

INTRODUCTION

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We are pleased to introduce this symposium, the fruit of collaboration between two of Brooklyn Law School's Centers: the Center for the Study of International Business Law, and the Center for the Study of Law, Language and Cognition. A volume devoted to the issues addressed here is long overdue, and their substance most timely. As Dean Joan Wexler stated in her introduction to the conference, which took place in September 2003:

Today's symposium, *Creating and Interpreting Law in a Multilingual Environment*, addresses important problems that have received very little attention in the American legal academic community: Increasingly, legal rules are developed and applied among people and cultures that speak different languages. How do the problems of language and communication affect the development of these rules, and what should be done when those problems have an impact on the application of those rules? Our speakers today will cast some light on this subject, which has become even more pressing as international commerce transcends national and linguistic borders.

Despite their vital importance, the issues addressed in these papers have been virtually ignored in the American academy. During the past quarter century, a substantial amount of scholarly literature on statutory interpretation has developed in the United States, much of it generated by the strong views repeatedly expressed by Associate Justice Antonin Scalia of the Supreme Court of the United States. In that time, Legislation and Statutory Interpretation courses have sprung up at many American law schools, including Brooklyn Law School. Case books and other educational materials on the subject have pro-

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liferated, as publishers compete with each other for this educational market. Conferences are held, often with published proceedings. Yet, virtually all of this material limits itself to questions of statutory interpretation within the boundaries of the United States even though "globalization" has become a buzzword. Business has become an international affair, and legal systems have been developing at a rapid pace to accommodate this reality. Whether we speak of the European Union, the World Trade Organization, or of domestic laws enacted pursuant to international conventions, legal systems are getting accustomed to addressing legal orders beyond their own domestic law.

A consequence of this globalization of the legal order, of course, is that single laws are sometimes rendered in multiple language versions and deemed to have equal status, and that nations sometimes commit themselves to enacting, within their own systems and in their own language, substantively identical laws. The recent expansion of the European Union gives it 25 member nations and 20 official languages. What if a dispute arises between Cyprus and the Czech Republic over an EU law [directive?]? What version should courts use when they interpret it? What happens when a legal concept that is part of an international convention only *seems* to translate crisply from one legal system to another? In fact, similar sounding words often have radically different legal implications.

These are among the questions that the distinguished authors whose papers are published here address. The symposium was divided into three panels, and the articles track that organization. The first group of articles (Sullivan, Côté, Revell) deal with multilingual legislation and statutory interpretation within a single country: Canada. We are fortunate to have the opportunity to draw on the experience of a country so close to ours, and especially fortunate to publish articles by such distinguished contributors. Professors Sullivan and Côté are each recognized as leading scholars in the area of statutory interpretation in Canada, and Mr. Revell is responsible for the multilingual drafting of statutes in the province of Ontario.

Professor Sullivan's article, *The Challenges of Interpreting Multilingual, Multijural Legislation*, gets right to the heart of the matter: Canada's legal system is both bilingual and bijural, since Quebec is not only a French-speaking province, but it is also a civil law province in an otherwise common law country.

Moreover, the establishment in 1999 of the new Territory of Nunavut, whose government is to be based on traditional Inuit values, promises to make Canada multilingual and multijural. Sullivan regards questions of statutory interpretation and drafting as a means of resolving the tension between two goals: maintaining a coherent, unified legal order, and diverse legal cultures, which operate in different languages and use divergent concepts. In this context, she criticizes current legal doctrine and suggests principles more likely to accomplish these goals.

Professor Côté's article, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, is an exercise in legal realism. While statutory interpretation in Canada is supposed to be bilingual, Côté argues forcefully that, in practice, it is not. For one thing, interpretation occurs largely in environments where one language predominates. It would be unusual to find lawyers in Quebec consulting the English version of a provincial statute that everybody has been construing in French. For the most part, however, the asymmetry privileges the English versions of statutes.

Finally, an article by Donald Revell, who is Chief Legislative Counsel to the province of Ontario, writes about the process of bilingual drafting in his article, *Authoring Bilingual Laws: The Importance of Process*. Canada's parliamentary form of government generally means that ministries will be the source of legislative proposals. Revell argues that drafting proposed legislation first in English and then translating it into French works very well when the proper checks are in place. Problems with legislation come not from the fact that a law originated in one language or the other, but, rather, from the absence of a serious process with multiple opportunities for review and revision, which come with taking bilingualism seriously.

Many countries with more than one official language face issues about statutory interpretation similar to Canada's. The discussion in this set of articles will be relevant in this broader context, as well.

The second panel focused on the EU, where laws are written in all languages of its member nations. What happens when a dispute arises as to the meaning of one of those laws? How do judges decide which text to examine in order to remain loyal to the purpose of the statute without stepping on the sovereignty or sensitivities of any of the members? The contributors to this

section, Professors McLeod, Engberg, and Salmi-Tolonen are all in a position to shed light on these important issues.

Professor McLeod's article, *Literal and Purposive Techniques of Legislative Interpretation: Some European Community and Common Law Perspectives*, will resonate with American legal thinkers who work in the area of statutory interpretation. A legal theorist from the U.K., McLeod considers the problem of what happens when the domestic courts of EU members, charged with enforcing EU law, have their own principles of statutory interpretation that are at odds with the principles employed by the European Court of Justice, which is charged with the ultimate interpretation of EU law. In particular, EU law, deriving largely from the civil law tradition of the continent, approaches the interpretation of statutes in a purposive manner, while common law countries appear to be much more concerned with a statute's literal meaning. In this instance, however, McLeod argues that the law of the U.K. has moved considerably towards considering the purpose of the statute and intent of the legislature over the past decades, rendering any conflict only apparent. In making these points, McLeod provides an excellent introduction to interpretive problems facing the EU, and provides the basis of interesting comparative analysis between the U.S. and the U.K.

The next two articles are written by authors with background in linguistics, and address the difficulty of a multilingual legal order trying to govern itself under a single set of authoritative documents written in the languages of all its members. Professor Engberg, a Danish linguist who writes about issues of legal interpretation, points out serious problems when the concepts from one language do not match those of another in his article, *Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation*. From the perspective of the psychology of language, problems of statutory interpretation in multilingual settings mimic problems of statutory interpretation in monolingual settings. The problem that arises is flexibility in our understanding of legally relevant concepts. Multilingualism complicates matters by adding an additional dimension: not only do different people understand the same concepts differently, as so often happens in the domestic setting, but the concepts themselves are, to some extent, culturally-bound and not identical when translated from one language to another. Engberg presents interesting models of word meaning to ex-

plain how these problems arise, and the extent to which they can be handled successfully. He illustrates his points nicely with cases from the EU.

Professor Salmi-Tolonen's goals are similar to those of Engberg. In her article, *Legal Linguistic Knowledge and Creating and Interpreting Law in Multilingual Environments*, Salmi-Tolonen draws on her wealth of knowledge about both linguistic theory and problems of legal interpretation both within European countries themselves and in the EU. Drawing on interpretive issues that arise in the interpretation of statutes in her native Finland, Salmi-Tolonen also sees the problem of multilingualism as yet another complicating factor in an already problematic interpretive setting. She illustrates her points with examples both from the use of Swedish and Finnish in domestic statutory interpretation, and from the problems facing the interpretation of EU legislation and international conventions, whose concepts are instantiated in local laws. The papers from both linguists present explanations for many of the problems and disputes that the legal authors, both from Europe and North America, present in their contributions to this volume.

Finally, the third panel looked at a particular problem in making law across borders. Problems of interpretation sometimes arise when the laws or legal cultures of the various countries use expressions that *seem* to be translations of one another, but actually convey very different concepts. How can different legal systems fashion laws in their own languages and within their own cultures that will be uniform and predictable enough to allow the smooth flow of commerce across borders?

Dr. Lopéz-Rodríguez, in *Towards a European Civil Code Without a Common European Culture? The Link Between Law, Language and Culture*, considers whether calls for more European harmonization are viable, specifically in the area of contract law. To facilitate harmonization, Dr. Lopez-Rodriguez suggests the promotion a common European discourse to pave the way for meaningful European legal uniformity. Dr. Lopéz-Rodríguez believes that such a discourse is necessary to overcome obstacles created by both language and culture. Such obstacles may manifest themselves in different national laws transposing a given European directive, or in the difficulty transposing concepts between legal languages of the various countries (whether these concepts are new or previously existing, but modified, concepts). The components to promote this

desired discourse include legal research, legal education, and the evolution of a common methodology. This discourse is necessary to overcome cultural and linguistic differences prior to harmonization; indeed, it is the foundation upon which further harmonization can be sought.

It is both interesting and gratifying to see how well these papers fit together, although written by people with training in very different disciplines, examining diverse legal systems. But it should not be surprising. The creation and interpretation of law is a human endeavor. What better way to study it than to raise important questions of law, and to force broad exploration into aspects of our human nature that make the rule of law in multilingual settings both possible and difficult at the same time?

THE CHALLENGES OF INTERPRETING MULTILINGUAL, MULTIJURAL LEGISLATION

*Ruth Sullivan**

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I. INTRODUCTION

After centuries of imperialism, war and migration, the territory of most modern nations encompasses multiple language and cultural groups.¹ However, the extent to which this diversity is formally reflected in positive law differs from one nation to another and reflects a range of factors — from the historical evolution of the nation to current demographics and power relationships. The decision to designate more than one language as official or to apply more than one legal system within a nation has important practical consequences and also carries important symbolic weight. But both the practical and symbolic significance vary depending on whether the decision to recognize multiplicity is entrenched in a rigid constitution, is embodied in ordinary (and therefore amendable) legislation or is merely a government policy.

The impact of constitutional or legislative recognition of diversity also depends on the response of courts and other official interpreters to the relevant legal texts. In 1985, for example, the Supreme Court of Canada was called on to interpret and apply a provision of the Canadian Constitution that requires Acts of the Legislature of Manitoba to be enacted in French and English.² In its result, the court declared virtually all of Manitoba's statutes invalid because they were enacted only in English.³ In this case, respect for constitutional values prevailed over considerations of cost and convenience. The court's primary concerns were the constitutive role of language in culture and its relations to law and governance.⁴ In a subsequent deci-

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1. See generally DANIEL NETTLE & SUZANNE ROMAINE, VANISHING VOICES: THE EXTINCTION OF THE WORLD'S LANGUAGES ch. 2 (2000).

2. Manitoba Act 1870, S.C. ch. 3, § 23 (1870) (Can.).

3. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (To avoid legal chaos, the court suspended the declaration for a period sufficient to allow Manitoba to prepare and enact a French version of its statute book.).

4. Justice Dickson wrote:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights

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sion, however, the same court was prepared to uphold legislation incorporating by reference massive amounts of unilingual material.⁵ In this case, considerations of cost and convenience trumped the concern for bilingual community.⁶

In assessing the impact of multilingualism and multijuralism in a state, the above-mentioned legal variables are important, but equally important is the extent to which the official languages and recognized legal systems are embedded in local culture.⁷ The key questions here are whether it is possible to work, play and receive services in the recognized languages, and the degree of harmony between legal and cultural norms.

The significance of these variables can be illustrated by comparing Canada to the United States. Canada became a federal state in 1867 when the British Parliament enacted the Constitution Act, 1867.⁸ This Act established a constitutional frame-

and duties they hold in respect of one another, and thus to live in society.

Id. at 744.

5. See Reference *Re Manitoba Language Rights*, [1992] 1 S.C.R. 212, 229–31.

6. The Court wrote:

In [some cases of incorporation by reference], translation is impracticable because of the fact that these standards are continually revised by the standard setting bodies. It would be difficult for a legislature to maintain an authoritative translation in the face of this practice. Sometimes in cases where international or national standards are used, translations are already available. But where they are not, it would defeat the purpose of incorporating an outside document to require translation in compliance with [the language requirements of] s. 23 and, in any event, it is unlikely that translation would guarantee accessibility to materials which are, practically speaking, inaccessible to the majority of citizens because of their technical nature.

Reference *Re Manitoba Language Rights*, [1992] 1 S.C.R. 212, 230–31.

7. See Denise G. Réaume, *Official-Language Rights: Intrinsic Value and the Protection of Difference*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 245 (W. Kymlicka & W. Norman, eds., 2000). See also Michael Bastarache & André Tremblay, *Language Rights*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 653, 672–74 (Gérald-A. Beaudoin & Ed Ratushny, eds., 2d ed. 1989); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 *LA. L. REV.* 677, 678–80 (2000); Roderick Macdonald, *Legal Bilingualism*, 42 *MCGILL L.J.* 119, paras. 42–43 (1997) [hereinafter *Legal Bilingualism*]; Claire L'Heureux-Dubé, *Bijuralism: A Supreme Court of Canada Justice's Perspective*, 62 *LA. L. REV.* 449, 450–54 (2002).

8. CAN. CONST. (Constitution Act, 1867), *Vict.* 30–31, ch. 3, § 30–31 (U.K.).

work that is similar in many respects to that of the United States.⁹ Both countries are predominately English-speaking, common law jurisdictions, and both include one internal unit whose citizens upon joining the federation were French-speaking and whose legal system was civil law.¹⁰ This makes both countries a mixed jurisdiction as that term is understood in comparative law.¹¹ However, the roles of the French language and the civil law in Canada are very different from their role in the United States.

In Canada, Francophone civilists have a significant presence in the country's national institutions.¹² Québec elects seventy-five of three hundred and one members of Parliament,¹³ and the last three long-serving Prime Ministers of Canada have been Québec lawyers.¹⁴ Francophone civilists are also well represented in the federal civil service, which is responsible for developing legislative proposals and drafting the legislative texts that are submitted to Parliament for enactment.¹⁵ Finally, the

9. For example, both are federations established by agreement of former British colonies in which legislative authority is exercised by a central legislature and the legislative assemblies of the constituents; both are electoral democracies; both are founded on British notions parliamentary sovereignty and rule of law; both rely on superior courts to enforce constitutional principles through judicial review. See DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 69 (1987).

10. For a discussion of Louisiana, see Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 *LA. L. REV.* 1283 (1997).

11. For a discussion of mixed jurisdictions, see Tetley, *supra* note 7, at 726 & n.250. See also UNIVERSITY OF OTTAWA, *WORLD LEGAL SYSTEMS*, at <http://www.droitcivil.uottawa.ca/world-legal-systems/engmonde.html> (last visited Mar. 17, 2004).

12. This is the result of the obligations imposed on government by the Official Languages Act. Official Languages Act, R.S.C. ch. 31 (1985) (Can.).

13. See EUGENE FORSEY, *HOW CANADIANS GOVERN THEMSELVES* 38 (5th ed. 2003), available at http://www.parl.gc.ca/information/library/idb/forsey/How_Canadians_Govern_Themselves-5th_Ed.pdf (last visited Mar. 17, 2004).

14. The last three long serving Canadian Prime Ministers were the Honourable Pierre Trudeau, Brian Mulroney and Jean Chrétien, respectively. See CANADA ONLINE, *PRIME MINISTERS OF CANADA: CANADIAN PRIME MINISTERS SINCE CONFEDERATION IN 1867*, at <http://canadaonline.about.com/library/bl/blpms.htm> (last visited Mar. 16, 2004).

15. For an account of the role of the civil service in the preparation of legislation at the federal level, see GOVERNMENT OF CANADA PRIVY COUNCIL, *CABINET DIRECTIVE ON LAW-MAKING*, at <http://www.pcobcp.gc.ca/default.asp?>

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nine-member bench of the Supreme Court of Canada, which is responsible for interpreting and applying all Canadian law, including Québec civil law, has, since 1949, included three civilist judges.¹⁶ The Federal Court and the Tax Court of Canada are similarly mixed, including both French- and English-speaking judges with both civil law and common law backgrounds.¹⁷

In the United States, despite Louisiana's French roots and civil code, neither the language nor the legal system has had much impact on the making or interpretation of federal law.¹⁸ It appears that neither French nor civil law is formally or substantially present in any of the three branches of government at the federal level. In my view, this difference is due, at least in part, to the absence of language rights and duties in the U.S. Constitution.¹⁹

By contrast, section 133 of the Constitution Act, 1867 constitutionally obligates the Canadian Parliament to operate and enact legislation in both French and English.²⁰ This section also

page=publications&Language=E&doc=legislation/lmgcabinetdirective_e.htm (last visited Mar. 17, 2004) [hereinafter CABINET DIRECTIVE ON LAW-MAKING].

16. Historically, the appointments to this court from common law provinces have been Anglophones, while the appointments from Québec have been Francophones. In recent years, however, two Francophones from common law provinces have been appointed along with an Anglophone judge from Québec. This evolution reflects a recognition of the independence of language and legal system and an attempt to overcome essentialist connections between French and civil law on the one hand and English and common law on the other.

17. Both the Federal Court and the Tax Court are federal courts, which are subject to the obligations imposed by § 133 of the Constitution Act, 1867. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), §§ 16(1) & 19(1); Official Languages Act, R.S.C., ch. 31, §§ 14–16 (1985) (Can.); Federal Courts Act, R.S.C., F.-7, ch. 8, § 5(4) (2002) (Can.). See also FEDERAL COURT OF CANADA, ANNUAL REPORT FOR 2002-2003 1, available at http://www.fct-cf.gc.ca/publications/annual/AnnRep02-03_e.pdf (last visited Mar. 17, 2003).

18. In the United States, federal law is enacted in English only and no effort is made to harmonize its provisions with civil law concepts or terminology.

19. See generally U.S. CONST.

20. Section 133 of the Constitution Act, 1867 provides:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Québec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any

provides that either language may be used in any pleading or process of the courts established under the Act.²¹ In 1982, limited rights to receive government services in French or English and to have one's children educated in one's preferred language were also constitutionally entrenched.²² These rights are implemented and to some degree supplemented through legislation such as the Official Languages Act,²³ which is considered to be human rights legislation and therefore attracts a liberal interpretation.²⁴ They are also enforced by the courts, sometimes tepidly, but in recent years more vigorously.²⁵ There is a vast literature, in both French and English, exploring the implications of these rights and assessing both legislative and judicial attempts to enforce them.²⁶

Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Québec. The Acts of the Parliament of Canada and of the Legislature of Québec shall be printed and published in both those Languages.

CAN. CONST. (Constitution Act, 1867) § 133. *See also* CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), §§ 16(1) 17(1) & 19(1). Similar obligations are imposed on New Brunswick by §§ 16(2), 17(2), 18(2) of the Charter and on Manitoba by § 23 of the Manitoba Act. Manitoba Act 1870, S.C. ch. 3, § 23 (1870) (Can.).

21. *Id.*

22. *See* CAN. CONST. (Constitution Act, 1982), pt. I. (Canadian Charter of Rights and Freedoms), §§ 20 & 23.

23. Official Languages Act, R.S.C., ch. 31, § 31 (1985) (Can.).

24. *See* R. v. Beaulac, [1999] 1 S.C.R. 768, paras. 16–17, 22, 25. *See also* Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, paras. 26–28; Lalonde v. Ontario (Commission de restructuration des service de santé), [2001] 208 D.L.R. (4th) 577 (Ont. Can.), paras. 131–38.

25. The leading case is R. v. Beaulac, in which Justice Bastarache wrote: "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada....To the extent that Société des Acadiens du Nouveau-Brunswick [Society of Acadians of New Brunswick] [[1986] 27 D.L.R. 4th 406 (Can.)]...stands for a restrictive interpretation of language rights, it is to be rejected." R. v. Beaulac, [1999] 1 S.C.R. 768, paras. 16–17, 22, 25.

26. A good survey is provided by PETER HOGG, CONSTITUTIONAL LAW OF CANADA 1291–1321 (loose-leaf ed. 2000). *See also* André Tremblay, *Les Droits Linguistiques* [Linguistic Rights], in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 15-2–15-37 (Gérald-A. Beaudoin & Errol Mendes eds., 3d ed. 1996); LANGUAGE AND THE STATE: THE LAW AND POLITICS OF IDENTITY (2d ed. 1991); LES DROITS LINGUISTIQUES AU CANADA [Linguistic Rights in Canada] (Michael Bastarache, ed. 1986); LANGUAGE RIGHTS IN CANADA (Michael Bastarache ed. 1987).

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Another important reason for the different response to linguistic and legal diversity in the two countries is demographics. The Francophones of New Brunswick, Ontario, Québec and Manitoba constituted a significant portion of the population when those provinces became part of Canada, and their descendants continue to exercise considerable political and economic clout today.²⁷ By contrast, there was no civilist Francophone participation in the drafting of the U.S. Constitution. When Louisiana joined the union, the United States was well established as an English-speaking, common law nation.²⁸ Over the years, as one of fifty states, and with a relatively small territory and population, Louisiana has not been well-placed to affect things at the centre.²⁹

Canada also differs from the United States in the way it has conducted its relations with Aboriginal peoples. While neither nation has much to be proud of in this area, Canada has been slower to recognize the legal norms relied on in Aboriginal culture and to develop ways to accommodate them within its constitutional framework.³⁰ However, two relatively recent events have given impetus to a new approach. The first is the entrenchment in 1982 of Aboriginal rights, including treaty rights,

27. See CENTRE FOR RESEARCH AND INFORMATION ON CANADA, LANGUAGES IN CANADA, at http://www.circ.ca/en_html/guide/language/language.html (last visited Mar. 19, 2004); DEPARTMENT OF CANADIAN HERITAGE, MOBILITY, VISITS AND TRAVEL, at <http://www.pch.gc.ca/progs/lo-ol/perspectives/english/interests/EP03d.htm> (last visited Mar. 19, 2004) [hereinafter MOBILITY, VISITS AND TRAVEL]; DEPARTMENT OF CANADIAN HERITAGE, KINSHIP TIES, at <http://www.pch.gc.ca/progs/lo-ol/perspectives/english/interests/EP03c.htm> (last visited Mar. 19, 2004).

28. See Ward, *supra* note 10, at 1290–91.

29. For a general account of the difficulties faced by French civil law in Louisiana, see Kathryn Venturatos Lorio, *The Louisiana Civil Law Traditions: Archaic or Prophetic in the Twenty-first Century?*, 63 LA. L. REV. 1 (2002).

30. For a review of the American record, see FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982); Vine Deloria, *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989); James Zion, *Taking Justice Back: American Indian Perspectives*, in ROYAL COMMISSION ON ABORIGINAL PEOPLES, ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 309 (1992). For a review of the Canadian record, see James Youngblood Henderson, *Empowering Treaty Federalism*, 58 SASK. L. REV. 241 (1994) [hereinafter *Empowering Treaty Federalism*].

in the Canadian Constitution.³¹ This recognition has strongly affected the judicial approach to interpreting the historical treaties between First Nations and the Crown.³² The second is the establishment in 1999 of the new Territory of Nunavut, populated largely by the Inuit of Canada's North.³³ This new Territory was established to give a significant measure of self-government to the Inuit as part of a massive land claims agreement.³⁴ As explained by Nunavut's first premier, the goal is to build a government based on traditional Inuit values and knowledge, with Inuktitut as the working language of the legislature and government.³⁵ While Canada has long been a bilingual, bijural nation, with the establishment of Nunavut it is poised to become a multilingual, multijural nation.

The success of this (belated) evolution is by no means assured. As suggested above, the survival of a language and a legal tradition requires various types of support. While not all of these are within the government's control, it seems clear that a degree of government support for the basics of cultural identity is necessary for survival, even if it is not sufficient.³⁶ Con-

31. "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), § 35(1). "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Id.* at § 27.

32. The point is made most forcefully by Justice Cory in *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78. See generally *Empowering Treaty Federalism*, *supra* note 30.

33. See Nunavut Act, S.C., ch. 28, § 28 (1993) (Can.).

34. See Agreement Between the Inuit of the Nunavut Settlement Areas and Her Majesty the Queen in Right of Canada, art. 4 (incorporated into law by the Nunavut Land Claims Agreement, S.C. 1993, ch. 29). See also John Merritt, *Nunavut: Preparing for Self-Government*, 21 NORTHERN PERSPECTIVES 1, 3-6 (1993), available at <http://www.carc.org/pubs/v21no1/nunavut1.htm> (last visited Mar. 17, 2004); Peter Jull, *Building Nunavut: A Story of Inuit Self-Government*, 1 THE NORTHERN REV. 59 (1988) (on file with author).

35. See Paul Okalik, *The Nunavut Challenge: Working Together*, Speech to the Conference on Governance, Self-Government and Legal Pluralism (Apr. 23, 2003), at <http://www.gov.nu.ca/Nunavut/English/premier/press/cgsglp.shtml> (last visited Mar. 16, 2004).

36. Denice G. Réaume, *The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?*, 47 MCGILL L. REV. 593 (2002) [hereinafter *The Demise of the Political Compromise Doctrine*]. See also Michael O'Keefe, *New Canadian Perspectives: Francophone Minorities: Assimilation and Community Vitality*, in *DEFINING THE CONCEPTS*, available at

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stitutional rights and duties must be implemented through appropriately designed and adequately funded initiatives. Courts must also contribute by offering liberal interpretations of linguistic rights and by enforcing them with effective remedies.

In this Article, I focus on the challenges of interpreting legal texts that are enacted in more than one language and draw on more than one legal system. The first challenge facing interpreters of such texts is recognizing and acknowledging difference. It is obvious that French, English and Inuktitut are different languages and that civil law, common law and Aboriginal law are different legal systems. What is less obvious is how the differences matter and how they can be dealt with in an appropriate way.

Recognizing and acknowledging difference is challenging because it requires knowledge of “the other.”³⁷ This is difficult for those who live in the dominant language and tradition, for ordinarily they have no need to know the other. Even when minority rights are constitutionally protected, there is little incentive for those in positions of power to carry out the research and attempt the transformation of consciousness that knowledge of this sort entails. This is arduous work, which is normally carried out by members of the minority group who have little choice in the matter.³⁸ In principle, however, the burden belongs to the official interpreters of legislation.³⁹

Once the lessons of difference are received and understood, the second challenge facing interpreters is to develop an appropriate response. Possible responses range from assimilation in

<http://www.pch.gc.ca/progs/lo-ol/perspectives/english/assimil/defining.htm>
(last visited Mar. 16, 2004).

37. See generally FRANCO RELLA, *THE MYTH OF THE OTHER* (2003). For discussion of Aboriginal peoples in North America as “other” see Frank Pommerheim, *Liberalism, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, at 423.

38. The dominant group in a society is the group that controls goods or benefits that are necessary or desirable for members of the society to flourish. The dominant group has no incentive to change, since it already has what it needs. The burden of change, therefore, falls to the minority whose need motivates its efforts to bridge the gap.

39. In so far as a linguistic community is legally entitled to access law in its own language, the official interpreters of law have a corresponding obligation to acquire the linguistic skills necessary to give meaningful effect to the right.

an effort to achieve unification, to separation in an effort to achieve equality, to dialogue in an effort to achieve integration.⁴⁰ In Canada, these possibilities are expressed in terms of both language and law. Linguistic assimilation is a daily reality for Aboriginal peoples⁴¹ and an ongoing threat for Francophones, especially Francophones outside Québec.⁴² To fend off assimilation, there is a strong tendency to establish linguistic dualism – institutions and practices that are equal-but-separate.⁴³ Only when linguistic traditions are culturally secure is it possible to achieve a genuine bilingualism in which the languages enrich and modify one another through interaction. A similar dynamic operates in law. Aboriginal law, though not extinct, is in a precarious state,⁴⁴ while civil law in North America must constantly struggle against assimilation by the common law.⁴⁵ To ensure survival, proponents must safeguard the autonomy of these traditions. Dialogue among legal traditions can occur successfully only if each speaks from a position of strength.

40. The dialogue leading to integration model is described by Roderick Macdonald as “legal bilingualism.”

Legal bilingualism would ultimately require bilingualism in all its practitioners. Rather than encouraging or even allowing two distinct official legal cultures to form around two languages, the practice of legal bilingualism would draw on both languages to construct one official legal culture. In Canada today, that official legal culture is neither French nor English, neither civil law nor common law; it is all these together, with the ambiguity that such complexity implies.

Legal Bilingualism, *supra* note 7, at 165.

41. See *You Took My Talk: Aboriginal Literacy and Empowerment*, Fourth Report of the Standing Committee on Aboriginal Affairs, House of Commons, Dec. 1990, at 105 app. D.

42. See *MOBILITY, VISITS AND TRAVEL*, *supra* note 27.

43. Linguistic dualism is described negatively in *Legal Bilingualism*, *supra* note 7, at paras. 6–8, 42–44. Cf. *The Demise of the Political Compromise Doctrine*, *supra* note 36, at para. 23, n.32.

44. See Barbara Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 4 MINN. L. REV. 927, 958–62 (1999); John Borrows, *With or Without You: First Nations Law in Canada*, 41 MCGILL L.J. 629 (1996) [hereinafter *With or Without You*].

45. See France Allard, *The Supreme Court of Canada and Its Impact on the Expression of Bijuralism*, in 3 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 3 & n.11, at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3(a)_eng.pdf) (last visited Mar. 19, 2004).

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Having recognized difference and the possible responses to difference, the final challenge for interpreters is to strike the right balance among the possibilities. It is tempting to suppose that the conflict between assimilation and equality-through-separation naturally yields dialogue and integration; but there is no real basis for this supposition. The right interpretive response depends on the legal and cultural framework in which the legislation operates, the nature and extent of the differences between the several languages and legal traditions, the ability of interpreters to recognize and bridge these differences, and not least the language politics and culture politics of the jurisdiction.

In this Article, I attempt to explore the impact of these variables on interpretive theory and practice. I have several goals. The first is to describe the well-established principles governing the interpretation of bilingual legislation in Canada. The second is to describe and comment on some emerging principles governing the interpretation of bilingual legislation that is also bijural (common law and civil law). The third is to draw attention to the challenges of interpreting legal texts that exist in Aboriginal as well as European languages and are grounded in both Aboriginal and European law. In examining these topics, I focus on the way legal texts are produced as well as the judicial response to them. I also consider how the various interpretive approaches fit into the categories described above — assimilation, equality through separation and dialogue leading to integration.

Part II of this Article comments on some features of the evolution of Canada's federal statute book. In Parliamentary democracies, the executive branch proposes and drafts most legislation and has responsibility for publishing and managing the law.⁴⁶ Individual statutes are treated as self-contained structures reflecting a coherent set of objectives and embodying a more or less efficient scheme for achieving those objectives. Statutes are also thought of as comprising a distinct literary genre; like poems or plays, they are governed by fairly rigid

46. See HOGG, *supra* note 26. See also CABINET DIRECTIVE ON LAW-MAKING, *supra* note 15.

conventions of style and organization.⁴⁷ These conventions facilitate comprehension and form the basis for analysis of the legislative text. The statutes that are part of a jurisdiction's law at a given moment constitute its "statute book," comparable to the oeuvre of a poet or playwright.⁴⁸ The statute book is taken to be a coherent and internally consistent (although not an exhaustive) statement of the enacting jurisdiction's law.⁴⁹

A noteworthy feature of Canada's statute books at both the federal and provincial levels is the practice of regular general revision.⁵⁰ In a general revision, the legislature authorizes the executive branch of government to produce an updated version of the legislation currently in force within the jurisdiction.⁵¹ Amendments and repeals since the last revision are incorporated; incoherencies, contradictions and mistakes are corrected; and the style in which the statutes are drafted is updated and made uniform.⁵² Although the substance of the law remains the same, its form may change quite noticeably.⁵³ The practice of revision not only facilitates access to legislation but affords the government a means to communicate its view of law and its responsibilities to the public.⁵⁴ The presentation of the two official languages and legal systems of Canada features importantly in this communication and is examined in Part II.

Part III of this Article sets out the two main rules governing the interpretation of bilingual legislation in Canada, namely

47. For an account of these conventions, see generally ELMER A. DRIEDGER, *THE COMPOSITION OF LEGISLATION: LEGISLATIVE FORMS AND PRECEDENTS* (2d ed., rev. 1976); G.C. THORNTON, *LEGISLATIVE DRAFTING* (3d ed. 1987).

48. Ruth Sullivan, *Some Implications of Plain Language Drafting*, 22 *STATUTE L. REV.* 175, 182 n.13 (2001) [hereinafter *Some Implications of Plain Language Drafting*].

49. See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 1 S.C.C. 42, para. 27. See also PIERRE-ANDRÉ CÔTÉ, *THE INTERPRETATION OF LEGISLATION IN CANADA* 308 & nn. 3–6 (2000) [hereinafter *THE INTERPRETATION OF LEGISLATION IN CANADA*]; RUTH SULLIVAN, *SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES* 169, 262 & n.80 [hereinafter *SULLIVAN & DRIEDGER*].

50. See Norman Larsen, *Statute Revision and Consolidation: History, Process and Problems*, 19 *OTTAWA L. REV.* 321 (1987).

51. Statute Revision Act, R.S.C., 1974-75-76, ch. S- 20. (1985)(Can.).

52. SULLIVAN & DRIEDGER, *supra* note 49, at 534.

53. *Id.* at 535.

54. See *Some Implications of Plain Language Drafting*, *supra* note 48, at 182–83.

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the equal authenticity rule⁵⁵ and the shared meaning rule.⁵⁶ It explores the rank that should be assigned to them in the pantheon of statutory interpretation rules. It also looks at insights into the nature of law afforded by legislation drafted in two or more languages.

Part IV describes the current initiative of the Canadian government to harmonize federal law with the civil law of Québec. It looks at the new scholarship this initiative has generated, rooted in a civilist perspective, and the resulting amendments to Canada's Interpretation Act. It explores two concepts of bijuralism: suppletive bijuralism, reflecting an equal-but-separate approach to the two legal systems, and derivative bijuralism, reflecting dialogue and the possibility of integration. It ends with a critical analysis of a recent decision by the Supreme Court of Canada which illustrates how very challenging the interpretation of bilingual, bijural legislation can be.

Part V deals with the interpretation of the historical treaties between Britain (later Canada) and the First Nations occupying territory within the current borders of Canada. In interpreting these treaties, the courts regard the written English version, rooted in the common law, as constituting the sole text to be interpreted.⁵⁷ I argue that in fact treaties are also recorded in the oral tradition and legal artefacts of the First Nation parties and these, no less than the written English text, constitute the

55. See *THE INTERPRETATION OF LEGISLATION IN CANADA*, *supra* note 49, at 324; *SULLIVAN & DRIEDGER*, *supra* note 49, at 74–77. The equal authenticity rule requires

that legislation be enacted or made, and not merely published, in both English and French....[B]oth language versions of a bilingual statute or regulation are official, original and authoritative expressions of the law. Neither version has the status of a copy or translation; neither enjoys priority or paramountcy over the other.

Id. at 74–75.

56. For a definition of the shared meaning rule, see *infra* Part III.C. See *THE INTERPRETATION OF LEGISLATION IN CANADA*, *supra* note 49, at 326–28; *SULLIVAN & DRIEDGER*, *supra* note 49, at 81–87.

57. Even in cases where the court emphasizes the importance of receiving evidence of the context in which treaties were signed, including the Aboriginal version of the treaty as preserved in oral history, the “treaty itself” is identified with the English language text and the Aboriginal version is regarded as “con-text.” See, e.g., *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; *R. v. Marshall*, [1999] 3 S.C.R. 456.

official record of the treaty. I also consider the impact this realization should have on the interpretation of the treaties.

Part VI describes the initiatives underway in the Territory of Nunavut to ensure that residents have access to legislation in their language of Inuktitut and to ensure that legislation is rooted in local Aboriginal knowledge and culture. It briefly speculates on the interpretation problems that may result if these initiatives prove successful.

II. THE REFORM OF CANADA'S STATUTE BOOK⁵⁸

In Canada, federal legislation has been bilingual and bijural from the beginning.⁵⁹ A particularly challenging feature of the Canadian situation is that there is not a one-to-one correspondence between the territory where French or English is spoken and the territory where the civil law and the common law constitute the basic legal system.⁶⁰ Federal legislation is addressed to Francophones as well as Anglophones in the common law provinces and to Anglophones as well as Francophones in Québec.⁶¹

Until recently, federal efforts to meet this challenge were inadequate in many respects. Historically, federal Acts and regu-

58. The descriptions and comments in this part are based primarily on my observations while working for the Legislative Services Branch of Canada's Department of Justice in 1989-1991 and again in 2001-2002. They are also based on ongoing but informal discussions with federal drafters. However, they are personal views, which do not necessarily coincide with the position of the Department of Justice or the views of my contacts there. [hereinafter Sullivan Observations].

59. As explained below, these features of the federal statute book flow from the constitutional requirement that federal legislation be enacted in both languages and from the division of legislative powers between Parliament and the provincial legislatures.

60. Many Anglophones live in civil law Québec; many Francophones live in common law provinces, especially New Brunswick, Manitoba and Ontario. See STATISTICS CANADA, at <http://www.statcan.ca/start.html> (last visited Mar. 16, 2004).

61. See Lionel Levert, *Harmonization and Dissonance: Language and Law in Canada and Europe: the Cohabitation of Bilingualism and Bijuralism in Federal Legislation in Canada: Myth or Reality?*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 6-7 (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

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lations were almost always drafted in English first with a common law context in mind, then translated into French and adapted — more or less — to Québec's civil law.⁶² There were many things wrong with this practice. First, the translations often were legally inadequate.⁶³ Second, the quality of the French often was poor. Because the translators were not lawyers, they lacked the knowledge required to translate legal ideas, and therefore, were reduced simply to translating the words.⁶⁴ This resulted in a French version that preserved English sentence structure and common law drafting style, and bore little resemblance to the elegance and concision of a civil code.⁶⁵ Reliance on translation also led to what might be called the problem of bureaucratic pre-interpretation. This problem arises when translators or other bureaucrats (such as statute revisers) have the power before enactment to resolve ambiguities in the legislative text.⁶⁶

A third problem with previous drafting practice was that outside Québec, adaptation to civil law was a low priority.⁶⁷ As a result, efforts to harmonize federal law with Québec's civil code often were haphazard and inadequate. On occasion, appropriate common law and civil law terminology was used in both language versions.⁶⁸ More often, the common law term for a concept, principle or institution was used in the English version, while the civil law term for an analogous (though not necessarily identical) concept, principle or institution was used in French.⁶⁹ This technique was favoured, in part, because it avoided loading the text with legal terminology from two sys-

62. *Id.* See also *Legal Bilingualism*, *supra* note 7, at para. 30.

63. See e.g., *R. v. Tupper*, [1967] S.C.R. 589; Levert, *supra* note 61, at 6; *Legal Bilingualism*, *supra* note 7, at para. 33.

64. Levert, *supra* note 61, at 6–7.

65. The best illustration of this practice is probably the Criminal Code, R.S.C., ch. C-46 (1985) (Can.). While the current French version of the Code improves on previous versions, it remains inadequate.

66. See Larsen, *supra* note 50, at 341 (noting that “revisers are liable to wander over the line that divides revision and substantive change.”).

67. See Levert, *supra* note 61, at 7.

68. For example, “lease of real property or immovables” in English and “location de biens réel ou immeubles” in French.

69. For example, “agent” in English and “mandataire” in French, “mortgage” in English and “hypotèque” in French. See Criminal Code, R.S.C., ch. C-46., § 207.1 (1985) (Can.) (regulating “gaming and betting”).

tems.⁷⁰ An additional consideration, rooted in Canadian regional politics, was the desire to avoid the backlash that might result from making prominent room for Québec's civil law in the English text. The drawback to this practice was that it ignored the existence of Anglophones in Québec and Francophones in other provinces. In symbolic terms, it sent an essentialist message — that French is the language of the civil law and English the language of the common law. This message invited an equal-but-separate approach to the federal statute book.

In 1978, in an effort to address at least some of these problems, the federal Department of Justice adopted the practice of co-drafting, which requires statutes to be drafted simultaneously by both an English and a French drafter.⁷¹ Both drafters receive instructions (in one or both languages) and each produces a draft for review by the instructing department.⁷²

While co-drafting improved the quality of new legislation, it did nothing for legislation that was already on the books. This problem was tackled in the 1985 general revision of the Statutes of Canada, in which the French version of many statutes was rewritten in a more authentic French style.⁷³

Co-drafting was primarily a response to the bilingual character of federal legislation; it was an attempt to create an authentic French text as opposed to a translation that was merely deemed to be authentic. However, the bijural character of federal legislation complicated the matter. When dealing with legislation that is bilingual but unijural, it is reasonable for the drafting conventions and style of the single legal system to prevail. When dealing with legislation that is bijural as well as bilingual, however, a different approach might be expected. Upon the introduction of co-drafting in Canada, civilist Francophone drafters rightly called into question the imposition of common law conventions and style on the French language version of federal legislation, and they urged a more civilist ap-

70. See Sullivan Observations, *supra* note 58.

71. Levert, *supra* note 61, at 6. Initially, only statutes were co-drafted while regulations were merely co-reviewed by English and French lawyers from the Legislative Services Branch. However, increasingly regulations as well as statutes are co-drafted.

72. See Sullivan Observations, *supra* note 58.

73. See *generally* Revised Statutes of Canada, R.S.C. (Can.).

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proach, not to both versions, but to the drafting of the French version.⁷⁴

This reform was rejected for a variety of reasons. For one thing, much federal law is public law, and public law in Canada (including Québec) is unijural and grounded in the common law.⁷⁵ There is no obvious justification for using civil law conventions and style to draft legislation that is grounded in the common law. Further, to shift back and forth between styles depending on whether an Act or a provision was judged to create public or private law would be unworkable in practice.

A more fundamental reason for rejecting civil law drafting in the French version was the desire to preserve the iconography of the federal statute book, which at that time attempted to communicate not just the equal validity of the two language versions but still more their sameness. It was important that the two versions say the same thing and look the same way on the page.⁷⁶ To this end, starting in 1968, the two versions of federal legislation were presented in parallel columns, English on the left and French on the right.⁷⁷ In both versions, each section or subsection set out a rule in a single sentence, with roughly parallel structure and wording and with identical formatting.⁷⁸ The parallel sections and subsections began at the same point on the page and were attended by identical marginal notes and headings.⁷⁹ If the English version used tabulation or paragraphing, so did the French. While adopting a civilist approach to drafting the French version of federal legis-

74. See Sullivan Observations, *supra* note 58.

75. This results from the fact that English law was introduced into the territory of what is now Québec by the Treaty of 1763 in which France surrendered the territory to England. In the Québec Act of 1774, civil law was reintroduced only in respect of “property and civil rights.” The rest of the law remained English. See 2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool), [1996] 3 S.C.R. 919, para. 76.

76. See generally, *Some Implications of Plain Language Drafting*, *supra* note 48 (The appearance of sameness is especially important when the readers of the text are unilingual and therefore unable to rely on comprehension to determine that they are the same.).

77. See generally S.C. 1968 (Can.); R.S.C. 1970 (Can.) and R.S.C. (Can.). Before 1968, the French and English versions were published in separate volumes. Putting them into the same volume obviously encourages dialogue and integration.

78. See generally R.S.C. 1970 (Can.).

79. *Id.*

lation need not have destroyed the sameness of the law, it would have diminished the appearance of sameness and was therefore unacceptable.

Although Francophone drafters have not been allowed to adopt a civilist style of drafting, the historical rigidities of bilingual drafting have been relaxed to a degree. It is no longer necessary for the French version to track the sentence structure and wording of the English version. In new legislation, the French version of a section or subsection is often more concise and significantly shorter than the English version.⁸⁰ On the English side, common law drafting has evolved toward a higher level of generality and abstraction, which has brought it more in line with civilist style. Since the introduction of co-drafting, English drafters have been free to follow the lead of their French co-drafter in including two sentences within a single section or subsection, in declining to paragraph and the like. The French-English text is the product of negotiation and compromise, or in some cases, agreement to disagree.⁸¹ In fact, it has become an exercise in dialogue.

During the 1980s, reform of the federal statute book focused on bilingualism. More recently, the federal government has turned its attention to bijuralism.⁸² This interest was sparked by a number of developments. One was the work done in several provinces and at the federal level to develop adequate French terminology for common law concepts, institutions and principles.⁸³ This work responded to Francophone populations outside Québec and their entitlement to access the law in their own language. A second, more important impetus was the enactment of the new Civil Code of Québec,⁸⁴ which came into force in 1994.⁸⁵

80. In fact, the French version may contain two sentences to the English version's one, and it may ignore the paragraphing of the English version.

81. See Sullivan Observations, *supra* note 58.

82. See Levert, *supra* note 61.

83. See, e.g., National Program for the Integration of Both Official Languages in the Administration of Justice, at <http://www.pajlo.org> (last visited Mar. 17, 2004).

84. The French spelling of Québec, with its *accent aigu*, is used in both the English and French versions of the title.

85. Civil Code of Québec, S.Q. ch. 64 (1991) proclaimed into force on Jan. 1, 1994 by order-in-council no. 712-93, 125 G.O. II, 3589.

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For Québec, this was a national event of great cultural significance. A Civil Code is the expression of the principles upon which members of a society live in harmony with one another and it embodies the fundamental values that make that society distinct. In keeping with Québec's so-called quiet revolution, which during the 1960s and 1970s repudiated many conservative values of the past, the new Code extensively changed Québec's private law.⁸⁶ This created considerable disharmony with existing federal legislation, which referred to concepts or institutions from the former code and used its discarded terminology.⁸⁷ To avoid confusion and uncertainty, a harmonization initiative was required.

In 1993, the federal government created a Civil Code section within the Department of Justice with a mandate to harmonize federal legislation with the new code.⁸⁸ In 1995, it announced a bijuralism policy.⁸⁹ In 1997, it launched an ambitious program to review all existing federal legislation dealing with property and civil rights to ensure its compatibility not only with Québec's new code, but with provincial law generally.⁹⁰

As explained by the Minister of Justice, the federal harmonization program has three goals:

- to reaffirm the unique bijural character of Canadian federalism by making the expression of that character explicit and visible in federal legislation in both languages[;]

86. As Mario Dion notes, the Civil Code of Québec led to the amendment of nearly 80% of the provisions of the Civil Code of Lower Canada. Mario Dion, *Civil Code of Lower Canada*, adopted pursuant to 29 Vict., ch. 41 (1865) (Can.), available at http://canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1c.html (last visited Mar. 19, 2004).

87. *Id.*

88. For an account of the institutional evolution of the federal harmonization initiative, see Louise Maguire Wellington, *Bijuralism in Canada: Harmonization Methodology and Terminology*, in 4 *THE HARMONIZATION OF FEDERAL LEGISLATION AND CANADIAN BIJURALISM* (2d publication 1999), available at http://www.justice.gc.ca/en/dept/pub/hfl/fasc4/fascicule_4_eng.pdf (last visited Mar. 17, 2004).

89. *Id.* at 22 app. III.

90. The relevant documents are set out as appendices in 1 *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* (2d publication 1999). For the mandate of the Civil Code Section, see Maguire Wellington, *supra* note 88, at 21.

- to strengthen civil law's rightful place beside common law in the statute books of Canada[; and]
- to ensure the terminology and concepts of federal legislation and the Québec civil law are compatible.⁹¹

This initiative is ambitious in scope and unusually well funded.⁹² The government has commissioned extensive research into a wide range of issues concerning bijuralism and the relationship between federal and provincial law.⁹³ It has also developed a range of drafting techniques suited to the drafting of bilingual, bijural legislation,⁹⁴ a method for harmonizing existing federal law with provincial law⁹⁵ and several new principles of interpretation.⁹⁶ Finally, and most ambitiously, it has under-

91. The Honourable Anne McLellan, Speech at the Conference on the Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism, (Nov. 24, 1997), at <http://canada.justice.gc.ca/en/news/sp/1997/bijur.html> (last visited Mar. 19, 2004). For a detailed account of the genesis and evolution of the program, see *Bijuralism and Harmonization: Genesis*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

92. See A. Anne McLellan, *A Word From the Minister*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM v (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

93. For a description of bijuralism and the relationship between federal and provincial law, see CAN. DEPT. OF JUSTICE, CONSULTATION PAPER, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC 4–8 (1999); CAN. DEPT. OF JUSTICE, CONSULTATIONS & OUTREACH, SECOND SERIES OF PROPOSALS TO HARMONIZE FEDERAL LAW WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC 1 & n.2 (Jan. 2003), at <http://canada.justice.gc.ca/en/cons/harm/note.html> (last visited Mar. 19, 2004, 2004).

94. See CAN. DEPT. OF JUSTICE, REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE (Apr. 4, 1996) (unpublished) [hereinafter REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE]. See also Maguire Wellington, *supra* note 88, at 8.

95. See Maguire Wellington, *supra* note 88, at 15.

96. See Interpretation Act, R.S.C., ch. I-21, §§ 8.1, 8.2 (1985), amended by ch. 4, pt. 2, 2001 S.C. (Can.). For discussion, see Henry Molot, *Clause 8 of Bill S-4: Amending the Interpretation Act*, in 6 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 13–14 (2d publication 1999), available at <http://www.canada.justice.gc.ca/en/news/sp/1997/bijur.html>

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taken a comprehensive statute and regulation revision, focusing on the goal of harmonization.⁹⁷

While these changes to the Canadian statute book are technical and seem remote from the concerns of everyday life, they have symbolic significance and cultural symbolism, which are both important in multicultural societies.⁹⁸ The way in which the federal statute book is managed is an integral part of the federal government's response to the claims of linguistic minorities across Canada and its efforts to defeat the separatist ambitions of Québec.

III. INTERPRETING MULTILINGUAL LEGISLATION

A. *Legal Status*

In interpreting multilingual legislation, an essential first step is to establish the legal status of the several language texts. Some may be translations for convenience only, with no legal force.⁹⁹ Others may be official legal texts, enacted as such, but

ice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6(b)_eng.pdf (last visited Mar. 27, 2004).

97. See Marie-Noelle Pourbaix, *S-4: A First Harmonization Bill*, in 6 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 7 (2nd publication 1999), available at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6(a)_eng.pdf) (last visited Mar. 19, 2004); Marie-Claude Gervais, *Harmonization and Dissonance: Language and Law in Canada and Europe – Program to Harmonize Federal Legislation with the Civil Law of the Province of Québec, Assumption of Complementarity and Methodological Issues*, in 1 THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM 12 nn. 1–2 (2d publication 1999), available at http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc1/fascicule_1_eng.pdf (last visited Mar. 19, 2004).

