itself not contested, this should

48 *Fisher*, No. 09-50822, *slip op.* 86-87). Garza J. supported his assertion with footnoted references to academic sources concluding “There is broad scholarly support for this proposition.” *Id.* at n.22.

not surprise. Such counter-majoritarian credentials as the Court may have chosen to claim are necessarily limited by parameters of context and have arguably always been overstated; the Court “identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.”(Klarman, 1996, p. 18).

Without a structural analysis of race that can connect with this wider debate, those who would criticize the conservative wing of the Roberts Court for its refusal to conceptualize the pursuit of racial diversity in a way that satisfies current equal protection formulations must be prepared to counter the argument that affirmative action programs not only deflect attention and resources from a national problem of increasing economic inequality but also perpetuate a language of race and racial identity which is ideologically uncritical and for that reason itself inherently conservative in character (Michaels, 2006; Darder & Torres, 2004, p.11).

5 Conclusion

In this paper I have queried the suggestion that, at least in relation to race, legal language can be characterized by its precision. I now suggest two things: first, that if “[t]he terminology of a profession constitutes both the world of that profession and that profession's picture of the world,” (Eisele, 1976, p.377) then the indeterminacy of the referents of race in a post-racial era means that imprecision will be unavoidable and, second, that if, as Stuart Hall (1996) suggests, in the absence of foundational guarantees, politics is all we have, then race is not the only floating signifier. With the open texture of the language of the Equal Protection Clause comes both a forum and a mechanism by which the content of constitutional norms can be negotiated. If the language of the Court is to be not only reflective but also constitutive of that wider “maelstrom of a continuously contingent guaranteed political argument, debate and practice” by which the meaning of race in a “post-racial” society falls to be determined, then the words of Justice Blackmun⁴⁹ in the Court’s first affirmative action case have never been

49 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

more apt: “[i]n order to get beyond racism, we must take account of race.”

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Anne Richardson Oakes is Reader in American Legal Studies in the School of Law, Birmingham City University. She is based in the School's Center for American Legal Studies and is Editor-in-Chief of the *British Journal of American Legal Studies*. She holds a BA (Hons) degree in History and Politics and a PhD awarded for her research into the desegregation of the Boston public schools. She is qualified as a solicitor and has a professional legal background and extensive teaching experience in the fields of property law and public law. Her current teaching is U.S. Constitutional Law which she teaches on the LLB program. Her specialist areas of interest include the Equal Protection jurisprudence of US Supreme Court with particular reference to desegregation (special interest: the Boston public schools), the recent affirmative action cases and interdisciplinary perspectives. She also has an interest in judicial ethics. She is a member of the Society of Legal Scholars and the Law Society. Address: Law School, Birmingham City University, Perry Barr, Birmingham, B42 2SU. U.K. Tel: +44 121 331 5640; Email: anne.oakes@bcu.ac.uk.