98. See Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719, 724 (2001) (“To have one’s language officially affirmed is to be affirmed as a cultural group. This becomes especially important if one’s language is chosen out of many languages for official recognition and affirmation.”).

99. The Inuktitut version of Nunavut’s legislation is an example, discussed *infra* notes 314–20. For discussion in the context of the European Economic Union, see Susan Sarcevic, *Problems of Interpretation in an Enlarged European Union*, in RODOLFO SACCO, L’INTERPRÉTATION DES TEXTES JURIDIQUE RÉDIGÉS DANS PLUS D’UNE LANGUE [The Interpretation of Legal Texts Drafted in More than One Language] (2002) 239, 245–47 [hereinafter THE INTERPRETATION OF LEGAL TEXTS].

subject to an interpretation rule that gives paramountcy to one or more of the other language texts.¹⁰⁰ In the absence of such a rule, each language version enacted by the legislature is authentic.¹⁰¹ This means that none has the status of a translation; all are original and equally authoritative expressions of the law. This is so, it should be noted, regardless of the means in fact used to prepare the two language versions. The important point is not whether one text is a translation of the other but whether a given text has been enacted by the legislature.¹⁰²

In Canada, the French and English versions of bilingual legislation at the federal and provincial levels are enacted as law and both are equally authentic.¹⁰³ In the Yukon, Northwest Territories and Nunavut, the language situation is more complex.¹⁰⁴ The Official Languages Act of the Northwest Territories, for example, requires legislation to be enacted in English and French and declares that both versions are equally authoritative.¹⁰⁵ In addition, however, it declares a number of Aboriginal languages to be official languages of the territory — Chipewyan, Cree, Dogrib, Gwich'in, Inuktitut and Slavey.¹⁰⁶ Any of these languages may be used in the legislature and simultaneous

100. Such a rule provides in effect (even if it is more subtle in form) that if there is a conflict between the two language versions of a provision, a particular language version prevails.

101. See THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 323–26; SULLIVAN & DRIEDGER, *supra* note 49, at 74–76.

102. See Reference *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 747. Of course, it would be possible for a non-enacted language version to be declared authentic, either through legislation or constitutional amendment. For a seminal account of equal authenticity between language versions, see R.M. BEAUPRÉ, INTERPRETING BILINGUAL LEGISLATION 5–13 (1986). See also THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 323–26; SULLIVAN & DRIEDGER, *supra* note 49, at 74–78.

103. See CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), sched. B, ch. 11, § 18; Official Languages Act, R.S.C., ch. 31, § 13 (1985) (Can.).

104. See Official Languages Act, R.S.Y., ch. 133 (2002) (Can.); Official Languages Act, R.S.N.W.T., ch. O-1 (1988) (Can.); Official Languages Act, R.S.N.W.T. 1988, ch. O-1, as duplicated for Nunavut by Nunavut Act, S.C., ch. 28, § 29 (1993) (Can.).

105. See Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 10(1) (1988) (N.W.T.).

106. See Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 4 (1988) (N.W.T.).

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translation (i.e., interpretation as opposed to translation on paper) is provided to ensure that all members of the legislature understand what is going on.¹⁰⁷ Copies of the sound recordings of legislative debates both in the original and interpreted versions must be provided to members of the public “on reasonable request.”¹⁰⁸ However, there is no obligation to enact legislation in these languages. There is merely authority to enact regulations to require publication of “a translation of any Act...made after enactment.”¹⁰⁹ Such translations have no legal status; a person relies on them at their peril.

B. Implications of Equal Authenticity

The first implication of the equal authenticity rule is that in every case both versions of the legislation must be read by official interpreters such as Ministers, tribunals and courts. An interpreter cannot know the substance of the law declared by Parliament until he or she has considered both versions and resolved any discrepancies between them.¹¹⁰ As a practical matter, if official interpreters must rely on both versions to determine the law, ordinary citizens (or the lawyers who advise them) are obliged to do so as well.

At first glance, this implication seems problematic, if not absurd. The Constitution requires legislation to be enacted in French and English, and the equal authenticity rule declares both language versions to be equally valid and authoritative. The purpose of these rules is obvious: the legislature is being made to function bilingually so that ordinary citizens can function unilingually.¹¹¹ If this is so, why should it be necessary to read both versions?

The reason both versions must be read, despite their equal authenticity, is that citizens can safely rely on a single version only if they can be sure that both say the same thing. And in

107. LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES, OPERATIONS OF THE LEGISLATIVE ASSEMBLY, at <http://www.assembly.gov.nt.ca/visitorinfo/NWTStyleOfGovernment/Operations.html> (last visited Mar. 17, 2004).

108. Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 10(3) (1988) (N.W.T.).

109. Official Languages Act, R.S.N.W.T. 1988, ch. O-1 § 10(2) (1988) (N.W.T.).

110. SULLIVAN & DRIEDGER, *supra* note 49, at 77–78.

111. See Reference *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

practice, this assurance can never be achieved. Drafting mistakes are inevitable; and even in the absence of mistake, different language versions can rarely be identical.¹¹² Most of the time the discrepancies between the two versions are minor and insignificant, but that is not always the case. To determine what discrepancies exist and whether they matter, the interpreter must read both versions.¹¹³

More fundamentally, however, it is arguable that the primary purpose of bilingual legislation is not to facilitate unilingual access to the law, but to build community. To focus on access leaves out of account the comprehensive body of language rights protected by the Constitution and by federal and provincial legislatures, of which bilingual enactment and publication is only one. These include the right to education and to government services in one's own language, as well as the right to speak and be heard in court in one's own language.¹¹⁴ These rights are best interpreted in light of one another as part of a comprehensive scheme. Further, the focus on access does not fully account for the facts. As Rod Macdonald points out,

...citizens have a legitimate expectation of being able to understand the law that is applicable to them. But this argument simply exhausts itself in multilingual societies such as Canada. Instrumental effectiveness and moral legitimacy apply just as much to aboriginal peoples and to immigrants who speak neither French nor English, yet apart from aboriginal peoples, few have claimed the need for multilingual legislation. The argument, that is, rests primarily on symbolic and not on instrumental grounds.¹¹⁵

Denise Réaume makes a similar point when she suggests that the primary purpose of official bilingualism is not to facilitate

112. See Jean Claude G mar, *L'interpr tation du texte juridique ou le dilemme du traducteur* [The Interpretation of Legal Texts or the Translator's Dilemma], in *THE INTERPRETATION OF LEGAL TEXTS*, *supra* note 99, at 103-04; Louis-Philippe Pigeon, *La traduction juridique - L' quivalence fonctionnelle* [Legal Translation: The Functional Equivalent], in JEAN CLAUDE G MAR, *LANGAGE DU DROIT ET TRADUCTION: ESSAIS DE JURILINGUISTIQUE* [The Language of the Law and Translation: Essays on Jurilinguistics] (1982).

113. SULLIVAN & DRIEDGER, *supra* note 49, at 77-78.

114. See generally CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), §§ 16-23. Note that the nature and extent of these rights vary among the provinces and territories.

115. *Legal Bilingualism*, *supra* note 7, at 138-39, n.71.

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access to law but to promote linguistic security.¹¹⁶ Réaume's analysis echoes the preamble of the Official Languages Act, which mentions the government's commitment to "enhancing the vitality and supporting the development of English and French linguistic minority communities...and to fostering full recognition and use of English and French in Canadian society."¹¹⁷ These sentiments are also found in numerous judgments of the courts.¹¹⁸

On this analysis, the primary purpose of bilingual and bijural legislation is to promote the viability of French and English cultural communities in Canada, to ensure that both groups feel at home in the country. Understood in this light, the obligation to read both language versions of federal legislation, even in places where little French is spoken, is consistent with the goals of official bilingualism. At home is a bilingual, bijural place, where two cultures do not just co-exist in equal but separate columns but interact with one another in a shared space. The ideal here is dialogue leading to integration.

116. Denise G. Réaume explains:

Linguistic security requires not only that the use of one's language not be made a ground of liability..., but also that the instrumental usefulness of the language be supported, not merely for the sake of other ends considered extrinsically [such as access to law], but out of respect for the intrinsic value of a life lived within a particular linguistic milieu....

...It is fitting that the constitution should seek to make the most important aspects of the country's political institutions accessible to minority official language communities. The ability to live one's life in one's own language is thereby importantly expanded to include interaction with government agencies and participation in political institutions.... More important, the operation of public institutions in a minority official language advances the intrinsic expressive interest in language use by making the state and its institutions full participants in the life of the community, and the members of the group full participants in public life.

The Demise of the Political Compromise Doctrine, *supra* note 36, at paras. 44–45.

117. Official Languages Act, R.S.C., ch. 31 (1985) (Can.).

118. See, e.g., Reference *Re* Manitoba Language Rights, [1985] 1 S.C.R. 721, 744; Ford v. Québec (Attorney General), [1988] 2 S.C.R. 712, 748–49; Mahe v. Alberta, [1990] 1 S.C.R. 342, 362; R. v. Beaulac, [1999] 1 S.C.R. 768, paras. 17, 25.

A second implication of the equal authenticity rule is that neither version of bilingual legislation can be favoured over the other simply on the basis of language.¹¹⁹ Conflicts between the versions must be resolved, for it would be an unacceptable violation of the rule of law if interpreters were to apply different rules to citizens depending on which version of the statute they invoked. However, under the equal authenticity rule, conflicts are resolved not through a paramountcy rule, but by determining the substance of the law that Parliament intended to enact.¹²⁰ In some cases this approach may favour the English version, in others the French version, in others neither version. But in all cases, if one version is preferred over the other, it is preferred only because it coheres with the court's interpretation of the text based on the entire range of interpretive techniques available to it, and not on the automatic preference for one language over the other.¹²¹ The two versions are equal in that both must be read and considered in comprehending the substance of the law. They are also equal in that either may be rejected if it fails to express accurately the substance of the law as determined by the court.¹²²

A third implication of equal authenticity is that the legislative text is comprised of both versions.¹²³ As Nicholas Kasirer puts it, each version aspires to be a complete and reliable expression of the law, but neither can manage on its own.¹²⁴ The two versions are "predicated, as vehicles for meaning, on the ongoing existence and availability of the [other]."¹²⁵ They are halves of a single whole, and to access the law properly both versions must be read and understood.

119. This point is conclusively established in Reference *Re* Manitoba Language Rights, [1985] 1 S.C.R. 721, at 777–78.

120. *Food Machinery Corp v. Canada* (Registrar of Trade Marks), [1946] 5 C.P.R. 76.

121. See Reference *Re* Manitoba Language Rights, [1985] 1 S.C.R. 721.

122. *R. v. Cie immobilière BCN*, [1979] 1 S.C.R. 865.

123. This point is repeatedly made by the courts. See, e.g., *R. v. Mac*, [2002] 1 S.C.R. 856.

124. Nicholas Kasirer, *Lex-icographie Mercatoria* [Lexicography Mercatoria], 47 AM. J. COMP. L. 653, 673 (1999). Kasirer is speaking of a bilingual lexicon of European contract law, but his point applies equally to bilingual legislation. *Id.*

125. *Id.* at 656.

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If both versions of a bilingual text must be read to determine the law, it follows that professional interpreters must be bilingual to do their job properly.¹²⁶ Ideally they must be fully bilingual, which entails not just fluency in both languages but fluency in both cultures as well. While many legal professionals in Québec are bilingual and a significant number are fully bilingual, that is not the case elsewhere in Canada.¹²⁷ Absence of linguistic capacity and cultural knowledge is a major barrier to achieving the ideal of dialogue and integration. As Rod Macdonald writes,

Numerous factors contribute to the apparently inexorable decay of legal bilingualism into legal dualism: intellectual laziness among legal professionals; rampant unilingualism among legal elites; a proliferation of mediocre translations of texts; an educational system that privileges information over understanding; and, not least, a plethora of secondary sources and computerized finding tools.¹²⁸

While the factors mentioned by Macdonald are of great importance, I do not agree that bilingualism is decaying into dualism. In truth, Canada has never experienced the legal bilingualism he describes — there is no golden age from which to decline. I see legal dualism as a necessary (although not a sufficient) condition for achieving legal bilingualism. To move from dualism toward bilingualism, the factors mentioned by Macdonald must be addressed — and are being addressed in modest ways. Although full bilingualism outside Montréal is relatively rare, the federal government has put significant resources into ensuring that its own lawyers are fluent in both official languages and are cognizant of both legal systems and cultures.¹²⁹ It has also sponsored and published a significant

126. See Tetley, *supra* note 7, at 727; *Legal Bilingualism*, *supra* note 7, at 165.

127. Pierre-André Côté, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, 29 *BROOK J. INT'L L.* 1067 (2004).

128. *Legal Bilingualism*, *supra* note 7, at para. 43.

129. The federal government sends its lawyers for language training on a regular basis. Promotion is contingent on linguistic as well as legal competence. Drafters in the Legislative Services Branch are encouraged to complete the program offered by the University of Ottawa that allows civilists to achieve a degree in Common Law (in English or French) and common law lawyers to achieve a degree in Civil Law (in English or French).

body of legal scholarship on bijuralism, through both government departments and institutions such as Royal Commissions and the Law Commission of Canada.¹³⁰ In recent years, opportunities for Francophones and civilists to learn common law and for Anglophones and common law lawyers to learn civil law have proliferated in Canadian law schools, at least in the East.¹³¹ Globalization has helped as well, by providing incentives for everyone to recognize the limits of their own small place in the world.

C. *The Shared Meaning Rule*

The basic rule that has come to govern the interpretation of bilingual legislation in Canada is known as the shared meaning rule. In cases where the two versions of a bilingual statute do not say the same thing, if one is ambiguous and the other is clear, the meaning that is shared by both is presumed to be the meaning intended by the legislature.¹³² This rule is based on the fundamental assumption that both versions of a legislative text must declare the same law.¹³³ To apply different rules to similarly situated persons, depending on some test of language identification, would violate formal equality and, in disputes

130. All publications of government and government sponsored legal scholarship are in both English and French.

131. Both the University of Ottawa and the University of Moncton offer a complete program of common law in French leading to a common law degree. *See generally* UNIVERSITY OF MONCTON WEBSITE, at <http://www.umoncton.ca/> (last visited Mar. 14, 2004). The University of Ottawa offers common law lawyers a year-long program in English leading to a degree in Civil Law and civilist lawyers a year-long program in French leading to a common law degree. *See generally* UNIVERSITY OF OTTAWA WEBSITE, at <http://www.uottawa.ca/welcome.html> (last visited Mar. 14, 2004). McGill University offers a three year bilingual program in which graduates simultaneously study both legal systems and graduate with degrees in both. Several Universities offer civilist lawyers a year-long program in English. *See generally* MCGILL UNIVERSITY WEBSITE, at <http://www.mcgill.ca/> (last visited Mar. 14, 2004).

132. The shared meaning rule is discussed at length in BEAUPRÉ, *supra* note 102, pt. 1, 1–194. *See also* THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 326–32; SULLIVAN & DRIEDGER, *supra* note 49, at 80–94.

133. This follows from the most basic premise underlying the rule of law, namely that law is the same for all subjects. *See* R. v. O'Donnell, [1979] 1 W.W.R. 385 (B.C.C.A.).

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between persons with different identifications, could lead to impasse rather than resolution.¹³⁴

The shared meaning rule also assumes a one-to-one relationship between the meaning of a legislative text and the law.¹³⁵ This assumption is much harder to justify. As in other rules that refer to “the meaning” of a text, it is difficult to know what kind of meaning the interpreter has in mind: the dictionary meaning? the literal meaning? the meaning in context? If the reference is to meaning in context, how much context? To determine whether the two versions of a contested provision say the same thing, must both versions be read in their entirety? And are the two versions to be compared before or after other interpretive efforts, such as scheme analysis or reliance on presumed intent?

The highly inconsistent practice of the courts suggests that little thought has been given to these questions. They are rarely addressed in any formal way.¹³⁶ However, in a recent case involving interpretation of the Criminal Code, the Supreme Court of Canada had this to say:

In his *Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327, Pierre-André Côté reminds us that statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions. Where the words of one version may raise an ambiguity, courts should first look to the other official language version to determine whether its meaning is plain and unequivocal.

In this case, any ambiguity arising from the English version is resolved by the clear and unambiguous language of the French version of [section] 369(b). *There is therefore no need to resort*

134. Consider the dilemma that would arise if a court were called on to adjudicate between a litigant who relied on the clear meaning of the French version of a provision and a litigant who relied on the clear meaning of the English version of the same provision. The facts would be the same for both, but the applicable rule would differ. To apply a different rule, depending on linguistic affiliation, would both violate rule of law and fail to resolve the dispute.

135. This assumption is discussed in *Legal Bilingualism*, *supra* note 7, at 159.

136. See Ruth Sullivan, *Statutory Interpretation in the Supreme Court of Canada*, 30 OTTAWA L. REV. 175, at 192, 195 & nn. 45–47 (1998-99) [hereinafter *Statutory Interpretation in the Supreme Court of Canada*].

*to further rules of statutory interpretation, such as those invoked by the Court of Appeal.*¹³⁷

This passage seems to suggest that the shared meaning rule occupies top spot in a hierarchy of interpretation rules. Interpretation is to begin with a search for the shared meaning and to end if such a meaning is found. In effect, this analysis adopts the rhetoric and method of textualism:¹³⁸ if one version is ambiguous and the other is plain, the plain meaning not only resolves the ambiguity but renders any further interpretive effort superfluous.

At first glance it might seem that such an analysis is justified by the equal authenticity rule. If as a matter of constitutional law the two versions are equal, how can an interpreter validly reject the meaning found in both in favour of a meaning that is found in only one of them? And if the shared meaning must be adopted as a matter of constitutional law, what is the point of looking at other evidence of legislative intent?

In my view, this analysis is grounded in the faulty assumption that the law enacted by a legislature can be equated with the meaning of the words used to declare and communicate the law. Let us suppose that the primary duty of interpreters is to give effect to the law that the legislature intended to enact in so far as that intention can be known. The legislature's intention is necessarily an inference drawn from reading the text (whether unilingual or bilingual) in context, having regard to the purpose of the legislation, the consequences of adopting a proposed interpretation and admissible extrinsic aids. In drawing inferences, interpreters are obliged to take both language versions into account. But that does not entail accepting a shared meaning if there are other more compelling grounds to infer that some other meaning was intended.¹³⁹ The language of a text may or may not be an apt expression of the legislature's intention. It may be apt in one language but not in the other. There is no necessary relation between the clarity of a text and

137. *R. v. Mac*, [2002] 1 S.C.R. 856, para. 5–6 (emphasis added).

138. For the seminal modern account of textualism, see William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STANFORD L. REV.* 321 (1990).

139. *R. v. Compagnie Immobilière Ltée.*, [1979] 1 S.C.R. 865, at 874–75, paras. 16–17.

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its fidelity to the law that it is meant to declare. In order to determine what law was intended, interpreters must have access to the full range of techniques used to interpret legislation.¹⁴⁰ As the court itself noted in an earlier case, if the shared meaning of the two versions of bilingual legislation could not be rejected when it turns out to be implausible, the effect would be to permit mistranslation or drafting error to trump legislative intent.¹⁴¹

The *Mac* case can be used to illustrate the problems that arise from making shared meaning the definitive basis for inferring intended law. The issue in the case was the proper interpretation of the word “adapted” in section 369(b) of the Criminal Code:

ENGLISH	FRENCH
<p>369. Every one who...</p> <p>(b) makes, offers or disposes of or knowingly has in his possession any plate, die, machinery, instrument or other writing or material <i>that is adapted</i> and intended to be used to commit forgery</p> <p>...</p> <p>is guilty of an offence....</p>	<p>369. <i>Quiconque...</i></p> <p>(b) fait, offer ou aliéner ou sciemment a en sa possession quelque plaque, matrice, appareil, instrument ou autre écrit ou matière adaptés et destinés à servir pour commettre un faux</p> <p>...</p> <p><i>est coupable d'un acte criminel....</i></p>

Counsel for the Crown argued that “adapted” here means “suitable for” rather than “physically modified or altered,” and the court accepted this interpretation.¹⁴² It found that although “adapted” in the English version was ambiguous, “*adapté*” in the French version was clear — not because “*adapté*” normally means “suitable for” but because the legislature is presumed to use the same words to express the same meaning and different

140. *Id.* at 871–72.

141. *See Johnson v. Laflamme*, [1916] 54 S.C.R. 496, at 504–05.

142. *R. v. Mac*, [2002] 1 S.C.R. 856, para. 5–6.

words to express different meanings.¹⁴³ The court noted that in section 342.01(1)(d) of the Code, which dealt with a similar offence, the English word “adapted” was rendered in French not by “*adapté*” but by “*modifié*”:

ENGLISH	FRENCH
342.01 (1) Every person who... (d) possesses any instrument, device, apparatus, material or thing that the person knows has been used or knows is <i>adapted</i> or intended for use in forging or falsifying credit cards is guilty of an offence...	342.01 (1) <i>Quiconque...</i> d) a en sa possession, <i>un instrument, un appareil, une matière ou une chose qu'il sait utilisé pour falsifier des cartes de crédit ou en fabriquer des fausses, ou qu'il sait modifié ou destiné à cette fin est coupable...d'un acte criminel...</i>

The wording of section 342.01(1) suggests that when the legislature means “physically altered” it uses the word “*modifié*” in the French version.¹⁴⁴ Since it used the word “*adapté*” in section 369 it must mean something different, the only possibility being “suitable for.”¹⁴⁵ This, then, must be the shared meaning of “adapted / *adapté*” in section 369.¹⁴⁶

The first problem with this reasoning is the arbitrary choice of context. The court might equally have relied on the dictionary meanings of “adapted / *adapté*” or considered those words in the context of section 369 alone. Had it taken this approach it would have judged both versions ambiguous and would have required a full analysis. Alternatively, it might have enlarged the context to include other provisions of the Code and discovered that, far from using language consistently, the Criminal Code is full of inconsistent terminology, the inevitable result of multiple amendments over the years. The court offers no justification for examining the disputed language in light of section 342.01(1) while ignoring other contexts, the purpose of the provision and possible extrinsic aids.

143. *Id.* at para. 7.

144. *Id.*

145. *Id.*

146. *Id.*

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A second problem with the court's approach in *Mac* is its conclusion that in sections 369 and 342 of the Code, the French drafter correctly used different words to express an intended difference in meaning, while the English drafter's use of the same words in the two sections was a mistake.¹⁴⁷ Once again, no justification is offered for its conclusion. Perhaps it was the French drafter who erred by using different terminology to express the same meaning. To determine which version correctly reflects legislative intent, it is necessary to canvass the entire body of relevant evidence; focusing on a single feature of the text is not enough.

The better view, and certainly the more widespread view, is that the shared meaning rule does not occupy a special position in statutory interpretation. Despite its constitutional origins, like the other so-called "rules" of statutory interpretation, it operates as a principle or presumption. The presumptive character of the shared meaning rule is spelled out very clearly by Justice Stone in *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration)*:

As the recent decision in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862 indicates...the shared meaning rule is not absolute. [Judge] Gonthier maintained, at paragraph 25 [page 879], that a court is free to reject a shared meaning if it appears contrary to the intention of the legislature. To illustrate this point, Judge Gonthier quoted the following key passage from *R. v. Compagnie Immobilière BCN Ltée*, [1979] 1 S.C.R. 865, at pages 871-872:

...

"[The shared meaning rule] is a guide; it is one of several aids to be used in the construction of a statute so as to arrive at the meaning which, 'according to the true spirit, intent and meaning of an enactment, best ensures the attainment of its objects'....The rule...should not be given such an absolute effect that it would necessarily override all other canons of construction."

Thus, the shared meaning principle is not always determinative of the interpretive exercise, and will be discarded if an alternative interpretation leads to a preferable or more acceptable result.

147. *Id.*

...

Indeed, the jurisprudence suggests that the courts must continue to employ ordinary principles of statutory interpretation when construing bilingual legislation. The object of the inquiry, therefore, is to search out and give expression to the legislature's intention in light of statute's purpose, the context in which it was enacted and other interpretive strategies.¹⁴⁸

In short, equal authenticity requires interpreters to give equal attention to both versions in their efforts to determine legislative intent. But it does not require them to accept a shared meaning if there are grounds to believe that some other meaning was intended. In order to determine whether some other meaning was intended, they must resort to the full range of interpretive techniques.

D. Applications of the Shared Meaning Rule

One would think that the shared meaning rule would be most heavily relied on when the two versions of a statute say the same thing. Redundancy in the two versions suggests that the drafters have correctly reproduced their instructions and that the legislature had a clear and consistent understanding of what it was enacting, regardless of the version on which it relied. A coincidence of meaning between the two versions is a strong indicator of legislative intent and is undoubtedly relied on in practice by conscientious bilingual interpreters. But the shared meaning rule itself is rarely invoked in these circumstances.¹⁴⁹ Rather, it is reserved for cases where there is a perceived conflict between the two versions of the legislative text.

In the case law, the shared meaning rule is invoked and relied on when one language version of legislation is thought to be ambiguous while the other appears to be clear, and the clear meaning offers a plausible interpretation of both versions.¹⁵⁰ Under these circumstances, the shared meaning offers cogent evidence of legislative intent and may carry considerable weight

148. *Flota Cubana de Pesca v. Canada*, [1998] 2 F.C. 303, paras. 20, 21.

149. For a rare exception, see *R. v. Barnier*, [1980] 1 S.C.R. 1124 at para. 11.

150. THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49; SULLIVAN & DRIEDGER, *supra* note 49, at 80–87.

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— depending, of course, on *how* clear and plausible it is and whether other relevant considerations support or contradict it.¹⁵¹

When the two versions of legislation say different things, there is no shared meaning and the courts must resort to other interpretive strategies to resolve the conflict.¹⁵² In such cases, there are three possibilities. The court may adopt one of the versions on the grounds that it accurately expresses the legislature's intent while the other is flawed by drafting error.¹⁵³ It may conclude that neither version accurately expresses the legislature's intent and both drafters erred.¹⁵⁴ Or it may attempt to construct an interpretation that is grounded in both versions.¹⁵⁵

This last approach is illustrated by *Aeric Inc. v. Canada Post Corp.*¹⁵⁶ Rather than choosing between the language versions or rejecting both for some third alternative, the court in *Aeric* attempts to integrate the two. The issue in the case was the meaning of the expression “the principal business/l'activité principale” used in regulations under the Canada Post Corporation Act.¹⁵⁷ The applicant argued, on the basis of the English wording, that only profit-making activities could be considered in determining the “principal business” of a person.¹⁵⁸ The respondent relied on the French version to urge a broader interpretation which would permit consideration of any activity carried on by a person.¹⁵⁹ Judge Ryan responded to these arguments by constructing a meaning based on both versions, concluding that the expression “principal business/l'activité principale” referred to non-profit-making activities, but only if these activities were related to a business carried on by the person.¹⁶⁰

151. SULLIVAN & DRIEDGER, *supra* note 49, at 81–82.

152. *Id.* at 90–93.

153. *Id.* at 90 n.59.

154. While this is a theoretical possibility, I am unaware of any examples.

155. SULLIVAN & DRIEDGER, *supra* note 49, at 86–87.

156. *Aeric Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127 at para 60.

157. Canada Post Corporation Act, R.S.C., ch. C-10 (1985) (Can.).

158. *Aeric Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127.

159. *Id.* at para. 37.

160. As the *Aeric* court explained:

...the use of the term “l'activité principale” in the French version of para. (h) gives support to a wide reading of “principal business.” On the other hand, the use of “principal business” in the English version suggests that “l'activité principale” should be read in a somewhat more restricted way than a literal reading might suggest.

When one version of the legislation is broader in scope than the other, it is sometimes said that the narrower meaning should be preferred since this meaning is shared by both versions.¹⁶¹ However, this analysis has been repeatedly rejected by the courts.¹⁶² Unless the broader version is ambiguous and the narrower version is clear, there is no basis for invoking the shared meaning rule under these circumstances.¹⁶³ The proper approach when the scope of the versions differs, and both are more or less clear, is to rely on other interpretive techniques.

Two conclusions result from this brief survey. First, the shared meaning rule is normally invoked only at points of pathology in the preferred language text. In practice, the equal-but-separate model dominates. Second, when the shared meaning rule is invoked, the interpreter is called on not just to apply the text, but to establish it — to redraft it in effect. This has

Id. at para. 62.

161. See, e.g., *R v. Hinchey*, [1996] 3 S.C.R. 1128, at 1157; *Schreiber v. Canada*, [2002] SCC 62, at para. 56; *R. v. Daoust*, [2004] SCC 6, at para. 26.

162. For a review of the relevant cases, see Paul Salembier, *Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule?*, OTTAWA L. REV. (forthcoming 2004) (on file with author). See also SULLIVAN & DRIEDGER, *supra* note 49, at 82–83.

163. Courts frequently rely on THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 327 to justify their claim that when one version is broader in scope than the other, the common meaning is the narrower one. However, Côté has repudiated this position. Côté writes:

Il y a lieu de faire observer que si la prévalence de la version claire sur la version ambiguë se justifie rationnellement, puisque l'on doit présumer que la meilleure expression de la volonté législative est celle qui est exempte d'ambiguïté, il en va autrement de la prévalence de la version restreinte: il n'y a, à notre avis, aucun motif rationnel de préférer le sens le plus restreint, car rien ne permet d'affirmer qu'il représente mieux l'intention législative que le sens large. [It is worth noting that while the primacy of the clear version over the ambiguous version is rationally justified, for one must presume that the better expression of the legislature's will is the one that is free of ambiguity, the same cannot be said of the primacy of the narrow version: in my opinion, there is no rational basis to prefer the narrow meaning, for there is no justification for saying that it is a better expression of the legislature's will than the broader meaning.]

Pierre-André Côté, *L'Interprétation des textes législatifs bilingue au Canada* [The Interpretation of Bilingual Legislative Texts in Canada], in THE INTERPRETATION OF LEGAL TEXTS, *supra* note 99, at 12 (2002), (emphasis added).

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implications for the way we understand legislative text and the role of the judge in interpretation.

E. What Bilingual Legislation Reveals About Law

Bilingual legislation draws attention to aspects of legislation that courts tend to ignore since they don't sit well with the official mythology of statutory interpretation. First, it focuses attention on the way legislation is prepared and whose intentions in fact govern the way a legislative scheme is struck and legislative rules are formulated. In Canada, in practice, the legislature has a relatively modest role to play. The more important players are the Cabinet, which initiates all government sponsored legislation,¹⁶⁴ the bureaucrats in the sponsoring department who prepare the proposal to the Cabinet and instruct the legislative drafters,¹⁶⁵ and the drafters themselves who not only help determine the scheme and wording that bests gives effect to the instructions they have received, but also administer departmental duties such as ensuring that proposed legislation accords with the rule of law and other constitutional norms.¹⁶⁶

This focus on the realities of legislative preparation invites courts to pierce the legislative veil, so to speak, and to receive evidence or take judicial notice of how a particular piece of legislation was made — the drafting process and conventions current at the time of enactment, the time frame in which the bill was drafted and the real possibility of mistake. Were courts to pierce the legislative veil, they would quickly encounter the problem of bureaucratic pre-interpretation that arises when legislation is prepared in one language and subsequently translated into another, or when legislation is redrafted in the context of a statute revision. In both situations a bureaucrat is effectively given the task of resolving ambiguity in the existing legislative text without the benefit of interaction with instructing officers or legislative committees. Equally disconcerting, in both situations the bureaucrat is well positioned to create inadvertent conflict between the two language versions by misunderstanding the original text or offering an infelicitous translation or revision.

164. *See supra* note 15.

165. *Id.*

166. *See Sullivan Observations, supra* note 58.

A second effect of bilingual legislation is that it forces interpreters to distinguish the law enacted by the legislature from the words of the legislative text, in other words, to acknowledge that the wording of a text does not embody or contain the law but is merely a basis for inferring the law.¹⁶⁷ Even though the two versions of a legislative text say different things, they are nonetheless taken to express the same rule of law.¹⁶⁸ This is possible only because the enacted law is not equivalent to the text, but is a construction inferred from reading the words of the text in context and relying as well on other evidence of legislative intent. This recognition is important because it undermines the basic assumption underlying textualism, namely that law is contained in the words of the legislative text.¹⁶⁹

IV. INTERPRETING MULTIJURAL LEGISLATION

Like the United States, Canada is a bijural federation in the sense that it contains internal jurisdictions most of which apply the common law but one that applies civil law, at least in private law matters.¹⁷⁰ In both countries as well, there are areas where Aboriginal law and institutions have a growing role to play.¹⁷¹ This creates challenges for legislatures, which must ensure that their enactments mesh in an appropriate way with the other legal systems within the federation.

Québec's first civil code came into force in 1866, a year before Confederation.¹⁷² At Confederation, under the federal - provincial division of powers established by the Constitution Act, 1867, the provinces retained jurisdiction over matters of property and civil rights in the Province, subject to Parliament's paramount jurisdiction over matters explicitly assigned to the

167. See THE INTERPRETATION OF LEGISLATION IN CANADA, *supra* note 49, at 327; *Legal Bilingualism*, *supra* note 7, at para. 47.

168. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

169. See *Statutory Interpretation in the Supreme Court of Canada*, *supra* note 136, at 203 & n.245.

170. See generally LA. REV. STAT. ANN. vols. 16-17 (1972 & Supp. 2000); Civil Code of Québec, ch. 64, 1991 S.Q. (Can.).

171. See *supra* note 29 and authorities cited therein.

172. Civil Code of Lower Canada, adopted pursuant to 29 Vict., ch. 41 (1865) (Can.), available at http://www.canadiana.org/citm/specifique/lois_e.html (last visited Mar. 4, 2004).

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federal Parliament.¹⁷³ These include bankruptcy, marriage and maritime law — matters that would otherwise come within property and civil rights.¹⁷⁴ Parliament also has jurisdiction over matters such as criminal law, federal taxation and federal Crown liability, each of which necessarily interacts with provincial law governing property and civil rights.¹⁷⁵

In legislating about matters within its jurisdiction, Parliament can create its own concepts and institutions, declare its own doctrines and governing principles and devise its own rules.¹⁷⁶ Federal legislation is paramount over provincial law to the extent of any conflict.¹⁷⁷ However, even though Parliament, when acting within its jurisdiction, is legally entitled to disregard provincial law,¹⁷⁸ as a practical matter it could not and would not want to do so. In most cases the best way to achieve federal objectives in areas involving property and civil rights is to make use of existing provincial law concepts, institutions, and principles. Since these may be different in Québec and the common law provinces, federal legislation that draws on provincial law is bijural — and multijural to the extent law reform in the common law provinces proceeds along varying paths. Even when Parliament opts for unijuralism and creates a single federal regime that is meant to operate uniformly throughout the country, if the legislation deals with property or civil rights, at some point it must come in contact with provincial law.

Rod Macdonald has suggested that in a federal system legislatures have a duty to minimize conflict and incoherence between national and local law.¹⁷⁹ Arguably this is an aspect of the rule of law. However, when legislatures fail to discharge

173. See CAN. CONST. (The Constitution Act, 1867) pt. IX, § 129. Under section 129, pre-existing law was continued until altered by the appropriate legislature. *Id.*

174. See CAN. CONST. (Constitution Act, 1867), § 91 (setting out “matters” assigned to Parliament).

175. *Id.*

176. See HOGG, *supra* note 26, at 307–08.

177. CAN. CONST. (Constitution Act, 1867) § 91.

178. This follows from the doctrines of sovereignty and paramountcy.

179. Roderick A. Macdonald, *Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Québec Civil Law*, in THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUEBEC AND CANADIAN BIJURALISM 29, 41–42 (1997) [hereinafter *Harmonizing the Concepts and Vocabulary of Federal and Provincial Law*].

this duty, the task falls to the courts and must be managed through interpretation.

The challenge for courts is to identify the ways in which and the extent to which particular legislation is bijural and to factor that analysis into their interpretation. There is a range of possibilities here.

(1) Federal legislation may expressly incorporate by reference a clearly identified set of provincial rules. For example, the rules governing vehicular traffic on federal property are the rules of the province in which the property is situated.

(2) Federal legislation may create a scheme designed to work within provincial law. For example, the Bankruptcy and Insolvency Act presupposes that the legal relations between a bankrupt person and his or her creditors have been fixed by provincial law; it merely declares the consequences of those relations in situations of bankruptcy. The federal rules are superimposed on provincial law.

(3) Federal legislation may use terms of art from both common law and civil law — for example “real property and immovables / *biens réels et immeubles*” — with the intention of relying on the common law in the common law provinces and on civil law in Québec.

(4) Federal legislation may use a term of art from the common law — for example, exemplary damages — with the intention of relying on the common law in both common law provinces and Québec. The reverse is equally possible, although historically it rarely has occurred.

(5) Federal legislation may create a new concept or institution or declare a new principle that is intended to displace provincial law. Such a concept, institution or principle might draw on both common law and civil law sources, on international law or Aboriginal law, or it might be an original creation.¹⁸⁰

Possibilities 1-3 describe legislation that is bijural in a suppletive sense: the provincial law of both the common law provinces and Québec is relied on to supplement, that is, to explain or complete, federal legislation. The result is that federal law may have somewhat different effects in different provinces.

180. For other analyses of the range of possibilities, see Maguire Wellington, *supra* note 88, at 3 & n.7; REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE, *supra* note 94.

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Suppletive bijuralism is the chief focus of the federal harmonization program and it promotes an equal-but-separate model of bijuralism. By contrast, possibilities 4 and 5 refer to legislation that is unijural in the sense that the rule set out in the federal text is meant to have the same meaning and apply in the same way throughout Canada.¹⁸¹ Any concept, institution or principle referred to in a unijural rule must be given the same meaning in all the provinces. However, the meaning given to this uniform concept, institution or principle may itself be bijural (or multijural) in a derivative sense; that is, it may be derived from two (or more) legal sources. This form of bijuralism is based on the model of dialogue and integration.

Historically, the challenges of working with two legal systems in a federal state have been felt much more in Québec than elsewhere in Canada.¹⁸² The main factor here is the dominance of the common law at both the federal and provincial levels. Public law throughout the country is unijural common law.¹⁸³ Further, when Parliament wants to impose a uniform rule to govern a private law matter within its jurisdiction, it typically has relied on common law sources.¹⁸⁴ This allows for the easy harmonization of federal and provincial law in the common law provinces but creates major problems for Québec. Another factor was the modest attention paid to developing effective techniques for drafting bijural legislation.¹⁸⁵ This, combined with the poor quality of the French language version, often made it difficult for interpreters to discern Parliament's intent in relation to Québec.¹⁸⁶ Finally, there was the gradual but significant erosion of the Civil Code of Lower Canada as a complete and

181. My use of the term "unijural" differs from that of the Department of Justice, which uses it in a derivative sense to refer to terms or concepts derived from the common law alone or the civil law alone.

182. Most of the case law addressing harmonization problems comes from Québec. SULLIVAN & DRIEDGER, *supra* note 49, at 94.

183. *See supra* note 75.

184. At least that was the case in the past. It remains to be seen whether the harmonization program, along with other factors such as globalization, will work to produce a more balanced approach.

185. *See supra* note 7.

186. *See, e.g.*, Deputy Minister of Rev. (Que) v. Rainville, [1980] 1 S.C.R. 35, 41.

authentic embodiment of Québec's *jus commune*.¹⁸⁷ This erosion was caused in part by reliance on common law cases to interpret the Code, first by the Privy Council and later by the Supreme Court of Canada, whenever a concept or rule set out in the Code seemed to be more or less the same as a common law concept or rule.¹⁸⁸ Such reliance not only distorted the substantive law of the Code but also undermined civil law methodology by focusing on precedent instead of doctrine.¹⁸⁹ Another contributing factor was the Québec legislature's reliance on ordinary statute, rather than Code amendment, as a tool of law reform.¹⁹⁰ The absence of a fully functioning civil code made assimilation to the common law that much easier.¹⁹¹

On January 1, 1994, the Civil Code of Québec came into force and created an opportunity to address these historical problems.¹⁹² The federal government has responded to this opportunity in a serious and comprehensive way. While its response has many dimensions, this Article focuses on the creation of new scholarship with a civil law emphasis, the methodology of harmonization, the interpretation of harmonized legislation, derivative bijuralism and the independence of language and law.

A. New Scholarship

In 1993, in anticipation of the new code, a Civil Code Section was established within the Department of Justice.¹⁹³ It began its work by organizing a series of studies and reports.¹⁹⁴ The Section commissioned academic lawyers to write papers analyzing the constitutional framework within which harmonization occurs in Canada, exploring points of contact between federal

187. See Roderick A. Macdonald, *Encoding Canadian Civil Law*, in THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW AND CANADIAN BIJURALISM 164–70 [hereinafter *Encoding Canadian Civil Law*].

188. See Allard, *supra* note 45, at 3–7.

189. See *id.* at 8.

190. See *Encoding Canadian Civil Law*, *supra* note 187.

191. *Id.*

192. See Dion, *supra* note 86.

193. See Maguire Wellington, *supra* note 88, at 2, app. II.

194. These are described in CAN. DEPT. OF JUSTICE, CONSULTATIONS & OUTREACH, SECOND SERIES OF PROPOSALS TO HARMONIZE FEDERAL LAW WITH THE CIVIL LAW OF THE PROVINCE OF QUEBEC, at <http://canada.justice.gc.ca/en/cons/harm/note.html> (last visited Mar. 19, 2004, 2004).

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and civil law and recommending policies to govern the work of harmonization and interpretation of the finished product.¹⁹⁵ Two important things emerge from these studies: first, a set of concepts and principles concerning harmonization within a federal system, including most notably the concepts of complementarity and dissociation, and second, a set of techniques for dealing with bijuralism in a bilingual jurisdiction.

1. Complementarity versus Dissociation: a Civilist Coup

A striking feature of the scholarship commissioned by the government is its nearly exclusive reliance, in the early stages at least, on civil law lawyers to develop the policies, methodologies and interpretation rules designed to govern the relationship between federal legislation and provincial law — not only the law of Québec, but the law of all the provinces and territories.¹⁹⁶ The harmonization of federal and provincial law in Canada is evolving as a largely civilist project, based on assumptions that are remote from common law thinking.¹⁹⁷ There is irony here, and more than a little poetic justice.¹⁹⁸ One can

195. The academic papers have been collected in a series of published collections. See CAN. DEPT. OF JUSTICE, *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE QUÉBEC CIVIL LAW AND CANADIAN BIJURALISM, COLLECTION OF STUDIES* 165–68 (1997); CAN. DEPT. OF JUSTICE, *HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* (2nd publication 2001), available at <http://canada.justice.gc.ca/en/dept/pub/hfl/table.htm> (last visited Mar. 20, 2004); Didier Lluellas, *Harmonization of the Bankruptcy and Insolvency Act with Québec Civil Law: Editor's Comment*, 37 *REVUE JURIDIQUE THEMIS* 1 & 2 (2003); Marc Cuerrier et al., *Canadian Bijuralism and Harmonization of Federal Tax Legislation*, 51 *CAN. TAX J.* 1 (2003) (special issue on the harmonization of the federal income tax with Québec civil law).

196. The Harmonization Program was initially a project of the Civil Code Section of the Department of Justice, even though it was designed not only to adapt federal legislation to the new Civil Code but also to ensure the French version of federal legislation operates appropriately in common law Canada. The contributors to the first collection of studies were all jurists from Québec. Yet the amendment to the Interpretation Act developed by the Section applies to the whole of Canada. This amendment is set out and discussed below.

197. For example, the notion of a pre-existing, self-contained and coherent *jus commune*, which lies at the heart of the Harmonization Program, is a civilist notion.

198. Since Confederation, Québec has had to adapt to a unilingual, common law based conception of federal law, with little appreciation by the rest of Canada of the difficulties involved. As a result of the Harmonization Pro-

readily appreciate the impulse of Québec scholars to do everything possible to secure the borders of the new civil code. Nonetheless, I believe that this exclusively civilist orientation in the federal harmonization project is a mistake. Ignoring the common law, or assuming that it is identical to civil law, is no less inappropriate than ignoring civil law and its significant differences. Furthermore, the civilist approach to harmonization has implications for the development and interpretation of federal legislation that in my view are unfortunate.

The assumptions underlying the federal harmonization project are well expressed by Jean-Maurice Brisson and André Morel in an influential paper prepared for the Department of Justice in 1995, in which they assert the following:

[T]he relationships between the civil law and federal legislation are fully analogous to those between Québec statutes and the Civil Code. The latter...establishes...the *jus commune*. As such, it is called on to complement "other laws, although other laws may complement the Code or make exceptions to it".¹⁹⁹ The same is true of federal legislation when it deals with some issues of private law; the civil law may add to it, in which case there is a relationship of *complementarity* between the two, or the federal statute may, on the contrary, derogate from the private law, in which case there is a *dissociation* between them.²⁰⁰

gram, common law Canada may now encounter some adaptation difficulties of its own.

199. Brisson and Morel here refer to the preliminary provision of the Civil Code of Québec, which provides in full:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property. The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

Civil Code of Québec, ch. 64, 1991 S.Q. (Can.) (preliminary provision).

200. Jean-Maurice Brisson & André Morel, *Federal Law and Civil Law: Complementarity and Dissociation*, in CAN. DEPT. OF JUSTICE, THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUÉBEC CIVIL LAW AND CANADIAN BIJURALISM, COLLECTION OF STUDIES 2, 217 (1995) (emphasis added).

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Brisson and Morel go on to point out that in all the provinces, because the private law of the province (whether civil law or common law) constitutes the *jus commune*, federal law is essentially dependent on provincial law. Whereas the *jus commune* is a coherent and autonomous system of law, statutes are essentially departures from the *jus commune*; they may alter or add to a particular rule or principle, but ultimately they operate within the established terms, principles and institutions of the *jus commune*. Brisson and Morel conclude:

Whenever a federal statutory provision uses a private law concept without defining it or otherwise assigning some specific meaning to it, and whenever a statute falls short of comprehensively governing a question of private law or lacks a formal incorporating provision, the omission must be remedied by referring to one of the two legal systems in force.²⁰¹

This analysis has become the major article of faith underlying the current harmonization program. In a recent consultation document concerning the second series of harmonization proposals, the Department declares:

The bijural status of Canada and its legislation, coupled with the fact that federal legislation, taken as a whole, does not constitute an autonomous legal system, means that when Parliament is silent on the meaning to be given to a private law expression to which reference is made, it is necessary to refer to the applicable provincial private law for interpretation. This is known as the principle of complementarity. Furthermore, a standard or rule of provincial law will supplement a federal statute that is silent on a question relating to property and civil rights. The provincial private law is then applied in a suppletive manner to the federal statute. For example, when reference is made in a federal statute to the concept of lease without any further qualification, it is the private law of the province that will provide, on a suppletive basis, a definition of this concept. Similarly, a federal statute that does not provide specific rules with respect to successions will be interpreted, on a suppletive basis, according to the rules of provincial private law.

201. *Id.* at 30. See also Jean-Maurice Brisson, *L'impact du Code civil du Québec sur le droit fédéral: une problématique* [The Impact of the Civil Code of Québec on federal law: an examination of the issues], 52 R. DU B. 345, 352–53 (1992).

However, federal law may derogate from private law and establish its own rules and the federal rule may then become or more or less autonomous. This is called a relationship of dissociation.²⁰²

While these analyses are not inaccurate, in my view they are inadequate. First, they leave out of account the ordinary role of judicial interpretation in completing legislation, not only in common law systems but in civil law systems as well. Second, they imply that derogations from private law are anomalous and exceptional. This verges on essentialism²⁰³ and supports a conservative approach to law.

The distinction between complementarity and dissociation developed by Brisson and Morel partly tracks an important distinction in common law between reform legislation and program legislation.²⁰⁴ While reform legislation is designed to operate within the context of the common law,²⁰⁵ program legislation relies on autonomous principles and original institutions to give effect to legislative policies.²⁰⁶ Progressive legislative initiatives often seek to displace the common law with legislative schemes that reflect new approaches to issues such as labour relations (union legislation) or automobile insurance (no-fault schemes).²⁰⁷ Not only is there nothing anomalous or exceptional about such legislation, but it is a standard tool of reform. In interpreting

202. CAN. DEPT. OF JUSTICE, INTRODUCTORY NOTE – PUBLIC CONSULTATIONS, SECOND SERIES OF PROPOSALS TO HARMONIZE FEDERAL LAW WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, at <http://canada.justice.gc.ca/en/cons/harm/note.html> (last viewed Jan. 15, 2004).

203. Essentialism is the view that language and legal culture are intimately and inextricably linked such that it is impossible to produce an authentic common law in French or an authentic Civil Code in English. For discussion, see Elmer Smith, *Peut-on faire de la common law en français? [Is It Possible to Do Common Law in French?]*, 3 R.DE L'UNIVERSITÉ DE MONCTON 39 (1979); Jean-Claud Gémard, *L'interprétation du texte juridique ou le dilemme du traducteur [The Interpretation of Legal Texts or the Translator's Dilemma]*, in THE INTERPRETATION OF LEGAL TEXTS, *supra* note 99, at 103 (2002).

204. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Frank P. Grad, *The Ascendancy of Legislation: Legal Problem Solving in Our Time*, 9 DALHOUSIE L. J. 228, 251 (1985).

205. SULLIVAN & DRIEDGER, *supra* note 49, at 201.

206. *Id.* at 202.

207. See, e.g., Canada Labour Code, R.S.C., ch. L-2 (1985) (Can.); Statutory Accident Benefits Schedule – Accidents on or After Nov. 1, 1996, O. Reg. 403/96, enacted under the Insurance Act, R.S.O., ch. 18 (1990) (Can.).

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such legislation, before turning to the common law, the courts appropriately look to the principles and policies that are expressly set out or are implicit in the legislative scheme.²⁰⁸

The final (and most important) point is that there is no reason why the federal Parliament, acting within its jurisdiction, should favour reform legislation or seek to preserve the *jus commune* of the provinces. Obviously, a major reason for giving jurisdiction over a matter to Parliament in the first place was to displace variable provincial law with uniform federal law. This purpose must be taken into account when dealing with federal legislation. All this is ignored in the Brisson – Morel analysis.

2. Techniques for drafting bijural legislation²⁰⁹

As mentioned above, a key challenge in interpreting Canadian federal legislation is to determine whether Parliament intended a given provision to be bijural or unijural. The way in which a provision is drafted can be a good indicator of legislative intent. Consider the following:

DRAFT NO.	ENGLISH	FRENCH
1	an act of God	cas fortuit ou force majeure
2	an act of God	un acte de Dieu
3	a fortuitous or uncontrollable cause	cas fortuit ou force majeure
4	unforeseeable and uncontrollable circumstances.	des circonstances imprévisibles et irrésistibles.

In common law “an act of God” is a legal term of art;²¹⁰ in civil law “cas fortuit or force majeure” is similarly a legal term of art,²¹¹ but it differs from its common law analogue in recognizing the acts of third parties as a potential cause of non-liability.²¹²

208. See SULLIVAN & DRIEDGER, *supra* note 49, at 202.

209. The account which follows is based on REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE, *supra* note 94. See also Maguire Wellington, *supra* note 88, at 8–10.

210. See PHILIP OSBORNE, *THE LAW OF TORTS* 306 (2000).

211. See Civil Code of Québec, ch. 64, Art. 1470, para. 2, 1991 S.Q. (Can.).

212. See *Gulf Oil Canada Ltd. v. C.P.R.*, [1979] C.S. 72, 75 (Que.).

In Draft 1 above, the common law term of art is used in the English version and the civil law term of art is used in the French version. This drafting technique normally signals that the common law concept is to be applied in the common law provinces and the civil law concept is to be applied in Québec.²¹³ This was the primary method used to create bijural texts before 2001.²¹⁴

In Draft 2, the common law term of art is used in the English version and a translation of that term is used in the French version, ignoring the civil law analogue. This drafting technique signals that the common law concept is meant to be applied in Québec as well as the rest of Canada.²¹⁵ In Draft 3, we have the obverse: the civilist term is translated into English, ignoring the common law analogue. Again, this suggests that a single rule — in this case the civil law rule — is meant to apply across the country.²¹⁶

In Draft 4, existing terms of art from both systems are avoided. This drafting technique invites interpreters to devise an understanding of the language that is rooted in the purpose and context of the legislation in which the language appears.²¹⁷ This understanding might draw on both common and civil law, and other sources as well.

In its review of bijural drafting techniques, the harmonization program focused on developing alternatives to the technique used in Draft 1, in which common law terminology is used in the English text while civil law terminology is used in the French version. It was looking for alternative ways to create texts that are bijural in the suppletive sense explained above.²¹⁸ From a practical perspective, its purpose was to ensure that the

213. This understanding is codified in section 8.2 of the federal Interpretation Act. See Interpretation Act, R.S.C., ch. I-23, § 8.2 (1985) (Can.).

214. This drafting approach is reflected in section 8.2 of the original Official Languages Act. See Act of July 9, 1969, ch. O-2, §8(2)(c), 1970 S.C. (Can.)(repealed).

215. See, e.g., *Novotny Estate v. R.*, [1994] 2 C.T.C. 2274, para. 12.

216. I am unaware of any example of this in federal legislation.

217. This drafting approach might be adopted in legislation designed to implement international treaties or land claim agreements with Aboriginal peoples.

218. See REPORT OF THE LEGISLATIVE BIJURALISM COMMITTEE, *supra* note 94, at 3, 12; Wellington, *supra* note 88, at 8 & n.24. Suppletive bijuralism is explained *supra* at p. 41.

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text of federal legislation gives meaningful access to the law for Francophones in common law Canada and Anglophones in Québec.²¹⁹ At a symbolic level, its purpose was to tell readers of the statute book that Canada is a bilingual, bijural place.²²⁰ The following sets out the techniques canvassed by the project.

TECHNIQUE	ENGLISH	FRENCH
<i>Single Term Fits All</i>	contract “contract” is the English term both for civil law and for common law contracts. It should be understood to refer to civil law in Québec and common law elsewhere.	<i>contrat</i> “ <i>contrat</i> ” is the French term for both civil law and common law contracts. It should be understood to refer to civil law in Québec and common law elsewhere.
<i>Doublets</i>	real property or immovables “real property” is the English term for the common law concept while “immovables” is the English term for the analogous civil law concept. In the English version, the common law term comes first.	<i>immeubles ou biens réel</i> “ <i>immeubles</i> ” is the French term for the civil law concept while “ <i>biens réel</i> ” is the French term for the analogous common law concept. In the French version, the civil law term comes first.

219. “The policy on legislative bijuralism aims at providing Canadians with federal legislative texts that will reflect, in each linguistic version, the legal system in use in their province.” Maguire Wellington, *supra* note 88, at 22 (quoting the Canadian Department of Justice’s Policy on Legislative Bijuralism).

220. See McLellan, *supra* note 92, at v.

TECHNIQUE	ENGLISH	FRENCH
<i>Partial Doublet</i>	mortgage or hypothèque “mortgage” refers to a common law security interest in real property while “hypothèque” refers to an analogous civil law security interest in immovables.	hypothèque In French, a single expression “ <i>hypothèque</i> ” is used to refer to the civil law security interest in immovables and the analogous common law interest in real property.
<i>Paragraphed Doublet</i> ²²¹	“liability” means (a) in the Province of Quebec, extracontractual civil liability, and (b) in any other province, liability in tort.	"responsabilité ": (a) <i>dans la province de Québec, la responsabilité civile extracontractuelle;</i> (b) <i>dans les autres provinces, la responsabilité dilictuelle.</i>
<i>Generic Language</i>	accept security for payment ²²² This phrase applies to all forms of security available under any provincial law.	<i>accepter des garanties pour le paiement</i> This phrase applies to all forms of security available under any provincial law.

It will be noted that each of these techniques presupposes complementarity rather than dissociation. The project did not address methods for expressing the intention to create unilingual federal law.

221. A paragraphed doublet can be used to set out either definitions or rules.

222. This language is broad enough to encompass both common law and civil law ways of securing payment as these exist from time to time. This method is preferred by drafters because it is less cumbersome and eliminates the need to amend the federal text when provincial law changes.

2004] *MULTILINGUAL, MULTIJURAL LEGISLATION* 1035*B. The Methodology of Harmonization*²²³

The federal harmonization program applies to both new and existing legislation.²²⁴ To deal with new legislation, federal drafters have received training in the techniques of bijural drafting described above, and federal bills with a significant private law component are vetted by specialists in the Civil Law Section of the Department of Justice.²²⁵ To deal with existing legislation, the Civil Law Section has undertaken a revision of the federal statute book to ensure that its references to the law of property and civil rights are appropriately harmonized with Québec's new Civil Code. Close to half of federal statutes will have to be amended as a result of this initiative.²²⁶

The harmonization revision has the strengths and weaknesses of all revisions. On the plus side, it gives the government a chance to correct drafting mistakes and infelicities in its legislation and to implement new drafting policies.²²⁷ It is thus a way of adapting the statute book to evolving notions of law and the state's relation to those it governs. The current initiative tells Québeckers that the federal government recognizes the importance of the new Civil Code and will go to considerable trouble to ensure respect for its autonomy. It also tells the linguistic minorities in Québec and the rest of Canada that their interests matter. As mentioned above, these symbolic statements are important in multilingual, multicultural societies.²²⁸

The down side of a revision process is that it effectively hands the power to resolve interpretation issues to bureaucrats instead of courts. Under the federal harmonization program, the lawyers who staff the program must review federal legislation to determine the relationship between federal legislation and provincial law.²²⁹ They must consider whether this relationship is adequately expressed, having regard to the principles of com-

223. For a detailed account of the methodology of harmonization, see Maguire Wellington, *supra* note 88, at 3–8.

224. *Id.* at 8, 13.

225. See Gervais, *supra* note 97, at 12.

226. *Id.* at 12.

227. See SULLIVAN & DRIEDGER, *supra* note 49, at 533–34.

228. For discussion of the symbolic dimension of the statute book, see *Some Implications of Plain Language Drafting*, *supra* note 48, at 182–87.

229. See Maguire Wellington, *supra* note 88, at 6; Gervais, *supra* note 98, at 12.

plementarity and dissociation, the terminology of the new Civil Code, and the terminology of the common law in French.²³⁰ Finally, they must propose amendments to existing federal law when, in their view, the existing text of federal legislation fails to express what they take to be the correct relationship between federal and provincial law.

The practice of allowing bureaucrats to resolve interpretation issues before they come to the attention of the courts is troubling for a number of reasons. First, bureaucrats generally lack the experience and expertise of judges. Historically, in Canada most revision work has been carried out by non-lawyers. Second, revision work goes on in private, without explanation or meaningful review. Although modern revisions are subject to legislative scrutiny, this scrutiny is minimal at best. Legislatures lack the time and incentive to second guess the sort of work carried out in a revision, especially on the vast scale of a general revision. In principle, this should not matter since the changes proposed by revisors are purely technical; although the form of the law may change, the substance remains the same. In practice, however, revision work often involves substantive change. Revisors are called on to resolve ambiguities, correct drafting errors and modernize legislative style. To carry out these tasks, they must interpret the existing legislative text, and in doing so they inevitably rely on their own linguistic intuitions, which may or may not be informed by appropriate legal and social knowledge.

These concerns are addressed to some extent in the current harmonization program. The program's staff consists of lawyers with expertise in civil law and comparative law and the Department consults widely with scholars and the general public.²³¹ In addition, the Department publishes what it calls biju-

230. See Maguire Wellington, *supra* note 88, at 4–7; Gervais, *supra* note 98, at 16.

231. For a description of the consultation, see CAN. DEPT. OF JUSTICE, CONSULTATION PAPER, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, 6–8 (1999). See generally PUBLIC CONSULTATIONS DOCUMENT, SECOND SERIES OF PROPOSALS, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, 4–6 (2003).

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ral terminology records.²³² These describe the bijuralism problems that have been detected in a federal statute, summarize the research carried out in response, and explain the reasoning behind each solution adopted.

While reassuring to a degree, these measures do not address the most disturbing feature of the current harmonization program. This is its strong preference for supplementary bijuralism as reflected in the principle of complementarity — as opposed to derivative bijuralism (or multijuralism) reflected in the principle of dissociation. The terminology records do not refer to factors such as legislative purpose and scheme, avoiding absurd outcomes or the conventions on which analysis of legislative text is normally based. Instead of attempting to establish the intended relationship between federal and provincial law by referring to the range of relevant factors, they assume a relationship of complementarity. This narrow, single-dimensional approach to the interpretation of federal legislation departs quite significantly from the standard, multi-dimensional approach practiced by the courts.²³³

C. Rules for Interpreting Bijural Legislation

The most significant work of the harmonization program to date has been the addition of the following provisions to the federal Interpretation Act:²³⁴

232. These records are found at CAN. DEPT. OF JUSTICE, BIJURAL TERMINOLOGY RECORDS, CIVIL LAW AND COMPARATIVE LAW SECTION LEGISLATIVE SERVICES BRANCH, *available at* <http://Canada.justice.gc.ca/en/ps/bj/harm/> (last visited Mar. 19, 2004).

233. The leading case is *Re Rizzo v. Rizzo Shoes*, [1998] 1 S.C.R. 27.

234. Interpretation Act, R.S.C., ch. I-21, §§ 8.1, 8.2 (1985), as amended by Harmonization Act, No. 1, ch. 4, 2001 S.C. (Can.).

ENGLISH	FRENCH
<p>8.1. Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada, and unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles or concepts in force in the province at the time the enactment is being applied.</p>	<p>8.1. <i>Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.</i></p>
<p>8.2. Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Québec and the common law terminology or meaning is to be adopted in other provinces.</p>	<p>8.2. <i>Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.</i></p>

Sections 8.1 and 8.2 each contain three distinct provisions. The first is contained in the opening words of section 8.1, which assert that the common law and civil law are equally authoritative sources of law in Canada.²³⁵ Thus, when courts encounter original federal terminology — i.e., terminology that does not obviously belong to either the common or civil law — they must not presume that Parliament intended to adopt a common law

235. See Molot, *supra* note 96, at 13.

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concept, institution or principle.²³⁶ Rather, they must presume that Parliament gave as much consideration to civil law as it did to common law in devising its own concept, institution or principle. One system is not favoured over the other.

However, the opening words of section 8.1 do not make common law and civil law the only sources of federal law. Parliament may draw on the concepts, institutions or principles of other systems of law, including not only international law, but also Aboriginal law and the law of foreign jurisdictions.²³⁷ Parliament may also create concepts, institutions or principles that do not derive from any existing system of law, or that begin in but go beyond their source in an existing system of law.

The second provision in section 8.1 establishes that federal references to provincial law are ambulatory rather than static. When a federal law refers to a provincial rule, principle or concept, it refers to that rule, principle or concept as it exists in the province of application “at the time the enactment is being applied [*au moment de l’application du texte*].”²³⁸ I find this language difficult to understand. Presumably it refers to the time when the legally relevant facts occurred. Presumably there is no intention to alter existing temporal application rules, but merely to ensure that references to concepts, institutions or rules of provincial law are understood to refer to provincial law as it exists from time to time.

I must acknowledge, however, that my reading of the second part of section 8.1 is much narrower than that of other commentators. It is widely assumed that that the second part of the provision (along with section 8.2) effectively enacts into law the principle of complementarity.²³⁹ I reject this assumption. In my

236. *Id.* at 14.

237. *Id.*

238. See Marie-Noelle Pourbaix, *S-4: A First Harmonization Bill*, in 6 *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* 7, (2nd publication 2001), available at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6(a)_eng.pdf) (last visited Mar. 19, 2004); Molot, *supra*, note 96, at 15.

239. In the consultation paper on harmonization published by the Department of Justice in 1999, the following appears:

These rules [§§ 8.1 and 8.2 of the Interpretation Act] are designed to recognize the suppletive role of civil law and the common law in federal law and to entrench bijuralism....The first provision is designed

view, properly understood, section 8.1 does not codify the principle of complementarity.

The first thing to notice is that section 8.1 does not state that provincial law applies unless it is expressly excluded by federal legislation. Rather, the provision states that provincial law applies if (1) “in interpreting an enactment *it is necessary/ il est nécessaire* to refer to a province’s rules, principles or concepts....”²⁴⁰ and (2) the law does not provide otherwise. The first task then is to decide if a reference to provincial law is necessary in order to make sense of the enactment and to apply it to particular facts. In a paper prepared for the federal government on the harmonization of federal tax legislation with provincial law, David Duff writes:

...[T]he first condition, that it must be “necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights” to interpret the enactment,...would seem to be satisfied where the enactment relies on or employs a concept with an established private law meaning that is not defined in federal legislation, relies on private law rules or principles to define the legal relationship to which it applies, or is silent on a matter that is governed by a specific provincial rule forming part of the law of property and civil rights. Since the enactment cannot be applied without relying on the private law rules, principles or concepts, it follows that it is “necessary to refer to [them].”²⁴¹

to expressly recognize Canadian bijuralism and to *expressly recognize the complementarity of federal law and the provincial law of property and civil rights.*

CAN. DEPT. OF JUSTICE, CONSULTATION PAPER, PROGRAM FOR THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC, PROPOSED LEGISLATIVE AMENDMENTS, at 10 (emphasis added). This understanding is supported by the preamble to the *Federal Law – Civil Law Harmonization Act, No. 1* and in particular the fourth recital which states: “Whereas the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law...” Federal Law—Civil Law Harmonization Act, No. 1, ch. 4, preamble, 2001 S.C. (Can.).

240. Interpretation Act, R.S.C., ch. I-21, § 8.1 (1985), amended by ch. 4, pt. 2, 2001 S.C. (Can.).

241. David Duff, *The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation and Canadian Bijuralism*, 51 CAN. TAX. J. 1, 48 (2003).

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The unstated assumption here is that in interpreting a federal enactment, judges have no jurisdiction to develop and apply distinctly federal concepts or principles based on their reading of the federal text in the context of Canadian law generally (both federal and provincial) as well as in the context of other sources. In other words, the only legitimate legal context for interpreting federal legislation that deals with property or civil rights is provincial law and more particularly the *jus commune* embodied in the Civil Code in Québec or scattered through case law and legislation in the common law provinces. With this approach, as pointed out by Brisson and Morel, the relation between federal law and provincial law is the same as the relation between ordinary Québec legislation and the Civil Code of Québec.²⁴² The *jus commune* is established at the provincial level, while federal legislation is a *loi d'exception*.

There are several threads of thought here. First, there is the undeniable fact that legislative texts are always incomplete and require interpretation.²⁴³ As Rod Macdonald writes, "No statute, not even a civil code...is self-sufficient. There will always be some body of unenacted law that provides the normative support for the terms, concepts and institutions enacted by legislation."²⁴⁴ The job of the interpreter can be seen as bringing support to the text in order to complete it. The challenge is identifying the relevant support.

A second thread is the notion of a *jus commune* comprising a coherent, complete and self-contained legal system. This obviously reflects a civilist conception of law. Macdonald helps us understand the significance of the notion by distinguishing among the following overlapping, but distinct categories: (1) *Common Law*: the legal tradition including equity that originated in England and was introduced into most British colonies; (2) *common law*: a method of making new law through court judgments; (3) *unenacted law*: principles, policies and concepts derived by interpreters from constitutional texts, international conventions, legislation, doctrine, case law, custom and

242. Brisson & Morel, *supra* note 200, at 217.

243. For discussion, see *Statutory Interpretation in the Supreme Court of Canada*, *supra* note 136, at 208–10, (1998–99).

244. *Harmonizing the Concepts and Vocabulary of Federal and Provincial Law*, *supra* note 179, at 44.

shared public values; (4) *jus commune*: the body of rules, principles and concepts that constitute the foundation of a jurisdiction's private law; and (5) *suppletive law*: the law relied on to complete an incomplete legislative text.²⁴⁵

There is no doubt that interpreting federal legislation requires reference to suppletive law, and that the suppletive law should not automatically be *Common Law* as defined above. It is also clear that in the absence of federal legislation there is no jurisdiction in federal court judges to create *common law* in areas of federal jurisdiction.²⁴⁶ The key issue raised by the harmonization project is whether judges can create *unenacted law* in the course of interpreting federal legislation.²⁴⁷ In my view, the answer to the question must be yes. However, the principle of complementarity (as explained by Brisson, Morel, Duff and others) answers no. It asserts that the *suppletive law* must be the *jus commune* of the province. Although there is room for unenacted law at the provincial level in interpreting the *Civil Code*, it is precluded at the federal level.

This approach protects the integrity of Québec's new code, and one can readily appreciate its attractiveness to Québec jurists. In my view, however, it is unacceptable. First and foremost, it rules out the possibility of unenacted law at the federal level. In both practice and principle, the creation of unenacted law is a normal by-product of proper interpretive practice, not only in common law jurisdictions but in civil law jurisdictions as well. It can be eliminated only by imposing inappropriate and probably impossible constraints on interpreters. Second, this approach to the interpretation of bijural legislation is rooted in a conception of bijuralism in which complementarity is seen as the default position and dissociation (notice the negative connotations of the term) as the sole alternative. This conception is

245. *Encoding Canadian Civil Law*, *supra* note 187, at 145.

246. The cases cited for this proposition are *Canadian Pacific Ltd. v. Québec North Shore Paper Co.*, [1977] 2 S.C.R. 1054; *R. v. McNamara Construction (Western) Ltd.*, [1977] 2 S.C.R. 654; *Canada v. Foundation Co. of Canada*, [1980] 1 S.C.R. 695. In my view, these cases address the narrow issue of the jurisdiction of the Federal Court under § 101 of the Constitution Act, 1867 and do not in fact rule out the possibility of federal common law, still less federal unenacted law.

247. The point is addressed by Allard, *supra* note 45, at 21–25.

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inadequate because it ignores the possibility of derivative bijuralism. This possibility is explored in the next section.

D. Derivative Bijuralism

While the federal harmonization program has focused primarily on suppletive bijuralism, a number of recent papers explore the potential of derivative bijuralism. France Allard has written persuasively on this subject. She points out that in a number of areas (for example, family law, labour law and human rights legislation), the Supreme Court of Canada has sought to develop a uniform approach to legal problems that is grounded in both civil and common law. She characterizes this approach as a dialogue:

In family law, and more particularly with regard to child custody, the Court has seen fit to consider common law decisions in its civil judgments and vice versa, while recognizing the conceptual differences of the concepts in both traditions....

Furthermore, when the issue before the Court concerns universal values, there is a more pronounced tendency to mention the rules and solutions of either tradition....

The dialogue between the traditions in the Supreme Court's decisions is consistent with the idea that the Supreme Court is more than a court of appeal for each of the provinces....In its decisions and particularly the most recent ones, the Court appears to be motivated by a desire to consider the effect of its decisions in all jurisdictions, both civil and common law, while respecting the characteristics particular to each of them.

In these new directions taken by the Court, there appears to be a more pronounced reciprocal influence between traditions as comparative analysis becomes increasingly prominent in its judgments. There is also a more marked tendency toward universalism in the basis for solutions and in the solutions themselves....This kind of unification through persuasion is very different from the unification of the law as it was exercised at the turn of the twentieth century, when unification generally meant assimilation of civil law by common law.²⁴⁸

Daniel Jutras points out that there are various ways in which common law and civil law interact in the judgments of Cana-

248. *Id.* at 20–21.

dian courts.²⁴⁹ First, there is the “comparative reference,” in which the court surveys other jurisdictional approaches to the problem before the court.²⁵⁰ Such references are largely academic; they do not affect the way the court analyses the case. Second, there are judgments in which the court explores the way an issue is handled in civil and common law with a view to seeking the best solution to the problem at hand.²⁵¹ Finally, there are judgments in which “the duality of sources is inherent in the very issue under consideration.”²⁵² A good example is case law interpreting the Canada Shipping Act, which draws on both legal traditions.²⁵³

These and other surveys of Canadian case law reveal the real possibility and potential benefits of a derivative bijuralism or multijuralism in which federal legislation is routinely interpreted in light of all relevant legal systems (e.g., common law, civil law, Aboriginal law, Islamic law, international law). As Patrick Glenn writes:

[The] tradition of comparative law is simply an attempt to find a better solution, the discovery of which can never stop the further search for an even better solution. In this search, no source can be ruled out, as the Supreme Court did to a certain extent in the first half-century of its existence. And since sources cannot be excluded in creating a new law, they cannot be excluded any more in the continuation of one's own law. Sources must be judged on their merits.²⁵⁴

249. See Daniel Jutras, *Emerging Issues in Private Law: A Case of Cross-Fertilization*, paper presented to the National Judicial Institute Conference on Bijuralism, (Apr. 4, 2003). For a survey of recent case law in which the Supreme Court of Canada has addressed both legal systems in resolving private law disputes, see generally Louise Lavallée, *Bijuralism in Supreme Court of Canada Judgments Since the Enactment of the Civil Code of Québec*, in 3 *THE HARMONIZATION OF FEDERAL LEGISLATION WITH THE CIVIL LAW OF THE PROVINCE OF QUÉBEC AND CANADIAN BIJURALISM* (2d publication 1999), available at [http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3\(a\)_eng.pdf](http://www.canada.justice.gc.ca/en/dept/pub/hfl/fasc3/fascicule_3(a)_eng.pdf) (last visited Mar. 19, 2004).

250. Jutras, *supra* note 249, at 3.

251. See, e.g., *Transamerica Life Ins. Co. of Can. v. Goulet*, [2002] 1 S.C.R. 719; *Transamerica Life Ins. Co. of Can. v. Oldfield*, [2002] 1 S.C.R. 742.

252. Jutras, *supra* note 249, at 3.

253. See, e.g., *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

254. H. Patrick Glenn, *Le droit comparé et la Cour suprême du Canada* [Comparative Law and The Supreme Court of Canada], in *MELANGES LOUIS-*

2004] *MULTILINGUAL, MULTIJURAL LEGISLATION* 1045*E. The Independence of Language and Law*

In interpreting legislation enacted in more than one language, the goal is to establish a uniform rule that applies to everyone. People belonging to different language groups cannot, because of discrepancies in the several language versions, claim to be governed by different rules.²⁵⁵ However, when interpreting legislation that applies to multiple territorial units within a federation, the goal is different. In Canada at least, Parliament is able to make different rules for different provinces, and it may often have good reason to do so.²⁵⁶ In interpreting bijural (or multilingual) legislation, therefore, the goal is not to establish a uniform rule but rather to determine legislative intent, specifically to determine whether Parliament intends its rule to operate in the same way throughout the country, to operate differently from one province to the next, or to operate differently in Québec than in the rest of the country. If there is reason to believe that Parliament intended a uniform rule, the next task is to establish the content of that rule, having regard for all possible sources of law — civil, common, Aboriginal, international and foreign.

In interpreting legislation that is bilingual and bijural (or multilingual / multijural), it can be difficult to distinguish the issues relating to language from those relating to law. The complexity involved in interpreting such legislation is well illustrated by the judgment of the Supreme Court of Canada in *Schreiber v. Canada (Attorney General)*,²⁵⁷ which is the court's first pronouncement on bijuralism since the enactment of the Federal Law - Civil Law Harmonization Act, No. 1.²⁵⁸ In *Schreiber*, the court appropriately explores both the common law and civil law concepts referred to in the legislation to be inter-

PHILIPPE PIGEON, *OUVRAGES COLLECTIFS* [Collective Works] 211 (1989) [original quote in French].

255. This would violate the rule of law. See SULLIVAN & DRIEDGER, *supra* note 49, at 80–81.

256. See *id.* at 95.

257. *Schreiber v. Can.*, [2002] 3 S.C.R. 269.

258. “The Court of Appeal for Ontario did not have the benefit of a clarifying amendment to s. 6(a) of the Act by the Harmonization Act, which came into force on June 1, 2001, a few months after the decision of the Court of Appeal for Ontario was rendered.” *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at para. 66; Federal Law-Civil Law Harmonization Act, No. 1, ch. 4, 2001 S.C. (Can.).

preted;²⁵⁹ however, its decision to apply the civil law concept rests on dubious reasoning.

In 1999, in accordance with the extradition treaty between Canada and the Federal Republic of Germany, Germany asked Canada to arrest and detain Karl Heinz Schreiber, a Canadian citizen, for the purpose of extradition.²⁶⁰ Acting under a warrant issued by an Ontario court, Schreiber was arrested in Toronto and held for eight days before being released on bail.²⁶¹ Schreiber subsequently brought an action in the Ontario courts against Germany and Canada seeking damages for the loss of liberty and loss of reputation suffered as a result of his arrest and detention.²⁶² Germany moved for dismissal of this action on the ground of sovereign immunity.²⁶³ Section 3 of the State Immunity Act provides that a foreign state is immune from the jurisdiction of any Canadian court, subject however to certain exceptions.²⁶⁴ Schreiber maintained that his action was within the exception for proceedings relating to personal injury set out in section 6 of the Act in the following terms:

ENGLISH	FRENCH
<p>6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to</p> <p>(a) any death or personal injury, or</p> <p>(b) any damage to or loss of property that occurs in Canada.</p>	<p>6. <i>L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant</i></p> <p>(a) <i>des décès ou dommages corporels survenus au Canada;</i></p> <p>(b) <i>des dommages matériels survenus au Canada.</i>²⁶⁵</p>

The issue for the court was whether the distress, humiliation and loss of freedom experienced by Schreiber as a result of his arrest constituted “personal injury — *dommages corporels*”

259. Schreiber v. Can., [2002] 3 S.C.R. 269, at paras. 38–46, 58–65.

260. *Id.* at para. 2–3.

261. *Id.* at para. 3.

262. *Id.* at para. 4.

263. *Id.* at para. 5.

264. State Immunity Act, R.S.C., 1980-81-82-83, c.95 s.1 § 3 (1985)(Can.).

265. *Id.*

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within the meaning of the Act.²⁶⁶ In the analysis below, I am critical of how the Supreme Court of Canada addressed this issue and I suggest an approach to interpreting federal legislation that would avoid the serious problems in the judgment.

When interpreting bijural federal legislation, the first task is to decide whether the language to be interpreted is ordinary — i.e. draws on the conventions of language shared by the general community — or is legal — i.e. refers to specialized legal concepts, institutions or principles.²⁶⁷

(1) If the language is ordinary, in the absence of a provision to the contrary, the interpreter must establish the single rule that is meant to apply uniformly across the country.

(2) If the language is legal, the interpreter must determine whether the concept, institution or principle referred to is bijural (in the suppletive sense) or unijural. In making this determination, the interpreter must have regard to section 8.2 of the Interpretation Act, which provides that a text that contains both civil law and common law terminology or terminology that has a different meaning in common and civil law is to be considered bijural, unless the law provides otherwise.²⁶⁸

(3) If the reference is bijural, the interpreter must adopt the common law meaning in the common law provinces and the civil law meaning in Québec, as provided by section 8.2 of the Interpretation Act.

(4) If the reference is unijural, the courts must determine whether the legal concept, institution or principle derives from the common law, the civil law, both common and civil law, international law or some other source or combination of sources. Having determined the source of the reference, the courts must apply it uniformly — as much as possible — throughout the provinces and territories. As noted above, the adoption of a unijural solution to a particular problem does not effectively avoid bijuralism. First of all, the unijural solution may itself rely on bijural sources, and second, in most cases

266. *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at paras. 12, 38.

267. This step is necessary because the problem of bijuralism arises only with legal language.

268. Section 8.2 of the Interpretation Act was not in force when *Schreiber* was decided. It will be interesting to see how, if at all, it affects judicial analysis.

the unijural solution merely postpones the interaction between federal and provincial law.

In the *Schreiber* case, it might have been possible to regard the language at issue as ordinary rather than legal. The expression “personal injury” could be understood outside a legal context as referring to any harm suffered by an individual, while “*dommages corporels*” could be understood (perhaps) as a reference to bodily harm. Moreover, from a legal perspective, both terms are problematic: “personal injury” is ambiguous and “*dommages corporels*” is eccentric.²⁶⁹ Nonetheless, neither term is likely to be used outside a legal context.

Once a court is satisfied that it is dealing with legal terms, the next step is to determine whether the legal terminology in question is bijural or unijural. In the *Schreiber* case, given the purpose of the State Immunity Act, the presumption of compliance with international law and the wording of section 6, there is a strong basis for concluding that the terms “personal injury / *dommages corporels*” are unijural, grounded in international law.

The purpose of the State Immunity Act is to implement, to the extent judged appropriate by Parliament, Canada’s international law obligations concerning the conduct of foreign states and their representatives in Canada. These obligations are the same regardless of the province in which the activities of a foreign state or its representatives occur. Furthermore, the wording of section 6 significantly tracks the relevant international law materials. Article 11 of the European Convention on State Immunity refers to loss of immunity “in proceedings which relate to redress for *injury to the person* or damage to tangible property/ *lorsque la procédure a trait à la réparation d’un prejudice corporel ou matériel.*”²⁷⁰ Article 12 of the Draft Articles on Jurisdictional Immunities of States and their Property excludes immunity in proceedings to compensate “for death or *injury to the person* or damage to or loss of tangible property /

269. It is eccentric in that references to injury or harm to the person normally use the term “*préjudice*” and references to damages for injury or harm to the person normally use the term “*dommages-intérêts*.”

270. *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at para. 34.

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en cas de décès ou d'atteinte à l'intégrité physique d'une personne, ou en cas de dommage ou de perte d'un bien corporel."²⁷¹

Relevant secondary sources use similar language. For example, the Explanatory Reports on the European Convention on State Immunity state:

ENGLISH	FRENCH
Where there has been <i>injury to the person</i> or damage to property, the rule of non-immunity applies equally to any concomitant claims for non-material damage resulting from the same acts....Where there has been no <i>physical injury</i> and no damage to tangible property, the article does not apply.	<i>En cas de dommage corporel ou materiel, le règle de la non-immunité s'applique également aux demandes en réparation du préjudice moral résultant du même fait....Lorsque aucune lésion corporelle ou autre atteinte à l'intégrité physique d'une personne, ni aucun dégât à une chose n'ont été causés [sic], l'article est inapplicable.</i> ²⁷²

The International Law Commission's commentaries on article 12 of the Draft Articles state that loss of immunity does not occur if "there is no *physical damage*. Damage to reputation or defamation is not *personal injury* in the physical sense / *il n'y a pas de dommage corporel* ou physique. *Ni la diffamation ni l'atteinte à la réputation ne sont une atteinte à la personne au sens physique du terme.*"²⁷³

The language used in these international materials corresponds closely to the language used in section 6, particularly in the English version.²⁷⁴ Given the purpose of the Act, the language used and the presumption of compliance with international law, it is plausible to conclude that "personal injury / *dommages corporels*" is intended to have its international law meaning, namely physical injury.

A second unijural way of reading section 6 is to treat "personal injury" as a common law concept and "*dommages cor-*

271. *Id.* at para. 35.

272. *Id.* at para. 47.

273. *Id.*

274. The English language sources consistently refer to "personal injury" or "injury to the person" while some the French language sources refer to "*dommage corporel*."

porels” as a French rendering of the common law concept. Whereas the expression “personal injury” is widely used in common law, the expression “*dommages corporels*” is not widely used in civil law. In civil law, injury is referred to as “*préjudice*”, and the civil law analogue to “personal injury” is not “*dommages corporels*” but rather “*préjudice corporel*” or “*lésions et blessures corporelles*.”²⁷⁵ “*Dommmages corporels*” could therefore be regarded as an attempt (albeit an awkward attempt²⁷⁶) to render the common law concept in French. The problem with this analysis is that “*dommages corporels*” does not correspond accurately with the broader and vaguer notion of “personal injury” in common law.

A third unijural way of reading section 6 is to treat “*dommages corporels*” as a civil law concept and “personal injury” as an English rendering of the civil law concept. One problem with this analysis is that the concept of “*dommages corporels*” is not an established term of art in civil law. As noted above, references to personal injury generally use the term “*prejudice*,” while references to heads of damage generally use the term “*dommages-intérêts*.” Moreover, even supposing that “*dommages corporels*” was a civil law term of art, and the drafter’s task was to render that concept in English, he or she would have chosen a term like “physical damage” or “bodily harm.” The term “personal injury” would be avoided because its ordinary meaning is too broad and its legal meaning unclear.

In my view, an analysis of the sort set out above must be carried out *before* section 8.2 of the Interpretation Act is applied. That is, before concluding that the language used contains civil law and common law terminology or that the terminology used has a different meaning in the civil law and the common law, the court must carry out an interpretive exercise where an effort is made to determine the appropriate legal context(s). In this case, applying this approach, I would conclude that the terms “personal injury / *dommages corporels*” should be given their meaning at international law, namely bodily injury.

275. See, e.g., Civil Code of Québec, ch. 64, art. 1457, 1991 S.Q. (Can.).

276. “Personal injury” (like “*préjudice corporel*” and “*atteinte à la personne*”) refers to a cause of action whereas “*dommages corporels*” refers to a head of damage. For some reason, this issue was not addressed when § 6 was revised under the harmonization program.

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The Supreme Court of Canada reached this very conclusion, but on different grounds, and its reasoning is problematic in my view. One problem is that the court does not expressly address the issues of whether the language to be interpreted is legal or ordinary and whether it is unijural or bijural. A second, more serious problem is that the court confounds the principles governing interpretation of bilingual legislation with the principles governing the interpretation of bijural legislation.²⁷⁷

In its analysis of the term “personal injury / *dommages corporels*,” the court notes that the expression “personal injury” is potentially broader than “*dommages corporels*” and could be taken to include injury to dignity, autonomy or reputation as well as physical injury.²⁷⁸ Given this ambiguity, the court decides to base its conclusion on the rules governing the interpretation of the bilingual legislation. It writes:

A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred...Furthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning...

In the case at bar, the French version, which states that the exception to state immunity is “*déces*” or “*dommages corporels*” is, as we shall see, the clearer and more restrictive version compared to the English “death” or “personal injury.”²⁷⁹

In order to see the problem with this analysis, it may be helpful to reproduce the text of section 6(a):

277. This problem was brought to my attention by Anne-Marie Hébert, Senior Counsel, Department of Justice, Canada.

278. *Id.* at para. 39.

279. *Id.* at para. 56.

ENGLISH	FRENCH
<p>6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to</p> <p>(a) any death or <i>personal injury</i>, or</p> <p>(b) any damage to or loss of property that occurs in Canada.</p>	<p>6. <i>L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant</i></p> <p>(a) <i>des décès ou dommages corporels survenus au Canada;</i></p> <p>(b) <i>des dommages matériels survenus au Canada.</i></p>

Let us assume, as the court does, that “personal injury” and “*dommages corporels*” are legal terms of art from common law and civil law respectively. Under the conventions for drafting bijural legislation that prevailed when the State Immunity Act was last revised, the English term “personal injury” expresses the relevant common law concept and the French term “*dommages corporels*” expresses the relevant civil law concept.²⁸⁰ This would also be the result under section 8.2 of the Interpretation Act. These concepts could be identical, but they need not be. If they are different, the common law meaning properly governs in common law provinces and the civil law meaning governs in Québec. That is the point of bijuralism. The court is mistaken in applying the same meaning rule to this sort of problem. In doing so, it effectively imposes unijuralism on what is a bijural, or a potentially bijural, text.

The court’s confusion is clearly revealed when it suggests that the interpretation of bijural legislation entails a search for a common meaning:

Under the principles governing the interpretation of bilingual and bijural legislation, where there is a difference between the English and French versions, the court must search for the common legislative intent which seeks to reconcile them. The gist of this intellectual operation is the discovery of the essential concepts which appear to underlie the provision being interpreted and which will best reflect its purpose, when viewed in its proper context.

280. See State Immunity Act, R.S.C., ch. S-18, § 6(a) (1985) (Can.).

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In this case, the French version is the clearer and more restrictive of the two versions. A failure to consider the key ideas underpinning the French version might lead to a serious misapprehension as to the scope of s[ection] 6(a). It would broaden its scope of application to such an extent that the doctrine of state immunity could be said to have been largely abrogated, whenever a claim for personal injury is made.²⁸¹

When interpreting legal terminology, it is appropriate to search for a common legislative intent or a common underlying concept only if the terminology to be interpreted is unijural. In the case of a bijural text (bijural in the suppletive sense), the court must not search for a common intent or a shared concept, but rather must interpret the legal terminology in question with reference to the legal system to which it belongs. In the *Schreiber* case, the scope of the common law concept of “personal injury” should have been established relying exclusively on common law sources; the meaning and scope of “*dommages corporels*” in the civil law is irrelevant to the significance of the term at common law. If it turned out that the concept of “personal injury” at common law was significantly broader than the concept of “*dommages corporels*” at civil law, the broader concept should have prevailed. Because the facts occurred in Ontario and the law suit originated there, Ontario law (not Québec law) is called upon to supplement federal legislation to the extent needed. Alternatively, had the facts occurred in Québec, Québec law would be relied on.

The court’s mistake in *Schreiber* is to confound language with legal system. The rule set out in the two language versions has to be the same, but the content of the rule, if it is bijural in the suppletive sense, may allow for a different legal result in different provinces.²⁸² The advantage of using doublets as a drafting technique is that it highlights the independence of language and legal system: the common law and civil law terminology appears in both language versions, indicating clearly to both French and English readers that the rule may be different in the common law provinces and Québec. When generic terminology is used, although it is less obvious, the same analysis applies: the rule enacted by Parliament is the same in both lan-

281. *Schreiber v. Can.*, [2002] 3 S.C.R. 269, at paras. 78–79.

282. *See e.g.*, *Furfaro-Siconolfi v. M.N.R.*, [1990] 2 F.C. 3.

guage versions, but it allows for the application of civil law concepts, institutions and principles in Québec and common law concepts, institutions and principles in the rest of Canada.

V. INTERPRETING HISTORICAL TREATIES

Interpreting legislation enacted in French and English to reflect both the civil law and the common law is challenging, but manageable for most interpreters. With relatively modest effort, an Anglophone or Francophone interpreter can attain a functional knowledge of the other language and legal system, and having reached that plateau can work toward full biculturalism. The differences between French and English language, law and culture are significant, but there is much common ground.²⁸³ The same cannot be said when it comes to Aboriginal languages, law and culture. The treaties between First Nations and the British Crown are a point of intersection between very different cultural traditions, each with its own way of making and recording law.²⁸⁴

Like the enactments of a legislature, treaties are speech acts — acts in which language is used as a means to achieve an end. The speech act itself occurs at a particular place and at a moment that is ephemeral; however, because the speech act is recorded in a text, it becomes portable and more or less permanent.²⁸⁵ Historically, Canadian courts have responded to trea-

283. Both languages and cultures are grounded in European intellectual history.

284. For discussion of Aboriginal ways of making and recording law, see James Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997); John Borrows, *Wampum in Niagara; The Royal Proclamation, Canadian Legal History and Self-Government*, in ABORIGINAL AND TREATY RIGHTS IN CANADA (Michael Asch ed. 1997) [hereinafter *Wampum in Niagara*]; Sharon Venne, *Understanding Treaty 6: An Indigenous Perspective*, in ABORIGINAL AND TREATY RIGHTS IN CANADA 173–207 (Michael Asch ed. 1997); Leonard Rotman, *Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence*, 46 U.N.B.L.J. 12 (1997); *With or Without*, *supra* note 44; James (Sakej) Youngblood Henderson, *First Nations Legal Inheritances in Canada: The Mikmaq Model*, 23 MANITOBA L. J. 1 (1996); Maria Teresa Sierra, *Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla*, 29 L. & SOCIETY REV. 227 (1995); INDIGENOUS LAW AND THE STATE Parts I & II (Bradford Morse & Gordon Woodman, eds. 1998).

285. Speech act analysis was introduced by John Austin. JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975). It was developed by John Searle,

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ties between First Nations and the Crown as if they were unilingual, unijural acts, recorded in unilingual, unijural documents.²⁸⁶ However, the written English text (with its ceremony of signature) is only the European version of the treaty; it tells only half the story of what is in essence a bilingual, bijural agreement and record of agreement. The other half of the story is told by the ceremonies and texts of the First Nations involved, including generally an exchange of presents, and in every case, the account of the treaty told by the elders and passed from one generation to the next.²⁸⁷

At the Treaty of Niagara, for example, the primary ceremony was the exchange of wampum.²⁸⁸ Wampum consists of beads sewn onto hide in patterns. It was used by eastern First Nations to record agreements, laws and events.²⁸⁹ The wampum exchanged at Niagara was a two-row wampum belt, signifying that the treaty was a peace and friendship treaty as opposed to a land surrender.²⁹⁰ The way in which the beads were arranged

most notably in, JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969). For an introduction to speech acts as they relate to legislation, see FREDERICK BOWERS, *LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION* 17–48 (1989).

286. In no case, to my knowledge, has a superior court considered a treaty to be a bilingual or bijural text. For discussion of the need to treat treaties as a bicultural text, see James Tully, *Reconsidering the B.C. Treaty Process*, in LAW COMMISSION OF CANADA, *SPEAKING TRUTH TO POWER: A TREATY FORUM* 11–12 (2001) [hereinafter *SPEAKING TRUTH TO POWER*].

287. See John Borrows, *Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests*, 12 WINDSOR Y.B. ACCESS JUST. 179, 192 (1992).

First Nations sovereignty was exercised through the spoken word and Wampum belts, and not through written statements. The reception of presents was also a part of the traditional ceremonial and oral nature of treaties. The gathering for presents provided an opportunity to meet in council and exchange words and material goods to reaffirm or modify previous long agreements according to changing conditions. This explains why First Nation leaders would travel such long distances to receive a few trinkets that were monetarily of trivial value.

Id. See also Delia Opekokew & Alan Pratt, *The Treaty Right to Education in Saskatchewan*, 12 WINDSOR Y.B. ACCESS JUST. 3, 28 (1992).

288. See *Wampum in Niagara*, *supra* note 284, at 163–65.

289. Rotman, *supra* note 284, at 17–18, nn. 23–24.

290. *Wampum in Niagara*, *supra* note 284, at 163. Robert Williams interprets the two-row wampum as follows:

in the wampum constitutes an Aboriginal text that supports the group's memory of and repeated telling of the treaty through its elders.²⁹¹

Sharon Venne describes the process by which Treaty 6 between the Plains Cree Peoples and the British Crown was concluded. At the treaty signing, the ceremonies included the smoking of the pipe and the whittling of ten sticks, representing the promises exchanged by the parties.²⁹² These sticks were preserved in a bundle, along with other objects associated with the treaty process. The Elder picked up each object in the bun-

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purpose, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonization Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 291 (1986), quoted in *Wampum in Niagara*, *supra* note 284, at 164. See also Rotman, *supra* note 284, at 17–19.

291. *Wampum in Niagara*, *supra* note 284, at 165.

292. Venne, *supra* note 284, at 203–04. Venne writes:

At the treaty signing, the white man made ten promises stating that they would never be broken as long as the sun shines and the waters flow. The commissioner said that ... no two-legged person could ever break those promises. An Elder by the name of Pakan (who was one of the signatories of Treaty 6, and a Chief of the Whitefish Lake Reserve) expressed concern about how Indigenous peoples could preserve the same information. He stated that the white man had a way in which he could preserve his knowledge about the treaties by writing them on paper.

He pointed to the land, which was full of buffalo, and at the animals. He stated, "Our Father gave all that to us. Are you sure that you will fulfil your promises? I will make ten sticks....We will keep the sticks to signify your promises."

Id.

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dle as he told the story of the treaty to Venne, ending with the promises signified by the sticks.

Venne also offers an account of the means by which history is preserved in the Cree oral tradition.

The Elders have within their memories a collective history. No one Elder has all the information about a particular event; each has a personal memory which embraces their parents' or grandparents' memory of the details and circumstances of events that took place.²⁹³

Keeping the stories through a number of memory lines ensures accuracy,²⁹⁴ as does the wealth of detail included in the stories.²⁹⁵

The Aboriginal record of historical treaties is embedded in the relevant Aboriginal literacy and draws on the knowledge, categories and norms of the relevant Aboriginal culture.²⁹⁶ This record is no less authentic, or legitimate, and arguably no less accurate than the texts produced by the English-speaking representatives of the Crown. It follows that the treaties between First Nations and the British Crown, like the statutes enacted by the Canadian Parliament, are bilingual, bijural "enactments" — recorded speech acts — from which a shared set of terms must be constructed. This creates a serious challenge for Canadian courts, staffed by judges with little to no knowledge of Aboriginal language or culture.

In recent years, the response to this challenge has been well-intentioned but timid. The reality of cultural differences has been acknowledged by the courts:

These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the

293. *Id.* at 177.

294. *Id.* at 176.

295. *Id.* at 174–76. See also H. Patrick Glenn, *A Chthonic Legal Tradition: To Recycle the World*, in *LEGAL TRADITIONS OF THE WORLD* (Oxford University Press 2000); LEON SHELEFF, *THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM* (2000); WALTER ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* (1982).

296. See David Barton & Mary Hamilton, *Literacy Practices*, in *SITUATED LITERACIES: READING AND WRITING IN CONTEXT* 7–15 (David Barton et al. eds. 2000).

time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.²⁹⁷

The necessary historical context is established through contemporaneous journals, letters and reports (filtered through the European sensibility of the author) as well as more recent historical and anthropological study (some of it by Aboriginal historians).²⁹⁸ The oral histories of Aboriginal peoples have also been accepted as evidence of historical practices, customs and traditions.²⁹⁹ In *Mitchell v. MNR*, Chief Justice McLachlin emphasized the importance of such evidence. At the same time, however, she issued a caveat suggesting that the Aboriginal record would have to give way to common law rules of evidence and European-based notions of common sense:

The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s[ection] 35(1) rights. As [Chief Justice] Lamer observed in *Delgamuukw*, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight....Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts."

Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense."³⁰⁰

Although the courts accept various forms of extrinsic evidence, including oral history, they have not relied on it as a ba-

297. *R. v. Horseman*, [1990] 1 S.C.R. 901, 907.

298. See Rotman, *supra* note 288, at 35–41.

299. See SULLIVAN & DRIEDGER, *supra* note 49, at 419–20.

300. *Mitchell v. MNR*, [2001] S.C.R. 911, paras. 37–39.

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sis for establishing the text of the treaty. It is regarded rather as supplying historical context for the English language, common law-based text.³⁰¹ The assimilationist imbalance created by this approach is then compensated for first by emphasizing the honour of the Crown and its fiduciary duty to Aboriginal peoples and second by adopting special rules for interpreting the English text.³⁰² The honour of the Crown means that “it must always be assumed that the Crown intends to fulfil its promises. No appearance of ‘sharp dealing’ will be sanctioned.”³⁰³ The special rules require the text of the treaty to be interpreted liberally, avoiding legal technicalities and resolving any ambiguity in favour of the First Nation.³⁰⁴ The language of the treaty must be interpreted as it would have been understood by the Aboriginal signatories at the time the treaty was signed.³⁰⁵

While this recognition of difference and the need for an appropriate response to difference is a significant advance, the court stops short of addressing the fundamental point. No less than a federal enactment, a treaty between a First Nation and the Crown is a bilingual, bijural speech act that is recorded in separate versions, both of which must be regarded as equally authentic constituents of the treaty text.³⁰⁶ Because non-Aboriginal Canadians (including lawyers and judges) are ignorant of Aboriginal law and culture, the courts cannot take judicial notice of the Aboriginal version of the text as they do of the English and French versions of federal legislation. However, they can establish the Aboriginal text as a fact through the re-

301. See, e.g., *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; *R. v. Marshall*, [1999] 3 S.C.R. 456. See generally SULLIVAN & DRIEDGER, *supra* note 49, at 420.

302. For a general account of the principles governing the interpretation of treaties, see SULLIVAN & DRIEDGER, *supra* note 49, at 416–20. See also James Youngblood Henderson, *Interpreting Sui Generis Treaties*, 36 ALBERTA L. REV. 46 (1997); Rotman, *supra* note 284; *Empowering Treaty Federalism*, *supra* note 30.

303. *R. v. Badger*, [1996] 1 S.C.R. 771, para. 41. See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1107–1108, 1114; *R. v. Taylor*, [1981] 34 O.R.2d 360, 367.

304. The leading cases are *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 36 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1107.

305. *R. v. Horseman*, [1990] 1 S.C.R. 901, 907; *R. v. Badger*, [1996] S.C.R. 771, 798–800.

306. See J. Edward Chamberlin, *Culture and Anarchy in Indian Country*, in 3 ABORIGINAL AND TREATY RIGHTS IN CANADA 18–19, 36–37 (Michael Asch, ed. 1997).

ception of appropriate evidence and through the development of appropriate principles for assessing the value of that evidence. Obviously, reliance on European common sense, which is said to underlie Canadian evidence law, will not serve for that purpose. Rather, the courts must rely on people with expertise in the relevant Aboriginal languages and literacies; they must master the rhetoric of Aboriginal artefacts and the oral tradition. This is not an easy thing to do, but it is possible; and it is made easier by the resurgence of oral culture in the Twentieth Century (through radio, telephone, television) and by the integration of oral and print culture that is achieved in much electronic communication and in modern document design.³⁰⁷

Having established the treaty text, the court must then reconcile the Aboriginal and European versions. Given that treaties derive their legitimacy from the voluntary consent of both parties to a shared understanding,³⁰⁸ dialogue and integration must be the preferred approach to treaty interpretation. The terms of the treaty must be constructed out of both versions with due regard to the context of both. What courts may discover through such dialogue is that whereas the oral tradition is less uncertain than imagined, the certainties of the written text are in many respects illusory. Certainly there is no reason to treat the European version of the text as a more reliable or apt expression of the original speech act. British and Canadian archival material shows the extent to which the formal record of at least some historical treaties differs from the account of the treaties set out in contemporaneous diaries and reports of Europeans who negotiated them.³⁰⁹ Quite apart from such discrepancies, however, the courts must acknowledge the inherent

307. See, e.g., JAMES O'DONNELL, *AVATARS OF THE WORD: FROM PYPYRUS TO CYBERSPACE* (1998); CHRISTIAN VANDENDORPE, *DU PYPYRUS A L'HYPERTEXTE: ESSAI SUR LES MUTATIONS DUE TEXTE ET DE LA LECTURE [FROM PYPYRUS TO HYPERTEXT: AN ESSAY ON THE EVOLUTION OF TEXT AND READING]* (1999); David Howes, *E-Legislation: Law-Making in the Digital Age*, 47 *MCGILL L. J.* 39 (2001). However, empirical studies show, breaking out of one's own cultural prison is harder than one might think. See MICHAEL CLYNE, *INTERCULTURAL COMMUNICATION AT WORK: CULTURAL VALUES IN DISCOURSE* (1994).

308. For discussion of what gives legitimacy to treaties, see Roderick A. Macdonald, *By Any Other Name ...*, in *SPEAKING TRUTH TO POWER*, *supra* note 286, at 77 & n.2.

309. See *Wampum in Niagara*, *supra* note 284, at 164–65; Rotman, *supra* note 284 at 35–40.

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limitation of all texts. The language of an English record of a treaty, no less than the language of a wampum belt, requires interpretation with all that interpretation entails — inference, assumption, guesswork. There is no justification for grounding that interpretation in a single version of the text and a single cultural tradition.

VI. THE LEGISLATION OF NUNAVUT

Legislation in Nunavut is prepared in English, French, Inuktituk and Innunnaqtun (a dialect of Inuktitut).³¹⁰ However, it is enacted in English and French only; the Inuktitut versions merely have the status of translations.³¹¹ This situation is unlikely to prevail for long.³¹² Inuktitut is the language spoken by a majority of the population of Nunavut, and it is the working language of the legislature.³¹³ A good deal of work has already been done to standardize the language and to develop legal vocabulary.³¹⁴ Under its constitution, the Legislative Assembly has the authority to enact laws for the preservation, use and promotion of the Inuktitut language;³¹⁵ proposals to require enactment in Inuktitut have already come before the legislative committee responsible for language matters.³¹⁶

310. See LEGISLATIVE ASSEMBLY OF NUNAVUT, BILLS & LEGISLATION, at <http://www.assembly.nu.ca/english/bills/aboutbills.html>. (last visited Mar. 18, 2004).

311. *Id.*

312. See Special Committee to Review the Official Languages Act, Final Report, Sixth Session First Legislative Assembly, Legislative Assembly of Nunavut 16–17 (Dec. 2003), available at http://www.assembly.nu.ca/english/committees/languages/final_eng.pdf. For a contrary view, see Charles Marecic, *Nunavut Territory: Aboriginal Governing the Canadian Regime of Governance*, 24 AM. INDIAN L. REV. 275, 292 (1999-2000).

313. See Legislative Assembly of Nunavut, *supra* note 312, at 5 app. III.

314. See, e.g., Table of Inuktitut and Innunnaqtun terminology for English terms used in collecting government statistics. GOVERNMENT OF NUNAVUT, RECOMMENDED TERMS, at <http://www.gov.nu.ca/Nunavut/stw.html> (last visited Mar. 18, 2004). See generally Nunavut Living Dictionary available at <http://livingdictionary.com> (last visited Mar. 18, 2004).

315. Nunavut Act, S.C., ch. 28, § 23(1)(n) (1993) (Can.).

316. See Recommendations regarding changes to the Official Languages Act, submitted to the Special Committee of the Legislative Assembly Reviewing the Official Languages Act (Jan. 18, 2002) available at <http://www.lang-com.nu.ca/english/pressreleases/ChangesOLAJan30.pdf>.

The impetus to enhance the status and expand the use of Inuktitut is closely tied to the goal of preserving and enhancing Inuit Qaujimajatuqangit — “I.Q.” for the benefit of southerners, as residents of Canadian provinces are called by those who live in the Territories. I.Q. is usually translated as “traditional Inuit knowledge.” A more telling translation, I suspect, would be “the knowledge and norms of the Inuit tradition.”³¹⁷

An essential component in preserving and promoting I.Q. is promoting the role of Elders in Nunavut institutions, including the legislature, government, schools and courts. Elders are consulted by the government in the preparation of legislation,³¹⁸ and the Legislative Assembly sets aside twelve seats for Elders inside its chambers.³¹⁹ Their role is to facilitate the integration of I.Q. into Nunavut’s legislation and to ensure compatibility between new legislative initiatives and Inuit tradition. Their participation in the legislative process establishes the legal relevance and legitimacy of Inuit cultural norms. The “wisdom of the Elders” thus becomes part of the legislative history of particular enactments and Inuit knowledge and culture becomes a necessary legal context for the interpretation of Nunavut legislation.

An example of this is the research into I.Q. carried out in developing conflict of interest legislation for the Territory. A researcher was asked to produce an overview of any Inuit norms and procedures relevant to the proposed legislation.³²⁰ She re-

317. “IQ is a set of practical truisms about the interrelationships between nature and society that have been passed orally from one generation to the next. It is a holistic, dynamic and cumulative approach to knowledge, teaching and learning.” Honourable Paul Okalik, Speech to the Conference on Governance, Self Government and Legal Pluralism 3 (Apr. 23, 2003), available at <http://www.gov.nu.ca/Nunavut/English/premier/press/cgsglp/shtml>.

318. See Inuit Qaujimajatuqangit Katimajit Established, available at <http://www.gov.nu.ca/Nunavut/English/news/2003/sept/sept8a.shtml> (last visited Mar. 4, 2004) (announcing the establishment of the Inuit Qaujimajatuqangit Katimajit, a council consisting of eleven community representatives who will advise the government on how to reflect IQ in policy development, delivery of programs and services, and day to day operations).

319. The Legislative Assembly of Nunavut operates on a consensus model. This means that there is no party affiliation and consequently no party discipline. The prime minister is elected by majority vote.

320. Patricia File, *Inuit Traditional Knowledge and Conflict of Interest: Review of Conflict of Interest Legislation Applicable to Members of the Legislative Assembly of Nunavut*, in REPORTS AND DECISIONS OF THE INTEGRITY

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lied on written accounts of past interviews with Elders as well as her own personal interviews.³²¹ The names of the Elders she interviewed are appended to the report, which sets out in list form relevant Inuit values, principles and processes.³²² The statement of purpose in the resulting legislation declares that the purpose of the Act is to affirm commitment to the common good in keeping with traditional Nunamummiut values and democratic ideals.³²³ At the least, this report forms part of the legislative history of the enactment; arguably that history extends to the views of the Elders interviewed by the researcher.³²⁴

I.Q. plays a more prominent and direct role in Nunavut's proposed Wildlife Act.³²⁵ Section 1(1) announces the purpose of the Act: to establish a comprehensive regime for managing wildlife and habitat in the Territory.³²⁶ Section 1(2) sets out a list of values which the Act is intended to uphold in fulfilling its purpose, including various principles of I.Q.³²⁷

In the definition section, Inuit Qaujimajatuqangit is defined as "traditional Inuit values, knowledge, behaviour, perceptions and expectations."³²⁸ Section 8 then sets out thirteen principles

COMMISSIONER FOR CULTURE OF INTEGRITY, *available at* <http://www.integritycom.nu.ca/English/Reports/culture-integrity-4-IQ.html> (last visited Mar. 18, 2004).

321. *Id.*

322. *Id.*

323. *Id.* See MODEL ACT § I(8).

324. For discussion of the admissibility and use of legislative history in Canada, see SULLIVAN & DRIEDGER, *supra* note 49, at 481.

325. Wildlife Act, S.Nu., ch. 26 (2003) (Can.), *available at* http://www.Nunavut-parks.com/bulletin_board/pdf/Wildlife%20Act%20%2D%20Chapter%2026%20%2D%20English%2Epdf [hereinafter Wildlife Act] (last visited Mar. 18, 2004).

326. *Id.*

327. Section 1.(2) of the Wildlife Act states:

1.(2) To fulfill its purpose, this Act is intended to uphold the following values:

(a) wildlife and habitat should be managed comprehensively since humans, animals and plants in Nunavut are all interconnected;...

(f) the guiding principles and concepts of Inuit Qaujimajatuqangit are important to the management of wildlife and habitat and should be described and made an integral part of this Act;

Wildlife Act, S.Nu., ch. 26, § 1.(2) (2003) (Can.).

328. *Id.*

and concepts intended to guide the interpretation and application of the Act. Section 9 further indicates how seven of these principles are to be understood by official interpreters in administering and applying the Act. For example:

9(1) The Government of Nunavut, the NWMB...and every conservation officer and wildlife guardian must follow the principle of *Pijitsirniq* when performing their functions under this Act.

(2) Although the principle of *Papattiniq* traditionally applied to objects rather than living things, because the Government of Nunavut and the NWMB have responsibilities to conserve wildlife, they must endeavour to apply the principle of *Papattiniq* to wildlife and habitat and conserve these resources for future generations of Nunvummiut.

...

(7) Because of the unique challenges facing Nunavut, this Act must be interpreted and applied in a way that respects the principle of *Qanuqtuurunnarniq*.

Finally, section 3(3) declares that "Inuktitut, or the appropriate dialect of Inuktitut, may be used to interpret the meaning of any guiding principle or concept of Inuit *Qaujimaqatungit* used in this Act."³²⁹

In effect, sections 8 and 9 of the Wildlife Act incorporate by reference a body of knowledge that is contained within an Inuktitut-based oral tradition, as opposed to a written set of standards. At first glance, this seems extraordinary. But it can also be understood as part of the ordinary evolution of the instruments of governance in western democracies. It is increasingly common for Western legislatures to incorporate by reference technical standards developed by independent national or international bodies.³³⁰ The effect is to make the incorporated set of standards legally binding on the persons to which the Act applies. This drafting technique creates access problems, particularly if the incorporated standards are subject to copyright (as they often are) and if they are drafted in only one language (as is often the case). The Supreme Court of Canada has toler-

329. *Id.*

330. See Sullivan Observations, *supra* note 58. For discussion, see JOHN MARK KEYES, EXECUTIVE LEGISLATION 269–70 (1992).

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ated these access problems, presumably because the benefits of mandating shared technical standards outweighs the cost of access problems and the disregard of community.³³¹ A similar cost-benefit analysis should apply to the incorporation of an Inuktitut-based, oral tradition into Nunavut law.

At present, the government of Nunavut appears to have decided that the benefits of a legal regime that relies on oral tradition outweighs the costs of sustaining and providing access to that tradition. These costs could be considerable. Incorporation of knowledge grounded in an oral tradition is feasible only if there is reason to believe in the ongoing viability of that tradition. Ironically, the creation of Nunavut (designed to reflect and sustain Inuit culture and the Inuit way of life) exposes the Inuit people to the pressures of the south and to globalization generally.³³² If Nunavut is to have a Wildlife Act that depends on the knowledge embodied in its oral tradition, the government must provide support to ensure the continued viability of the tradition — such as elders participating in the education system.

The Wildlife Act has not been enacted but it is likely to be re-introduced in the next session of the Legislative Assembly. What remains to be seen is how the courts, which are likely to be staffed by English-speaking, non-Aboriginals for many years to come, will respond to the discursive form of drafting and to the obligation to consult elders to determine the content of the law. When the occasion to respond arises, it will not be business as usual. Even though the Act is authentic in English and French only, it tells interpreters that it is to be treated as a multilingual, multijural text with special emphasis on the languages and norms of the Nunamummiut. It imposes a *legal obligation* on interpreters to educate themselves, and to receive evidence about the culture of the other. Further, by departing from the drafting conventions observed by most Canadian (and Commonwealth) legislatures, it invites interpreters to develop new canons of interpretation.

331. See *supra* notes 5–6 and accompanying text.

332. To become self-governing within the Canadian federation, the Inuit must master the governance structures used by the other governments of the federation.

VII. CONCLUSION

The Wildlife Act is extraordinary in its explicit attempt to incorporate Inuit language, knowledge and norms into European-style positive law. It not only permits, but requires dialogue between the oral tradition of the Inuit and the print-based tradition of European language and law. To rise to the challenges posed by this legislation, an official interpreter must be a multilingual, multicultural superhero. Alternatively, he or she must rely on help from appropriate experts. In the case of legislation such as Nunavut's Wildlife Act, the most important experts are the Elders who are the repositories of the incorporated traditional knowledge. Eliciting what they know in this context is comparable to reading standards incorporated by a Railway Safety Act, and relying on expert testimony to explain the terminology and underlying science.

The need to rely on experts is obvious when a court staffed by white judges, operating in a European-based tradition, is called on to interpret legislation that expressly requires knowledge of Aboriginal culture and traditions. However, the need is not confined to such cases. Arguably, any time a court that is not itself fully multilingual or multijural interprets a multilingual text or deals with a multijural matter, it is obliged to seek expert assistance from those who are able to compare and bridge the relevant legal and cultural traditions. Ideally such assistance would be part of the ongoing professional training offered to judges and would also be solicited through *amicus curiae* briefs. At the least, expert testimony by linguists, anthropologists, historians, Elders and the like should be routinely admissible in statutory interpretation cases. Testimony of this sort is invaluable in drawing attention to the complexities of interpretation and in particular to the ways in which language and law interact with cultural context. Most importantly, such testimony helps the court to recognize difference, to engage in dialogue, and in the end, perhaps to achieve a measure of integration.

BILINGUAL INTERPRETATION OF ENACTMENTS IN CANADA: PRINCIPLES V. PRACTICE

*Pierre-André Côté**

I. INTRODUCTION

Canada's experience with the interpretation of bilingual laws goes back a long way. For example, the Civil Code of Lower Canada, which came into force in 1866, contained a provision to guide interpreters in the resolution of problems caused by differences in the French and English versions of the Code.¹ Canadian courts have established a method for dealing with problems of interpretation of bilingual laws by building on the experience of many generations of jurists.

Anyone wishing to become familiar with the interpretive method would normally turn to a textbook on statutory interpretation, like my colleague Ruth Sullivan's excellent fourth edition of Elmer Driedger's *Construction of Statutes*.² Professor Sullivan provides an accurate description of the way bilingual statutes ought to be interpreted, based on numerous judicial *dicta* and decisions, most from the Supreme Court of Canada

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1 Civil Code of Lower Canada § 2615 (1866) (Can.):

If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French text, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail which is more consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention.

Id.

2. RUTH SULLIVAN, SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES (4th ed. 2002).

and some going back to the 19th century.³ As accurate as that description may be, however, I believe Professor Sullivan would agree that it does not necessarily reflect how bilingual legislation is actually interpreted in day-to-day legal practice in Canada. In fact, there are few areas of Canadian law where the contrast between “law in the books” and “law in practice” is more obvious.

While applicable legal principles require a bilingual reading and interpretation of bilingual legislation, practitioners are usually satisfied with an unilingual approach to bilingual texts. The purpose of this Article is to substantiate and illustrate this assertion and to examine some of the reasons for this situation. To do so, it will first summarize briefly the legal principles governing the interpretation of bilingual legislation in Canada, and then examine the various ways in which legal practice deviates from these principles.

A. Principles

Canadian courts have, over the years, developed principles of interpretation addressing the unique challenges presented by legal norms enacted in two different but equal linguistic versions. From these principles flow a method for interpreting bilingual texts, which can be presented through four methodological principles.

1. First principle: Bilingual statutes should be given a bilingual interpretation.

The Canadian Parliament enacts legal texts, not legal norms. The rules or norms have to be constructed by the readers of those texts, taking into account numerous factors, starting, of course, with the text of the law. This process of constructing legal norms which starts by reviewing the text of the law is what I mean by “interpretation.”

Since both linguistic versions of bilingual legislation constitute authentic expressions of the law (in effect, it might be better to say that they form together but one bilingual and authori-

3. *See id.* at 73, 94.

tative text of the law),⁴ someone cannot claim to correctly interpret a bilingual legislative text if they ignore one half of the text being interpreted. Thus, bilingual legislation requires bilingual interpretation, that is, an interpretation that takes into account the complete text of the law, which includes both an English and a French version.⁵

If we could be sure that there were no discrepancies between the two versions, we could arguably make do with an unilingual approach to bilingual texts. Since these discrepancies are present and even unavoidable, the only conclusion is that the best and most prudent way to interpret bilingual legislation is to consider both versions.

2. Second principle: In interpreting bilingual statutes, both versions should be attributed the same importance or weight.

Not only are both versions of a bilingual statute or regulation authentic, they are also to be considered as *equally* authentic.⁶ Equality of both versions carries, of course, enormous symbolic significance: neither French nor English speakers want to be considered second class citizens. On a more practical level, what has been called the “equal authenticity rule” states that both versions should contribute equally to the meaning of a given provision.⁷ For example, even if one version is known to

4. See, e.g., Roderick A. MacDonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 160–61 (1997):

Just as drafters of bilingual legislation are engaged in the translation of a single juridical idea into two natural languages, interpreters would come to accept that knowledge of one version alone is an insufficient point of reference for understanding the idea in question. They would understand legislative texts as fully embracing both English and French connotations and contexts, and as necessarily meaning what both versions say. No longer would it be possible to speak of two texts being equally authoritative. To the extent that any formulation of a legal rule can be authoritative, it will be necessary to speak of one authoritative bilingual text in French and English.

Id.

5. See SULLIVAN, *supra* note 2, at 77-78.

6. See SULLIVAN, *supra* note 2, at 74–77 (emphasis added). See also *R v. Cie Imm. BCN Ltee*, [1979] 1 S.C.R. 865, 871 (acknowledging that § 8(1) of the 1970 Official Languages Act specified that both English and French versions of legislative enactments were “equally authentic”).

7. See SULLIVAN, *supra* note 2, at 74–77.

be simply a translation of the other, this is not, *per se*, an acceptable reason to give it less consideration.

3. Third principle: Discrepancies in the two versions are to be treated as any other ambiguity and, subject to the fourth principle, must be resolved by resorting to the usual method of interpretation.

Where the reading of both the French and English versions reveals differences of meaning, the problem should be approached as a problem of ambiguity. Even though, there are two linguistic versions, there can be but one valid rule associated with a given provision in relation to particular facts. A choice thus has to be made, and the version to be favored will be determined by taking into account all the factors usually relevant to the ascertainment of statutory meaning. In the conventional rhetoric of statutory interpretation, it is said that the version which best reflects the "intention of Parliament" should prevail.⁸

The "literal meaning" of each version still retains some relevance, in that the words used in both versions of the provision being interpreted will determine the semantic possibilities of the text.⁹ The "ordinary" or "technical" meaning, however, cannot be a factor in the selection of the best interpretation because, in cases of divergence, both versions, being of equal weight, cancel each other out as it were, at least at the textual level.¹⁰

4. Fourth principle: In case of discrepancies, the meaning shared by both versions, if one can be found, constitutes a factor which should be considered in the interpretation of the provision, in addition to all the other relevant factors.

When the two versions do not express the same thing, one should try to reconcile them. In order to do that, Canadian courts will look for the meaning that can be attributed indis-

8. Doré v. Verdun (City of), [1997] 2 S.C.R. 862, 879. See SULLIVAN, *supra* note 2, 87–90.

9. See SULLIVAN, *supra* note 2, at 74–77.

10. See *id.*

tinctively to the two versions, the meaning which is shared by the two, the meaning that is common to both of them.¹¹

Sometimes, such a meaning cannot be found, and the interpreter will have to forgo textual considerations and resort to other means of resolving the ambiguity.¹² In other cases, one version is ambiguous, equivocal, and the other is clear, unequivocal.¹³ The clear version should be preferred. In a third category of instances, one version has wider meaning than the other: the version with the narrower meaning, which is shared by both versions, would then be favoured.¹⁴

When a shared meaning can be found, it constitutes merely a supplemental factor in the search for the best meaning of the provision. It will, however, be ignored if it is felt that it does not correctly reflect the intention of Parliament.¹⁵

The four principles just described would most likely be followed today by the Supreme Court of Canada in attributing meaning to a bilingual statute. Interpretation, however, is not a monopoly of the Supreme Court's. Interpretation is part of the every day activities of jurists, and there are many reasons to believe that the method required by these principles is seldom followed in practice.

B. Practice

When a subject has been as well studied as the legally accepted method for interpreting bilingual legislation in Canada,¹⁶ research is made easy. The situation is different when dealing with law in practice. Unless you can rely on empirical research, the task is a lot more difficult.

To my knowledge, such empirical research into the interpretive practices of Canadian jurists simply does not exist. This absence is in itself surprising. Could it be that, as proud as we Canadians may be of the principles our courts have developed,

11. *See id.* at 81–87.

12. *Id.* at 90–92.

13. *Id.* at 82–83.

14. *Id.*

15. *Id.* at 87–90.

16. *See generally* SULLIVAN, *supra* note 2; *see generally* RÉMI MICHAEL BEAUPRÉ, *INTERPRETING BILINGUAL LEGISLATION* (2d ed. 1986); *see generally* PIERRE-ANDRÉ CÔTÉ, *THE INTERPRETATION OF LEGISLATION IN CANADA* 323–32 (Katherine Lippel & Douglas J. Simsovic trans., 3d ed. 2000).

we are a bit embarrassed by the way these principles are in effect implemented in day-to-day legal practice? English-French bilingualism is a touchy matter in Canada, and certain subjects may be thought to be better left untouched.¹⁷

Absent such empirical research, I have had to draw, for this Article, on some 40 years of experience first as a law student and later as a lawyer and law professor in Montréal, on conversations with colleagues at the Université de Montréal and at the law firm with which I am associated and, obviously, I have drawn also on what I could find in books, essentially in law reports and law review articles. In a country as vast and diverse as Canada, this approach is obviously flawed in some way. One can safely say, for example, that the interpretation of bilingual legislation is bound to be conducted differently in Montréal and Toronto. One takes place in a largely bilingual environment where the majority is French-speaking and the other in a largely unilingual English-speaking community.¹⁸ Again, the day-to-day practice of bilingual interpretation by different jurists in the same linguistic, social and cultural environment may vary considerably as a function of individual linguistic skills and areas of practice.

My point of view is thus based largely on experience, intuition and educated guesses. This Article proposes hypotheses for further empirical research. I hope that, even in this form, it will be found useful.

In my opinion, the method of interpretation suggested by the four principles described earlier is seldom applied in Canadian legal practice. By legal practice, I am not referring only to interpretation by the courts: every time a meaning is attributed to an enactment by its reader, the text is being interpreted. Bilingual legislative texts are rarely interpreted in Canada according to the method identified by the courts as the method to be followed.

17. See, e.g., Thomas W. Simon, *Minorities in International Law*, 10 CAN. J.L. & JURIS. 507, 518 (1997).

18. See Statistics Canada, *Population by Knowledge of Official Language, Census Metropolitan Areas (2001)*, available at <http://www.statcan.ca/english/Pgdb/demo19b.htm> (last visited Feb. 28, 2004). In Montréal, 53% of the population knows both official languages and 91% of the population speaks French. *Id.* In Toronto, only 8% of the population knows both official languages and 96% of the population speaks English. *Id.*

The deviations from the principles observed in practice take essentially three distinct forms. There are many reasons to believe that, in the majority of instances, only one version is considered. This approach reflects what has been called “legal dualism.”¹⁹ In other instances, the version which is not the one in day-to-day use will be viewed only as an aid to interpretation. This is what I will call “occasional bilingualism.” Finally, when the two versions are considered, they may not be accorded the same weight. I will call this “unequal bilingualism.”

1. Legal dualism

The term “legal dualism” was used by Roderick MacDonald to describe a situation where official bilingualism translates, in practice, into two legal unilingualisms.²⁰ Paradigmatic instances of this situation would be an English-speaking lawyer in Vancouver using exclusively the English version of the Criminal Code of Canada, a bilingual federal statute, or a French-speaking lawyer in Québec City relying exclusively on the French version of the Civil Code of Québec, a bilingual Québec law. The method of interpretation favoured by this approach is simple: choose one version of the statute...and adhere to it, regardless of the outcome. The “other version” is completely ignored, creating a unilingual interpretation of a bilingual text.

At no time in my career have I been made more aware of legal dualism than one morning a little more than 20 years ago while I was preparing a lecture on a Supreme Court of Canada decision that was to become probably the leading case in modern Canadian Administrative Law.²¹ The case dealt with the question of judicial control of interpretations, by an administrative agency, of the statute the administrative agency was entrusted to apply. The Supreme Court decided that the text interpreted by the agency was ambiguous (there were, in the opinion of the Court, at least four different interpretations that could be sustained), that there was not one interpretation that could be said to be “right” and that since the conclusion arrived at by the agency was not “so patently unreasonable that its construction

19. See MacDonald, *supra* note 4, at 154.

20. *Id.*

21. C.U.P.E. v. N.B. Liquor Corporation, [1979] 2 S.C.R. 227.

cannot be rationally supported by the relevant legislation," intervention by the Court was not warranted.²²

Since I teach in French, I naturally was preparing my lecture by reading the French version of the Court's decision, which contained the official French version of the Province of New-Brunswick statute being interpreted.²³ Reading the French version many times, I simply could not find the ambiguity at the center of the controversy, and for good reason: the French text was unequivocal...but nobody seemed to have noticed, not even the members of the Supreme Court.

It is true that case was decided 24 years ago and a unilingual reading of a bilingual statute would certainly not happen today at the Supreme Court level. Recent experience shows, however, that it is still the practice of some lawyers and judges, even at the appellate level, to rely on one version only. In the recent case *R. v. Mac*,²⁴ the Supreme Court of Canada, realized that the French version of the Criminal Code of Canada (a federal and thus bilingual statute) had not been considered in the courts below. The Court rescheduled the hearing in order for the parties to make submissions taking into account the French version. The Court eventually ruled by giving considerable weight to that version.

To reduce the possibility of parties before the Supreme Court simply ignoring one version of a bilingual legislative text, the new *Rules of the Supreme Court of Canada* enacted in April 2002 now require the reproduction in the factum and in the book of authorities of both versions of all legislative texts that, by law, have to be printed in both languages.²⁵ When the Supreme Court has to resort to its rule-making powers in order to incite litigants to take into account both versions of bilingual legislative texts, one can easily imagine what goes on in everyday legal practice.

Among the causes of legal dualism, MacDonald identifies what he calls "rampant unilingualism among legal elites."²⁶ To

22. *Id.* at 237.

23. This official nature of the French version flowed at the time from the Official Languages of New Brunswick Act, R.S.N.B. ch. O.1 (1973)(Can.).

24. *R. v. Mac*, [2002] 1 S.C.R. 856.

25. Rules of the Supreme Court of Canada, SOR/DORS/2002-156, C.Gaz., pt. II, vol. 136, no. 9, s. 42(2)(b) (April 24, 2002).

26. MacDonald, *supra* note 4, at 156.

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interpret bilingually bilingual texts, it evidently helps to have at least a passive knowledge of French and English. As the following table published by Statistics Canada indicates,²⁷ bilingualism in Canada is generally not at a high level, except in the two provinces of Québec and New-Brunswick, where members of the French-speaking minority are concentrated.

English-French Bilingualism				
	1971	1981	1991	2001
Canada	13.4%	15.3	16.3	17.7
Newfoundland and Labrador	1.8	2.3	3.3	4.1
Prince Edward Island	8.2	8.1	10.1	12.0
Nova Scotia	6.7	7.4	8.6	10.1
New Brunswick	21.5	26.5	29.5	34.2
Québec	27.6	32.4	35.4	40.8
Ontario	9.3	10.8	11.4	11.7
Manitoba	8.2	7.9	9.2	9.3
Saskatchewan	5.0	4.6	5.2	5.1
Alberta	5.0	6.4	6.6	6.9
British Columbia	4.6	5.7	6.4	7.0
Yukon Territory	6.6	7.9	9.3	10.1
Northwest Territories	6.1	6.0	6.1	8.3
Nunavut	–	–	–	3.8

A comparison of metropolitan areas by language of population confirms the vast differences between, for example, Toronto, where the level of bilingualism stands at 8%, Vancouver, where 7.5% of the population is bilingual and Montréal, where bilingualism stands at 53%.²⁸

27. Statistics Canada, 2001 Census, English-French Bilingualism, available at www.12.statsca/english/census01/teacher's_kit/activity8_table5.cfm (last visited Apr. 2, 2004).

28. Statistics Canada, 2001 Census, Population by knowledge of official language, census metropolitan areas, available at www.statscan.ca/english/Pgdb/demo19b.htm (last visited Apr. 2, 2004).

Now, one may argue that these statistics do not reveal the level of bilingualism in the legal profession, where, it can be surmised, practitioners tend to be more educated and bilingualism more important considering, in particular, its role in legislation. It is not easy to obtain information about the language characteristics of the Canadian legal profession. The best I have been able to do is to look at the membership of the Canadian Institute for the Administration of Justice,²⁹ which, as of August 26, 2003, had 1,054 members, 55% of which are judges of various Courts in Canada, the rest being essentially members of the Bar from across Canada.

Among those 1,054 members, 799 (76%) declare themselves to be English-speaking. Of that number, 46, or 6%, are bilingual. Of the 255 French-speaking members (24% of the total membership), 161 or 63% are bilingual. The hypothesis that bilingualism is more frequent in the legal profession than in the general population is true of the French-speaking jurists, but not for the English speakers.³⁰

The nature of the tools Canadian practitioners use on a daily basis to access the text of legislation constitutes a cause as well as a consequence of legal dualism. In English Canada, the French version tends to be omitted from annotated codes and statutes. If you open, for example, any edition of the celebrated *Martin's Annual Criminal Code*,³¹ you will not find anywhere the French version of the Criminal Code or of related statutes, although all were bilingually drafted, adopted and published, and even though those texts are all supposed to be subject to a bilingual method of interpretation. The same could be said for most annotated federal or constitutional statutes published in English Canada.³²

29. For more information on the Canadian Institute for the Administration of Justice, see <http://www.ciaj-icaj.ca>.

30. I wish to thank Mrs. Christine Robertson, executive director of Canadian Institute for the Administration of Justice for this information.

31. EDWARD L. GREENSPAN, Q.C. & MARC ROSENBERG, *MARTIN'S ANNUAL CRIMINAL CODE 2004* (2004).

32. See, e.g., L. W. HOULDEN & GEOFFREY B. MORAWETZ, *THE 2003 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT (2003)*; MAHMUD JAMAL & MATTHEW TAYLOR, *THE CHARTER OF RIGHTS IN LITIGATION (2003)*.

French-speaking authors tend to publish federal and Québec codes and statutes in both languages,³³ although there are more and more exceptions.³⁴ In 1977, the Québec government ceased to publish the French and the English versions of its statutes side-by-side, so bilingual interpretation of Québec statutes has since then become more difficult. However, commercial publications of bilingual editions of the Civil Code, of the Code of Civil Procedure and of other statutes in some measure alleviate the problems created by the physical separation of the French and English versions in governmental publications.

When a lawyer works in daily practice with the unilingual text of a bilingual statute, an interpretation process resting on both official versions is not necessarily excluded, but chances are that approach will not be resorted to except where special circumstances require it. I call this “occasional bilingualism.”

2. Occasional bilingualism

Interpretive principles require that bilingual interpretation be systematic. Since both versions should serve as a starting point for construction of legal norms, both have to be taken into account every time a statute is given meaning. In everyday practice, however, and this certainly characterizes the approach dominant in the bilingual environment of Montréal, only one version is in daily use and the other version is looked at occasionally, when special circumstances seem to justify it. This happens, notably, when there is a need for confirmation of the meaning of the dominant version, or when that version’s meaning is doubtful and requires clarification. It goes without saying that this approach is encouraged when the French and English versions are not published side-by-side, but in separate documents.

The law firm where I act as counsel has an important municipal law practice. Municipal legislation is within the jurisdiction of the province.³⁵ Québec municipal legislation is first

33. *See, e.g.*, YVON MARTINEAU, *MANUEL DES CORPORATIONS DU QUÉBEC* [MANUAL OF QUÉBEC CORPORATIONS] (1994); GEORGE T. ROBIC, ET. AL. *CANADIAN COPYRIGHT ACT ANNOTATED* (2003).

34. *See, e.g.*, THERIAULT & FORTIN, *DROIT DES VALEURS MOBILIÈRES* [THE LAW OF TRANSFERABLE SECURITIES] (2001).

35. *Constitution Act 1867* (U.K.), 30-31 Vict., ch. 3, s. 92(8).

drafted in French and then translated into English.³⁶ Lawyers practicing municipal law tell me that they tend to use the French version in daily practice, but, since they are generally bilingual, that they will turn to the English version only when special circumstances justify it.

There is reason to think that this opportunistic use of bilingualism is not limited to Québec jurists. Many years ago, as I was reading a law review article about the interpretation of the then recently enacted Canadian Charter of Rights and Freedoms,³⁷ I was shocked to read that, among the sources the author said one could look at to assist in the interpretation of the Charter, the French version of the Charter figured in sixth place!³⁸ This is especially troubling, considering that the English and French versions of the Charter are declared to be “equally authoritative” by Section 57 of the Constitution Act, 1982.³⁹

The recourse to the other version simply as an aid to interpretation can be criticized as not being compatible with the equal authenticity rule, but one wonders whether a systematic bilingual approach is possible in daily legal practice. Even where knowledge of both official languages is not an obstacle to a bilingual method, it seems that, inevitably, one version will tend to dominate and the other will be relegated to an auxiliary role. This reflects a kind of practitioner’s custom or working habit which is very hard to change. If we take as an example the interpretation of Québec municipal legislation, the statutes are drafted in Québec City in French in a French-speaking environment.⁴⁰ The texts are discussed in the Québec National

36. LUC GAGNÉ, *LE PROCESSUS LÉGISLATIF ET RÉGLEMENTAIRE AU QUÉBEC* [THE LEGISLATIVE AND REGULATORY PROCESS IN QUÉBEC] 29–31 (Yvon Blais ed., 1997). Nicole Fernbach, *Getting the Message Across in Languages Other than English: The Canadian example* [sic], Presentation to the Fourth Biennial Conference of the PLAIN Language Association International (September 27, 2002) at <http://www.nald.ca/PROVINCE/ONT/PLAIN/message/1.htm>.

37. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

38. Robin Elliot, *Interpreting the Charter—Use of Earlier Versions as an Aid* U.B.C.L. REV. (Charter Edition) 11, 12–13 (1982).

39. CAN. CONST. (Constitution Act, 1982) pt. VII (Canadian Charter of Rights and Freedoms), §57.

40. GAGNÉ, *supra* note 36, at 29–31.

Assembly in their French version only.⁴¹ The English version is a translation. The practitioner working with the French version of the Cities and Towns Act,⁴² for example, knows this. What is the incentive to look systematically at the English version? Either it says the same thing as the French, and it may be seen as useless, or it contradicts the French, and it is possible that the French version will be preferred by a court as being the original and thus best version.

One thing seems sure: if occasional bilingualism did not work well in practice, it would very likely be abandoned. Occasional bilingualism may be an error, but *error communis facit jus*. The same could be said of the unilingual interpretation of bilingual texts in many parts of Canada: as long as everybody in a given milieu ignores the French or the English version, there is no real practical problem.

I have just hinted at the possibility that the Québec Courts may favour the original version of a statute over its translation. This illustrates the third manner in which practice may deviate from principles.

3. Unequal bilingualism

The French and English versions of Canadian bilingual legislation are supposed to be equally authoritative.⁴³ To this equality at the normative level, however, does not always correspond an equality at the factual level.

For example, it would seem obvious that when a text was first conceived in one linguistic version, then drafted, discussed in Parliament and adopted in that version, the other version being simply a translation of the final draft, more weight in interpretation to the version considered as the original will usually be given. As Roderick MacDonald points out, legal bilingualism is not really compatible with the production of dual versions by a process of translation.⁴⁴ Even when both versions have been drafted as originals, the simple fact that the ministerial in-

41. Debates of the Québec National Assembly can be consulted at www.assnat.qc.ca.

42. City and Towns Act, R.S.Q., ch. C-19 (Can.).

43. See *supra* note 7 and accompanying text (discussing the equal authenticity rule).

44. See MacDonald, *supra* note 4, at 148.

structions preceding the drafting process result from discussions that have taken place in one language only and are themselves drafted in that language will be detectable by interpreters, who will accordingly tend to attach more weight in their approach to the statute to the version drafted in the language of the ministerial instructions.⁴⁵

The process of ordering both versions in terms of their reliability or persuasive weight is rarely apparent in case law, because it contravenes the equal authenticity principle, but it is not completely absent. In one of the leading cases on the interpretation of bilingual legislation, *R. v. Compagnie Immobilière B.C.N.*, the Supreme Court compared the wording of the French and English versions of a federal tax regulation.⁴⁶ At the time, the French version of those regulations as well as the French version of the Income Tax Act⁴⁷ were translations of the original English version. In giving precedence to the English version, the Court underlined the fact that, while the English version of the Act used consistently the same words in relation to the problem before the Court,⁴⁸ the French version used different words in a seemingly arbitrary fashion.⁴⁹ This was sufficient to suggest that the French version, although official, was unreliable and should not prevail in cases of conflict with the English version.

More recently, the Supreme Court issued its first decision interpreting the new Québec Civil Code⁵⁰ in the case of *Doré v. Verdun (City of)*.⁵¹ Section 2930 of the Code contained a divergence between the French and English versions.⁵² The Québec Court of Appeal had given precedence to the French version.⁵³

45. *See id.*

46. *R. v. Compagnie Immobilière B.C.N.*, [1979] 1 S.C.R. 865.

47. Income Tax Act, R.S.C. ch. 148 (1952)(Can.).

48. *See* *Compagnie Immobilière B.C.N.*, [1979] 1 S.C.R. 865, 870–77 (discussing the expressions “disposition,” “proceeds of disposition,” and “disposed of”).

49. *Id.* at 871–74 (noting that in section 20 of the English version of the Income Tax Act, the expression “disposed of” appeared thirteen times. In seven of those occurrences, the French equivalent was “*disposé*,” and in six, “*aliéne*.”)

50. Civil Code of Québec, S.Q. ch. 64 (1991)(Can.)

51. *Doré v. Verdun (City of)*, [1997] 2 R.C.S. 862.

52. *Id.* at 880.

53. *Id.* at 878–79.

As one of the reasons for this choice, the appellate judge stated that the English version of the Code was “merely a translation” of the original French version, a translation that “did not meet with everyone’s approval” and suggested that it should not be given equal weight because of its unreliability, citing the well known Italian aphorism: *Traduttore, traditore* (Translator, traitor).⁵⁴ This approach was clearly rejected by the Supreme Court of Canada, where Mr. Justice Gonthier, while acknowledging that it was “unfortunately true” that the English version of the Code was a translation, stated that this fact could not be used to set aside an argument based on that version because to do so would be incompatible with the equal authenticity and equal status of both versions mandated by the Constitution.⁵⁵

The fact that a version does not appear to be as reliable as the other because it is a translation is probably not the only circumstance where unequal bilingualism may be encountered. Some areas of Canadian law are inextricably linked by history with one language and even if both linguistic versions are drafted as originals, one version will tend to dominate. According to professor (and now dean) Nicholas Kasirer of McGill University, “the Anglo-Canadian tradition in criminal law is deeply rooted in the English language” and the application of the equal authenticity principle in this area of Canadian law “is a myth that no-one really believes, but that everyone swears by.”⁵⁶ Québec criminal lawyers are quite aware of this, and colleagues who teach criminal law in French tell me that they feel the English version of criminal legislation tends to dominate even in the French-speaking interpretive environment.

Considerations of fairness may also impact on the weight given to a linguistic version of a statute. For example, Canadian Law recognizes the importance of giving citizens fair notice as to what conduct is prohibited under pain of criminal penalty.⁵⁷ Canadian Constitutional Law also considers that lack of

54. Verdun (City of) v. Doré, [1995] R.J.Q. 1321 at para. 24.

55. Doré v. Verdun (City of), [1997] 2 R.C.S. 862, 878–79.

56. Nicholas Kasirer, *The Annotated Criminal Code en Version Québécoise: Signs of Territoriality in Canadian Criminal Law*, 13 DALHOUSIE L.J. 520, 553 (1990).

57. See generally R. v. McIntosh, [1995] 1 S.C.R. 686.

fair notice may invalidate a statute that is excessively vague.⁵⁸ In a criminal trial, if the version drafted in the language of the accused does not reveal an offense while the other does, a judge might well feel justified, on grounds of fairness, in giving precedence to the version the accused, his lawyer, the jury, and eventually, the judge himself, are able to read and understand.

The Supreme Court of Canada has recently decided a case from Québec⁵⁹ where the French version of the Criminal Code described an offense more narrowly than the English one, with the result that the conduct of the accused could be seen as being prohibited by the English version, but not by the version drafted in the language of the accused, a French-speaking resident of Québec City. Even though, in the opinion of the Court, the English version best reflected Parliamentary intent and the French version contained a drafting error, the French version was preferred, essentially on grounds of fairness.⁶⁰

II. CONCLUSION

At first glance, the state of bilingual interpretation of statutes in Canada seems to be a cause for concern. The recommended method for giving meaning to bilingual statutes appears to be rarely followed in everyday legal practice. I believe, however, that this situation, though it could certainly be made better, is understandable.

First, it must be remembered that bilingual drafting of statutes reflects a constitutional or legal policy of making written law equally accessible to English-speaking and French-speaking Canadians. Equal authenticity says to members of both language-groups that they are entitled to rely on the version written in their own language. Bilingual drafting is premised on the fact that a majority of Canadians are either French or English-speaking and suggests that members of both language groups are entitled to rely exclusively on the version drafted in their own language.

The principles developed by the courts, however, state that the best way to give meaning to a bilingual statute is to take

58. See generally *R. v. Pharmaceutical Society* (Nova Scotia), [1992] 2 S.C.R. 606.

59. *R. v. Daoust*, [2004] S.C.C. 6.

60. See *id.* at paras. 35 and 37.

both versions as a starting point, which requires some degree of bilingualism on the part of the interpreter. One cannot fault the courts for arriving at the conclusion that the best and most prudent way to interpret bilingual legislation is to give equal consideration to both texts. How could they decide otherwise? The idea that the language of the parties would determine which version the courts should consider in giving meaning to a text is untenable, because it means that in the case of discrepancies, there would in fact be two valid rules that could be constructed from a single provision, and, furthermore, that these rules would apply differently depending on the language spoken by the Canadian in question.

Is there a way to reconcile the reality of a mainly unilingual legal profession with the requirements of institutional bilingualism? Maybe the solution is to think of the judge-made principles relating to the interpretation of bilingual statutes not as stating conditions for an interpretation to be valid, but as simply suggesting the best way to proceed. Interpretation by the Courts and interpretation in day-to-day legal practice take place under vastly different conditions. The constraints of time, money and limited human resources and skills that characterize everyday or routine interpretations are rarely present in judicial interpretation, especially at the highest levels.

For example, Canadian courts have recently accepted the view that examining Parliamentary or legislative history is an appropriate way of interpreting statutes, as it may give useful insights into the context surrounding the adoption of a given text. One can certainly assert that an interpretation which takes into account the Parliamentary history of a provision is to be preferred to one that ignores it, but this does not justify the conclusion that an interpretation which is arrived at without having resort to this kind of information is necessarily invalid or improper. The same could be said for a great number of elements that are considered relevant to the interpretation of a statute, like the previous state of the law, the content of related legislation and doctrinal writings on the interpretation of a specific provision.

All information comes with a cost, and practitioners will tend to balance this cost against the perceived advantages provided by the information eventually obtained. The result of this balancing operation will evidently vary widely based on circumstances. From judicial interpretation, especially at the appel-

late level, we expect the best level of information to be brought to bear on the results, and a lawyer preparing a factum for the Supreme Court of Canada on the interpretation of a statutory provision would be well advised not to ignore any element considered relevant by the Court, including, evidently, the two versions of the statute.

This situation is very different from what happens in routine interpretations during daily legal practice. The constraints of everyday practice simply do not allow for the gathering of the same quantity of information as what may be considered to be the best. Practitioners must often be content with a satisfactory level of information, with what is “good enough” as opposed to what is best. More often than not, this may mean that only one version of a bilingual statute will be considered, but when the meaning of that version seems in need of confirmation or clarification, the other will be consulted if the cost of doing so is perceived to be reasonable in comparison with the advantages. This cost will vary, notably, with the linguistic skills of the interpreter and whether the other version is easily accessible. The perceived advantages will depend in particular on the value the environment in which the interpretation occurs places on a bilingual approach to statutes.

Mainly because of the linguistic characteristics of the interpreters and of the working habits of the legal profession, the assignment of meaning to bilingual statutes in Canada is, in my opinion, only exceptionally done by a systematic and careful examination of both French and English versions. The gulf between theory and practice thus runs deep and, given the obstacles in the way of a truly bilingual approach to statutes in everyday legal practice, there is little reason to believe that this situation will change significantly in the foreseeable future, despite the real efforts of the Supreme Court of Canada to promote such a change.

AUTHORING BILINGUAL LAWS: THE IMPORTANCE OF PROCESS

*Donald L. Revell**

I. INTRODUCTION

Passing legislation is serious business. The task is rendered more difficult in those jurisdictions that enact their legislation in multiple languages. In such jurisdictions, complicated questions concerning statutory interpretation are amplified by possible discrepancies between or among the dual or multiple texts. The most serious question is the validity of each document. Some might argue that only the source document, assuming there is one, of a bilingual or multilingual document is truly authentic and that in the event of differences in interpretation, one should look to the source text for the “true” meaning as all other versions are “mere” or “simple” translations. This would at least be the case where there is a constitutional or statutory requirement for preferring one version over another. However, this method defeats principles of equality.

Alternatively, others argue that if a government acts in more than one language, then its acts should be taken as authentic in all the languages in which it acts. This is the position in Canada.¹ But, what is the best process by which to make legally

* Chief Legislative Counsel, Toronto, Ontario Canada. This is not an academic paper in the traditional sense. Much of what I have to say is a reflection of my personal experience. While some of it is in textbooks and other source materials, I have not relied on outside sources other than where noted. The views expressed are mine. They do not represent the views of the Government of Ontario or the Legislative Assembly of Ontario. For their assistance with the final draft of this paper, I thank David Halporn, Legislative Counsel, of my office, and Elaine Jewkes, my Administrative Coordinator. © The author retains copyright in this paper.

1. Professor Pierre-André Coté and Professor Ruth Sullivan deal with some of these matters in papers published elsewhere in this issue of this journal. See Pierre-André Coté, *Bilingual Interpretation of Enactments in Canada: Principles vs. Practice*, 29 BROOK. J. INT'L. L. 1067 (2004); Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, 29 BROOK. J. INT'L. L. 985 (2004). See also RUTH SULLIVAN, STATUTORY INTERPRETATION 91 (1997); RUTH SULLIVAN, SULLIVAN AND DREIDGER ON THE CONSTRUCTION OF STATUTES ch. 4 (4th ed. 2002).

equal bilingual legislation that minimizes discrepancies between the documents?

The province of Ontario has successfully written bilingual legislation since 1978. It began by translating key English statutes into French, and since 1991 all public general legislation has been enacted in bilingual form through the translation method. However, in order to fully understand the process by which bilingual legislation is authored, it is necessary to comprehend the larger picture of the entire legislative process.

Therefore, this Article will first review Ontario's overall legislative process. It will then examine in-depth the bilingual authoring processes of Ontario's Office of Legislative Counsel, followed by a discussion of two alternative models of bilingual legislation production – the co-drafting model and the double-drafting model. Finally, it will consider the importance of credibility in the bilingual authoring process and some of the factors that affect such credibility.

II. ONTARIO'S LEGISLATIVE PROCESS

Ontario follows the Westminster or British model of government.² The executive (cabinet) is chosen from the members of the majority party in the Legislature.³ While members of the opposition and government backbenchers⁴ may introduce bills, only a small percentage of such bills pass into law. Conversely, a majority of the bills introduced by the executive are usually

2. Despite following the British model, all Canadian provinces and territories have unicameral legislatures, while Canada's federal parliament is bicameral. See *Provincial Government*, in *The Canadian Encyclopedia* at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006533> (last visited Apr. 27, 2004) (providing general information on Canada's federal government system).

3. See J.E. Hodgetts, in *The Canadian Encyclopaedia* at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001149> (last visited Apr. 27, 2004).

4. See WIKIPEDIA (Mar. 22, 2004), at <http://en.wikipedia.org/wiki/Backbencher> (last visited Mar. 28, 2004) ("A backbencher is a Member of Parliament or a legislature who does not hold governmental office and is not a Front Bench spokesperson in the Opposition.").

enacted.⁵ Furthermore, only cabinet ministers may introduce taxing and spending measures.⁶

From my experience,⁷ Ontario's legislative process is the model followed by the common law jurisdictions of Canada.⁸ It can be described as a series of three cycles each of which begins

5. For example, in 2001, 117 Private Members Public Bills (PMBs) were introduced, but only nine passed into law. On the other hand, forty-four Government Bills were introduced and twenty-four were enacted. Of the nine PMBs, seven were introduced by "backbench" members of the governing Conservative Party. Only one bill introduced by a Liberal member and only one introduced by the New Democratic Party were enacted. Statistics on file with author.

6. Constitution Act, 1867, 30 & 31 Vict., ch. 3, § 54 (Eng.) (formerly known as the British North America Act, 1867); Legislative Assembly Act, R.S.O., ch. L-10, § 57 (1990) (Can.); LEGISLATIVE ASSEMBLY OF ONTARIO, STANDING ORDERS OF THE LEGISLATIVE ASSEMBLY OF ONTARIO para. 56 (Nov. 1999), available at http://www.ontla.ca/documents/standing_orders/out. This system is considerably different from that in the United States, where individual legislators have the power to introduce legislation. See U.S. CONST. art. I, § 1.

7. The author has been legislative counsel for the Province of Ontario, Canada since 1977. In 1986, he became Chief Legislative Counsel for Ontario with responsibility for the province's legislative drafting and translation services. He has drafted bills and regulations for virtually every ministry within the Ontario Government and has provided advice to the Speaker of the Assembly, government ministers and senior officials. Between 1986 and 1991, he was responsible for the completion of the first translation of Ontario's statutes (described below in this paper). He has been special advisor to the Deputy Minister of Justice of Nunavut, in which capacity he was responsible for the creation of Nunavut's legislative drafting and translation services. He has also been a consultant on legislative translation projects in Estonia and Latvia. He has taught on legislative drafting and process at York University and the University of Toronto and at numerous seminars. He has taught for several years on legislative translation and translation processes at the International Legislative Drafting Institute at the Public Law Centre, Tulane University, New Orleans. He has been the executive lead on the e-Laws project (www.e-Laws.gov.on.ca), which provides French and English access to the law of Ontario, for five years.

8. Canada has nine common law provinces and three common law territories. The Province of Québec is a civil law jurisdiction. The federal government, which has jurisdiction over all provinces and territories, now claims to be bijural, i.e., both common law and civil law in its orientation. Québec follows a different model in its legislative process that, as I understand it, is based on the system followed in many civil law jurisdictions. See generally SIR WILLIAM DALE, LEGISLATIVE DRAFTING: A NEW APPROACH (1977) (offering an excellent comparative analysis of legislative drafting in the United Kingdom, France, Germany and Sweden).

and ends with a ministry.⁹ These cycles are: the policy cycle, the authoring cycle and the Assembly cycle. I will describe each in turn.

A. *The Policy Cycle*

The first cycle in the legislative process is the policy cycle. Regardless of where the idea for a bill originates, the idea will be developed by a ministry's public servants into a policy proposal that sets out the need for legislation, the alternatives and staff recommendations. The minister responsible for that ministry must approve the policy proposal for it to proceed. If the minister approves, it is submitted to Cabinet Office,¹⁰ where it will be forwarded to one or more of the committees of cabinet¹¹ for review. The ministry staff will consult with stakeholders at this stage. The cabinet committees are made up of cabinet ministers and are supported by experienced staff who analyse the proposal. The submission is considered in light of overall government policy, program needs and cost, and the legal and political implications. If a committee wants, it may refer a submission back to the ministry for further information or turn it down. After committee approval, the submission will go to full cabinet for discussion and approval. Again, it can be returned to the ministry for further work, turned down or approved. If

9. Each ministry is headed at the political level by a minister of the Crown and at the bureaucratic level by a deputy minister. *See* R. MACGREGOR DAWSON, *THE GOVERNMENT OF CANADA* 260 (4th ed. 1963, revised by Norman Ward). The government acts through its ministries. They are the operational level of the government. Although headed by a politician, each ministry is staffed by career public servants who are expected to function in a politically neutral manner.

10. Cabinet office provides administrative support and policy analysis to cabinet. *See generally id.* chpts. 10, 11 & 12.

11. Cabinet is composed of the political heads of each of the government ministries (or departments) and is headed by the premier or prime minister. Cabinet determines overall government policy. Ministers are bound by a convention known as cabinet solidarity. Once policy has been decided, all ministers must support the policy or, in theory, resign. Cabinet requires that a draft government bill be approved by it before a cabinet minister introduces the bill in the legislature. *See* Public Service Commission of Canada, *supra* note 2; OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, *HOW A GOVERNMENT BILL BECOMES LAW (PRE-LEGISLATIVE STAGES)*, at <http://www.ontla.on.ca/library/billsresources/prelag.pdf> (last updated Mar. 2004).

cabinet approves, it issues a minute authorizing the ministry to proceed to the drafting or authoring cycle of the legislative process.¹²

B. The Authoring Cycle

Once the policy cycle is complete and the proposed legislation is approved for drafting, the authoring cycle begins. During the authoring cycle, the legal advisors to a ministry that needs legislation drafted¹³ come to the Office of Legislative Counsel¹⁴ with the cabinet minute containing the high level drafting instructions and the policy submission containing more detailed information on the proposed legislation. It is the function of the Office of Legislative Counsel to author a bilingual bill from these instructions. The process, which will be described in greater detail below, is iterative and requires close teamwork between the drafters and the legal advisors to the client ministry. In addition to its legal advisor or advisors, the ministry team will

12. I prefer the word “authoring” to “drafting” to describe the overall process followed by the Office of Legislative Counsel. In traditional terminology, we draft in English and translate into French. At the end of the day, we end up with one bilingual text that is equally official in English and French. Authoring seems like a neutral approach to describe the overall process used to create bilingual text.

13. The Office of Legislative Counsel considers any ministry for which it is drafting legislation to be a “client ministry.”

14. In Ontario, the Office of Legislative Counsel is the central authoring office for all government bills and regulations. See OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A GOVERNMENT BILL BECOMES LAW (PRE-LEGISLATIVE STAGES), at <http://www.ontla.on.ca/library/billsresources/prelag.pdf> (last updated Mar. 2004). The Office of Legislative Counsel also authors private members’ bills for members of the assembly and advises on the drafting of private bills. See OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A PRIVATE MEMBER’S PUBLIC BILL BECOMES LAW, at <http://www.ontla.on.ca/library/billsresources/pmpbill.pdf> (last updated Aug. 2, 2001); OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A PRIVATE BILL BECOMES LAW, at <http://www.ontla.on.ca/library/billsresources/prbill.pdf> (last updated Aug. 2, 2001) [hereinafter HOW A PRIVATE BILL BECOMES LAW]. See generally OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A BILL BECOMES LAW (2004), at <http://www.ontla.on.ca/library/billsresources/hbblhome.htm> (last visited Mar. 28, 2004) (providing an overview of the various types of bills in Ontario). The Office of the Legislative Assembly is also responsible for the legislative database and for desktop publishing of bills, regulations and statutes. See e-Laws, at <http://www.e-Laws.gov.on.ca> (last modified Mar. 7, 2004) (providing electronic access to these laws).

also include policy and operations personnel and may include outside advisors; however, normally only the legal advisor will attend drafting meetings. The process also requires close teamwork between the drafters and the members of the translation team. When the draft bill is ready, the client ministry is responsible for forwarding it to Cabinet Office together with a cabinet submission that describes the bill and notes any deviations from the approval minute authorizing the drafting. The documentation then goes to the Legislation and Regulations Committee of Cabinet¹⁵ where it is reviewed for compliance with the minute and for further consideration of policy and financial implications. The committee may request drafting changes or more information on the draft. If the committee approves the draft, it goes to the full cabinet for approval. Again the full cabinet may request changes or it may decide not to proceed. However, approval is normally given for the minister to introduce the bill in the Assembly, with or without changes.

C. The Assembly Cycle

In the assembly cycle, the minister of the ministry for which the bill was drafted moves first reading.¹⁶ After the bill has been printed, it will be called for second reading, which entails approval in principle.¹⁷ At this stage, the debate can be far ranging.¹⁸ If the bill passes second reading it may be referred to a standing committee or to the committee of the whole house for clause-by-clause consideration.¹⁹ Any member of the committee may move amendments unless the amendments impose a tax or

15. This committee has had its name changed from time to time, but its functions have remained the same throughout the author's career. See Donald L. Revell, *Rule-Making in Ontario*, 16 LAW SOCIETY GAZETTE 350, 358–61 (1982).

16. In the Westminster system each bill must receive three “readings” before it can become law. A reading is a formal step accomplished on the motion of the person who introduced the bill. Only the motion is read – not the actual bill. I am not aware of a government bill ever being defeated at first reading.

17. See, e.g., LEGISLATIVE ASSEMBLY OF ONTARIO, STANDING ORDERS OF THE LEGISLATIVE ASSEMBLY OF ONTARIO para. 69 (Nov. 1999), available at http://www.ontla.ca/documents/standing_orders/out.

18. See, e.g., *id.* para. 71.

19. See, e.g., *id.* para. 72(d).

authorized the spending of public money.²⁰ The public may appear before a standing committee, but not the committee of the whole house. Upon report by the committee, the bill will be ordered for third reading.²¹ No amendments are possible at this stage.²² After third reading, the bill will await the assent of the Lieutenant Governor and becomes law upon assent. At this point, the ministry becomes responsible for the implementation of the law and the legislative cycles have all been completed where they started — in the ministry.

In closing this part of the paper, I would note that one should expect that with a highly centralized process there is a greater possibility of a high level of consistency across the statute book. It is certainly one of my goals as Chief Legislative Counsel for my office.

III. THE AUTHORING PROCESS

Authoring legislative texts in more than one language requires, in my opinion, a coherent process to ensure the legal and linguistic quality of each text. In this section, I will describe the three methods of authoring with which I am familiar — the Ontario model, the co-drafting model and the double-drafting model.

A. *The Ontario Model*

1. *Background: How Ontario became a Bilingual Jurisdiction*

Ontario is a bilingual jurisdiction for its public general statutes.²³ It was not always so. Until 1978, Ontario legislation existed only in English. In that year, the Lieutenant Governor of Ontario announced a pilot project to translate key Ontario statutes into French during the Throne Speech at the beginning of the legislative session.²⁴ This was at a time of tremendous

20. See, e.g., *id.* para. 56.

21. See, e.g., *id.* para. 77(a).

22. See, e.g., *id.* paras. 68, 70.

23. Ontario also provides for the submission of private bills. See HOW A PRIVATE BILL BECOMES LAW, *supra* note 14.

24. The reasons for this decision are worth a separate paper. I have dealt briefly with the history of bilingualism in Ontario in two papers. See Donald L. Revell, *Bilingual Legislation: the Ontario Experience*, 19 STATUTE LAW REVIEW 32, 32–34 (1998); Donald L. Revell, *Multilingualism and the Author-*

political upheaval in Canada when Québec, with its French majority population, was threatening to secede.²⁵ The Ontario government saw the translation of law in a wider context of securing “a harmonious and unified nation.”²⁶ The Evidence Act²⁷ was amended to provide that these translations could be used in court; in the event of a conflict, however, the English version would prevail. Many major statutes, including the Highway Traffic Act,²⁸ the Education Act²⁹ and the Workers Compensation Act,³⁰ were translated under this program. Throughout this project, bills were enacted in English and then, if our translation project team considered them to be of sufficient importance to Ontario’s French-speaking minority, they were translated into French after enactment of the bill into law. By necessity, because of the pre-existence of the English statutes, Ontario at this time was using a classic translation model for authoring French statutes.³¹

ing of Laws, 1 REVUE INTERNATIONALE DE LANGUES JURIDIQUES ET DE DROIT COMPARÉ 34, 34–35 (2002).

25. Beginning in the late 1960s and continuing through the 1970s, the Québec separatist movement gained strength. Two defining moments were the October Crisis in 1970 and the election of a separatist government in 1976. In the October Crisis, members of a separatist group kidnapped a British diplomat and a Québec politician who opposed separatism. The diplomat was released unharmed; the politician was assassinated. The Parti Québécois won the 1976 election on the promise of holding a referendum to lead Québec out of the Canadian federation. See Michael B. Stein, *Separatism*, in THE CANADIAN ENCYCLOPEDIA, at www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0007291 (last visited Apr. 16, 2004). It was in this context that the Ontario Government developed its policy on bilingualism and the provision of French-language services in Ontario.

26. LEGISLATIVE ASSEMBLY OF ONTARIO, DEBATES OF THE LEGISLATIVE ASSEMBLY OF ONTARIO 3, 8 (Hansard) (Feb. 21, 1978).

27. Evidence Act, R.S.O., ch. 151, § 26(2) (1970) (Ont.), as enacted by S.O. 1979, ch. 48, § 1 (Ont.).

28. Highway Traffic Act, R.S.O., ch. 198 (1980) (Ont.) (published in French as *Code de la Route* (Dec. 1990) by the Ministry of the Attorney General of Ontario).

29. Education Act, R.S.O., ch. 129 (1980) (Ont.) (published in French as *Loi sur l'éducation* (Dec. 1991) by the Ministry of the Attorney General for Ontario).

30. Workers Compensation Act, R.S.O., ch. 539 (1980) (published in French as *Lois sur les accidents du travail* by the Ministry of the Attorney General for Ontario in Mar. 1987).

31. See *infra* Part III.A.2 (for further discussion of the translation model).

In 1986, legislation was enacted to provide that all public general acts would be enacted in bilingual form beginning in 1991; that all laws contained in the Revised Statutes of Ontario, 1980 and all acts enacted between 1981 and 1991 would be translated; and that the translations would be enacted as official law.³² Between 1986 and late 1989 some 12,000 pages of text were translated into French; the translated text, together with the English text, was then consolidated and revised.³³ Several statutes were enacted in bilingual form between 1986 and 1991 even though the formal regime did not start until January 1, 1991.³⁴ The Revised Statutes of Ontario, 1990 came into force on December 31, 1990.³⁵ They are fully bilingual. By virtue of the Statutes Revision Act, 1989, the revised statutes became official law without formal enactment by the Legislature.³⁶

Since Ontario's laws are now enacted bilingually, both versions are considered equally authentic for judicial purposes.³⁷ Thus, the law no longer provides that the English version prevails. As a result, Ontario now has two types of "official" bilingual statutes — those enacted in English and then translated and those enacted in bilingual form. I leave it to statutory interpretation experts to decide if those of the first type should be interpreted differently than those of the second type.

32. French Language Services Act, S.O., ch. 45, § 4 (1986) (Ont.).

33. My calculation is based on the number of pages in the Revised Statutes of Ontario, 1980, and the number of pages of text enacted from the end of 1980 to the end of 1990.

34. Apart from the French Language Service Act, 1986, there were several other major bilingual acts. See *Intervenor Funding Project Act*, S.O., ch. 71 (1988) (Ont.); *Loan and Trust Corporations Act*, S.O., ch. 33 (1987) (Ont.); *Municipal Freedom of Information and Protection of Privacy Act*, S.O., ch. 63 (1989) (Ont.).

35. Proclamation, S.O. (1991) (Ont.).

36. Statutes Revision Act, S.O., ch. 81, § 7 (1989) (Ont.). The Legislature subsequently confirmed the Revised Statutes of Ontario, 1990, in the Revised Statutes Confirmation and Corrections Act, S.O., ch. 27, § 1 (Ont.).

37. This is the position at common law. See MICHAEL BEAUPRÉ, *INTERPRETING BILINGUAL LEGISLATION* ch. 1 (Carswell ed., 2d ed. 1986). See also Pierre-André Coté, *Bilingual Interpretation of Enactments in Canada: Principles vs. Practice*, 29 BROOK. J. INT'L. L. 1067 (2004); Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, 29 BROOK. J. INT'L. L. 985 (2004).

2. *Ontario's Current Authoring Process:
Ontario's Translation Model*³⁸

The Ontario legislative authoring process is diagrammed in Figure 1.³⁹

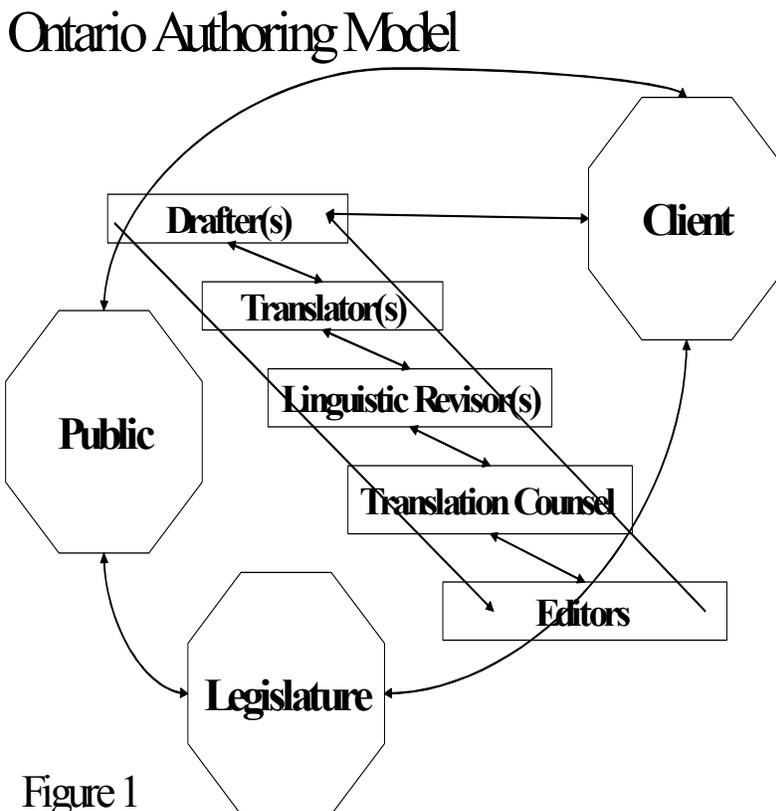


Figure 1

The process begins with the client ministries.⁴⁰ Each ministry has its own legal branch that is responsible for preparing the ministry's drafting instructions. These instructions will be

38. All material under this heading is derived from the author's personal experience. It describes the process developed in our office, in consultation with our staff. This process, like any process, evolves over time.

39. Figure 1 was prepared by the author for a lecture that he has delivered several times at the International Legislative Drafting Institute, Public Law Center, Tulane Law School, New Orleans.

40. *See supra* note 13.

based on the cabinet minute that resulted from the policy development cycle and on the cabinet submission that led to the minute.⁴¹ While written instructions are preferred, the instructions sometimes appear in the form of a draft bill prepared by the branch lawyer, or may consist of oral instructions if it is a simple matter. Regardless of the form of the instructions, an authoring team is assigned to the file by chief legislative counsel.⁴² The drafter will review the instructions, review the existing law, establish a plan for the new bill, and then will usually meet with the client to clarify issues. The process is iterative and the drafter or drafters may prepare several drafts before the draft is sent to translation. This eliminates unnecessary translation as the drafters work out the legal and policy issues with the client ministry. The drafter has the advantage of working directly with the clients who have in-depth knowledge of both the subject matter and of any special English-language terms of art that relate to the draft bill. The translation team has no such luxury, because they do not work directly with the clients. Furthermore, I believe that no ministry is capable of instructing in French and only a few of them can fully comment on the French version of a draft text.⁴³ Nevertheless, client ministries are asked for any relevant French-language or bilingual materials related to the project to facilitate translation. This is how I described the work of the translation team in a previous article:

The translator must prepare a text that accurately reflects the original text in law while at the same time being linguistically correct in the target language. This frequently involves consultations between the drafter and the translator. A senior language professional known as a linguistic revisor reviews every draft translation. The linguistic revisor ensures that the French version is accurately and clearly translated in a way

41. For a discussion of the policy development cycle, see *supra* Part II.A.

42. The authoring team will consist of one or more drafters, one or more translators, one or more linguistic revisors and one or more legal revisors. Drafters, even if they are fluently bilingual, draft only in English.

43. In reality, only five percent of Ontario's population speaks French as a first language. Office of Francophone Affairs, The Francophone Community in Ontario, at <http://www.ofa.gov.on.ca/english/commun.html> (last modified Jan. 26, 2004). Thus, it is highly unlikely that the ministry or the clients would be able to provide adequate instructions or feedback in French.

that will be accepted by the French-speaking community. The text of both versions is then reviewed and revised by a bilingual lawyer who ensures that both versions are equal in law. Finally, the legislative editors review both versions for spelling, grammar and formatting errors.⁴⁴

Figure 1 shows that just as the client is connected to the drafter, everyone in the authoring team is connected via a two-way street so that questions can be asked and ambiguities resolved. This interconnectedness allows for valuable cross-fertilization between the two texts.⁴⁵ We expect that the members of the translation team will meet with the drafter throughout the drafting process to question the drafter and especially to resolve ambiguities and suggest ways that might improve the draft for both French and English readers. Figure 1 also highlights the fact that the authoring process is ultimately connected to the Assembly and then to the public.⁴⁶

The translation model, which in different jurisdictions may or may not include linguistic revision or legal revision, is probably the most widely used model for authoring laws in more than one language. This model, as used in Ontario, has checks and balances built in to ensure high quality legal texts in both French and English in the circumstances surrounding an authoring project.

B. Alternative Models for Authoring Bilingual Legislation

The translation model has been very successful for Ontario and is the most widely used model for authoring laws in more than one language. However, it is by no means the only system used to satisfy this purpose. Two other systems used are the co-drafting model and the double-drafting model.

44. Revell, *Multilingualism and the Authoring of Laws*, *supra* note 24, at 35.

45. Michael J.B. Wood, *Drafting Legislation in Canada: Examples of Beneficial Cross Pollination Between the Two Language Versions*, 17 *STATUTE LAW REVIEW* 66, 69 (1996).

46. If the government or the opposition parties wish to move amendments in committee, the motions are drafted in our office by the same process as is used for the original bill drafting.

1. *Co-drafting*⁴⁷

The authoring model known in Canada as co-drafting was developed by the Office of Parliamentary Counsel in the Department of Justice for Canada for authoring laws in French and English. New Brunswick also uses this model. In co-drafting, an English drafter and a French drafter are assigned to each project. There are no translators involved in the process although a language professional known as a jurilinguist may review the texts. While one or the other of the drafters will act as lead drafter and prepare the first draft, each receives instructions from the client. The second drafter generally waits until the first draft is finished before beginning to draft. The two are expected to collaborate. One might question how close the collaboration could be under the tight deadlines of the parliamentary agenda.

The co-drafting model assumes that clients can instruct in both languages. While this is possible in some bilingual jurisdictions, it is not always the case. Some ministries may have higher degrees of bilingualism than others. Indeed, one must question if true bilingual instructions are ever possible in any jurisdiction. The time allotted for authoring is small, as is the time allotted for producing instructions for the drafters. As deadlines approach, it is likely that instead of two drafters acting as equals, the second drafter will in fact act more like a translator.

Unlike the translation model where all versions are expected to be mirror images of each other, the same may not be true in the co-drafting model. Here both versions are considered to be “original” and the drafter in each language has leeway in presenting the text so long as when finalized both versions contain the same legislation. That is to say, when both versions are read from top to bottom, they have the same effect. This is sometimes known as “vertical equality.” Until recently, this

47. The material under this heading is based on numerous discussions over many years with three of Canada’s former Chief Legislative Counsel, Lionel Levert, Gérard Bertrand and Peter Johnson. See Gérard Bertrand, *Codification, Révision et Rédaction des Lois en Régime Fédéral de Droit Jurisprudentiel Anglais et en Situation de Bilinguisme Officiel Français-anglais, l’Expérience Canadienne*, 3 REVUE JURIDIQUE ET POLITIQUE INDEPENDANCE ET COOPERATION 499, 503 (1986).

meant that in federal legislation in Canada the English version of a section might have clauses and the French version would not, or one version might have more clauses than the other.⁴⁸ This causes problems for those who want to do comparisons of the French and English texts. Thus, because of concerns raised by parliamentarians, public servants, the legal profession and judges, the federal drafting office has adopted a policy of close parallelism in structure.⁴⁹ This brings the co-drafting model a step closer to the translation model.

In the translation model of authoring text, all versions are expected to express the same thing in the same way at the same place in the text.⁵⁰ This is called "horizontal equality." While the syntax may vary between the two versions, these variations are minimal. The clause structure will always correspond. Translations will have vertical equality if they are horizontally equal. This leads to texts that are easier to compare than texts that have only vertical equality. Horizontal equality makes it easier to catch errors at the authoring stage than is the case with documents that have only vertical equality. It is reasonable to assume that a reduction in errors ultimately reduces compliance, enforcement, and prosecution costs.

Co-drafting advocates argue that the process ensures that each text is a true original. Hence neither version of the legislation has an inferior status because it is a translation. However, there is no reason why a properly established translation process cannot meet the objective of producing high quality texts in more than one language, thus meeting the linguistic and cultural needs of the jurisdiction without the risks that re-

48. See, e.g., Immigration and Refugee Protection Act, S.C., ch. 27, §§ 16(2), 38(1), 49(1), 68(2), 81, 111(1), 134(1) (2001) (Can.) (the English version contains more clauses than the French version). See also Grain Act, R.S.C. ch. G-10, § 88(1) (1984) (Can.) (the English version has four clauses, while the French version has only two). In some cases one would argue that the English should have been redrafted to conform to the French and in others that the French should have been redrafted to conform to the English. In fact, one could argue that § 88(1) of the Grain Act should have been reconceived in both languages.

49. Department of Justice, Office of Parliamentary Counsel, Drafting Note, no. 2001-3 (2001) (unpublished government document) (on file with author).

50. This is the expectation of the author's office and in the translation offices he has helped to establish or to which he has acted as a consultant in Nunavut, Estonia and Latvia.

sult from the possible loss of horizontal equality. Furthermore, co-drafting often leads to a misallocation of resources by using lawyers who are not trained in creating documents in two languages to resolve issues that are more properly the domain of translation experts.

2. *Double Drafting*

Ontario has experimented with “double drafting,” where one drafter prepares both versions of a bilingual text. While it is still used occasionally, the Office of Legislative Counsel has grave reservations about its efficacy. It found that there is usually insufficient time to allow one person to draft and polish both versions of a bill. It also leads to a misallocation of resources by requiring lawyers to do work that can be more efficiently completed by translators. Finally, the drafter, having already prepared the English version, may convert his or her errors in the original into errors in the other – just as one misses mistakes when proofreading one’s own work.

IV. CREDIBILITY

Regardless of which method a jurisdiction ultimately decides to use for authoring its bilingual legislation, the jurisdiction must employ a credible process to ensure that the laws enacted in each language provide the public with the same high quality and equal authority as the other language texts. Professor R. A. Macdonald has commented on the Canadian situation:

Legal bilingualism presupposes finding a method for reading and interpreting these legal materials that recognizes their equal authority...and that, in Canada, necessarily draws on both English- and French-language versions. Without such a methodology, the promise of legal bilingualism risks being transformed into a practice of *de facto* legal dualism, that is, the pretence that Canadian law can be completely understood by referring to only one of the two official texts.⁵¹

In short, to ensure that bilingual legislation has equal authority, the process must be credible in order to allow for users of either text to have confidence in each version of the law.

51. Roderick A. Macdonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 128–29 (1997).

There are many factors that affect the credibility of the process. Although some of these factors have been discussed in a previous article,⁵² they are especially relevant to this discussion and shall be discussed below.

A. Culture and politics

It is difficult to imagine the development of bilingual laws in the absence of both cultural and political imperatives. Canada provides an excellent example. It would have been impossible to have achieved the political bargain that led to the creation of Canada in 1867 unless the French culture of Québec had been recognized in the Constitution Act, 1867.⁵³ This Act provided for official bilingualism at the federal level and in Québec. However, it was not until the 1960s and what was known as the “Quiet Revolution” in Québec,⁵⁴ that the federal government took legal bilingualism very seriously.⁵⁵ From what I have been told by a former Chief Legislative Counsel for Canada, drafting was done in English in Ottawa. The text was shipped for translation to another department a few miles away in Hull, Québec. There was virtually no contact between drafters and translators. There were countless discrepancies between the English and French texts. This was not a highly credible system. Ottawa, by the late 1960s had generated the political will to accommodate the emergence of a strong French culture and, by 1978, moved to co-drafting.⁵⁶ According to federal officials with whom I have spoken, co-drafting was part of the federal effort to give the highest possible credibility to the French versions of its laws, additionally all existing French versions were reviewed and revised to assure their legal and linguistic correctness.⁵⁷

52. See Revell, *Multilingualism and the Authoring of Laws*, *supra* note 24, at 36–40 (2002). Issues that affect the credibility of the process are, *e.g.*, costs, human resource implication, politics.

53. Constitution Act, 1867, 30 & 31 Vict., ch. 3, § 54, para 133 (Eng.), *reprinted in* Constitution Act, R.S.C., app. II, no. 5 (1985) (Can.).

54. René Durocher, *The Quiet Revolution*, in THE CANADIAN ENCYCLOPEDIA, at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006619> (last visited Feb. 23, 2004).

55. G. Laing, *Royal Commission on Bilingualism and Biculturalism*, in THE CANADIAN ENCYCLOPEDIA, at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0000741> (last visited Apr. 2, 2004).

56. *Id.*

57. Bertrand, *supra* note 47, at 503.

These versions first appeared in the Revised Statutes of Canada, 1985.⁵⁸ In my opinion, these changes were the result of the prevailing cultural and political imperatives of the day.

There was, I believe, a real desire to dampen the fire of Québec separatism. The move to bilingual law symbolized the cultural and political views of Ontario as a strong supporter of Canadian federalism. Many Ontarians do not realize the extent of legal bilingualism in Ontario, and others are firmly opposed, but overall I believe it is recognized that this is “the right thing” to do. While Ontario uses a translation model, it is a system that relies on close collaboration between drafters and translators.⁵⁹ Rather than being “mere” translations, they reflect, in my opinion, an authoring process that respects the culture of Ontario and its political will.

B. Funding for Multilingualism

Multilingualism costs money. For example, Ontario’s total authoring and publishing budget is approximately US \$2.65 million, which includes salaries for a fourteen member English-language drafting team and a fourteen member translation team.⁶⁰ You really do get what you pay for. In a bilingually developed jurisdiction, such as Ontario, devoting equal resources to both versions of the law adds credibility to the system.

The costs necessary in jurisdictions first developing its bilingual legislation are even greater. Extra funds will be needed to convert existing unilingual laws to bilingual form. In addition, all present funding is necessary for on-going staffing and operating costs, and editing, publishing, and data management costs. While these costs are minuscule in a large jurisdiction like Ontario with its overall budget of US \$21.24 billion,⁶¹ for small countries like the Baltic nations that wish to join the European Union, the costs per capita would be quite significant.

58. *Id.*

59. *See supra* Part III A.2 (for a discussion of “The Ontario Model”).

60. Based on figures supplied to the author by the Executive Coordinator of Administration and Finance, Office of Legislative Counsel, Ontario.

61. Supply Act, S.O., ch. 10 (2003) (Ont.) (Act authorizes expenditures for the fiscal year ending Mar. 31, 2004). The approved expenditures for the 2003/2004 fiscal year are CDN \$28,326,666,900. *Id.*

In a jurisdiction such as Nunavut,⁶² where the laws are in English and French but not in the native language that is spoken by 80% of the population, the failure to find the money to translate may have significant implications elsewhere in the system.⁶³ The failure to pass laws in Inuktitut is seen as a failure to realize these ambitions.⁶⁴ If credible translation work does not begin soon, the whole legal system will lose credibility. But Nunavut, with a population of 25,000, may, in my opinion, find that the cultural and political imperative cannot overcome the cost issue. Even if it does, it will still find other difficulties in overcoming language and staffing issues.⁶⁵

62. Nunavut was created as part of a land claims settlement recognizing the cultural and political ambitions of the Inuit people. See Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, Preamble, *ratified* by the Inuit (Nov. 1992), *signed* by the Prime Minister of Canada (May 25, 1993), *available at* http://www.aicn-inac.gc.ca/pr/agr/pdf/nunav_e.pdf. See also Nunavut Act, S.C., ch. 28 (1993) (Can.); Kevin Grey, *The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: The Uncharted Path to Effective Self Government*, 52 U. TORONTO FAC. L. REV. 300 (1993).

63. See Revell, *Multilingualism and the Authoring of Laws*, *supra* note 24, at 36–40. For example, it might be argued that more Inuit people would study law and become lawyers if the law and the teaching of the law in Nunavut were done in Inuktitut. It might also be argued that such a development would decrease the need for interpreters in court where virtually none of the lawyers work in the native languages and most of the parties and most witnesses speak little or no English or French.

64. FIRST LEGISLATIVE ASSEMBLY OF NUNAVUT, FINAL REPORT OF THE SPECIAL COMMITTEE TO REVIEW THE OFFICIAL LANGUAGES ACT, 6th Sess. (Dec. 2003), *available at* http://www.assembly.nu.ca/english/committees/languages/final_eng.pdf.

65. It is my observation that the Legislative Assembly of Nunavut conducts almost 100% of its business in Inuktitut. All laws are drafted in English and translated into French using a translation model similar to Ontario's. Inuktitut versions are also prepared for use by the Assembly. However, there are many problems related to their use as "authentic" enactments. First, many of the bills amend acts that have never been translated into Inuktitut. Second, there are no Inuktitut speaking lawyers to offer advice on whether the Inuktitut version is the same as either of the other two versions. Third, there are few translators available on an on-going basis to work on bill translation. Fourth, there is only an underdeveloped terminology bank. In short, there is little chance at the present time for translations of consistently high quality.

C. Terminology and other Issues of Language Quality

Instruction manuals that are obviously translations from another language are always confusing: either the syntax is slightly off or the terminology is just plain wrong. Although sometimes amusing, this can be frustrating when you are unable to understand the instructions. In such situations, both the manual and the manufacturer lose credibility. Likewise, the law loses credibility when inappropriate language is used.⁶⁶ Accordingly, it is important in bilingual and multilingual jurisdictions to ensure that as language quality is checked and rechecked appropriate terminology is developed and properly and consistently applied.

D. Credible staff

The quality of the drafters and the translators will have a pronounced effect on the credibility of the process and the final legislation. As a person on the front lines of legislative authoring, I sometimes get the impression that people really believe that the creation of legal documents is a purely technical exercise. The Office of Legislative Counsel is regularly asked to “just put this in legalese.” If only it were so simple. As creative processes, both drafting and translation have both technical and artistic challenges. One must address issues of language, law and politics to produce a well-written and well-translated document. If a law is to be credible, it must be presented in the political process as a credible document. The document gains credibility by being authored by experts. It is vital to hire people who have appropriate credentials and aptitudes, and then to provide these talented people with appropriate training. In Ontario, for example, all drafters must be lawyers.⁶⁷ While several have studied drafting at the post-graduate level, most have learned on the job and learned from mentors. The translators and linguistic revisors must have several years of experience before they are hired and they will be closely mentored on the

66. The plain-language movement would have been unnecessary if the law was always written in appropriate language.

67. This is a requirement for the position as set out in the job specification. We consider drafting to be the practice of law. In our opinion, it would constitute the unauthorized practice of law for non-lawyers to engage in legislative drafting.

job for a period of up to two years, but legal qualifications are not required. Legal revisors are lawyers who learn through mentoring; there is no academic training available for this work.

I cannot speak for jurisdictions beyond Canada, but from what I hear anecdotally, federal, provincial and territorial governments believe that they are well served by their authoring offices. As a result, the politicians focus on policy rather than wording issues in debate. If the politicians treat the process as credible, then, in my opinion, it becomes credible to others.

E. Time

Drafters and translators will always complain that they need more time to accomplish their tasks. Many times they are right to complain. Clients spend a great deal of time thinking about policy but allow minimal time for proper drafting. In a 1998 article I wrote:

In my opinion, the single biggest issue in the authoring process is the failure of clients to realize the complexities of the process. This frequently shows itself in inadequate time for authoring. It is a serious issue when only one language is involved; it becomes even more serious where two or more are used. Time constraints drastically influence all other issues, whether they be plain language or staff morale, and this appears to be a problem in many jurisdictions. The Office of Legislative Counsel in Ontario takes the position that it will do the best job possible in the time available. While a lack of time has a major impact on the drafter, it may have an even greater impact on the translation staff. They are virtually the last stage in the authoring process and as time collapses for drafting it must necessarily collapse even more for those at the end of the process.⁶⁸

At some point, a lack of time will undermine quality, and when quality suffers, credibility will be lost.

V. CONCLUSION

After first outlining the overall legislative process in Ontario, this Article discussed Ontario's translation model for authoring

68. Revell, *Bilingual Legislation: the Ontario Experience*, *supra* note 24, at 38.

bilingual legislation. Then, alternative models were considered, including the Canadian federal government's co-drafting model, and the occasionally-used double-drafting model. Finally, consideration was given to factors affecting the credibility of the process and the final legislation.

Simply stated, these are my conclusions. Bilingual or multilingual legislation must concern itself with creating versions of legislation with equal authority. Ontario's modified translation model, with its built-in checks and balances, provides an excellent example of how to create high-quality, bilingual legislation. It provides for the most efficient allocation of resources, and the horizontal equality which it strives to achieve ultimately reduces compliance, enforcement, and interpretation costs.

Whichever model a jurisdiction chooses to follow, it is essential that the process used for creating bilingual or multilingual laws be credible if both or all versions are to obtain equal authority. To maximize credibility, bilingual legislation should reflect the cultural and political imperatives of the public and it should receive adequate funding, proportionately distributed to all the languages. Terminology and other issues of language should be carefully considered and consistently applied by a staff with the necessary expertise and experience who are provided sufficient time to properly complete their difficult task. Only then will the legal system and its constituents be well served.

LITERAL AND PURPOSIVE TECHNIQUES OF LEGISLATIVE INTERPRETATION: SOME EUROPEAN COMMUNITY AND ENGLISH COMMON LAW PERSPECTIVES

*Ian McLeod**

I. INTRODUCTION: A TALE OF TWO TRADITIONS

The United Kingdom's entry¹ into the European Economic Community (as it then was)² involved an intimate intermingling of two of the world's great legal traditions: the English legal system's common law tradition³ and the Community legal system's civil law (or Roman law based) tradition. Among the more obvious differences between the two traditions are the English doctrines of the *legislative supremacy of Parliament* and *binding precedent*, neither of which has any counterpart within the civil law tradition. Although the doctrinal constraints within which the English legal system functions have not, in practice, generally inhibited judicial creativity to any substantial extent, the United Kingdom's entry into the Community did at least raise the perception of one particular area of difficulty, namely the difference between the English technique of *literalism* in the process of legislative interpretation and the civil law technique of *purposive* (or *teleological*, to use the civil law's own terminology) interpretation.

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1. Entry became effective on January 1, 1973.

2. In practice, the European Economic Community ("EEC") came to be known simply as the European Community ("EC"), but this usage was not formalized until the Treaty of Maastricht (Treaty on European Union, or "TEU"). The phrase *Community law* is to be preferred to the more commonly encountered *Union law* because the Community is still an essentially legal entity while the Union is a political entity.

3. The phrase *English legal system* is used here with its conventional meaning to describe the legal system of England and Wales.

Article I. Lord Denning MR⁴ gave voice to this perception when, having compared the detailed drafting of English legislation with the open-textured drafting of the Community Treaty, he said:

Beyond doubt the English courts must follow the same principles [of interpretation] as the European court. Otherwise there would be differences between the [member states]. That would never do. All the courts of all [the member states] should interpret the [Treaty] in the same way.⁵

The discussion contained within this Article will show that this perception of the extent of the distinction between English and Community techniques of interpretation was (at least in relation to the contemporary English practice of legislative interpretation) a significant overstatement,⁶ before proceeding to compare the English version of purposivism with that employed by the European Court of Justice.⁷

II. LITERAL AND PURPOSIVE INTERPRETATION IN ENGLISH LAW

There can be no doubt that, in the Nineteenth Century, the English courts were strongly inclined towards a literal approach to legislative interpretation. For example, in the *Sussex Peerage Case*,⁸ Lord Tindal CJ said:

If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound

4. The Master of the Rolls is the most senior judge of the Court of Appeal (Civil Division). The Court of Appeal ranks between the High Court and the House of Lords. In the overall order of judicial precedence, the Master of the Rolls ranks immediately below the Lord Chief Justice, who presides over the Court of Appeal (Criminal Division), and is the most senior member of the judiciary.

5. See *HP Bulmer Ltd. v. J Bollinger SA* [1974] 3 W.L.R. 202, 226 (Eng.). The same point was made by the European Court of Justice in *Amministrazione della Finanze del Stato v. Simmenthal SpA* ("Rules of Community law must be fully and uniformly applied in all the Member States"). *Amministrazione della Finanze del Stato v. Simmenthal SpA* (case 106/77) [1978] ECR 629, 643.

6. This statement proves true at least in relation to the contemporary English practice of legislative interpretation.

7. In the interest of textual simplicity, the phrase "European Court of Justice" is used throughout this article to include the "Court of First Instance."

8. The *Sussex Peerage Case*, 8 Eng. Rep. 1034, 1057 (H.L. 1844).

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those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver.⁹

Admittedly, it is possible, though not usual, to read this comment as being an affirmation of literalism as purposivism. However, no such equivocation is possible in relation to Lord Esher MR's comment in *R v. Judge of the City of London Court*:¹⁰ "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity."¹¹

The operation of this type of simple literalism may be illustrated by the case of *Whiteley v. Chappell*,¹² which arose from the statutory offence of impersonating "any person entitled to vote" at an election.¹³ The defendant impersonated someone whose name was on the register of electors but who had died between the date on which the register had been compiled and the date of the election.¹⁴ Although he was convicted at first instance, his appeal was allowed on the ground that dead men are not, in the words of the statute, "entitled to vote."¹⁵

However, when viewed in its proper historical perspective, the nineteenth century flourishing of literalism may be seen as a temporary aberration.¹⁶ More particularly, in an earlier age, when statutes were a relatively minor source of law, the English courts adopted an unashamedly purposive approach to leg-

9. See *id.* at 1057. See also *In Re Bernard Boaver* [1915] 1 K.B. 21, 27.

10. *Queen v. Judge of the City of London Court* [1892] 1 Q.B. 273.

11. *Id.* at 290.

12. *Whiteley v. Chappell* 4 Q.B. 147 (1868).

13. See *Personation at Election of Guardians of the Poor*, 14 & 15 Vict., ch. 105 §3 (1852) (Eng.). See also *Whiteley*, 4 Q.B. at 147.

14. *Whiteley*, 4 Q.B. at 147.

15. *Id.*

16. The reasons for this aberration are beyond the scope of this Article, but they may be summarized thus. The combination of the traditional doctrine of the legislative supremacy of Parliament and the progressive extension of the franchise from the Great Reform Act of 1832 onward, seems to have created a mindset on the part of judges that their role was to do what they were told by the supreme and, by the standards of the time, increasingly democratically validated Parliament. Additionally, the background of revolutionary activity in continental Europe (especially from 1789 to 1848) can hardly have left the judges in any doubt as to the potential consequences of failing to take account of the popular will.

islative interpretation, as the classic statement in *Heydon's Case*¹⁷ shows:

For the sure and true interpretation of all statutes...four things are to be discerned and considered:

1st What was the Common Law before the making of the Act?

2nd What was the mischief and defect for which the Common Law did not provide?

3rd What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?

4th The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress continuance of the mischief...according to the true intent of the makers of the Act.¹⁸

In due course, however, for the reasons outlined above,¹⁹ this approach gave way to literalism, only to re-appear under the name of purposivism, in the twentieth century.

More particularly, the ascendancy of purposivism may be associated with the period immediately after the Second World War, when a great deal of social legislation was enacted.²⁰ It may be tentatively suggested that many judges in that context, steeped in the democratic tradition, would naturally feel an obligation to promote the objects of the legislation where it was possible to do so. However, whatever the reasons for the transition from literalism to purposivism may have been, that there was such a transition is abundantly clear. In the words of Lord Diplock, "If one looks back to the actual decisions of this House...over the last thirty years one cannot fail to be struck by

17. *Heydon's Case*, 76 Eng. Rep. 637, 638 (1584).

18. *Id.* at 638. It is submitted that the use of the word *mischief* rather than *purpose* is immaterial.

19. See *supra* text accompanying notes 9–16.

20. See, for example, statutes as diverse as the National Health Service Act 1946 and the National Parks and Access to the Countryside Act 1949. National Health Service Act, 1946, 9 & 10 Geo. 6, ch. 81, National Parks and Access to the Countryside Act, 1949, 12, 13 & 14 Geo. 6, ch. 97. For the scope of the former, see *infra* text accompanying note 75. The scope of the latter is reasonably self-evident.

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the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.”²¹

One reason for the resurgence of purposivism appears to be the simple, if somewhat belated, realization that the idea of literal meaning is (or is likely to be) an illusion, as illustrated by the case of *Bourne v. Norwich Crematorium Ltd.*²² The case required the court to decide whether a crematorium company’s expenditure on a furnace chamber and chimney tower qualified for a tax allowance.²³ The answer to this question depended on whether the work was within the definition of “an industrial building or structure,” which, in turn, depended on whether the chamber and chimney were used “for a trade which consists in the manufacture of goods or materials or the subjection of goods or material to any process.”²⁴ Stamp J’s intuitive response to this question was forthright:

I would say at once that my mind recoils as much from the description of the bodies of the dead as “goods or materials” as it does from the idea that what is done in a crematorium can be described as “the subjection of” the human corpse to a “process.” Nevertheless, the taxpayer so contends and I must examine that contention.²⁵

Given the judge’s starting point, it is not altogether surprising that the taxpayer lost. For the present purposes, however, the most important element of this decision lies in the following statement of principle:

English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which one has assigned to them as separate words so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language. That one must construe a word or phrase in a section of an Act of Parliament with all the assistance one

21. *Carter v. Bradbeer* [1975] 1 W.L.R. 1204, 1208. The transition was, of course, gradual.

22. *Bourne (Inspector of Taxes) v. Norwich Crematorium Ltd.* [1967] 1 W.L.R. 691, 695.

23. *Id.*

24. *Id.*

25. *Id.*

can from decided cases and, if you will, from the dictionary, is not in doubt; but having obtained all that assistance, one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one would not think it can possibly bear.²⁶

Other reasons for the resurgence of purposivism may include an increased awareness that it contributes to, rather than detracts from, the effectiveness of statutory law.²⁷ The following cases provide useful examples of the power of purposivism in achieving results which could never flow from the application of strict literalism. Moreover, some of them show that the power of purposivism may extend even to cases where its application will undermine English law's traditional tendency to err on the side of favouring the defence in criminal cases; and, perhaps even more startlingly, may defeat property rights expressly conferred by statute.

*Smith v. Hughes*²⁸ arose from Section 1 of the Street Offences Act 1959, under which it was an offence "to solicit in a street ... for the purpose of prostitution."²⁹ It fell to the High Court to decide whether this provision applied where the prostitutes were soliciting either from behind windows or on balconies overlooking the street, while the men who were being solicited were in the street. Since the prostitutes themselves were plainly not in the street, it was at least arguable that they should be acquitted.³⁰ However, the court rejected this view, with Lord Parker CJ saying, "Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common pros-

26. *Id.* at 696.

27. For example, see the comments of Lord Steyn, which are quoted below in the context of interpreting legislation in the light of subsequent scientific change in *R (on the Application of Quintavalle) v. Human Fertilization and Embryology Authority*. *R (on the Application of Quintavalle) v. Human Fertilization and Embryology Authority* [2002] 1 F.C.R. 664.

28. *Smith v. Hughes*, [1960] 1 W.L.R.. 830; *see also* Street Offences Act, 1959, 7 & 8 Eliz. 2, c. 57, § 1(1), (Eng.).

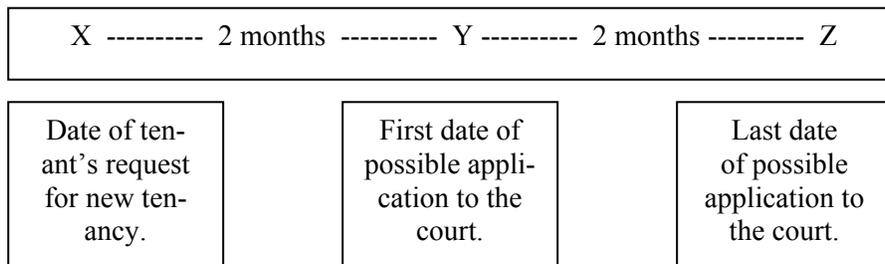
29. Street Offences Act, § 1(1).

30. On the basis that, as they were not in the street, it followed that they could not be convicted of conduct (in this case soliciting) in the street. *Hughes*, 1 W.L.R..at 830.

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titutes ... For my part, I am content to base my decision on that ground and that ground alone.”³¹

Other cases may not be characterized by the same level of public awareness of the legislative purpose, but this need not inhibit the courts from identifying and applying a putative purpose. For example, in *Kammins Ballrooms Co. Ltd. v. Zenith Investments Ltd.*,³² under Part II of the Landlord and Tenant Act 1954, tenants of premises used for business purposes who wished to have their expiring tenancies renewed were required to ask their landlords to grant them new ones.³³ If a landlord refused to grant a new tenancy, the tenant then had a statutory right to apply to the court, which could order the landlord to grant a new tenancy.³⁴ The case required the House of Lords to consider the meaning and application of Section 29(3) of the Act, which provided that, “no application ... shall be entertained unless it is made not less than two nor more than four months after...the making of the tenant’s request for a new tenancy.”³⁵ This may be represented thus:



31. *Id.* at 832. Lord Parker's confidence that everyone knew the purpose of the Act stemmed from the fact that it owed its genesis to the report of the Committee on Homosexual Offences and Prostitution, chaired by Sir John Wolfenden. The Wolfenden Report, as it was generally known, had given rise to extensive public debate. Committee on Homosexual Offences and Prostitution, *The Wolfenden Report* cmt. 247 (1957).

32. *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*, [1970] 3 W.L.R.. 287.

33. *Id.* Landlord and Tenant Act, 1954, 2 & 3 Eliz. 2, c. 56, § 26, (Eng.).

34. *Id.* at § 24.

35. *Id.* at § 29(3).

In this case, the tenant's application to the court was plainly outside the statutory period.³⁶ Nevertheless, the House of Lords held that the statutory provision did not necessarily invalidate the application,³⁷ although Lord Diplock did acknowledge that:

[S]emantics and the rules of syntax alone could never justify the conclusion that the words "No application...shall be entertained *unless*" meant that some applications should be entertained notwithstanding that neither of the conditions which follow the word "unless" was fulfilled.³⁸

The key to Lord Diplock's reasoning lies in his decision that of the purposes of the Landlord and Tenant Act is to encourage landlords and tenants to proceed by agreement wherever possible, together with his view that the time limit in question as purely procedural.³⁹ On this basis, it followed that landlords should be entitled to waive compliance with the time limit if they so wished. Therefore, in a case where the application to the court is made out of time, the first question for the court is whether the landlord has, in fact, waived the right to rely on observance of the time limits.⁴⁰

As we have seen,⁴¹ purposivism may even prevail over the criminal law's traditional bias in favour of the defence. The case of *R. v. Pigg*⁴² concerned the validity of a rape conviction, where the verdict had been by a majority.⁴³ Section 17(3) of the Juries Act, 1974⁴⁴ provided that a majority verdict could not be accepted unless "the foreman of the jury has stated in open

36. In fact, it was made approximately half way through the initial two month period. The reason for error appears to have been the tenant's solicitor's ignorance of the statutory time-scale. *Kammins Ballrooms*, 3 W.L.R.. at 287.

37. *Id.*

38. *Id.*

39. *Id.*

40. On the facts of the case, the landlord had not waived his right to rely on the statutory time limits, but this does not invalidate Lord Diplock's approach to the interpretation of the provision. *Id.* at 299-300.

41. *Smith*, [1960] 1 W.L.R. at 830.

42. *R. v. Pigg*, [1982] 1 W.L.R.. 6 (Eng.).

43. *Id.*

44. After centuries during which a conviction could flow only from a unanimous verdict, the possibility of conviction by a majority verdict (of either ten or eleven where there were twelve jurors, or nine where there were ten) had been introduced by the Criminal Justice Act 1967. *Id.*

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court the number of jurors who respectively agreed to and dissented from the verdict.”⁴⁵ In this case, when the foreman indicated that ten jurors had agreed to convict, the clerk of the court replied “ten agreed to two of you,” to which the foreman made no response.⁴⁶ Although the foreman’s failure to say how many jurors had disagreed was a clear contravention of the plain words of the statute, Lord Brandon declined to treat this failure as being fatal to the resulting conviction:

If the foreman of the jury states no more than that the number agreeing to the verdict is ten, it is nevertheless a necessary and inevitable inference, obvious to any ordinary person, that the number dissenting from the verdict is two. True it is that the foreman of the jury has not said so in terms as the 1974 Act, interpreted literally, requires. In my opinion, however, it is the substance of the requirement...which has to be complied with, and the precise form of words by which such compliance is achieved, so long as the effect is clear, is not material.⁴⁷

The purposive approach, even when it is not expressly labelled as such, may even override property rights which have been conferred by statute, as illustrated by *Re Sigsworth*.⁴⁸ The key provision was Section 46 of the Administration of Estates Act, 1925, which laid down, in absolute and unqualified terms, the order of inheritance in cases where people had died without making their wills.⁴⁹ On the facts of the case, the effect of the provision would have been that a murderer would have inherited the estate of his victim.⁵⁰ Clauson J, in the High Court, disappplied the provision, on the basis that, by parity of reasoning, the case was governed by the “well-settled principle that public policy precludes a sane murderer from taking a benefit under a victim’s will.”⁵¹ In other words, “the principle...must be

45. Juries Act, 1974, c. 23, § 17(3), (Eng.).

46. *Pigg*, [1982] 1 W.L.R.. at 6.

47. *Id.* at 12.

48. *In re Sigsworth*, [1935] 1 Ch. 98.; Administration of Estates Act, 1925, c. 23, § 46 (Eng.).

49. *In re Sigsworth*, [1935] 1 Ch. at 98.

50. *Id.*

51. *Id.* The principle, which in relation to testate succession is, of course, the basis of the decision in *Riggs v. Palmer*, is simply one application of a the more general principle that there is a presumption that Parliament did not intend to all people to gain advantages from their own wrongdoing. *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889). For another example of this pre-

so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle must be read and construed as subject to it."⁵²

Finally, the courts may use the purposive approach to deal with problems which arise from social and scientific changes. Two cases — one dealing with social change and one with scientific change — will suffice as examples.

In *Fitzpatrick v. Sterling Housing Association Ltd.*,⁵³ the House of Lords held that, for the purposes of Schedule I to the Housing Act, 1977, where a tenant of a dwelling died, leaving a same-sex partner with whom he had lived and who wished to remain in the dwelling, the survivor was a member of the deceased tenant's family living with him at the time of his death.⁵⁴ The practical consequence of this provision was that the survivor was entitled to inherit both the tenancy and security of tenure.⁵⁵ As Lord Nicholls put it, when discussing the meaning of the word *family* for the purposes of the statute:

In the present case Parliament used an ordinary word of flexible meaning and left it undefined. The underlying legislative purpose was to provide a secure home for those who share their lives together with the original tenant in the manner which characterizes a family unit. This purpose would be at risk of being stultified if the courts could not have regard to changes in the way people live together and changes in the perception of relationships.⁵⁶

In the context of scientific developments, the decision in *R (on the Application of Quintavalle) v. Human Fertilisation and Embryology Authority*⁵⁷ is instructive. The Human Fertilisation and Embryology Act, 1990 regulated the creation and use of

sumption in operation, see *Re X (A Minor) (Adoption Details: Disclosure)*, [1994] 3 W.L.R. 327, discussed in IAN MCLEOD, *LEGAL METHOD* 310–11 (4th ed., 2002).

52. *In re Sigsworth*, [1935] 1. Ch. 89.

53. *Fitzpatrick v. Sterling Housing Ass'n Ltd.*, [1999] 4 All E.R. 705 (H.L. 1999).

54. *Id.* at 717; Rent Act, 1977, ch. 42 (Eng.).

55. Rent Act, sch. 1, para. 3.

56. *Fitzpatrick*, 4 All E.R. at 722.

57. *Regina (on the application of Quintavalle) v. Human Fertilisation and Embryology Authority*, [2003] 2 All E.R. 105.

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human embryos outside the body.⁵⁸ At the time of enactment, fertilisation provided the only means of creating a human embryo.⁵⁹ Subsequently, scientists developed the technique of cloning by a process known as *cell nuclear replacement* (“CNR”).⁶⁰ The issue in the case was whether the scheme contained in the Act applied to embryos created by CNR.⁶¹ Holding that there was a plain Parliamentary intention that the Act should apply to all embryos created outside the human body, irrespective of the means of their genesis, Lord Steyn observed:

In order to give effect to a plain Parliamentary purpose, a statute may sometimes be held to cover a scientific development not known when the statute was passed. Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation, this is a benign principle designed to achieve the wishes of Parliament.⁶²

58. See *Regina (on the application of Quintavalle) v. Secretary of State for Health*, [2003] 2 All E.R. 113, 116.

59. Accordingly, the word “embryo” was defined for the purposes of the Act, and “except where otherwise stated” in terms of fertilization. See *Human Fertilisation and Embryology Act, 1990*, c. 37, § 1(1) (Eng.).

60. See *id.*

CNR is a process by which the nucleus, which is a diploid, from one cell is transplanted into an unfertilized egg, from which...the nucleus has been removed. The [replacement] nucleus is derived from either an embryonic or a foetal or an adult cell. The cell is then treated to encourage it to grow and divide, forming first a two-cell structure and then developing in a similar way to an ordinary embryo.

CNR is a form of cloning. Clones are organisms that are genetically identical to each other. When CNR is used, if the embryo develops into an live individual, that individual is genetically identical to the nucleus transplanted into the egg. There are other methods of cloning, for example, embryo splitting, which may occur naturally or be encouraged. Identical twins are a result of embryo splitting.

The famous Dolly the sheep was produced by CNR. Live young have been since produced by CNR in some other mammals. It has not yet been attempted in humans.

Id.

61. *Id.* at 115.

62. *Regina v. Human Fertilisation and Embryology Auth.*, [2002] 2 All E.R. 625, 722.

In this case, therefore, from the point of view of the protection afforded to it by the statute, an embryo is an embryo irrespective of its genesis. It follows that the courts should not deny some embryos the benefit of this statutory protection simply because of advances in medical technology occurring after the statute was enacted.

Although the cases discussed above provide clear examples of the modern English practice of purposivism, they generally provide little guidance as to how the legislative purpose is to be identified.⁶³

III. IDENTIFYING LEGISLATIVE PURPOSES IN ENGLISH LAW

Having established that purposivism is the predominant technique of legislative interpretation in English law, the next task is to ascertain the means by which the legislative purpose is to be identified. In common with all other legal systems which have emerged and evolved over time, English law contains no single identifiable statement of its own purposes. Furthermore, one consequence of the informality of the British Constitution is that there is similarly no simple and straightforward statement of its fundamental, underpinning values.⁶⁴ Nevertheless, few would seek to deny that, generally speaking, the British Constitution accords high priority to a variety of basic values, with obvious examples being the presumptive protection of the subject's right of access to justice (an important aspect of which is that the jurisdiction of the courts can be ousted only by clear words to that effect), and the presumption against gaining advantage from wrongdoing.⁶⁵ Two examples

63. With the exception *Hughes*, [1960] 1 W.L.R. at 830.

64. Perhaps to some extent making a virtue out of necessity, English common lawyers often emphasize the pragmatism of the common law. *See, e.g.*, *R. v. Higher Education Funding Council ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651. No doubt the common law will develop, as the common law does, case by case. It is not entirely satisfactory that this should be so, not least because experience suggests that in the absence of a prior principle irreconcilable or inconsistent decisions will emerge. But from the tenor of the decisions principles will come, and if the common law's pragmatism has a virtue, it is that these principles are likely to be robust. *Id.* at 666 (Sedley J.).

65. Values such as these are, of course, common to the Western liberal tradition as a whole, and no claim is being advanced here that they are uniquely characteristic of the English legal system.

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(one in relation to each of these values) will suffice for illustrative purposes.

First, in *Anisminic v. Foreign Compensation Commission*,⁶⁶ the House of Lords held that a statutory provision that determinations of the Foreign Compensation Commission⁶⁷ “shall not be called into question in any court of law”⁶⁸ did not preclude the court from considering a claim that an apparent determination was *ultra vires* and void as a matter of law (and, therefore, could not be accurately described as being a determination at all).⁶⁹ In other words, if the legislative purpose includes removing the subject’s right of access to the courts in order to challenge the legality of a public body’s decision-making processes, Parliament must make that purpose abundantly plain, because the courts will be unwilling to presume such a purpose on any other basis.

Secondly, it is worth recalling *In Re Sigsworth*,⁷⁰ where the court relied on the fundamental principle of the common law which prevents gaining advantage from wrongdoing, in order to avoid a result which could not have been within the scope of the legislative intention.⁷¹

Quite apart from relying on the application of basic principles such as those exemplified by the *Anisminic* and *Sigsworth* cases, the English courts may have recourse to a number of aids when seeking to identify legislative intention. Some of these aids are internal to the text in question, while others are external. Taking internal aids first, there is always the possibility that a statute will contain an express purpose section. In prac-

66. *Anisminic v. Foreign Compensation Commission*, [1969] 1 All E.R. 208.

67. The Foreign Compensation Commission was established by the Foreign Compensation Act 1950 to handle claims for compensation made by British subjects against foreign governments. Foreign Compensation Act, 1950, 14 Geo. 6, ch. 12, § 4(4) (Eng.). The scheme was that a foreign government which was liable to compensate British subjects would make a lump sum payment to the British government, on whose behalf the Foreign Compensation Commission would entertain claims and decide which were valid and which were invalid, before proceeding to quantify compensation in respect of those which were valid. The present case arose out of compensation due in consequence of the Egyptian nationalisation of the Suez canal.

68. Foreign Compensation Act, § 4(4).

69. *Anisminic*, 1 All E.R. at 221.

70. *In re Sigsworth*, [1935] 1 Ch. at 98.

71. *Id.* at 89.

tice these are very rare, but the Children Act, 1989 and the Arbitration Act, 1996 provide two relatively recent examples of provisions which furnish at least some guidance as to how problems of interpretation should be approached.⁷²

More useful in practice, because they are universally present, are the long titles of statutes, which may provide "the plainest of all guides to the general objectives of a statute," and short titles, although it must be remembered that, in the nature of short titles, "accuracy may have been sacrificed to brevity."⁷³ Reference may also be made to marginal notes. The classic

72. §1 of the Children Act 1989 is as follows:

1. Welfare of the Child

(1) When a court determines any question with respect to -

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.¹

Children Act, 1989, c. 41, §1 (Eng.). §1 of the Arbitration Act 1996 is as follows:

1. General Principles

The provisions of this Part of this Act are founded on the following principles, and shall be construed accordingly -

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

Arbitration Act, 1996, c. 23, § 1 (Eng.)

73. Scrutton LJ, *In re Boaler*, 1 K.B. at 21. For an example of a short title and a long title (reversing the order in which they appear in the text to this note), see the National Health Service Act 1946 which is an Act to provide for the establishment of a comprehensive health service for England and Wales and for purposes connected herewith. *Boaler*, [1915] 1 K.B. 21 (Scrutton, LJ); National Health Services Act, 1946, 9 & 10 Geo. 6, c. 81 (Eng.).

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example is *Stephens v. Cuckfield Rural District Council*,⁷⁴ where the council served a notice requiring a landowner to tidy up a site which was seriously injurious to the amenity of the district.⁷⁵ The statutory power⁷⁶ was exercisable only in respect of “a garden, vacant site or other open space.”⁷⁷ The question for the court was whether the power was exercisable in respect of a car-breaker’s yard.⁷⁸ While the site was clearly an “open space” (in the sense that it was uncovered), the court nevertheless decided that the statutory power was not exercisable. One thread in the reasoning leading to this conclusion was that the marginal note to the section referred to “power to require proper maintenance of waste land etc,” and it was clear beyond doubt that the site in question did not fall within this category.⁷⁹ Referring to the marginal note and its relevance to the process of interpretation, Upjohn LJ said, “While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind.”⁸⁰

Going beyond the confines of the statute itself, material may be conveniently divided into three categories (namely, pre-Parliamentary, Parliamentary and post-Parliamentary) in order to assess the extent to which material within each category may be used in order to identify the legislative purpose. Pre-Parliamentary, such as reports of official committees and Royal Commissions, are generally accepted as being relevant when seeking to establish the purpose — but not the meaning — of ensuing legislation.⁸¹ Parliamentary materials⁸² may normally

74. *Stephens v. Cuckfield Rural District Council*, [1960] 2 Q.B. 373.

75. *Id.* at 376.

76. Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51, § 33 (1).

77. *See Cuckfield Rural District Council*, [1960] 2 Q.B. at 373. *See also* Town and Country Planning Act § 33.

78. *Cuckfield Rural District Council*, [1960] 2 Q.B. at 374.

79. *Id.* at 378–79.

80. *Id.*

81. *R. v. Allen*, [1985] 2 All E.R. 641. For an example of the use of pre-Parliamentary materials in order to identify the legislative purpose, see *Hughes*, 2 All E.R. at 859 (relying on the *Wolfenden Report*).

82. In practice, the phrase *Parliamentary materials* almost invariably means the official record of Parliamentary business (including verbatim re-

be used for the purposes of statutory interpretation in only very limited circumstances, namely

where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a minister or other promoter of the Bill together, if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.⁸³

Taking these elements in turn, there will be many cases in which the requirement of *ambiguity* or *obscurity* either indubitably exists or, at least, can be made to appear to exist by a skilled advocate. Having thus established a very broad criterion, the House immediately proceeded to limit the scope of the new doctrine by restricting the use of Parliamentary materials to statements made by whoever introduced the Bill which became the Act which falls to be interpreted.⁸⁴ The third requirement (namely, that the statements should be clear) may seem sensible enough, but once again, the ingenuity of the advocate may well be enough to introduce sufficient doubt to exclude reliance on any particular statement.

In addition to the general rule expressed above, there is one further rule of much more limited scope: when interpreting legislation which has been passed to implement a Community law obligation, reference may be made to Parliamentary materials in order to identify the extent of that obligation.⁸⁵ The most obvious example of this would be where legislation is enacted to implement a Directive,⁸⁶ but the principle applies equally to all forms of Community legislation.⁸⁷

ports of debates in both the House of Commons and the House of Lords) which are published in *Hansard*.

83. See *Pepper v. Hart*, [1993] 1 All ER 42, 69 (Lord Browne-Wilkinson, concurring with five of the other six Law Lords; Lord Mackay LC, dissenting).

84. In practice, almost all Bills are government Bills and, therefore, the person to whose statements the court may refer will almost invariably be a government minister.

85. *Pickstone v. Freemans PLC* [1988] 3 C.M.L.R. 221, 238–44 (Lord Oliver's opinion).

86. Directives require member states to achieve defined objectives while leaving it to each member state to identify and adopt whatever mechanism it considers to be appropriate to achieve the objective in question, within the context of its own legal system. See Treaty Establishing the European Eco-

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Having discussed the origin, evolution, nature and power of purposivism in the English common law, it is now appropriate to turn to its position in European Community law.

IV. LITERAL AND PURPOSIVE INTERPRETATION IN EUROPEAN COMMUNITY LAW

The idea of literalism has never been central to the civil law⁸⁸ tradition in which Community law is rooted. Moreover, and perhaps more importantly, literalism is intrinsically unlikely to play a significant part in a multi-lingual system in which all languages (nine, in the case of the Community) are equally authentic. Overall, therefore, it is hardly surprising that, as the following discussion will show, the European Court of Justice attaches much greater importance to factors such as the overall legislative scheme and its purposes than it does to the idea of the literal meaning of the words used to convey that scheme and those purposes.

In *Wendelboe v. LJ Music*,⁸⁹ the European Court of Justice had to interpret Article 3(1) of the Transfer of Undertakings Directive, which the Court abbreviated as, “[T]he transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing at the date of a transfer...shall, by reason of such transfer, be transferred to the transferee.”⁹⁰ The question was whether it was the *contract of employment* or the *obligations* which had to be existing at the date of the transfer. In the English and Danish versions of the text, either conclusion was possible, but the Dutch, French, German, Greek and Italian versions were open to only one literal interpretation, namely that it was the contract of employment (or employment relationship) which had to be in existence at the date of the transfer. In other words, having read all the official language versions, it was impossible to conclude that there was a single, literal meaning.

conomic Community, Mar. 25, 1957, Art. 249, 298 U.N.T.S. 36 (i.e. Treaty of Rome 1957).

87. For example, in *Pickstone*, the English legislation had been triggered by a regulation. See *Pickstone*, [1988] 2 All E.R. at 803.

88. Using the term “civil law” to mean “Roman law based.”

89. *Wendelboe v. L.J. Music* APS, [1985] E.C.R. 457 (Eng.).

90. *Id.* at 466.

Although the version contained in the majority languages prevailed in this case, there is no principle which requires that this shall be so in all cases. For example, in *Elefanten Schuh v. Jacqmain*,⁹¹ the European Court of Justice had to interpret Article 18 of the European Community Convention on Jurisdiction and the Enforcement of Judgments 1968.⁹² The problem arose from a discrepancy between the French and Irish texts on the one hand and the English, Danish, Dutch, German and Italian texts on the other.⁹³ More particularly, the English text representing the majority, provided that “a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered *solely* to contest the jurisdiction.”⁹⁴ Assuming that the word “solely” means something, the effect of this version is that defendants who wish to contest *both* the jurisdiction of the court *and* (if they lose the jurisdiction argument) the merits of the case, must be taken as having submitted to the jurisdiction of the court.⁹⁵ The European Court of Justice upheld the French and Irish versions (neither of which contained anything equivalent to the word “solely”) on the basis that these were “more in keeping with the objectives and spirit of the Convention” than were the alternative language versions.⁹⁶

Of course, the lack of status which Community law accords to the literal technique leaves open the question of which other technique (*or techniques*) should be adopted. There is no universally agreed terminology for describing those techniques, but the two concepts which are involved are sometimes labelled *contextual* or *schematic and teleological*.⁹⁷ Advocate-General May-

91. *Elefanten Schuh v. Jacqmain*, [1981] E.C.R. 1671 (Eng.).

92. The European Community Convention on Jurisdiction and the Enforcement of Judgments 1968 is commonly known as the Brussels Convention.

93. *Jacqmain*, [1981] E.C.R. at 1671.

94. *Id.* (citing Article 18 of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 36).

95. *Id.*

96. *Id.* at 1685.

97. Rules of Interpretation of ECC Laws [1989] STAT LR 163, 168–73 (where Millett uses “schematic” and “teleological”). See generally STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW (3d ed. 1999) (where the authors use “contextual” and “schematic”).

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ras brought the whole topic into sharp focus when he said that the principal aim of the court was to identify the *clear* meaning:

[T]his Court may not substitute its discretion for that of the Community legislature; when the meaning of the legislation is clear it has to be applied with that meaning, even if the solution prescribed may be thought to be unsatisfactory. That is not to say, however, that the literal construction of a provision must always be accepted. If such construction were to lead to a nonsensical result in regard to a situation which the Court believed the provision was intended to cover, certain doubts might properly be entertained in regard to it. In other words, the clear meaning and the literal meaning are not synonymous. *There have been many cases in which the Court has rejected a literal interpretation in favour of another which it found more compatible with the objective and the whole scheme of the legislation in question.*⁹⁸

As Advocate-General Mayras acknowledged, *both* the objective (or purpose) *and* the scheme of the legislation have to be considered.⁹⁹ In practice, these two factors are commonly so closely inter-twined or overlapping as to amount to one single, contextual factor.¹⁰⁰

One of the earliest and most important examples of *schematic* (or *teleological*) interpretation may be found in *van Gend en Loos v. Nederlandse Administratie der Belastingen*,¹⁰¹ where a Dutch company was aggrieved by a contravention of Article 12 (now Article 25) of the Community Treaty, which prohibits member states from “introducing between themselves any new

98. *Fellinger v. Bundesanstalt für Arbeit*, [1980] 1 E.C.R. 535, 550 (emphasis added).

99. *Id.* at 550.

100. Indeed, it is difficult to see any point in making the distinction in the first place, since at least part of the purpose of any piece of Community legislation must be to advance either the scheme of Community law as a whole or some identifiable part thereof. It is difficult, therefore, to disagree with Lord Mackenzie Stuart, the United Kingdom’s first judge in the European Court of Justice, who once commented that he wished to add nothing to the discussion of the nature of the interpretations “except a note of scepticism and the suggestion there are dangers in over-analysis.” See LORD MACKENZIE STUART, *THE EUROPEAN COMMUNITIES AND THE RULE OF LAW* 72 (1977). For further comment on identifying the legislative purpose of Community legislation, see Case 26/62, *Van gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

101. *Van gend en Loos*, 1963 E.C.R. at 1.

customs duties...."¹⁰² For the present purposes, the question was whether the company could enforce the article against the Dutch customs authorities in the Dutch courts.¹⁰³ The European Court of Justice said:

The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between the member states and their subjects

...

It follows...that, according to the spirit, the general scheme and the wording of the Treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.¹⁰⁴

In other words, the whole scheme, and therefore an identifiable purpose, of Community law contributed to the requirement of an affirmative answer to the question raised by the company; and this answer was also supported by the wording of the relevant article.

However, in some cases the other factors may well operate to negative the literal meaning. For example, in *Commission v. Netherlands*,¹⁰⁵ the issue was whether butter which was being stored in Dutch customs warehouses (and which formed part of the Community's so-called butter mountain) could lawfully be re-packed into smaller quantities.¹⁰⁶ In response to the Dutch argument that this was a well-established national practice, the European Court of Justice said:

The...argument which seeks to establish that the contested packing is one of the forms of handling specified in article 1(1) of Directive 71/235, inasmuch as it was traditionally authorized in Netherlands customs warehouses, cannot be accepted. Although the inventory of national practices was carried out at an early stage in the preparatory work for the Directive, its purpose was not to maintain them but, on the contrary, to harmonize them.

....

102. *Id.* at 4.

103. *Id.* at 3.

104. *Id.* at 12.

105. *Commission v. Kingdom of the Netherlands*, [1983] 1 E.C.R. 1195.

106. *Id.* at 1196.

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In the Court's opinion, the question whether or not the contested packing comes within the scope of the customs warehousing procedure laid down by Directive 71/235 cannot be decided by reference to the [text]; instead, the operation must be considered *in the light of the objective of the customs warehousing procedure*.¹⁰⁷

Between the extremes of confirming and negating the literal meaning, there lies the possibility of using the schematic technique to fill in the gaps, a classic example of which is *Commission v. United Kingdom*.¹⁰⁸ The United Kingdom had introduced the Road Vehicles Lighting Regulations, 1984.¹⁰⁹ These Regulations required motor vehicles to be fitted with a dim-dip device, which would produce an intensity of beam below that of ordinary dipped headlamps whenever a vehicle's ignition was switched on.¹¹⁰ The Commission claimed that these Regulations infringed Council Directive 76/756/EEC on the approximation of the laws of the member states relating to the installation of lighting and light-signalling devices on motor vehicles and their trailers.¹¹¹ The United Kingdom responded that the Directive was non-exhaustive and merely prohibited refusal of type-approval for vehicles on grounds relating to the lighting and light-signalling devices listed in an Annex to the Directive.¹¹² Since dim-dip devices were not within the scope of the Annex, the United Kingdom argued that it followed that there was no infringement of the Directive.¹¹³ The European Court of Justice, however, took the view that the purpose of the Directive was to promote freedom of trade in motor vehicles across the Community, and that unique requirements of the type imposed by the United Kingdom in this case were incompatible with that purpose.¹¹⁴

It is clear from the foregoing discussion that Community Law acknowledges literal meaning as only one element in the matrix

107. *Id.* at 1205 (emphasis added).

108. *Commission v. United Kingdom of Great Britain and Northern Ireland*, [1988] 7 E.C.R. 3921.

109. Road Vehicles Lighting Regulations, S.I. 812 (1984).

110. *Commission v. United Kingdom*, 7 E.C.R. at 3932.

111. *Id.* at 3924–25.

112. *Id.* at 3926.

113. *Id.*

114. *Id.* at 3935.

of considerations by reference to which the legal meaning of a legislative instrument is to be identified, with the purpose of the legislative scheme being a further (and, in practice, more important) element within that matrix. What must now be considered is how legislative purposes are to be identified within Community Law.

V. IDENTIFYING LEGISLATIVE PURPOSES IN COMMUNITY LAW

The discussion of interpretation in the European Court has been able to proceed thus far on the basis of Community law as an all-embracing term, with legislative interpretation being given a correspondingly all-embracing meaning. However, when proceeding to discuss the identification of legislative purposes it is necessary, for some purposes, to distinguish between Community treaties and Community legislation, according to which usage *legislation* has the narrower meaning of *regulations, directives and decisions*.¹¹⁵

Proceeding to the substance of the discussion, it is useful to emphasize the contrast between the synthetic (or constructed) nature of the Community's legal system and the natural (or spontaneous) character of domestic legal systems. One important aspect of this is that the whole Community, including its legal system, is based on expressly articulated objectives (or purposes).¹¹⁶ For example, and to begin at the beginning, the preamble to the Community Treaty identifies a number of social and economic ideals as the foundation for achieving "an ever closer union among the peoples of Europe."¹¹⁷

In addition to these general statements of the purposes of the system of Community law as a whole, individual pieces of legislation (that is to say, regulations, directives and decisions) will each have their own purposes. The general proposition is, unsurprisingly, that Community legislation should be interpreted, so far as possible, in ways which make it consistent with the

115. See Lord Slynn of Hadley, *Looking at European Community Texts*, STAT. L.R. 12, 13 (1993).

116. As has already been noted *supra* Part II, second paragraph, this is in marked contrast to domestic legal systems. See accompanying text and *supra* note 16.

117. Consolidated Version Of The Treaty Establishing The European Community, Dec. 24, 2002, O.J. (C 324) 33, 39 (2002). Article 2 of the Treaty sets out the task of the Community in broadly similar terms. *Id.* at 40.

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Treaties and the general principles of Community law.¹¹⁸ More specifically, the operative part of each piece of Community legislation will be preceded by *citations* and *recitals*.

Citations consist of a number of short paragraphs, each of which begins with the words “having regard to.”¹¹⁹ Citations will typically identify the relevant treaty article(s) and any relevant proposals, opinions and consultations in which the legislation in question purports to locate its legal base. Clearly, therefore, while citations are important in those cases where an issue arises as to the legitimacy or illegitimacy of legislation, they also serve the purpose of identifying the legislative purpose as an aid to interpretation, which is a skill much more commonly required in legal practice.

Recitals consist of a number of paragraphs that are generally rather longer than those constituting citations, each of which begins with the word “whereas.”¹²⁰ Recitals set out the reasons underlying the legislation and may, therefore, be very helpful in identifying the legislative purpose(s).

Going outside the text of the treaties, the *travaux préparatoires* may be used for the purposes of interpretation, provided it is remembered that “any argument... which is not based on the Treaty itself cannot be decisive.”¹²¹ However, such aids, and therefore their limited assistance, will not always be available. In such cases, “in the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is.”¹²²

Travaux préparatoires are also relevant to the interpretation of Community legislation. For example, in *Stauder v. City of Ulm*,¹²³ the Court noted that a recital to a decision showed an intention to adopt an amendment to the decision which had been proposed when an earlier draft was being considered.¹²⁴

118. Klensch v. Secrétaire d'Etat à l'Agriculture et à la Viticulture, [1986] 10 E.C.R. 3477; Rauh v. Hauptzollamt Nürnberg-Fürth, [1991] 3 E.C.R. 1647.

119. See, e.g., Commission Regulation 282/2004, 2004 J.O. (L 49) 11; Commission Regulation 283/2004, 2004 J.O. (L 49) 25.

120. *Id.*

121. Case 362, Commission v. Luxembourg and Belgium, 1964 E.C.R. 625 (opinion of A-G Roemer).

122. Simon v. Court of Justice, 1961 E.C.R. 115.

123. *Stauder v. City of Ulm*, Sozialamt, Case 29/69, [1969] E.C.R. 419.

124. See *supra* text accompanying note 4.

Similarly, the Court of Justice has held that letters sent by the High Authority of the European Coal and Steel Community to the addressee of a decision, were available as aids to the interpretation of the decision itself.¹²⁵ On the other hand, “[s]ubsequent statements originating from officials of the High Authority cannot have any influence on the interpretation of decisions made by the latter, at least when such interpretation, irrespective of the statements made, leads to a logical result.”¹²⁶

The cases identified and discussed above lead to the conclusion that Community law contains a more developed body of authority as to the identification of legislative purposes than does English common law. Perhaps, however, this is less than altogether surprising, bearing in mind the teleological tradition of interpretation in which Community law is rooted.

VI. THE USE OF COMMUNITY TECHNIQUES OF INTERPRETATION IN ENGLISH COURTS

As we have seen, at an early stage in the United Kingdom’s membership of the Community Lord Denning MR accepted the need for English courts to employ the Community law method when interpreting Community legislation.¹²⁷ The point was further emphasized in *Henn & Darby v. Director of Public Prosecutions*,¹²⁸ where the issue was whether an English prohibition on the importation of obscene articles¹²⁹ was contrary to Article 30 of the Treaty of Rome, 1957 which prohibited quantitative restrictions on imports from between member state.¹³⁰ Responding to a preliminary reference from the House of Lords, the European Court of Justice said it was well established in Community law, that a total prohibition is a quantitative restriction for the present purposes. When the case returned to the House of Lords, Lord Diplock said:

In the Court of Appeal considerable doubt was expressed by that court as to whether an absolute prohibition on the import

125. *Societa Industriale Acciaiere San Michele v. High Authority of the European Coal and Steel Community*, [1964] C.M.L.R. 146 (1964).

126. *Lemmerz-Werke GmbH v. High Authority*, [1964] C.M.L.R. 384.

127. See *supra* note 4 and accompanying text.

128. *Henn & Darby v. Director of Public Prosecutions*, [1981] A.C. 850.

129. See Customs Consolidations Act, 1876, c. 36, § 42 (Eng.).

130. Treaty of Rome, 1957, c. 2, art. 30.

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of a particular description of goods could amount to a quantitative restriction or a measure having equivalent effect, so as to fall within the ambit of art. 30 at all. That such doubt should be expressed shows the danger of an English court applying English canons of statutory construction to the interpretation of the Treaty or, for that matter, of Regulations or Directives.¹³¹

From the Community perspective, the requirement of the adoption of shared techniques is not only a means of maximising the coherence of Community law as a whole,¹³² but is also an aspect of the doctrine which received one formulation in *von Colson v. Land Nordrhein-Westfalen*,¹³³ before being re-enforced in *Marleasing SA v. La Comercial Internacional de Alimentación SA*.¹³⁴ In *von Colson* the European Court of Justice said:

In applying the national law *and in particular the provision of a national law specifically introduced in order to implement [a Directive]*, national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in [the Treaty].¹³⁵

Although this statement emphasizes the position in relation to provisions specifically introduced to implement Community obligations, when read as a whole it is reasonably clear that it is intended to apply equally to all national provisions. Any doubt in this respect was laid to rest in *Marleasing*, which obliges national courts to interpret national law in accordance with Community law wherever this is possible, *even if no national legislation has been enacted specifically to comply with Community law*.¹³⁶ This includes the situation in which the relevant national law consists of *prior* legislation, which plainly cannot have been enacted to comply with a provision of Community law which did not exist at the time of its enactment.

131. See *Henn & Darby*, [1981] A.C. at 904.

132. See *Simmenthal SpA*, [1978] E.C.R. 629, 643.

133. Case 14/83, *Colson v. Land Nordrhein-Westfalen*, [1984] E.C.R. 1891, 2 C.M.L.R. 430 (1984).

134. Case C-106/89, *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*, 1990 E.C.R. I-4135, [1992] 1 C.M.L.R. 305 (1992).

135. *Id.* at 430 (emphasis added).

136. *Marleasing*, [1992] 1 C.M.L.R. 305, 307.

VII. CONCLUSION

Both the English common law and Community law approach the task of legislative interpretation in a purposive, or teleological, way. However, there is a significant difference between the two systems, in that lawyers operating within the Community legal system may refer to explicitly articulated statements of legislative purpose. By way of contrast, while the English legal system provides some aids to identifying legislative purposes, those purposes are almost always less explicitly identified. It follows both that the identification of legislative purposes is more difficult in English than in Community law, and that it is more difficult to be confident of the accuracy of any identification which is made.

Finally, and at the risk of stating the obvious, it may be worth commenting that, as the quantity of litigation coming before the Court of Justice demonstrates, the ability to identify legislative purposes both more simply and more accurately than is usually possible in the English legal system, does not necessarily guarantee that disputes will be resolved without recourse to the courts.

STATUTORY TEXTS AS INSTANCES OF LANGUAGE(S): CONSEQUENCES AND LIMITATIONS ON INTERPRETATION

*Jan Engberg**

I. INTRODUCTION

As a linguist and a translator working especially on texts and communication in legal settings, my main interest in statutory interpretation in multilingual settings concerns the ontological status of statutory texts. My basic assumption, based on results from modern research in cognitively oriented text linguistics, is that legal texts are perfectly normal texts subject to the characteristics of human communication (contextuality, cotextuality of meaning, as well as pragmatic fuzzyness) and are not logic constructs subject to logical operations.¹ Consequently, interpretation of such texts does not differ in substance from the interpretation process carried out in other kinds of textual communication. In this paper I will concentrate on the consequences of this basic assumption upon the feasibility and methodology of statutory interpretation within the European Union.² I will thus mainly look at statutory interpretation in a specialized (*viz.* multilingual) context. However, I shall also try to show some of the general consequences to be drawn for all statutory interpretation.

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1. Marcelo Dascal & Jerzy Wróblewski, *The Rational Law-Maker and the Pragmatics of Legal Interpretation*, 15 J. PRAGMATICS 421, 431 (1991).

2. The European Union is a prime example for analysis due to its translated texts and dogmatic belief that every text be seen and interpreted as an authentic original. For example, the Treaty on European Union lays down in Article 53 that all its language versions are equally authentic. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN UNION AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]; and Regulation No 1 from 1958 states in article four that "Regulations and other documents of general application shall be drafted in the four official languages." EEC Council: Regulation No. 1 Determining the Languages to be Used by the European Economic Community, art. 4, 1958 J.O. (B017) 385. The word used here is *drafted*, not *translated*, as all versions are to be seen as authentic.

Before going deeper into the matter, let me dwell a moment on my role as a linguist and a translator in the context of an inherently legal field like the description of statutory interpretation. I see my role to be what Professor Lawrence Solan³ has called a “tour guide.” Professor Solan talks about the role of linguists in the courtroom, identifying where the linguist’s expertise is relevant (in explaining the limitations as to interpretation that the language system poses) and where it is not (offering expert opinions on which meaning alternative is the best or most correct).⁴ Accordingly, my intention is not to explain to lawyers how they have to interpret statutes in multilingual settings or how specific statutes should have been interpreted in earlier instances. This would be outside the boundaries of my expertise. Instead, I want to offer a linguist’s perspective on the inherently language-dependent activity of statutory interpretation. This focus gives the reader an insight into what this activity looks like from a linguist’s point of view, that is, a guided tour through the linguistic part of the landscape of statutory interpretation in multilingual settings.

II. STATUTORY INTERPRETATION AND MEANING ASSUMPTIONS

A. *Basic assumptions*

Statutory interpretation is about finding the right or relevant meaning of words or phrases in cases where there is “doubt due to lack of the necessary clarity or transparency required for the application of the law.”⁵ In linguistic terms, such an operation necessarily involves the question of how mutual understanding develops,⁶ and this paper will be centered around approaches to monitor the details of problems arising from this question.

In standard statutory interpretation within a unilingual legal system like the Danish or that of the U.S., the problem or challenge is to interpret a word or a phrase in a statute expressed in one language and embedded in some (general or specialized)

3. Lawrence M. Solan, *Linguistic Experts as Semantic Tour Guides*, 5 FORENSIC LINGUISTICS 88, 94 (1994) [hereinafter *Linguistic Experts*].

4. *Id.* at 97–98.

5. Dascal & Wróblewski, *supra* note 1, at 428 (discussing judicial operative interpretation).

6. *Id.* at 423–427.

interpretive context. A part of the context that greatly impacts the process of reaching mutual understanding is exactly the fact that only one language is involved in this process. Discussions among specialists may therefore be centered around questions like “What kind of sources may be drawn upon (own intuition, dictionaries, linguistic expertise)?” and “What role does the interpreter himself or herself and the consequently necessary subjectivity play in this connection?”

In statutory interpretation in an EU context, the central problem is the same (interpreting words or phrases by reaching a mutual understanding), but it is aggravated by the fact that not only one, but normally eleven languages are involved.⁷ Thus, not only do we have the discussion among people speaking the same mother tongue about how a word may be interpreted, but on top of these problems we have different language systems in which meaning is generally distributed differently. So it is very difficult to achieve texts in all eleven languages, in which every word or small phrase has exactly the same meaning and implications. The court system, naturally, has a number of ways to cope with these challenges, but whether we judge these as efficient or not is connected to the question of how we conceptualize the process of achieving mutual understanding, as we shall see below.

As an example of the kind of task with which statutory interpretation is confronted in an EU context, we may look at a case treated by the European Court in 1985.⁸ In the spring of 1980, British trawlers sailed into a fishing zone in the Baltic Sea outside Polish territorial waters where the Polish government claimed exclusive fishing rights.⁹ The British trawlers cast empty nets in this zone, which were taken over by Polish trawlers.¹⁰ The Polish vessels trawled the nets, but did not take them out of the water at any time.¹¹ Likewise, they did not enter Polish territorial water. Instead, when the trawl was completed the ends of the nets were handed over to the British trawlers.¹²

7. TREATY OF AMSTERDAM, *supra* note 2, at art. 53.

8. Case 100/84, Commission v. United Kingdom of Great Britain and Northern Ireland, 1985 E.C.R. 1169.

9. *Id.* § 2.

10. *Id.* § 3.

11. *Id.*

12. *Id.*

The contents of the nets were taken aboard the British trawlers, which then took the fish to the UK.¹³ The European Commission wanted the trawlers to pay customs duty on the catch, on the grounds that the fish had been caught by the Polish trawlers and therefore stemmed from outside the EU.¹⁴ The British trawlers refused to pay the duty because the English version of the statutory text relied upon by the European Commission refers to *products of sea-fishing and other products taken from the sea by vessels registered or recorded in that country and flying its flag* as counting as “goods wholly obtained or produced in one country.”¹⁵ Their argument was that the decisive action is to take the fish out of the water and therefore fish caught under the described circumstances must count as originating in the UK.¹⁶ The main problem was that the majority of other language versions use formulations which also (e.g. the French version¹⁷) or exclusively (e.g. the German version¹⁸) concentrate on the act of *catching* the fish, not on the act of taking the fish out of the water. In the end, the Court opted for interpreting the English formulation to focus upon the “catch”-meaning, i.e., focusing on the act of constraining the fish from moving freely in the sea. The Court made this determination primarily to support the interpretation that was in best accord with the purpose and the general scheme of the statute.¹⁹

Later in this paper we shall investigate in more detail the argumentation of the Court.²⁰ At this stage, the above description of the example suffices to show the perspectives of the problem with which a multilingual legal system may be confronted:

13. *Id.*

14. *Id.* § 5.

15. EEC Council: Regulation No. 802/68 of the Council of 27 June 1968 on the Common Definition of the Concept of the Origin of Goods, art. 4(1), 1968 J.O. (L 148) 1.

16. Case 100/84, Commission v. United Kingdom of Great Britain and Northern Ireland, *supra* note 8, § 11.

17. French version used “*extraits de la mer*,” which is capable of meaning both ‘taken out of the sea’ and ‘separated from the sea.’ *Id.* § 15.

18. German version used “*gefangen*,” meaning ‘caught.’ *See id.* § 15.

19. Case 100/84, Commission v. United Kingdom of Great Britain and Northern Ireland, *supra* note 8, §17.

20. *See infra* Part 3.2.

1. The words of the different languages involved do not match totally, so a choice between possible meanings from different languages must be made.
2. The different possible meanings are in many cases mutually incompatible.
3. Consequently, the Court actually has to instigate a new meaning in one or more of the languages.

Whether these perspectives are seen as problematic depends heavily on the role the virtual language system (as opposed to the actual language use in communication) is seen to play in connection with achieving mutual understanding. If we look at actual communication and cognition (of which statutory interpretation is one type), I opt for *attributing a background role to the language system*. In short, the main constraint on interpretation methodology stems from the fact that all texts subject to real human communication (and consequently also legal texts, according to the basic assumption mentioned above) must inherently have a certain degree of indeterminacy concerning their meaning.²¹ Statutory interpretation must therefore rely on the subjective interpretation of human agents. In my opinion, the theories and methodologies of statutory interpretation must take this subjectivity into consideration with intention to secure, on these grounds, the kind of just and justifiable decisions that a modern Western society expects of legal institutions.

In the following, I will start out by presenting the traditional strong language theory and some of the problems that occur, when it is confronted with reality. This leads on to a discussion of how specialised meaning may be conceptualised in a Constructivist approach and what it means for statutory interpretation. A number of approaches relying on weaker language theories are introduced and their relations to Constructivist thinking are investigated. In the second part of the paper, the basic features of statutory interpretation in an EU context are presented and exemplified in a single case study, and finally some consequences of the said and found for the development of a multilingual legal system within the EU are outlined.

21. For details on the background for taking this stand, see *infra* Part 2.3.

B. The strong language theory

Not all theories of legal argumentation and statutory interpretation take as their point of departure my basic assumption concerning the process of achieving mutual understanding. The traditional assumption about the role of the statute in a code-based legal system, like that of Germany,²² is that the law is encompassed within the statute and the court only has competence to decide cases, not to set up the standards by which a case must be decided.²³ The rationale behind this line of thought is a desire to live up to the ideal of a just and objective legal system. The basic argumentation runs as follows: sentences imposed by the court should not be subjective decisions at the discretion of the individual judge or judges, but neutral and objective decisions made on the basis of facts and rules existing independently of the deciding judge or judges.²⁴ Therefore, interpretation of meanings in texts should be based on sources lying outside the mind of the judge.²⁵ In this view, statutory texts are seen as autonomous entities carrying autonomous and determinate meaning, thus being normative in their own right.²⁶ This is true for the text as well as for constitutive elements, such as the individual words. As an important methodological consequence of this view, a viable solution when interpreting legal texts is to use dictionaries, for example, as an instrument in finding normatively prescribed meanings.²⁷

22. See, e.g., Janice Becker, *Retaining Quality Translation Services*, 1994 CHI. B. ASS'N REC. 30, 31.

23. Ralph Christensen & Hans Kudlich, *Die Auslegungslehre als implizite Sprachtheorie der Juristen* [Interpretation Theory as Implicit Language Theory of Lawyers], in ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE [ARCHIVE FOR LEGAL AND SOCIAL PHILOSOPHY] 230–31 (2002).

24. *Id.* at 232–33.

25. *Id.*

26. Ralph Christensen & Michael Sokolowski, *Wie normativ ist Sprache? Der Richter zwischen Sprechautomat und Sprachgesetzgeber* [How Normative is Language? The Position of the Judge Between Sentencing Machine and Linguistic Legislator], in SPRACHE UND RECHT [LANGUAGE AND LAW] 66–68 (Ulrike Haß-Zumkehr ed., 2002).

27. *Id.* at 67; Lawrence M. Solan, *Ordinary Meaning in Legal Interpretation*, in 2001 PROCEEDINGS FROM THE CONFERENCE OF LAW AND LANGUAGE – PROSPECT AND RETROSPECT 1, 5 (Univ. of Lapland CD-ROM) [hereinafter *Ordinary Meaning*].

While the ideal of autonomous normative text is a tradition strongly connected with the code-based German legal system, it is not limited to the German system. Professor Solan cites²⁸ the 1917 U.S. Supreme Court decision of *Caminetti v. United States* for the following statement:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.²⁹

Here we see the idea of the statutory text and the words contained within as having autonomous and determinate meanings sufficient to make it possible to “enforce [them] according to [their] terms.”³⁰ Professor Solan points to the so called “New Textualism” propagated by Justice Scalia as a recent example of a similar approach.³¹ Thus, rather than being an idea connected to code-based and not to common law-based legal systems, the idea of the autonomous and determinate meaning of legal texts and words contained in such texts is connected to a specific view of language, independent of the legal system in which the language is used. Professors Christensen and Sokolowski call this “the strong language theory,” as it intends to give the power of carrying meaning to language itself and to texts and words autonomously.³²

C. Problems with reality

When we try to implement this strong language theory to actual human communication and cognition, however, we encounter serious problems. Ferdinand de Saussure, one of the founding fathers of modern linguistics as the study of linguistic structure, noticed that the language system is not present in actual communication.³³ Instead, it is an abstract notion, built by each

28. *See Ordinary Meaning*, *supra* note 27, at 5.

29. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

30. *Id.*

31. *Ordinary Meaning*, *supra* note 27, at 5.

32. Christensen & Sokolowski, *supra* note 26, at 65.

33. FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 13 (Charles Bally et al. eds., 1983).

communicating individual on the basis of experiences with actual speech: "A language accumulates in our brain only as the result of countless experiences. ... The impressions we received from listening to others modify our own linguistic habits."³⁴ However, Saussure still presupposed an approximately identical system built up in the brain of each language user,³⁵ constituting the equivalent of an objective meaning existing independently of the characteristics of the individual processor. This is the central characteristic, and a necessary presupposition, of the strong theory of language: only if sender and receiver have near identical systems are they able to understand words in the same way. It is, however, a fairly unlikely constellation. It is difficult to come up with descriptions of actual language acquisition processes that may yield such identical systems in every communicator. The problem is that the meaning of texts can only exist as a construction in the minds of individuals, built on the basis of perceived underspecified textual signs and existing mental models. An objective meaning existing independently of human agents does not seem possible in the real world of linguistic practice. The closest we may get to this ideal is to achieve mutually agreed inter-subjective meanings, agreed to under the conditions that each individual's constructed meaning only be communicated to others via texts subject to the same limitations (perceived underspecified textual signs and existing mental models). This means that all word meanings are potentially dynamic and may be influenced by communication, subject to constraints in communicative norms, etc., but not to systematic features of the meaning.

This problem was not a great hindrance to Saussure, who was mainly interested in the study of the abstract language system and not of actual communication.³⁶ Approaches with more interest in the cognitive reality and in the actual way language contributes to communication and mutual understanding, however, have had to take this discord more seriously. One such approach, which is the one I will use as my basic descriptive

34. *Id.* at 19.

35. *Id.* at 13.

36. SAUSSURE, *supra* note 33, at 19.

framework in this article, is Connectionism.³⁷ Using cognitively plausible and testable models, Connectionism shows how natural language communication functions quite securely without recourse to the characteristics presupposed by Saussure or the propagators of the Strong Theory of Language. Connectionism attempts to resist presupposing identity of meaning systems upon the mental systems of communicators or presupposing a fixed set of symbolic rules. In other words, what Connectionism wants to achieve is an answer to the question: What would a model of the human language processing system look like if it enabled the kind of mutual understanding observed in real life to emerge, without presupposing identity of the processing systems?

1. Model of meaning construction

The Connectionist model presented here has been developed primarily on the basis of work by Professor Herrmann et al. and Professor Graf et al.³⁸ The Connectionist approach conceptualises meaning as relations between words and concepts and among concepts.³⁹ It states that understanding a word is equal to activating relations between different groups of knowledge in the brain.⁴⁰ The model is primarily intended to show the simul-

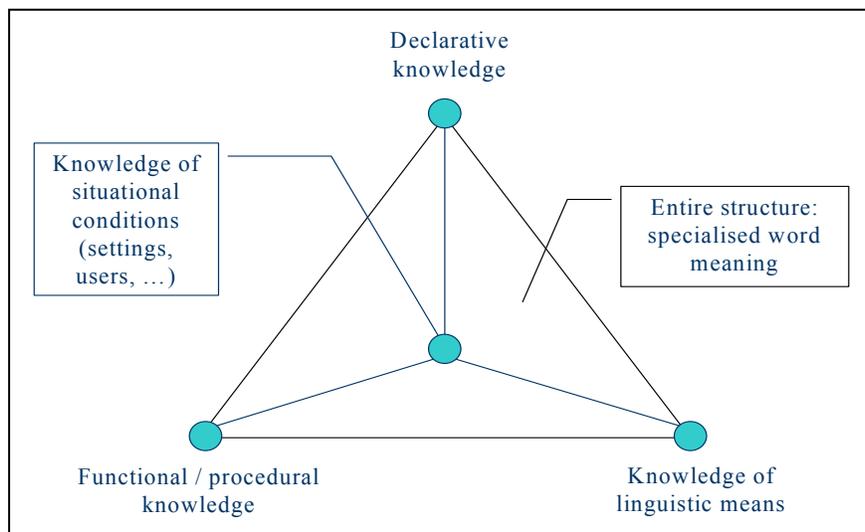
37. See generally, JAMES L. MCCLELLAND ET AL., *PSYCHOLOGICAL AND BIOLOGICAL MODELS: PARALLEL DISTRIBUTED PROCESSING: EXPLORATIONS IN THE MICROSTRUCTURE OF COGNITION* (1986) & JAMES L. MCCLELLAND & DAVID E. RUMELHART, *EXPLORATIONS IN PARALLEL DISTRIBUTED PROCESSING* (1988). A thorough criticism was formulated by Steven Pinker & Alan Prince, *On Language and Connectionism: Analysis of a Parallel Distributed Processing Model of Language Acquisition*, 28 *COGNITION* 73 (1988).

38. Theo Herrmann et al., *Die mentale Repräsentation von Konzepten, Wörtern und Figuren [Mental Representation of Concepts, Words and Figures]*, in *BEDEUTUNG – KONZEPTE – BEDEUTUNGSKONZEPTE. THEORIE UND ANWENDUNG IN LINGUISTIK UND PSYCHOLOGIE [MEANING – CONCEPTS – CONCEPTS OF MEANING. THEORY AND APPLICATIONS IN LINGUISTICS AND PSYCHOLOGY]* (Joachim Grabowski et al. eds., 1996); and Ralf Graf et al., *Grundriß eines Modells der Aktivierung von Konzepten, Wörtern und Figuren [Outline of a Model of Activation of Concepts, Words and Figures]*, in *BEDEUTUNG – KONZEPTE – BEDEUTUNGSKONZEPTE. THEORIE UND ANWENDUNG IN LINGUISTIK UND PSYCHOLOGIE [MEANING – CONCEPTS – CONCEPTS OF MEANING. THEORY AND APPLICATIONS IN LINGUISTICS AND PSYCHOLOGY]* (Joachim Grabowski et al. eds., 1996).

39. Herrmann et al., *supra* note 38, at 120.

40. *Id.* at 127.

taneous activation of elements from different knowledge groups that constitute a specialised meaning.



The model shows a stylised picture of different groups or types of knowledge involved in actual text understanding. The intention is to monitor the state of the cognitive system after the meaning of a word in a specific communicative situation is understood, i.e., after interpreting a word in context. The model works with four types of knowledge. This stems from new insights in text linguistics regarding factors influencing text construction. According to these insights, texts may be described completely along four dimensions (formal and grammatical dimension, thematic dimension, situational dimension and functional dimension).⁴¹ At the same time, the model is in line with

41. See e.g., Wolfgang Heinemann, *Textsorten. Zur Diskussion um Basisklassen des Kommunizierens. Rückschau und Ausblick [Genres. On the Discussion about Basic Classes of Communication. Retrospect and Future Perspectives]*, in *TEXTSORTEN. REFLEXIONEN UND ANALYSEN [GENRES. REFLECTION AND ANALYSES]* 16 (Kirsten Adamzik ed., 2000); KIRSTEN ADAMZIK, *TEXTLINGUISTIK. EINE EINFÜHRENDE DARSTELLUNG [TEXT LINGUISTICS. AN INTRODUCTION]* 59 (2004).

the Connectionist theories mentioned above.⁴² Each corner of the model is to be seen as a single chunk of knowledge connected to other single chunks, but at the same time every chunk is part of a network consisting of other knowledge chunks of the same kind.⁴³

Concentration will be placed on the way mutual and predictable understanding works in this model. Therefore, I will not go into further detail of the different types of knowledge, but proceed directly to describing the processes connected to natural language understanding.⁴⁴ However, it is important to note that the knowledge of situational conditions is special in the way that the chunks of knowledge of this type govern the choice of knowledge chunks from the other types of knowledge.⁴⁵ This is a consequence of the concept of cognition always being situated, i.e., that we never interpret input from the outside world in a *tabula rasa* situation, but always on the background of our existing perception of the situation we are in.⁴⁶

The presented model shows the connections that are activated when a word is encountered and processed in a specific communicative situation. The activation process means that the connection between two knowledge chunks is enforced and thus becomes maximally evident to the processing system. “Understanding” means creating a meaningful combination of connections.⁴⁷

Understanding occurs through one of three possible processes:⁴⁸

- *Due to a routine*: If the understander has already encountered the word frequently and recently in a similar context, the activation of the connections (or better: the *re-activation*) goes very quickly, as connections in the human system are not activated in an on-off process, but in an on-and-glowing-off

42. See *infra* Part 2.3.

43. See George A. Miller, *The Magical Number Seven*, 63 *PSYCHOLOGICAL REVIEW* 2, 92–93 (1956) (stating that knowledge chunks are considered “constant for immediate memory”).

44. More details may be found in Jan Engberg, *Dynamics of Meaning – an Under-Exposed Feature of LSP Linguistics*, in *LSP TRANSLATION IN THE NEW MILLENNIUM* 31–36 (Peter Kastberg ed., 2003).

45. Graf et al., *supra* note 38, at 186–89.

46. DAN SPERBER & DEIRDRE WILSON, *RELEVANCE* 108 (1986).

47. Herrmann et al., *supra* note 38, at 120.

48. SPERBER & WILSON, *supra* note 46, at 114.

process. So connections that have not 'stopped glowing' when the word is encountered again are activated together, without a real construction having to take place. Thus, these connections are preferred over potentially competing connections. Basically, high frequency of activation enforces the connection. This is a kind of top-down processing.

- *New construction*: Connections may be constructed anew, if the combination is not previously known to the understander. This is a kind of bottom-up processing, because the meaning is constructed by combining basic elements on the basis of textual instructions and experience in the form of previous connections. Without wanting to go into more detail on this, I believe that due to this capacity of the human cognitive system, all texts, including, for example, statutory texts, are potentially understandable for most language users, provided sufficient basic knowledge is at hand in the system (= in the individual) or available from outside for the system to draw inferences. The problem is to have the right kind of knowledge to be able to select the inferences intended by the sender. I have performed a small empirical study together with Professor Wolfgang Koch that suggests the hypothesis may be right, but definitely more work is needed here.⁴⁹

- *Modification of routine*: The last possibility, fairly important in connection with development of statutory interpretations, is that the model can also very easily cope with changes emerging, for example, because a more convincing argumentation changes the way a word is used. This happens if a clash occurs between the routine activation and the input. So changes may come about, for example, through explicit changes of meaning (corrections, guided change), through explicit changes inside the networks for procedural or declarative knowledge (semi-guided change), but also through simple communicative experience of other uses than the familiar ones (non-guided change). In the area of statutory interpretation in the EU system in focus here we have an example of a guided change in the form of explicit change of meaning. We will have a look at the cited example in the context of the presented model below.

49. Jan Engberg & Wolfgang Koch, *Inkrementeller Aufbau fachlicher Wissensstrukturen bei der Lektüre von Fachtexten – eine rechnergestützte Pilotstudie* [Incremental Construction of Domain-Specific Knowledge Structures when Reading Domain-Specific Texts – A Computer-Aided Pilot Study], in SPRACHE UND DATENVERARBEITUNG [LANGUAGE AND COMPUTING] (2000).

A Connectionist system shows both how understanding can proceed in a rule-like way, how we may understand things we have not understood before, and how we may modify our semantic knowledge. It thus shows under what conditions understanding (= meaning construction) may be more or less predictable, although no identical system is presupposed.

2. Statutory interpretation as a special kind of grounded understanding

As stated already above, in my view statutory interpretation is basically a kind of normal human understanding and may therefore be described along the lines of models like the one presented in section 2.3.1. However, there are also some important differences between normal understanding in everyday conversation and statutory interpretation. The question is what impact these differences have on the modelling. Understanding is generally an automated and hardly monitorable task with lots of processing going on behind the scenes and lots of implicit knowledge involved. This makes it almost impossible for us to describe in any detail what goes on when we understand what others say to us. Statutory interpretation, on the other hand, is different in two important respects:

- *Statutory interpretation is a conscious process running along agreed lines:* When interpreting statutes, a judge knows exactly what kind of activity he is involved in, differently from what he does when just understanding everyday communication. Everyday understanding is an automatic process, statutory interpretation a conscious and consciously multi-layered process, in which the interpreter tries to establish a consistent interpretation of a text.⁵⁰ The outcome of this process is something much more elaborated than what we normally connect with the expression “word meaning.”⁵¹ Jurisprudence in the

50. DIETRICH BUSSE, RECHT ALS TEXT: LINGUISTISCHE UNTERSUCHUNGEN ZUR ARBEIT MIT SPRACHE IN EINER GESELLSCHAFTLICHEN INSTITUTION [LAW AS TEXT: LINGUISTIC INVESTIGATIONS OF LANGUAGE WORK IN AN INSTITUTION] 162–68 (1992) [hereinafter LAW AS TEXT].

51. Dietrich Busse, *Verständlichkeit von Gesetzestexten – ein Problem der Formulierungstechnik?* [Comprehensibility of Statutory Texts – A Problem of the Formulating Technique?], in GESETZGEBUNG HEUTE / LÉGISLATION D’AUJOURD’HUI / LEGISLAZIONE D’OGGI / LEGISLAZIUN DAD OZ 39–40 (1994) (dis-

form of scientific work in the area of legal argumentation intend to arrive at agreed interpretive principles for this conscious process and thus intend to delimit the possible outcomes of the process in order to make its outcome more predictable than the understanding process in everyday communication.⁵²

- *Statutory interpretation involves sources not normally considered for understanding a text:* When interpreting statutes in legal settings the input is not just knowledge in the mind of the interpreter as in normal understanding, but also and even to a dominating degree a number of written sources like precedence, doctrine, statutes, legal commentaries, etc.⁵³

The differences are obviously important and the defining characteristics of statutory interpretation. However, as Professor Solan has already shown, legal interpretation clinging primarily to fixed interpretive principles cannot in all cases fulfil the basic requirements of achieving justice without recourse to more subjective factors,⁵⁴ so an element of more free and subjective interpretation has to be inserted. This presupposes a weaker language theory than the one presented in section 2.2, and thus we are back at statutory interpretation being a subtype of normal human understanding. Finally, this means that the model presented above may also be adequate for the description of statutory interpretation.

3. The weaker language theories

The ideas presented so far are not alien to scholars of legal argumentation. The literature, that will be cited in the remainder of this section, has a number of approaches taking the position that normative texts are not normative (and thus do not have normative meanings) in their own right, but only as a consequence of the way they are handled in communication. In the following we will have a short look at a small sample of dif-

cussing the outcome of the interpretation process as a complex knowledge frame).

52. *Id.* at 38–39; LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 186 (1993) [hereinafter *LANGUAGE OF JUDGES*].

53. *LAW AS TEXT*, *supra* note 50, at 119–20.

54. *LANGUAGE OF JUDGES*, *supra* note 52, at 178.

ferent approaches, giving us an impression of some of the central ideas in this line of thought.

The basic assumption of the weaker meaning theories (a short repetition: meaning is not in the text, but in the minds of people, created on the basis of context, therefore not the text but the interpreter is in charge of legal decisions) challenges primarily the idea of the autonomous text with its context-independent meaning presented in section 2.2 above. This may seem a bit scary to some specialists in legal argumentation, because it looks as if it opens up for total subjectivity of interpretation. But in fact, for legal interpretation as such, the changes in basic assumptions do not necessarily present a major problem. However, it does require that we give up the fiction that meaning is actually something objective and objectifiable that exists outside of communication and that we may therefore interpret texts without recourse primarily to our individual knowledge base.⁵⁵ Under the (empirically more easily justifiable) assumption that meaning is *only* present in communicators, the task of the judge is actually not to *discover* what a specific word means, or what it may not mean, as is implied by such standards for legal argumentation as “the literal meaning” or “the plain meaning.”⁵⁶ Rather the task is to *decide* whether the use of a specific word (and meaning) by a specific person in a specific situation and the consequent behaviour of the person is in accordance with the rule or regulation stated to be the basis of his action.⁵⁷ This task might in the context of the U.S. legal system be categorized under the heading of searching for the “ordinary meaning” of a word.⁵⁸ The job of the judge in a court case is thus not to *find existing* meanings, but to decide on meanings, to end the meaning conflict between the parties and thus to *establish the meaning* most probably intended by the utterer.⁵⁹ Such basic assumptions are in perfect accordance with Connectionist modelling: meaning is constructed by connecting knowledge units present from experience, either in accordance with a situationally agreed interpretation (ordinary

55. *See, e.g., id.* at 186.

56. *Ordinary Meaning, supra* note 27, at 3.

57. Christensen & Sokolowski, *supra* note 26, at 76–77.

58. *Ordinary Meaning, supra* note 27, at 3.

59. Christensen & Sokolowski, *supra* note 26, at 69.

meaning) or (if such an interpretation is not present, or if the agreed interpretation does not fit) in accordance with the input and the situationally agreed principles for combining arguments in legal settings (instigated meaning).⁶⁰ Meaning thus derives from input, from text, *and* from the mental system.

As the reader will have noticed, the approach presented above, especially the version presented by Christensen and Sokolowski,⁶¹ is closely linked to ideas from post-modernism. However, the dynamic nature of post-modernist thinking and its focus on subjectivity and the absence of clear boundaries and structures is at odds with the way the field of law is conceptualised in modern Western societies, where we emphasise the necessary predictability of legal decisions and thus presuppose relatively clear boundaries and structures.⁶² The problem has been treated by different authors, of which we will look at only two, focusing on different solutions to the problem.

First, Professor Solan's interpretation of the problem and proposal for a solution. According to Professor Solan there is a problem in admitting and expressing in court decisions that the common sense of the judge is the source of the court's decision, at least in hard cases, rather than the words or some objective principles of interpretation.⁶³ The problem is the fear of "a reduction in confidence that a rule of law governs the exercise of power by government" if judges admit that their decisions include a subjective component.⁶⁴ Solan's solution is to make the courts aware of the problem, particularly the nature of linguistic meaning, and then suggest ways the court may establish the "ordinary" meaning of words, i.e., the meaning words have in actual communication.⁶⁵ Thus, where Christensen and Soko-

60. Sperber & Wilson, *supra* note 46, at 108.

61. See Christensen & Sokolowski, *supra* note 26.

62. See, e.g., THOMAS A.O. ENDICOTT, VAGUENESS IN LAW 17 (2000),

[Deconstruction] exposes law to debate, but not to argument. It suggests new possibilities of change, but allows no claim that the reasons in favour of a change are better than the reasons against it. It points out the privileging of ideas, but in cannot say what ideas *should be* privileged.

Id.

63. LANGUAGE OF JUDGES, *supra* note 52, at 178.

64. *Id.*

65. *Ordinary Meaning*, *supra* note 27, at 13–18.

lowski totally discard the idea of rules as constitutive for linguistic meaning,⁶⁶ Solan looks for other and in his opinion more adequate ways of establishing the rules, compared to the traditional solution of relying on for example dictionaries.⁶⁷

A radical version of post-modernist thinking is *deconstruction*.⁶⁸ In the deconstructionist view, the consequence of the fact that a word's meaning is never fully determinate is that no meaning may be determinate. Deconstructionists must always be skeptical as to the ideologies hidden behind all kinds of language use.⁶⁹ This view is naturally a challenge to legal thinking. First, it is far from our common-sense view of language.⁷⁰ Second, it makes it impossible to rely on word meanings in any legal interpretation.⁷¹ Consequently, different approaches have developed various descriptions that make it possible to preserve indeterminacy as a scalar⁷² rather than a binary (determinate vs. indeterminate), or even one-sided⁷³ notion (as all meanings are seen as indeterminate).

We shall limit our discussion to one approach, the rhetorical approach to legal interpretation presented by Wendy Raudenbush Olmsted.⁷⁴ One Olmsted example is the development of

66. Christensen & Sokolowski, *supra* note 26, at 68–69.

67. *Ordinary Meaning*, *supra* note 27, at 13.

68. “Deconstruction inverts whatever anything seems to mean, by reversing privileging of one interpretation over another. Deconstruction is also occasionally used in a wider sense as more or less equivalent to what is sometimes called post structuralism, or critical theory or even just theory.” ENDICOTT, *supra* note 62, at 15.

69. *Id.* at 16, *citing* Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 157–58 (Michel Rosenfeld & D.G. Carlson eds., 1992).

70. ENDICOTT, *supra* note 62, at 1.

71. *Id.*

72. Scalar is defined as “having an uninterrupted series of steps” or “capable of being represented by a point on a scale.” Merriam-Webster, Merriam-Webster Online Dictionary, at <http://www.webster.com/cgi-bin/dictionary?book=Dictionary&va=scalar> (last visited Mar. 24, 2004).

73. Binary is “something made of or based on two things or parts.” Merriam-Webster, Merriam-Webster Online Dictionary, at <http://www.webster.com/cgi-bin/dictionary?book=Dictionary&va=binary&x=15&y=14> (last visited Mar. 24, 2004).

74. Wendy Raudenbush Olmsted, *The Uses of Rhetoric: Indeterminacy in Legal Reasoning, Practical Thinking and the Interpretation of Literary Figures*, in 24 PHIL. & RHETORIC 1 (1991).

the term “inherently dangerous things”⁷⁵ from meaning primarily poison, guns, etc., on to meaning also defective automobiles.⁷⁶ This change is due to changes in the surrounding world, changes in the concept of danger, changes in the point of view as to what degree of security is necessary for citizens to feel safe, etc.⁷⁷ It is the indeterminacy of “inherently dangerous” that makes it possible for the provision to be applied also in the new situation. Yet, this capacity of development does not mean that the expression “inherently dangerous” is radically indeterminate. Instead it is *relatively determinate and relatively indeterminate*. This means that part of its meaning has been agreed upon to have a specific meaning (for example the notion of danger does not necessarily differ between the different uses of the word – this part is rather stable), whereas other parts have been agreed upon to be ambiguous or vague in their meaning (for example the notion of a danger being inherent).⁷⁸ The main point is that determinacy and indeterminacy are scalar and not binary notions and that they may be implemented strategically in, for example, legislative provisions and legal argumentation. In this view, the writer decides how determinate or indeterminate he wants to be, and this choice may be made on the basis of reasonable arguments.⁷⁹ We find here again the urge to establish rules making interpretation predictable, despite the fact that a degree of indeterminacy has to be accepted.⁸⁰ In this case it is done by making determinacy a question of agreement among language users.

Scrutiny of weaker language approaches to legal argumentation shows that Connectionist modelling backs up post-modernists’ belief that every understanding is an interpretation of a stock of subjective mental models. However, the Connectionist model also allows for situational knowledge chunks to be

75. As opposed to “things not of themselves dangerous.”

76. Olmsted, *supra* note 74, at 7.

77. *Id.*

78. *Id.* at 6–8

79. *Id.* at 1. Similarly, Endicott (based on Hart) says that meanings of linguistic expressions may be best conceptualised as a core meaning and a penumbra; the penumbra being the area of indeterminacy. ENDICOTT, *supra* note 62, at 8–11. Only in penumbra cases is the indeterminacy relevant for legal argumentation, otherwise a sufficient degree of certainty is given for meaning to be indisputable and thus to at least function as determinate. *Id.*

80. *Ordinary Meaning*, *supra* note 27, at 13–18.

planning chunks or dominating chunks. Such chunks of knowledge may be set up by agreement within an interpretive community,⁸¹ thus constraining interpretations within the relevant group of language users. In this way, Connectionism may actually play the part of bridging the gap between the subjectivity of the process of understanding and the objectivity needed of legal interpretation processes in a modern society.⁸² It may thus also build the bridge between more post-modernist approaches and the above mentioned wish to set up ways in which legal interpreters might establish a rule-like ordinary meaning of a word, thereby providing practicing lawyers a practical tool for their decision-making rather than just placing them in the chaos of subjectivity guided by rationality.

III. STATUTORY INTERPRETATION IN THE EU CONTEXT

The characteristics and consequences presented in the previous sections are general characteristics of statutory interpretation. They are particularly important when talking about legal texts in multilingual settings.⁸³ The fact that not just one language and one system of law is implicated, but more languages and more systems of law are involved actually multiplies the problems, as different languages and legal systems may present indeterminacies at different places.⁸⁴ In the remainder of this paper, we shall look at the consequences of the presented models and approaches for describing the process of statutory interpretation in the development of legal notions within a multilingual legal system. First, we shall investigate legal translation (the prerequisite of multilinguality in the EU legal system) in the light of the presented models. This will be followed by a closer look at the argumentation of the Court in the case presented in section 2.1 in light of the presented model, including discussion of the applied principles of Connectionist modeling.

81. As suggested by Olmsted, *supra* note 74.

82. Objectivity stressed by, for example, Professor Solan. *See Ordinary Meaning, supra* note 27, at 13–18; LANGUAGE OF JUDGES, *supra* note 52, at 178.

83. *Ordinary Meaning, supra* note 27, at 2.

84. The EU is made up of twenty-five (including ten new member states) countries and includes Common Law and Civil Code states. Europa, The EU at a Glance, European Governments On-line, at http://europa.eu.int/abc/governments/index_en.htm (last visited Mar. 17, 2004).

A. Translated originals as a characteristic

In the EU system, all official legal documents (for example regulations, directives, and judgements) have official versions in all eleven languages of the Union.⁸⁵ Furthermore, all language versions are seen as being equally authentic.⁸⁶ This characteristic is achieved by translating the original texts into all languages and then declaring all translations to be authentic originals.⁸⁷ For the courts, this procedure means that although all versions have to be treated as originals, in fact the process of translation is a determining factor for statutory interpretation in the EU system. We will therefore start out with a look at the consequences of the weak and Connectionist language views for the process of translation.

The most important consequence for the translation of statutory texts is the impact it has on the object of translation. What has to be translated, i.e., what the translator has to render in the target language, are not words with objectively fixed meanings (specialised terms), but a text meaning constructed through the interplay of a number of linguistic features. These features give rise to agreed, but not fixed, text interpretations among specialist readers.⁸⁸ Every interpretation is inherently subjective, but constrained by the mental models built up by each member of the group through similar experiences during education, training and work in the legal profession.⁸⁹ Thus, the interpretive history of a statute is a line of agreed interpretations based on argued subjective interpretations by the members of the authorised discourse community.⁹⁰ The translator has to render the agreed interpretation at the moment of translation. At the same time, it means that it is possible to give

85. See TREATY OF AMSTERDAM, *supra* note 2, art. 53.

86. *Id.*

87. Anne Lise Kjær, *On Legal Translation in the European Union: Problems of Multilingualism in International Legal Systems*, in SPRACHE, RECHT, KULTUR. ÜBERSETZUNGSSTRATEGIEN IM NEUEN JAHRHUNDERT [LANGUAGE, LAW, CULTURE. TRANSLATION STRATEGIES IN THE NEW CENTURY] 5 (forthcoming 2005).

88. Specialist readers belong to a group with authority to decide fights over meaning, namely lawyers in different functions. LAW AS TEXT, *supra* note 50, at 120.

89. *Id.*

90. *Id.* at 184–86.

multiple correct renderings of the same legal source text, as the agreed interpretation may be expressed in different ways all leading to the same result.

This rendering of the original interpretation may be more or less easy, dependent on the correspondence between source and target legal systems. In cases where so called “comparative concepts” exist,⁹¹ i.e., overarching concepts where one or more specialists in comparative law have asserted the degree of overlap between legal concepts from two or more legal cultures, the translation process is fairly easy for the translator. This ease exists only so long as the translator stays inside areas considered overlapping in the source and target culture.⁹² One could say that what is achieved by establishing a comparative concept is a relative determinacy⁹³ created by agreement among the relevant specialists (if the comparative concept is accepted by more than one legal specialist). A situation in which the comparative concept is identical with all the underlying national concepts, i.e., where there is total overlap between the concepts from source and target culture, is fairly rare. This is true because national interpretive communities rarely include lawyers from multiple legal cultures at the same time (apart from multilingual legal systems like the Belgian or Canadian). Therefore, what the translator may normally hope for is a comparative concept showing partial matches between the source and target concepts and a tendency among the senders of such texts to widen the overlap through international cooperation and through the impact of getting to know interpretations from other legal cultures. In my opinion, comparative concepts as secured matches (albeit partial matches), safeguarded by the discourse community itself in the form of specialists in comparative law, are the ideal raw material to work with for the translator, primarily because of their being rooted in the legal discourse community. Here we see one of the consequences of the presented model for the work of the translator: the translator must not just follow blindly the suggestions of the compara-

91. C. J. P. van Laer, *Comparatieve Begrippen voor Juridische Vertalers* [*Comparative Concepts for Legal Translators*], 3 *TERMINOLOGIE ET TRADUCTION* 65, 66 (1999).

92. *Id.* at 73. This overlap is determined by the specialists in comparative law that are the constituency of the discourse community.

93. *See generally* Olmsted, *supra* note 74.

tive legal specialist, but find out whether the overlap in the interpretations from the source and the target legal culture is relevant for the translation task at hand.⁹⁴ As such, the work of the specialist in comparative law differs from the work of the translator. The legal specialist scrutinizes the interpretations constituting the legal system, whereas the translator finds out what parts of the system are relevant in the concrete situation in order to create a picture similar to the textual interpretation of the source text in the target language and culture.⁹⁵

Thus, we can see that it is the inherent interpretive character of legal communication, as well as any other kind of human communication, that makes translation of legal texts possible. The interpretive character of language makes it possible for a reader in the target culture to interpret a combination of words in a text he recognises as belonging to translated texts that differ from the way he would interpret them in a non-translated text, i.e., without the constraints of the agreed interpretations within the national interpretive community to which he belongs. It is because of this that the reader is able to grasp the different, agreed interpretations and thus learn what the writer of the original text has meant. The fact, that this is possible provides substantial support for the viewpoint propagated here: understanding and interpreting legal texts is not a matter of decoding objective meaning elements, but a creative process involving the use of existing mental models⁹⁶ as well as the inclusion of input from the actual situation.⁹⁷ The hardest task for the translator is to make the target language receiver use the process of modifying a routine or constructing his mental model anew, instead of just relying on his target legal cultural knowl-

94. John E. Joseph, *Indeterminacy, Translation and the Law*, in TRANSLATION AND THE LAW, 8 AMERICAN TRANSLATORS ASSOCIATION SCHOLARLY MONOGRAPH SERIES 13, 34 (Marshall Morris ed., 1995).

95. C. J. P. van Laer, *supra* note 91, at 74. Comparative concepts are also not decisive for a specific translation of legal terms. Not the specialist in comparative law, but the translator decides eventually. Like time and place, the text to be translated and the target group of the translation may be decisive in the evaluation of differences between a source term and a possible target term. *Id.*

96. Including mental models based on agreed interpretations subject to change through argumentative fights over meaning within the discourse community. LAW AS TEXT, *supra* note 50, at 120.

97. *See infra* Part 2.3

edge and his interpretive routines when understanding the source legal culture.⁹⁸

B. The Argumentation of the European Court

The European Court is special in two respects with regard to the translated originals discussed in the previous section. As mentioned, the Court has to work on the basis of translations declared to be originals, which means that they all have equivalent importance when deciding on meaning.⁹⁹ Second, the European Court is an authority with special interest in harmonizing legal meaning.¹⁰⁰ Due to the Court's particular interests and role, it is necessary for the Court to determine one meaning valid for all language versions.¹⁰¹ These two factors have a major impact on argumentation, as we shall see in the following.

Let us now have a closer look at the argumentation of the European Court on translated texts declared to be originals. The argumentation in the case of the British and the Polish trawlers will be treated.¹⁰² The core of the case is the interpretation of the linguistic element describing what trawlers do to fish.¹⁰³ The argumentation of the Court runs as follows:

Secondly, it should be noted that the phrase 'extraits de la mer' or its equivalent is employed in the Greek, French, Italian and Dutch versions of regulation no 802/68 and *is capable of meaning both* 'taken out of the sea' and 'separated from the sea.' Even allowing that the English version, which uses the phrase 'taken from the sea,' has the significance attributed to

98. Wolfgang Mincke, *Die Problematik von Recht und Sprache in der Übersetzung von Rechtstexten [Problems of Law and Language in the Translation of Legal Texts]*, in 77 ARCHIV FÜR RECHTSUND SOZIALPHILOSOPHIE [ARCHIVE FOR LEGAL AND SOCIAL PHILOSOPHY] 446, 456 (Franz Steiner & Verlag Stuttgart eds. 1991). In order to cope with this problem, Joseph suggests that the translator should be noticeable as an author in the text, in the form of comments and stylistically awkward expressions, telling the receiver that he has to be aware of differences and that it is not possible to smoothly render all legal aspects of a source text in a target text written in a different language. Joseph, *supra* note 94, at 33–35.

99. See TREATY OF AMSTERDAM, *supra* note 2.

100. *Id.* § 15.

101. *Id.* §§ 9–15.

102. Case 100/84, Commission v. United Kingdom of Great Britain and Northern Ireland, *supra* note 8.

103. *Id.* § 15.

it by the United Kingdom ('complete removal from the water'), the German version of the regulation employs the term 'gefangen,' meaning 'caught,' as the United Kingdom itself acknowledges, claiming that 'it seems ... to be an inappropriate term to use.'¹⁰⁴

The Court states that comparing the different language versions, three different possibilities are found:

- Two senses are possible, no possibility is excluded ('taken out of the sea' vs. 'separated from the sea') (Greek, French, Italian and Dutch version)¹⁰⁵
- Only the first sense is possible (English version)¹⁰⁶
- Only the second sense is possible (German version)¹⁰⁷

This is a situation in which the different senses exclude each other mutually – there is no sufficient overlap between all senses for it to be possible to determine a common meaning on this basis.¹⁰⁸ This is stated in the argumentation following the quotation above:

Accordingly, a comparative examination of the various language versions of the regulation does not enable a conclusion to be reached in favour of any of the arguments put forward and *so no legal consequences can be based on the terminology used*. Consequently, as the court has held on numerous occasions, in particular in its judgment of 27 October 1977 in case 30/77, *Regina v Pierre Bouchereau* (1977) ecr 1999 in the case of divergence between the language versions the provision in question *must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.*¹⁰⁹

In the first part of the argumentation, the failure of what might be said to be the default principle is stated,¹¹⁰ due to the lack of sufficient overlap between the meanings of *taken from the sea*, *extraits de la mer* and *gefangen*, respectively.¹¹¹ The

104. *Id.*

105. *Id.*

106. *Id.* §§ 13, 15.

107. *Id.*

108. *Id.* §§ 9–15.

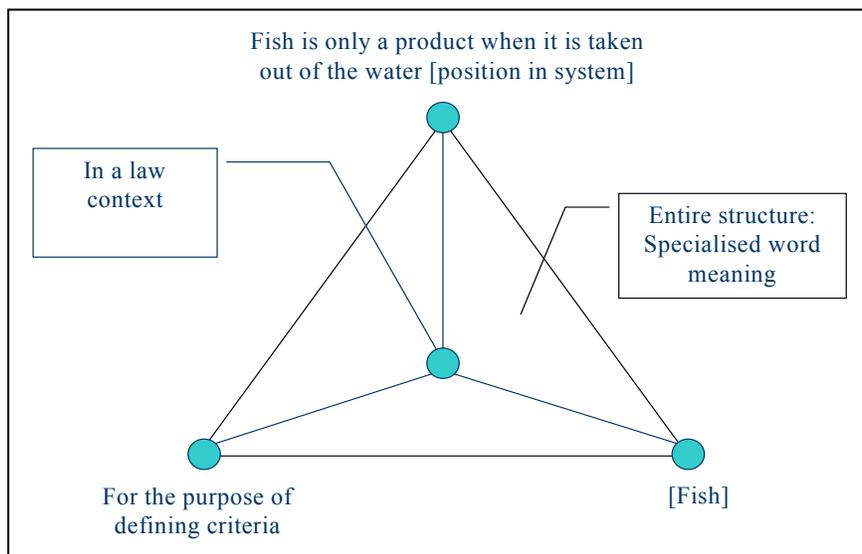
109. *Id.* §§ 16–17 (emphasis added).

110. *Id.* § 15.

111. *See supra* note 15. Using the terms introduced in section 3.1, we could say that the Court establishes a comparative concept in order to find out

Court therefore uses a second principle apt for such a situation, namely the interpretation by reference to the purpose and general scheme of the rules.¹¹² Thus, the Court solves the conflict by creating a new meaning identical in all languages involved, overruling the existing differences in meaning.¹¹³ According to the Court's criteria the result must be in accordance with the purpose of the provision (as seen by the Court) and it must be in accordance with the systematically surrounding notions, i.e., it must not create systematic breaks in the overall legal framework.

If we describe the original English meaning of the disputed lexical element (according to the English government)¹¹⁴ in the regulation in the model presented above, we get the following picture:



where the overlaps or lack of overlaps between the different concepts represented by *extraits de la mere*, *gefangen* and *taken from the sea* are. Email from Conrad van Laer, University of Maastricht, to Jan Engberg, Aarhus School of Business (Jan. 2, 2004) (on file with author).

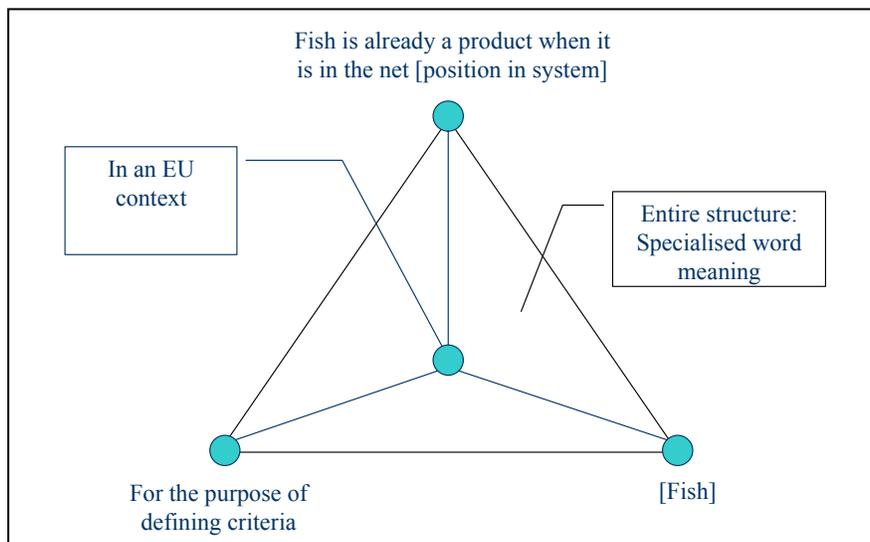
112. Case 100/84, *Commission v. United Kingdom of Great Britain and Northern Ireland*, *supra* note 8, § 18.

113. *Id.* § 15.

114. The English version, which uses the phrase 'taken from the sea,' was interpreted by the UK as complete removal of the fish from water. *Id.* § 15.

This means that when an English lawyer uses the word *fish* for the purpose of defining the criteria for taxation, the declarative knowledge he connects to it is the knowledge that fish is only a product when it is taken out of the water.

The meaning created on the basis of the decision by the Court looks as follows:



This means that consequent to the decision reached by the Court,¹¹⁵ all language versions, including the concept referred to by the English word *fish* when used for the purpose of defining criteria for taxation, *in an EU context* contains the characteristics of being a product when it is in the net of the trawler rather than solely after removal from the water. The Court has set up a new declarative knowledge chunk¹¹⁶ and limited this chunk to the narrower situational context of the EU and not to all legal contexts. The Court does not say anything about what the English word means in general (as in its opinion according to the first citation above there is a clash between the meanings of the different language versions). Instead a new and specialised

115. Case 100/84, *Commission v. United Kingdom of Great Britain and Northern Ireland*, *supra* note 8, § 22.

116. See discussion of “declarative knowledge chunks” *infra* 2.3.1

meaning is created within the limited borders of the Court's "linguistic jurisdiction", *viz.*, the cases influenced by European Law. Generally, it could be a problem to have specialised meanings different from everyday meanings, as this influences the intelligibility of a text and thus of a subject area. However, the development of continental European legal systems like the German system have made it a rule to generally perform these specialisations of meaning in order to cope with the complexity of modern societies.¹¹⁷ In the area of legal communication it is nothing special to alter and specialise word meanings, although it is naturally not an optimal solution to give a lexical element a specialised meaning which has no connection to the way the lexical element is used in other contexts.¹¹⁸

This process is not without critics. A harsh critic of the argumentative procedure described above is the German professor of linguistics Petra Braselmann. She attacks both the idea of all language versions being equal within the EU system (because this creates interpretations problems in which no version may be said to be the original) and the role that teleological interpretation must come to play in such a system.¹¹⁹ Problems here are:

- Different degree of specification in the different language versions (only partial equivalence)
- Differences in the way different languages conceptualise the same action
- The role that teleological interpretation must play in solving the problem¹²⁰

The first two objections have to do with the underlying perception of meaning and the confidence the author has in the

117. LAW AS TEXT, *supra* note 50, at 189–90; Busse, *supra* note 51, at 44–46.

118. Case 100/84, Commission v. United Kingdom of Great Britain and Northern Ireland, *supra* note 8, § 11. According to the British government, that argument was particularly relevant to the case. *Id.*

119. Petra Braselmann, *Der Richter als Linguist. Linguistische Überlegungen zu Sprachproblemen in Urteilen des Europäischen Gerichtshofes [The Judge as Linguist. Linguistic Considerations of Language Problems in Judgements from the European Court of Justice]*, in SPRACHE UND LITERATUR IN WISSENSCHAFT UND UNTERRICHT [LANGUAGE AND LITERATURE IN SCIENTIFIC AND EDUCATIONAL SETTINGS] 71, 81 (1992).

120. *Id.* at 81–82.

possibilities of the human system to create meaning interactively. Her point of view is that problems occur because the different language systems involved have differences in the way they conceptualise the world.¹²¹ These differences result in an equivalence between the different versions which is necessarily only partial, thereby making it impossible after translation to work with such texts as originals. I believe such an interpretation presents word meanings as more fixed and unchangeable than they are in reality. At the same time, it is based on a different and more code-oriented view of translation than the one propagated here: If the original text does not exist as a fixed entity, but only as a temporary agreement among the specialists as to its interpretation, and this interpretation is what the translator has to render in a different language, then naturally this may change over time and have different shapes in different texts due to the different language systems and their different conceptualisation of the world.¹²² Only, a static conceptualisation of linguistic meaning has problems describing this characteristic and acknowledging the process of translation in that way. Therefore, such basic assumptions will tend to lead to the rejection of the possibility of a multilingual legal system. On the other hand, conceptualising meanings the way I have presented above in 2.3.1 (and which seems to be in accord with the way real communication works)¹²³ renders a multilingual legal system, with real multilinguality as its basis, possible. If the meaning of disputed elements of every language have equal potential importance for interpretation, if no wording of one of the versions has the capacity of overruling the others and if meanings are inherently dynamic and sensible to communication, we may actually reach a really multilingual legal system.¹²⁴ The

121. *Id.* at 73, 75, 77.

122. CHRISTIANE NORD, TRANSLATING AS A PURPOSEFUL ACTIVITY: FUNCTIONALIST APPROACHES EXPLAINED 31–33 (1997); Jan Engberg, *Legal Meaning Assumptions – What are the Consequences for Legal Interpretation and Legal Translation?*, 15 INT'L J. SEMIOTICS L. 375, 385 (2002).

123. Herrmann et al., *supra* note 38, at 127.

124. Anne Lise Kjær, *A Common Legal Language in Europe?*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW IN THE LIGHT OF EUROPEAN INTEGRATION 396–397 (Mark van Hoecke ed., 2004). Kjær reaches a similar conclusion, stating that multi-lingual legal discourse with common legal texts is possible and may gradually “create a basis for a legal discourse across the different legal cultures and different languages of Europe.” *Id.*

practical viability of such a system is a different topic that I shall not touch upon here, but as long as the European Union upholds the idea of multilinguality as the ideal of the cooperation, this is the only possible solution. In my view only a weak language theory like those presented above in 2.4 may adequately describe why the system works today and why it may develop in the intended direction.

Braselmann's third objection is to the role of the interpreting judge in statutory interpretation. To Braselmann, statutory interpretation in a multilingual context is only possible with undue recourse to teleological interpretation, which is problematic because of its subjectivity.¹²⁵ She believes it would be better to use principles more closely linked to the wording of the statutory texts. However, this presupposes a strong view of language that is difficult to coordinate with what we find when we investigate actual human conversation. Because understanding is the root of statutory interpretation, and because understanding can only be performed as a subjective process with intersubjective control procedures, every interpretation is and must be subjective in its basis. Furthermore, every interpretation is a decision between alternatives.¹²⁶ The important thing in order to guarantee control with the development is the explicit presentation of the arguments.¹²⁷ Indeed, subjectivity is a potential problem, but one that we cannot get rid of by going back to the words and their literal meanings. This is not feasible, as the words have to be interpreted by humans in a subjective process in order to acquire meaning. The problem has to be solved by taking the necessary subjectivity seriously and presenting the argumentative process behind the subjective process.

IV. CONSEQUENCES AND CONCLUSIONS

What I have said and found may be summarised in the following three points:

- Statutory communication and statutory interpretation as a specific kind of understanding may be best conceptualized as subjective interpretation on the basis of (partially institutionally) agreed meaning constraints, a number of explicit inter-

125. Braselmann, *supra* note 119, at 82.

126. Olmsted, *supra* note 74, at 2.

127. *Id.* at 9.

pretation principles and a number of primarily written sources.

- Practical statutory interpretation in a multilingual EU context actually does not merely look for the meaning which words or phrases in the interpreted texts are normally connected with (the ordinary meaning), but through communication in the group of specialized lawyers statutory interpretation in this context is at times equivalent to combining knowledge chunks in a new way in the light of shared and agreed interpretations.
- Teleology plays a major part in such an approach, which is more strongly the case in an EU context but also necessarily the case in more word oriented interpretation. This is a consequence of the dynamic and interpretive nature of linguistic meaning, and it is a prerequisite for the efficient functioning of a legal system.

The question is now what these results mean for prospects of a multilingual legal system like the European Union.¹²⁸ It is a given fact, underscored by the branch of linguistics known as “Linguistic Relativity,” that what one language system conceptualizes in one way is not conceptualised in the same way in all (or even in any) other language systems.¹²⁹ This is especially true of legal terminologies at a system level. This fact has led some scholars to postulate that it is impossible for EU statutes to ever be read and interpreted in the same way in eleven different languages. For example, the Danish linguist specializing in legal integration, Anne Lise Kjær, originally argued that it would be impossible to achieve a situation in which every one from Helsinki, Finland to Athens, Greece interprets EU statutory texts in the same way — in the light of eleven languages and fifteen different legal systems — because natural language words are filled with historically grown meaning that may not just be taken away and substituted by new meaning.¹³⁰

Such arguments are true to a certain extent, but the important factors are the time limits we set up for the process and the

128. *See supra* note 2.

129. A good overview of Linguistic Relativism is given in JOHN J. GUMPERZ & STEPHEN C. LEVINSON, *RETHINKING LINGUISTIC RELATIVITY* (1996).

130. Anne Lise Kjaer, *Ret og Sprog i EU: Mangfoldighed, Sprogforbistring – og Graenser for Integration? [Law and Language in the EU: Diversity, Confusion – and Limits to Integration?]*, in RETFAERD [JUSTICE] 4, 14 (1998).

kind of process we suggest for reaching the goal. As I have tried to show, stability of legal meaning found in a national context presupposes a certain division of labour between those with authority and those without: Legal concepts within a national legal system are stable because only a limited group of specially trained experts (primarily the judges) have the authority to decide what legal words mean. At least in the German legal system, it is unlikely that every citizen without training or instruction would, e.g., interpret statutes the way lawyers have agreed to interpret them.¹³¹ So maybe the necessary level to reach for a legal system to be valid and efficient is not that every person interprets all texts in the same way *without talking to anyone*, but only that nearly every lawyer immersing himself or herself into the relevant communication process *may be convinced* that a certain interpretation is sensible. In other words, the criterion is whether agreement on an interpretation may be established among the authorized experts in a clear way, not whether every one would arrive at the same interpretation in all situations.¹³²

If we look at the case described above in these terms, it means the lexical entity from the different language versions describing what trawlers do to fish will not automatically be interpreted in the same way, as the underlying language systems are different in the way they conceptualise this process (as shown in the argumentation by the European Court¹³³). One could say that even the ordinary meaning¹³⁴ is not identical across languages and systems. Thus, the criterion for fish to be products from a taxation perspective will differ according to the language version used. If identical ordinary meaning were the ideal of the European Union, development of a multilingual legal system would probably be virtually impossible due to the underlying differences in the language systems. What is possi-

131. Karin Luttermann, *Wie Lang ist Lebenslang? Juristische Definitionssemantik und Allgemeiner Sprachgebrauch [How Long is Lifelong? Legal Definitional Semantics and Everyday Language Use]*, 27 DEUTSCHE SPRACHE [GERMAN LANGUAGE] 236, 245 (1999).

132. As will have become clear from the quotation in note 124, Kjær has come to the same conclusions in her recent work. Kjær, *supra* note 130.

133. Case 100/84, *Commission v. United Kingdom of Great Britain and Northern Ireland*, *supra* note 8, § 15.

134. *See supra* Part 2.4.

ble, however, is to set up a legal institution and equip it with a semantic power that makes it possible to *create* identical meanings on the basis of input or on the basis of what meaning seems most sensible in the light of the overall purpose of the statute.

The creation of meaning through a decision of the Court does not guarantee that the interpretation (and thus this new meaning of the words used) will be generally accepted in the different states belonging to the EU. The decision of the Court in the cited case does not in itself guarantee that the British government is convinced. What the Court does, in linguistic terms, is to take advantage of its authority to decide meanings within its limited context. Whether the Court's interpretation and newly created meaning are successful depends on the degree to which the argumentation of the Court is convincing and therefore accepted first by lawyers in this field and later by other fields of law and by other English speakers. This process of widening the acceptance of a proposed interpretation is only possible via communication and argumentation. It presupposes an open mind on all sides of the communication, including the possibility of convincing the Court that their new meaning is not a good solution. Then again, this is the way meaning develops in all other contexts, so it is probably also a viable solution for the development of a legal system based on specialised word meanings.

A common European law may actually come about, not by dictating meanings, but by immersing the authorized specialists into communicative argumentation based on convincing purpose oriented arguments and gradually creating the necessary common cognitive basis among lawyers working in the field. This is to a certain extent revolutionary (as it challenges the idea of the Rule of Law as an overall principle of the legal system) and it will take a long time before the process has reached a stage where it can work without much communication. Yet, I consider it to be the most viable way if we want to keep the European Union as a multilingual legal system, one in which diversity and the meaning potential of many languages are sources for new insights for those engaging in the communicative game. And it is Constructionist models that show why the human language processing system is able to work this way.

LEGAL LINGUISTIC KNOWLEDGE AND CREATING AND INTERPRETING LAW IN MULTILINGUAL ENVIRONMENTS

*Tarja Salmi-Tolonen**

INTRODUCTION

The last two decades have witnessed what has come to be known as a *linguistic turn* in a number of disciplines. The fact that Brooklyn Law School has a Center for the Study of Law, Language and Cognition is evidence that the importance of language and the need for linguistic knowledge is recognized in law, as particularly proven by Professor Solan in his publications.¹ In this article I attempt to cast light on the interplay between language and law in legal discourse. This I will do basically in the Finnish and European context.

I see law and all legal activity as communication and I call my approach proactive. This designation draws on the approach to preventive law taken by a group of Finnish researchers and legal practitioners known as *proactive law*.² The aim is to emphasize the options lawyers have in helping their clients

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1. I would particularly like to mention LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993); LAWRENCE M. SOLAN, *Ordinary Meaning in Legal Interpretation*, in POHJOIS-SUOMEN TUOMARIKOULU [The Judicial Academy of Northern Finland] (2001).

2. See, e.g., ENNAKOIVA SOPIMINEN [Proactive Contracting] (Soile Pohjonen ed., 2002) (an English edition of this book, complemented with new articles by U.S. legal scholars, is in preparation and forthcoming). See also SOILI NYSTÉN-HAARALA, *LONG-TERM CONTRACTING: CONTRACT LAW AND CONTRACTING* (1998); Seminar: *Future Law, Lawyering, and Language: Helping People and Business Succeed* (May 12-13, 2003), organized by the Research Project of the Academy of Finland, The University of Lapland Website, at <http://www.ulapland.fi/?deptid=13095>.

not just to avoid conflicts, but also to enable them to succeed in their undertakings. The first and foremost purpose of legal linguistics is to look forward and see how linguistic methods can help legal professionals at the various stages of their careers.

Although the importance of language and the fact that law and language are intertwined has been acknowledged by legal scientists and practicing lawyers,³ the benefits that linguistics and linguistic methods offer have not yet been realized to their fullest potential. Research and development of linguistic investigation has mostly been overlooked and is sometimes misunderstood despite the impressive body of research published over the years.⁴ Perhaps one reason for this result is an insufficient operationalization of the findings. I will mention some points that I believe to be misconceptions as the paper develops.

It has been said that both law and words are mysterious. We need to demystify them both. Some of the concerns in interpreting statutes in a foreign legal context involve the invisible⁵ and opaque⁶ parts of the relevant legislation. These concerns are

3. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961); V.K. Bhatia, *Cognitive Structuring in Legislative Provisions*, in *LANGUAGE AND THE LAW* 136–55 (John Gibbons ed. 1994); F. BOWERS, *LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION* (1989); DENNIS KURZON, *IT IS HEREBY PERFORMED...EXPLORATIONS IN LEGAL SPEECH ACTS: PRAGMATICS & BEYOND VII* 6 (1986); Tarja Salmi-Tolonen, *On Some Syntactic Features of European Community Law English*, in *FROM OFFICE TO SCHOOL: SPECIAL LANGUAGE AND INTERNATIONALISATION* (C. Lauren & M. Nordman eds., 1989) [hereinafter Salmi-Tolonen, *On Some Syntactic Features*].

4. See Salmi-Tolonen, *On Some Syntactic Features*, *supra* note 3.

5. By invisibility I mean the hierarchy of norms in a given legal order, as is demonstrated in the international arbitration context. For instance, it is not visible at the outset that in Finland several norms and provisions have to be taken into consideration while interpreting the Finnish Arbitration Act 1992. See generally Statute Book of Finnish Law, available at <http://www.finlex.fi/com>.

6. An example of opaqueness can be found in the Arbitration Act §10:

An arbitrator may be challenged by a party, if he would have been *disqualified to handle the matter as a judge, or if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.*

Finnish Arbitration Act 1992 (emphasis added). The implicit reference here is to Section 13 of the Code of Judicial Procedure, which specifies the provisions for disqualifying judges. The *travaux préparatoire* do not enlighten us as to what practical significance this amendment has to arbitrators' disqualification or other circumstances that could cause justifiable doubts as to make them

also closely related to the choice of law and/or language. International arbitration is a good illustration of this relationship.⁷ If we presume that invisible and opaque parts in statutes exist, it logically follows that there are also parts of legislation that are transparent and open to interpretation.

The structure of the presentation will be as follows: First, in Section I, I will provide a short description of legal linguistics and detail its potential use in statutory interpretation. In Section II, I will try to cast some light on the situation as it exists in Finland, a bilingual country. I will briefly explain the development, background and context of Finnish legislation, including its judicial and legal language. Section III discusses issues that exist in a supranational setting. Section IV will discuss issues that arise under international law. All these issues will be discussed from both the point of view of legal linguistics and a civil law country and either a bilingual or multilingual legal environment.

I. LEGAL LINGUISTICS

The purpose of legal linguistics is to study the language of the law, in all its forms,⁸ and its development and usage in order to create new knowledge of the interplay between language, law and society. This body of knowledge should grow through sys-

partial or dependent. See Tarja Salmi-Tolonen, *Invisibility-Opaqueness-Transparency: Clearing Vision in the Context of Arbitration*, a paper read at the Law and Language in International Arbitration, A GILD-MMC International Conference, October 2-4, 2003, City University of Hong Kong (on file with Author). For a discussion on the hierarchy of laws in Finland, see Pekka Timonen, *Sources of Law and Material on Sources of Law*, in AN INTRODUCTION TO FINNISH LAW (J. Pöyhönen ed., 2002) (on file with Author).

7. Finland has filed declarations under Articles 92 and 94 of the Convention on Contracts for the International Sale of Goods (CISG); therefore, where the Finnish Commercial Code and CISG apply, Finland is not bound by Part II of the Convention (Formation of the Contract). If, however, a Finnish company enters into a contract with, say, a French company and they agree that French law applies, the parties would be bound by Part II of the CISG, since France has made no declarations or reservations. See Pace Law School Institute of International Law, CISG Database, at <http://cisgw3.law.pace.edu/cisg/countries/cntries-Finland.html>.

8. See Dennis Kurzon, *Language of the Law and Legal Language*, in SPECIAL LANGUAGE: FROM HUMANS THINKING TO THINKING MACHINES 283-90 (Christer Laurén & Marianne Nordman eds., 1989) (discussing terminology).

tematic academically approved methods; only then can it proactively serve in legal training and society in general.

A. Popular Misconceptions

Statutes and other subgenres of legal language are often required to comply with standards such as unambiguity, clarity and comprehensibility. These requirements, at least in Finland, are repeated again and again, especially in the guidelines given to drafters.⁹ What is harder to find is an attempt to operationalize these requirements. All three – unambiguity, clarity and comprehensibility – are subjective qualities which depend on the given audience. I will discuss each of these requirements in turn and try to cast some light on the issues.

In the 1970s, broad-based criticism resulted in revisions of public and administrative language use in Finland and elsewhere in Scandinavia.¹⁰ Since then, membership in the EU and the general juridification¹¹ of society, or an elaboration of the substance of law, have brought along new problems.¹² In the case of Community Law, overworked translators often receive the blame for incomprehensible texts.¹³ Occasionally this criti-

9. See, e.g., DEPARTMENT OF JUSTICE, LAINLAATIJAN OPAS [Guidelines for Legal Draftsmen] (1996).

10. Cf. KIELI JA VIRKAKONEISTO, VIRKAKIELIKOMITEAN MIETINTÖ [COMMITTEE MEMORANDUM: LANGUAGE AND PUBLIC OFFICE, MEMORANDUM OF THE LANGUAGE IN PUBLIC OFFICE COMMITTEE] (1981). This committee's assignment was to propose how the comprehensibility of the documents, decisions and other texts given by civil servants to the general public could be improved. *Id.*

11. See generally Hanneke van Schooten, *Instrumental Legislation and Communication Theories*, in SEMIOTICS AND LEGISLATION: JURISPRUDENTIAL, INSTITUTIONAL AND SOCIOLOGICAL PERSPECTIVES 185–211 (Hanneke van Schooten ed., 1999).

12. A welfare state, even a Nordic welfare state, very open and free in principle, is by definition an “intervention” state. Intervention in this case is both quantitative and qualitative. It has become necessary to regulate areas of people's lives which in a democracy would otherwise be left for self-regulation, for the purposes of executing the distributive law. Cf. *supra* note 11.

13. Aino Piehl, *The Influence of EC Legislation on Finnish Legal Language: How to Assess it?*, in THE DEVELOPMENT OF LEGAL LANGUAGE (Heikki Mattila ed., 2002); PIRJO KARVONEN, SUOMI EUROOPPALAISessa KIELIYHTEISÖSSÄ (1996); KOULUTUS-JA TIEDEPOLITIIKAN LINJAN JULKAISUSARJA NRO 42. OPETUSMINISTERIÖ, HELSINKI [FINLAND IN THE EUROPEAN LANGUAGE COMMUNITY. EDUCATION AND SCIENCE POLICY PUBLICATIONS. No. 42.].

cism may be justified, but more often than not, the criticism is misdirected for reasons, which to my mind, spring from the lack of understanding of the complex interplay between different sources of knowledge.

The quality of draft bills hit the headlines once again in Finland at the beginning of the year 2003.¹⁴ The President of the Republic, Mrs. Tarja Halonen, had already reopened the discussion in her presidential address at the opening of the 2001 annual session of Parliament on February 2, 2001¹⁵ by pointing out that ambiguously written laws may jeopardize citizens' basic rights. When Parliament¹⁶ was finishing its work before the forthcoming parliamentary election in March 2003, the Parliamentary Spokeswoman, Mrs. Uosukainen,¹⁷ reprimanded the ministries because of the poor quality of legal writing.¹⁸ This resulted in Parliament having to rewrite the texts in its sessions.¹⁹ Mrs. Uosukainen referred in particular to the motor vehicle tax law that was hurriedly passed before Parliament was dissolved.²⁰

14. Martta Nieminen, *Uosukainen: Drafting Laws at the Ministries is of Poor Quality*, HELSINGIN SANOMAT, Jan. 10, 2003, at A6 (explaining that it is unacceptable that Parliament has to rewrite the laws and that Uosukainen demands that the problem be made an issue at the negotiations for the new government).

15. Mrs. Halonen said: "Nevertheless, the increased volume of legislation has justified our asking whether laws give citizens a clear picture of their rights. The Parliamentary Ombudsman has on numerous occasions drawn attention to the obfuscatory text of legislation, something that can easily lead to a loss of entitlements. Especially those laws that apply to us all should be couched in such clear language that they can be taught to young people, even at school." Address by President of the Republic Tarja Halonen at the Opening of the 2001 Annual Session of Parliament on Feb. 2, 2001, available at <http://www.presidentti.fi/netcomm/news/showarticle.asp?intNWSAID=9590&LAN=ENG&intSubArtID=6243>.

16. Parliament is a unicameral body whose main function is to pass legislation. See Parliament of Finland Website, Parliament as a Legislative Body, at http://www.eduskunta.fi/efakta/esite/englanti/eesit_03.htm. See also The Ministry of Justice website, at <http://www.om.fi/711.htm>.

17. Mrs. Uosukainen has a degree in Finnish language and was a teacher of Finnish before she embarked on a political career. See Virtual Finland Website, Election 2000, at <http://virtual.finland.fi/elections/president2000/english/uosukainen.html>.

18. Cf. Nieminen, *Drafting Laws*, *supra* note 14.

19. Cf. *id.*

20. The New Act was necessary for implementing EC legislation. The issue was the cause of much public discussion because the motor vehicle tax in

The discussion continued and several members of the judiciary took part in it, among them the President of the Supreme Administrative Court.²¹ The Ministry of Justice claimed that written laws were ambiguous because the drafters were young, the schedules were tight, and drafting was not taught at the universities.²² A committee was then set up to make suggestions for improving the quality of drafting.²³ To my mind, no committee can necessarily improve the quality of drafting unless the relationship between language and the law is better understood.²⁴ In Finland, unlike in Canada, translators or other

Finland has been very high and consequently purchasing a vehicle is very expensive. For an example of a recent case on the motor vehicle tax, see Case C-101/00, *Tulliasiamies v. Siilin* (Sept. 19, 2002), available at <http://curia.eu.int/jurisp/cgi-bin/form.pl?>

21. Teuvo Arolainen, *The President of the Supreme Administrative Court Reprimands Legal Drafters*, HELSINGIN SANOMAT, January 7, 2003.

22. *Id.* See also Jukka Perttu, *Rissanen: Drafting Must be Improved*, HELSINGIN SANOMAT, January 14, 2003, at A6. Mrs. Kirsti Rissanen LL.D., as Permanent Secretary to the Minister of Justice, manages the work at the Ministry. Mrs. Rissanen is annoyed with the criticism directed at legal drafting. She argues for the establishment of a new checking point for the bills drafted and suggests that legal drafting should be taught at law schools. In the author's experience, optional courses are organized and taught by experienced drafters from the ministries. For example, Professor Matti Niemivuo of the University of Lapland has for years worked as a legislative counsel at the Ministry of Justice and has taught courses in legal drafting at the University of Lapland, Faculty of Law. However, even if drafting is learned by apprenticeship, what is true for other skills is true for drafting: without knowledge there is no skill. It should also be noted here that the Finnish basic law degree, the LL.M., at present takes on average six years to complete and provides similar qualifications to all students. Most graduates take a year's trainee period at the district court (the court of first instance); the students can then add training on the Bench after their LL.M. At present, a degree reform, often referred to as the Bologna process, is being planned in all European Union Member States and will bring a two-tier (3-year bachelor's plus 2-year master's) degree to Finnish Universities; this will also include law degrees. See Doug Payne, *The Bologna Process: The Slow Path to a European Higher Education Area*, *The ELSO Gazette*, Issue 17 (December 2003), at <http://www.the-also-gazette.org/magazines/issue17/features/features3.asp>.

23. PAREMPAAN LAINVALMISTELUN SUUNNITTELUUN JA JOHTAMISEEN, KANSLIAPÄÄLLIKKÖTYÖRYHMÄN KEHITTÄMISEHDOTUKSET, VALTIONEUVOSTON KANSLIAN JULKAISUSARJA, AUG. 2003 [TOWARDS BETTER PLANNING AND MANAGING OF DRAFTING BILLS, HEADS OF DEPARTMENTS' PROPOSALS, PRIME MINISTER'S OFFICE'S PUBLICATIONS AUG. 2003], available at <http://www.vnk.fi/>.

24. According to Markku Tyynilä, Head of Office at the Ministry of Justice, improving the quality of draft bills is an ongoing project. A committee estab-

language experts are not invited to join in at any stages of the drafting process.²⁵ This means that the linguistic expertise of the ministries is neither recognized nor put to use in its full capacity. In other words, even in a bilingual country the co-drafting principle is not observed.²⁶

Clear, unambiguous, comprehensible statutory writing is the ideal often mentioned. The qualities required are qualities of language. However, if language is seen as separate from the content of the provisions, a finishing coat of polish to be added afterwards, we do not have much hope in the near future. Revision alone does not guarantee lucid laws.

Proactive work is needed in order to clarify and demystify language and law. However, this clarification is possible only if we understand that the connection between language and legal reality is epistemic. In order to understand and ask relevant questions about this common epistemological ground, it is necessary to cross traditional boundaries between disciplines. David Mellinkoff's seminal work,²⁷ first published in 1956, lists the features that allegedly cause comprehension difficulties in English statutory language.²⁸ Those features are well known to the readership and I will not go into them in detail, but will discuss some that I consider more or less universal in the Western legal languages.

1. Long Sentences

Long sentences imply complex syntactic structure with several main and subsidiary clauses. It is true that sentences in legal texts are longer than in other text types.²⁹ However, the

lished on Oct. 26, 2001, chaired by Tyynilä, handed in new guidelines for ministries for drafting government proposals. See The HELO Committee Report on Sept. 15, 2003, available at <http://www.om.fi/21716.htm>.

25. A legislative counsel at the Ministry of Justice confirms this result. See Sten Palmgren, *Legal Swedish and Legal Finnish*, in THE DEVELOPMENT OF LEGAL LANGUAGE: PAPERS FROM AN INTERNATIONAL SYMPOSIUM HELD AT THE UNIVERSITY OF LAPLAND, 153–63 (Heikki Mattila ed., 2000).

26. Cf. SUSAN ŠAR EVI, NEW APPROACH TO LEGAL TRANSLATION (1997).

27. See generally DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963).

28. See *id.* at 399–454.

29. See C.L. Barber, *Some Measurable Characteristics of Modern Scientific Prose*, in CONTRIBUTIONS TO ENGLISH SYNTAX AND PHILOLOGY 21–43 (Frank Behre ed., 1981). See also Marita Gustafsson, *Some Syntactic Properties of*

length of statutory sentences serve certain purposes.³⁰ There are rhetorical and functional reasons for the structure of the sentences.³¹ Despite these justifications for longer sentences in legal texts, one must inquire whether shorter sentences may be more beneficial. However, a number of studies³² have shown that a syntactically simple structure is always connected to complex semantic content and high lexical density and therefore may support the argument of the necessity of the long sentence.³³ High lexical density refers to a large number of content words and terms of art, denoting specialized concepts.³⁴ Consequently, there is very little redundancy in the text which makes the meaning hard to process. Form and function are inseparable and therefore legislative texts cannot be improved merely by decreasing the number of words per sentence.

Professor Gunnarsson conducted an interesting experiment of a kind which, as far as I know, has not been repeated since.³⁵ To give a brief summary of her study, she gave a rather complex piece of legislation, the Act on the Joint Regulation of Working Life, to a test group first to read and then to act upon. She found that the text surface did not affect the functional comprehensibility. The results showed that the variable that most affected the results was not the complexity of the text but the

English Law Language, in PUBLICATIONS OF THE DEPARTMENT OF ENGLISH, THE UNIVERSITY OF TURKU No. 4 (1975).

30. For instance, sentences are autosemantic minitexts that are coherent and thus help the reader to connect related provisions. See Salmi-Tolonen, *On Some Syntactic Features*, *supra* note 3. For a discussion on the concept of minitexts, see J.E. GRIMES, *THREAD OF DISCOURSE* (1975).

31. See, e.g., V.K. BHATIA, *AN APPLIED DISCOURSE ANALYSIS OF ENGLISH LEGISLATIVE WRITING* 26–32 (1983).

32. See, e.g., M.A.K. HALLIDAY & RUQAIYA HASAN, *LANGUAGE, CONTEXT, AND TEXT: ASPECTS OF LANGUAGE IN A SOCIAL-SEMIOTIC PERSPECTIVE* (Oxford 1989) (1985).

33. See generally M.A.K. HALLIDAY, *AN INTRODUCTION TO FUNCTIONAL GRAMMAR* (1985); M.A.K. HALLIDAY & RUQAIYA HASAN, *COHESION IN ENGLISH* (1976).

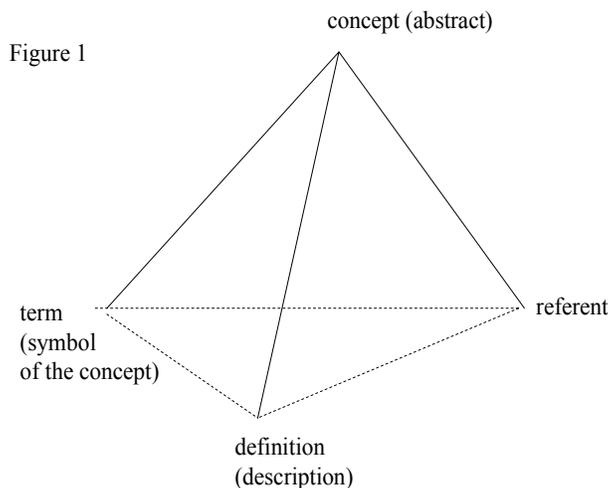
34. See *A Brief Introduction to the Work of M.A.K. Halliday and Systemic-Functional Linguistics*, at <http://language.la.psu.edu/tifle2002/halliday.html> (“Lexical density is the ratio of lexical, or content, items to grammatical items in a text; it’s a measure of information density. The more words that carry content and terms of art that denote specialized concepts, the higher the lexical density is, and less redundant the text.”).

35. B.L. GUNNARSSON, *FUNCTIONAL COMPREHENSIBILITY OF LEGISLATIVE TEXTS: EXPERIMENT WITH A SWEDISH ACT OF PARLIAMENT* 71–105 (1984).

previous amount of knowledge and experience the test group had.³⁶ Similar kinds of results have been drawn from testing technical instructions and manuals.³⁷

2. Lexical Semantics

Generally, lexical semantics is the study of words and their meanings. In this Article, I will discuss lexical semantics with respect to words in legal texts. It goes without saying that terms of art and linguistic symbols of concepts in a special field have a special meaning, which is clearly defined within the special field in question. A tetrahedral figure used in terminology work, for instance, illustrates and clarifies the arbitrary relationship between an abstract concept, its term or designation, its definition and the external real world object, if any.



The dashed lines indicate that the connections are arbitrary. The connections between the abstract concept which exists only in the mind and the real world referent and the linguistic symbol are arbitrary and are based on agreement or consensus.³⁸

36. *Id.* at 91–99.

37. See, e.g., LEENA SALMI, DOCUMENTS MULTILINGUES POUR LOGICIELS ET UTILISABILITÉ [MULTILINGUAL DOCUMENTS FOR SOFTWARE AND USABILITY] (2003).

38. This concept of the arbitrary relationship between a word and its meaning and referent has been ascribed to Ferdinand de Saussure, a Swiss

What is often forgotten in lexical semantics is that language is not separate from its users and the communicative situations. Meaning is more a consequence of words and phrases than of their inherent quality.³⁹ Moore and Carling point out that words are not containers, whose contents are transferred unaltered from one person to another.⁴⁰ The interpreters do not get information from an expression as such but use the expression in order to have access to information and knowledge they already possess. Thus, the purpose of language is to draw the meaning out of the interpreter. The interpretation and meanings are therefore always to some extent subjective.

An illustrative case in Finland concerned the Supreme Court's decision on the meanings of the words 'tool', 'implement' and 'instrument' (*työkalu* or *työväline* in Finnish).⁴¹ The basic question was whether a motor vehicle was a taxi driver's tool. According to the Execution Act, Chapter 4, Section 5, Subsection 1:3, the debtor's necessary tools shall be exempt from seizure irrespective of their value.⁴² Therefore, the question was whether the taxi driver's motor vehicle was such a necessary tool. The Supreme Court repealed the decisions of the District Court and the Court of Appeal who had come to the same conclusion and ordered the vehicle to be returned to the taxi driver. The Supreme Court ruled that a vehicle was indeed a taxi driver's 'tool,' despite the interpretation by the execution officer (who had seized the taxi driver's vehicle due to unpaid taxes). The Supreme Court justified its decision by stating that the amount of back taxes was so excessive that it was not possible for the taxi driver to earn that amount of money even if he had the vehicle. The value of the car was nowhere near the amount of money needed to cover his back taxes, but the decision of the execution officer was to stay in force.

linguist, and his famous work, *COURS DE LINGUISTIQUE GÉNÉRALE*, published posthumously in 1916.

39. TERENCE MOORE & CHRISTIE CARLING, *LANGUAGE UNDERSTANDING: TOWARDS A POST-CHOMSKYAN LINGUISTICS* 11–12 (1982).

40. *Id.*

41. KKO: 2001:100 (Oct. 10, 2001). The Supreme Court is the court of last resort in Finland. See *CODE OF JUDICIAL PROCEDURE, THE STATUTE BOOK OF FINLAND*, available at <http://www.finlex.fi/lains>.

42. See *Statute Book of Finland, The Execution Act*, chpt. 4, §5(1:3), available at <http://www.finlex.fi/lains>.

In a more recent case, *Mikopa Oy and Turvaaura Oy vs. Suomen Autokatsastus Oy*,⁴³ the Supreme Court will have to resolve whether “safety groove”⁴⁴ was a general noun or a proper name. If it were a proper name, it would then be a protected trademark.⁴⁵ In 2001 in *Suomen Autokatsastus Oy vs. Turvaaura Oy* before the Market Court, the respondent, Turvaaura Oy who held a patent to the method, had in their marketing campaign referred to the misleading marketing of competitive products and the results of misuse the respondent had obtained in their testing of the product. The advertisement mentioned the product “Prosecur-urat” which is the product Suomen Autokatsastus Oy sells. The government owned company, engaged in statutory motor vehicle inspection and testing,⁴⁶ and Turvaaura had previously worked in cooperation and Autokatsastus had marketed the product in this manner prior their separation. The Market

43. Mikopa Oy & Turvaaura Oy vs. Suomen Autokatsastus Oy, MT:2001:012 (Aug. 6, 2001), available at <http://www.oikeus.fi/markkinaoikeus/tulostus/11467.htm>. Leave to appeal has been granted by the Supreme Court S2002/841 according to the registrar of the Supreme Court (April 29, 2004).

44. *Turvaaura* [safety groove] is a Finnish innovation involving the grinding of grooves three millimetres deep into the glass of a car windscreen, which helps keep the windscreen wipers clean by knocking off snow, ice, and other particles each time the wipers pass over them. See Tuomo Pietilainen, *The Supreme Court Will Rule on the Use of the Word Turvaaura' (safety groove)*, HELSINGIN SANOMAT, Aug. 19, 2003.

45. See Mikopa Oy & Turvaaura Oy vs. Suomen Autokatsastus Oy, MT:2001:012 (Aug. 6, 2001), available at <http://www.oikeus.fi/markkinaoikeus/tulostus/11467.htm>.

46. For a discussion of motor vehicle inspection and testing, see The Statute Book of Finland, Decision of Ministry of Transport and Communications on Licenses for Roadworthiness Tests for Vehicles, 202/1999, Finnish Legislation Online Data Base, available at <http://www.finlex.fi/lains>. The inspection is operated by government-owned Finnish Motor Vehicle Inspection Ltd. and independent licensed operators. Motor Vehicle Act 1090/2002, ch. 6, § 53. The annual vehicle inspection is a regularly performed inspection of registered motor vehicles, in which the general condition of the vehicle and any information recorded in the vehicle registration are examined. The annual inspection date for vehicles and trailers over 3,500 kg in total weight is determined by the date taken into use as recorded in the vehicle registration. See The Government Decree on the Roadworthiness Tests for Motor Vehicles 1245/2002, The Finnish Vehicle Administration AKE, available at <http://www.ake.fi>. Vehicle registration is based on the Road Traffic Act 267/1981 (last visited Apr. 2, 2004); Motor Vehicle Registration Act 1100/1998; and Motor Vehicle Registration Decree 1598/1995, available at <http://www.finlex.fi/lains> (last visited Apr. 2, 2004).

Court found that Turvaura Oy had not proven that Autokatsastus had advertised in such a manner that would constitute a breach of competition laws and whether it misused the protected trade mark.⁴⁷ The Market Court decided in favor of the claimant because the respondent had used allegations in its marketing which were against good business manner.⁴⁸

The owner of the protected trademark also took the case to the District Court of Helsinki and appealed to the Court of Appeals after the District Court's decision that the trademark had deteriorated to the extent that it had become an everyday word instead of a proper name.⁴⁹ The Court of Appeals did not change the decision and the owner then applied for and was granted leave to appeal to the Supreme Court.⁵⁰ An interesting feature here is that the District Court in its justification relied strongly on the fact that the word "turvaura" had been entered into the Finnish Language Basic Dictionary⁵¹ in 1994.⁵²

Often, as in this case, it is not a term, not even a legal term, or the linguistic symbol of a special field concept, but a word, the linguistic symbol of a general language concept, that is interpreted by a court. In *Turvaura*, in a manner of speaking, the Supreme Court will have to decide whether the linguistic symbol is a word or a term. As was mentioned above, the answer is in the usage of the symbol. If it is used in a restricted special field context with a strictly defined meaning, it is a term.

47. Mikopa Oy & Turvaura Oy vs. Suomen Autokatsastus, Oy, MT:2001:012 (Aug. 6, 2001).

48. Market Court rulings in competition and public procurement cases are subject to appeal to the Supreme Administrative Court. In market law cases, the procedure is governed by the provisions of the Act on Certain Proceedings before the Market Court and the Code of Judicial Procedure. Market Court rulings in market law cases may be appealed to the Supreme Court if the latter grants leave to appeal. See The Statute Book of Finland, The Market Court Act, available at <http://www.finlex.fi/lains>.

49. See Mikopa Oy & Turvaura Oy vs. Suomen Autokatsastus Oy, MT:2001:012 (Aug. 6, 2001).

50. *Id.*

51. SUOMEN KIELEN PERUSSANAKIRJA OSA II (Risto Haarala et al. eds., 1994); KOTIMAISTEN KIELTEN TUTKIMUSKESKUKSEN JULKAISUJA [FINNISH LANGUAGE BASIC DICTIONARY, PUBLICATIONS OF THE RESEARCH CENTRE OF THE DOMESTIC LANGUAGES OF FINLAND].

52. This Finnish case bears similarities to an internationally better known case that *Sony* lost in Austria about *Walkman*.

B. The Audience of Legal Texts

Legislative text, as any kind of legal text, is always dialogic in a very explicit sense and not only in the Bakhtinian⁵³ implicit sense. The text is clearly addressed to someone and engages in discussion with several other texts and their writers. The audience of legal texts can also be described, in terms suggested by Fleck,⁵⁴ as exoteric (outsiders), a group constituted by, for instance, the parties of a particular case who are not legal professionals.⁵⁵ The parties, *i.e.* the exoteric groups, are represented in legal contexts by the esoteric group (insiders) who are legal professionals. Tuori has pointed out that there are visitors in the legal field whose conflicts are translated into a language different from their own and the solution of their conflicts is taken out of their hands.⁵⁶ This can be taken as criticism in any democracy. In addition, in the case of litigation there are the members of the Court, who naturally belong to the insiders. Furthermore, as in all legal communication, there is the legislator, abstract and impersonal, who is the party who sends the message, *i.e.*, a statute, but who does not necessarily ever actually receive explicitly the message sent in return, but is nevertheless one of the receptors.⁵⁷

The function of the text varies depending on the audience. To those directly involved, whether esoteric or exoteric, a statutory text is informative, expository, and directive. However, to those who are not directly involved, a statutory text is first expository and informative and only secondarily, in case they should in some future occasion or case be acting in a different role, directive. For instance, the international United Nations Commission on International Trade Law (“UNCITRAL”) Model Law⁵⁸ provides a detailed account of rules and proceedings which

53. Cf. MARTINA BJÖRKLUND, MIHAIL BAKHTIN [Handbook of Pragmatics] (Jef Verschueren, Jan-Ola Östman & Jan Blommaert eds., 1995).

54. LUDWIK FLECK, GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT (1979).

55. *Id.* at 111–12.

56. Kaarlo Tuori, *Law, Power and Critique*, in LAW AND POWER: CRITICAL AND SOCIO-LEGAL ESSAYS 7, 14 (Kaarlo Tuori et al. eds., 1997).

57. See Anna Trosborg, *Contracts as Social Action*, in THE CONSTRUCTION OF PROFESSIONAL DISCOURSE 54–57 (B.L. Gunnarsson et al. eds., 1997).

58. UNCITRAL Model Law on International Commercial Arbitration (1985), available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>.

functions to harmonize and improve the national laws; accordingly, its function is descriptive and expository.⁵⁹

According to Kerbrat-Orecchioni,⁶⁰ who has categorized communication as involving presence/non-presence and speaking/non-speaking, most written texts are addressed to a non-present and non-speaking audience.⁶¹ Statutory texts have an audience that might fall into any of these four categories, according to the audience's presence or non-presence, and the audience being speaking or non-speaking. Legislation has what might be called a primary audience consisting of the interpreters, e.g., the members of the court and the litigants who can be present and who can reply. There is also the secondary audience to whom the text is addressed, namely the legislator, and in the case of European Community Law, the Commission, and the politicians of the European Parliament.⁶² Thirdly, there is the audience which I label onlookers: legal scientists, lawyers, the general public, and politicians who for various reasons are interested in the proceedings and who form the audience Kerbrat-Orecchioni considers typical to written texts in general.⁶³

C. Linguistic Knowledge and Legal Knowledge

Creating and interpreting law in a multilingual or monolingual environment is, to my mind, an interplay of multiple sources of knowledge – especially linguistic knowledge and legal knowledge. Next I attempt to characterize linguistic knowledge and legal knowledge as I see them. In a narrow sense, we can say that legal knowledge is knowledge of propositions of law. In a broad sense, as it is understood here, it is the knowledge of legal culture in its broadest sense, including legal systems, legal

59. Tarja Salmi-Tolonen, *Arbitration Law as Action: An Analysis of the Finnish Arbitration Act*, in LEGAL DISCOURSE IN MULTILINGUAL AND MULTICULTURAL CONTEXTS: ARBITRATION TEXTS IN EUROPE 313–36 (Vijay Bhatia et al. eds., 2003).

60. CATHERINE KERBRAT-ORECCHIONI, L'ÉNONCIATION DE LA SUBJECTIVITÉ DANS LE LANGAGE (1980).

61. "Speaking" refers here to any linguistic contribution.

62. See also Tarja Salmi-Tolonen, *Persuasion in Judicial Argumentation: The Opinions of the Advocates General at the European Court of Justice*, in PERSUASION ACROSS GENRES: A LINGUISTIC APPROACH (Helena Halmari & Tuija Virtanen eds.) (forthcoming 2004).

63. See also RUTH AMOSSY, L'ARGUMENTATION DANS LE DISCOURS: DISCOURS POLITIQUE, LITTÉRATURE D'IDÉES, FICTION 34 (2000).

order, legal institutions, history and practices and practitioners. Thus, legal knowledge is

- a) language-dependent
- b) communal/interactional
- c) institutional

Firstly, legal knowledge is dependent on language because law is constituted in language and could not exist without it.⁶⁴ Secondly, legal knowledge is communal or interactional in the sense that it is

- a) language-related/textual/descriptive/encyclopaedic
- b) communal/interactional
- c) functional

When we put these two together we can see that according to this line of thinking, legal linguistic knowledge is

- a) communal
- b) interactional
- c) institutional and functional

Therefore, the argument is that language cannot be separated from its users and communicative situations. Meanings are subjective. Therefore, if meanings are not negotiated, even a linguist cannot say exactly what is meant. Linguistic methods can help point out patterns of language use that can give clues to intended meanings.⁶⁵ The implications are that we need to

- a) raise the level of language awareness
- b) increase linguistic knowledge
- c) be aware that meanings are subjective and shared meaning has to be negotiated

In the next section I shall briefly discuss the status of the two official languages as legal languages in Finland.

64. See JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 60–66 (1995).

65. See, e.g., Roger W. Shuy, *To Testify or Not to Testify?*, in *LANGUAGE IN THE LEGAL PROCESS* 3–18 (Janet Cotterill ed., 2002).

II. NATIONAL – BILINGUAL – FINLAND⁶⁶

Finland is officially bilingual.⁶⁷ The official national languages are Finnish and Swedish, the latter is spoken as a first language by about 6% of the population.⁶⁸ The official status of Swedish has historical roots in the period when Finland was a part of the Swedish realm.⁶⁹ There has been a permanent Swedish speaking population in Finland since the Middle Ages.⁷⁰ The Constitution of Finland grants Swedish an official language status, i.e., all government documents are also available in Swedish.⁷¹ The Constitution also grants another minority language Sámi⁷² and the speakers of Romany certain rights, but in a slightly more limited form.⁷³ The number of official languages is always a distributive decision, not just a question of politics or good will.

All Finnish citizens have the right to use their native language in a court of law in a matter pertaining to them.⁷⁴ The language proficiency requirements of judges were underlined in the preparatory work done for the recent reform of the courts of law. The new Language Act is currently under revision and discussion in Parliament.⁷⁵ The new act will repeal the old Language Act of 1922.⁷⁶ Although it has served its purpose, the act has become somewhat obsolete and is in need of modernization and clarification.⁷⁷ The purpose of the new act is to ensure that

66. For a more comprehensive survey, see Tarja Salmi-Tolonen, *Finland and the Context of Law*, in MULTILINGUAL AND MULTICULTURAL CONTEXTS OF LEGISLATION 103–27 (V.K. Bhatia, C.N. Candlin, Jan Engberg & Anna Trosborg eds., 2003).

67. FIN. CONST. ch. 2, §17, cl. 1.

68. See Tarja Salmi-Tolonen, *Finland and the Context of Law*, *supra* note 66, at 103.

69. *Id.*

70. *Id.*

71. FIN. CONST. ch. 2, §17, cl. 2.

72. A language spoken by the Sámi people of Lapland.

73. FIN. CONST. ch. 2, § 17, cl. 3.

74. See Tarja Salmi-Tolonen, *Finland and the Context of Law*, *supra* note 66, at 104.

75. *Id.*

76. *Id.*

77. *Id.*

the linguistic rights referred to in the Constitution will also be realized in practice.⁷⁸

The new language act focuses on our national languages, Finnish and Swedish.⁷⁹ Provisions for other languages will be laid down separately.⁸⁰ The purpose of the new act is twofold: first, to further equality between the national languages, and second, to promote bilingualism in Finland.⁸¹ The objective of the Language Act is to guarantee the constitutional right of everyone to use their own language, Finnish or Swedish, before courts of law and administrative authorities.⁸² A further objective is to ensure that everyone's right to a fair trial and good governance are guaranteed no matter what their language.⁸³ Moreover, an individual's language rights should be realized without need for specific express reference to the matter.⁸⁴ Section 2 of our new Language Act, which came into force on January 1, 2004, reads:

The Purpose of the Act

- (1) The purpose of this Act is to ensure the constitutional right of every person to use his or her own language, either Finnish or Swedish, before courts and other authorities.
- (2) The goal is to ensure the right of everyone to a fair trial and good administration, irrespective of language, and to secure the linguistic rights of individual persons without him or her needing specifically to refer to these rights.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. UUSI KIELLAKI, KIELILAKIKOMITEAN MIETINTÖ 2001:3, [New Language Act, Memorandum of the Language Law Commission 2001:3]. An English summary of the New Language Act can be found at the Finland Ministry of Justice Website, at <http://www.om.fi/tulostus/20802.htm>.

(3) An authority may provide better linguistic services than what is required in this Act.⁸⁵

If I were to analyze the text from an ideological point of view⁸⁶ subsection (3) is extremely interesting. It clearly implies that in Finnish society, civil servants tend to offer the minimum of service unless otherwise stated. Naturally, this says something about our times in general. The public sector was trimmed down in consequence of the recession and services had to be prioritized. Legislation in most countries entitle citizens to “good administration,” which includes good services and the ability to obtain advice from public offices, but it is not all that easy to say what constitutes good service and this concept is understood differently in different countries.⁸⁷ The fact that this new language was needed in the law does indicate that even if all those who enter civil service, whichever level, have to prove their ability to use both Finnish and Swedish, the reality is that their abilities or willingness to use their second language are less than what is required. The purpose of the new act is to ensure that the linguistic rights referred to in the Constitution will be realized also in practice.

A. Legislation

According to the wording in the Constitution of Finland, the Government and other authorities shall submit the documents necessary for a matter to be taken up for consideration in Parliament in both Finnish and Swedish.⁸⁸ As a consequence, all law proposals have to be translated before the Government and the President may present them to Parliament.⁸⁹ The Constitu-

85. Language Act 423/2003 §2, Statute Book of Finland, *available at* <http://finlex.fi>; unofficial English translation, *available at* <http://www.finlex.fi/saadkaan/E003023.pdf>.

86. Here ideology refers to the expectations and beliefs in everyday thinking and the construction of social reality in language. *Cf.* ROGER FOWLER, ROBERT HODGE ET AL. EDS., *LANGUAGE AND CONTROL* 490 (1979); NORMAN FAIRCLOUGH, *DISCOURSE AND SOCIAL CHANGE* 87 (1992).

87. *See, e.g.,* Kirsi Kuusikko, *Advice, Good Administration and Legitimate Expectations: Some Comparative Aspects*, 7 EUR. PUB. L. 455–72 (2001).

88. *See* Constitutional Laws of Finland, Procedure of Parliament § 14, *available at* <http://www.om.fi/constitution/3340.htm>.

89. The Constitution of Finland, ch. 6 Legislation, § 79 Publication and Entry into Force of Acts, *available at* <http://www.finlex.fi/saadkaan/E9990731.pdf>.

tion does not, however, contain any provisions concerning the reading of the Swedish text in Parliament. The Swedish language text is to be drawn up in the Office of Parliament.⁹⁰ Only the Finnish language texts of proposed laws are read in committees and plenary sessions of Parliament.⁹¹ Should there be any uncertainty about the wording of the Swedish language text, the matter is settled in the Speaker's Council.⁹² The procedure in Parliament obviously focuses on the Finnish text, but the Swedish text is equally authentic once the law is enacted and comes into force. Both texts are signed by the Speaker and published in the Statute Book of Finland.⁹³ An act cannot come into force before it is published and publishing is not complete until both Finnish and Swedish language texts are published.⁹⁴ However, the ideal of co-drafting is not a reality in Finland even if the enactment guarantees both language versions authenticity. The Swedish language text, even if it is processed as a translation, is authenticated during the enactment procedure.⁹⁵

B. Legal Swedish in Finland and Legal Swedish in Sweden

Finland and Sweden have a long socio-political history together. For about 600 years they were part of the same realm, the Kingdom of Sweden. Finnish legal language began when the Great Codification of 1734⁹⁶ was translated into Finnish presumably around 1740.⁹⁷ Since Finland started its development as a sovereign state, legal Swedish in Finland has di-

90. The Constitution of Finland, Ch. 2 Basic Rights and Liberties, § 17 Right to One's Language and Culture. This is also made clear in Government Bill No 1/1991, 131.

91. See Parliament as a Legislative Body, available at <http://www.eduskunta.fi>.

92. *Id.*

93. *Id.*

94. *Id.*

95. See KENNETH D. MCRAE, CONFLICT AND COMPROMISE IN MULTILINGUAL SOCIETIES, VOLUME 3, FINLAND 233–46 (1997).

96. See PAAVO PAJULA ENSIMMAINEN LAINSUOMENNOS: LISIA SUOMALAISEN LAKIKIELEN VARHAISHISTORIAAN [The First Finnish Law Translation: Additions to the early history of Finnish legal language, Publications of the Association of Finnish Literature] (1955). The translation of the 1734 law in its entirety is available at Agricola, Finnish History Network Website, at <http://www.utu.fi/agricola/hist/kktk/lait/1734>.

97. *Id.*

verged from the legal Swedish in Sweden. In principle, legal Swedish conforms to the legal Swedish variety used in Sweden, but terminology differs in at least four respects. First, either the terminology is similar but the concept it denotes is different, or the terms' purposes or the consequences are different. One example is *asunto-osakeyhtiö/bostadsaktiebolag*, a housing corporation (condominium), which does not have a conceptual legal equivalent in Sweden. Another example in this category is *osuuskunta*, a cooperative, which has the same legal sense in both countries but different terms are used *ekonomisk förening* (Sweden) *andelslag* (Finland) because *ekonomisk förening* covers a wider semantic field because there are economic organizations (*ekonomiska föreningar*) in Finland that do not fall under *osuuskunta*. Second, sometimes a Swedish version of a Finnish act is authorized using a different term even if there is no conceptual or functional difference.⁹⁸ After authorization it is difficult to change the term. Third, it is said that some terms have grown to be part of the practice. The Swedish term for dismissing a case in Finland is *förkasta*, and in Sweden it is *ogilla*. It has been said that this term, *förkasta*, in particular sounds archaic to Swedish lawyers.⁹⁹ Fourth, sometimes legal Swedish terms in Finland are made to comply to the Finnish counterpart so that a compound term is translated to resemble the Finnish, e.g., *avkortning*¹⁰⁰ for installment of a loan, which in Sweden is not a legal term, but belongs to the general language, unlike *amortering* which denotes the same concept but is recognizable as a legal term probably for historical and conventional reasons.

Today, in the European Union ("EU") there is only one version of Swedish used in EU documents for which the Swedish government is responsible, but it was agreed at the time that Finnish officials are given opportunities to be involved.¹⁰¹ In this respect, there has been a kind of reunion between the two legal Swedish languages.

98. For example, *avvittring* (Finland) and *bodelning* (Sweden) are the terms used for the division of the property of the spouses.

99. H.E.S. Mattila, *Oikeuslingvistiikka*, in OIKEUSJÄRJESTYS [Legal Order 2000] 60–61 (Risto Haavisto ed., 2000).

100. Literally, "shortening" of a loan. *See id.*

101. *See* Sten Palmgren, *Legal Swedish and Legal Finnish*, *supra* note 25.

III. SUPRANATIONAL – THE EU

Accession to the EU in 1995 brought Finland new varieties of legal language, which could be called “legal translation Finnish” and “legal translation Swedish.” Insufficient attention has yet been paid to these varieties of legal language. Only recently has it been recognized in general that translation language is a variety of its own; not simply a subordinate version of the original.

I myself have compared national legal English and EC legislation English before Finland joined the EC.¹⁰² My point of view was not terminological, but rather the discursive and pragmatic. I started with syntactic comparison in order to justify my hypothesis that different legal contexts produce different kinds of legal prose.¹⁰³ My starting point has always been that since the texts are legally authentic and authorized, they should be treated as such, even if in many cases the EC text probably is a translation (although that is not so often these days). Linguistic evidence shows that legal prose, written in different contexts, even if in the same language, is different.

The multi-functionality of linguistic elements can sometimes cause problems. For example, it has been reported that a mistranslated EC text has caused problems when faced by Finnish courts.¹⁰⁴ The translations of the EU texts have the status of the original, unlike international treaties or other documents.¹⁰⁵ The multi-functionality of linguistic elements such as the conjunction “and” has caused problems. In everyday life we can easily tell whether “and” means “both and” or “either or.” In the legal context we cannot always make the right choice based on our general everyday knowledge. The word “and” has caused some problems in Finnish courts because of a European Com-

102. See, e.g., Tarja Salmi-Tolonen, *The Linguistic Manifestations of Primary and Secondary Functions of Law in the National and Supranational Contexts*, 7 INT’L J. FOR THE SEMIOTICS OF L. 1, 19–39 (1994).

103. *Id.*

104. *Hannele Tulonen in HELSINGIN SANOMAT* (Jan. 22, 1998).

105. Treaty establishing the European Community, Art. 217, available at <http://europa.eu.int/abc/obj/treaties>; The Amsterdam Treaty, Art. 290, available at <http://www.europa.eu.int/abc/obj/amst/en>; Act on Judicial Procedure Ch. 17, § 3, available at <http://www.finlex.fi/lains>; Vienna Convention Part III, Sec. 3, Art. 32, Art. 31, Art. 33, available at http://www.unog.ch/achives/vienna/vien_69.htm.

munities Court of Justice (ECJ)¹⁰⁶ preliminary ruling. The case itself was German,¹⁰⁷ but as the working language of the ECJ is French, the judgment was first given in French.¹⁰⁸ The case was about employees' rights in the event of transfer of undertakings. Following a tender procedure, a German company had lost its service contract and laid off employees and one of them brought the case to a German Labour Court which then referred the case to the ECJ for a preliminary ruling as to whether Directive 77/187 shall apply to the transfer of an undertaking, business or part of a business to another employer as a result.¹⁰⁹ The German "und" (and) had been translated in Finnish as "tai" (or) and apparently the translation was similar in English.¹¹⁰ This was a serious but understandable error. Today, English is very often the best-known foreign language in Finland. Moreover, Finnish legal professionals also turn to the English translation if they suspect some discrepancy. The legal profession is now wondering if a preliminary ruling is given in a Greek case, should they learn Greek first. This of course is not necessary.

The prerequisite of translators entering the ECJ's translation departments is that they have a basic degree in law. In the case of the Finnish language department the degree is a Master of Laws, since this is the basic law degree recognized in Finland. The remedy to these translation problems can only be to raise the language awareness of legal professionals and the awareness of the close interplay between the knowledge of language and the knowledge of law.

106. *See, e.g.*, Case C-13/95, *Suzen v. Sehnacker Gabaudereinigung GmbH Krankenhausservice*, 1997 E.C.R. I-1259 [1997] 1 C.M.L.R. 768 (1997), available at <http://curia.eu.int/en/actu/activities/act97/9709en.htm>.

107. *Id.*

108. *Id.* However, according to the principles of the ECJ, the authentic version is the German translation.

109. Under Article 1(1), Directive 77/187 shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger. *See* Council Directive 98/50/EC of June 29, 1998, amending Directive 77/187, OJ 1998 L 201, 88. The first subparagraph of Article 3(1) of Directive 77/187 provides, "The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee." *Id.*

110. Importantly, in the transfer of business, the determination of whether "assets AND employees" or "assets OR employees" are transferred, makes a big difference.

IV. INTERNATIONAL

Finland has distinguished itself from the other Nordic countries by adhering to the school of “dualism.” Finland formally incorporates all major international treaties, such as human rights treaties, into its domestic law. Most human rights treaties have been incorporated with the hierarchical rank of an Act of Parliament.

An example may be helpful to illustrate this point. According to the above-mentioned principle of dualism, The UN Treaty on Human Rights was translated into Finnish and published in the code book.¹¹¹ Article 9, subsection 4 reads in an authentic English version: “Anyone who is deprived of his liberty by *arrest or detention* shall be entitled to take proceedings before a court ...” These two terms “arrest or detention” were translated into Finnish by two terms “*pidättämällä tai vangitseamalla*.” However, the two English concepts denoted by arrest or detention also contain “taking into custody,” whereas the Finnish concepts do not. In other words, the semantic field is covered in the English version by two expressions whereas in Finnish, at least three terms would be needed to cover this same field. The Finnish judiciary relied only on the Finnish version and thus violated the rights of a foreigner who had been taken into custody by denying him the right to bring his case before a court.¹¹² The problem in the example above has been attributed to language,¹¹³ but should it be?

Legal translators are usually instructed not to interpret law.¹¹⁴ Is the above example a translation error or not? In my

111. The Statute Book of Finland I-II, available at <http://www.finlex.fi/lains>.

112. 14.10.1993/3916 KHO: 1993-A-25 (Supreme Administrative Court). After this incident the translation of European Human Rights Convention Article 5, subsection 4, was corrected to read “*pidättämällä tai muuten*” [arrested or otherwise taken into custody] which is again a more general expression but does not exclude any of the components of the authentic version. See Treaty Series of the Statute Book of Finland, available at <http://www.finlex.fi/sopimukset/index.html>.

113. Heikki Karapuu, *Kansainvälisten yleissopimusten ja EY-säädösten autenttiset tekstit kansallisessa lainkäytössä* [The Texts of International Treaties in National Judicatory Usage], in OIKEUDEN KIELET [Languages of the Law: Law and Legal Thinking in a Multilingual World] 171–80 (Antero Jyränki ed., 1999).

114. See SUSAN ŠARČEVIĆ, NEW APPROACH TO LEGAL TRANSLATION, *supra* note 26.

opinion, this example enforces my argument that the interplay between legal knowledge and linguistic knowledge must be better recognized. In the above case, the legal professionals and the translators would have benefited from such knowledge. Translators, however, need to interpret the texts they translate, because they need to know enough about the legal orders and the legal context in which the text is created; this is found in the meaning of the text they translate. On the other hand, the judiciary should know that the Finnish version is not one of the authentic versions of the Treaty and should not use it as the primary source.

In International Commercial Law we find several examples where national and international laws are not in unison. Some examples are “impossibility of performance and other excuses” in international trade.¹¹⁵ Another example is “conformity of goods.”¹¹⁶ There are plenty of other concepts that can be used and interpreted differently in different contexts of law such as “warranty” and “surety.” These problems are very well known to both civil law and common law professionals. However, the terms used are the same but the contents are different.

Here I once more refer to the implications listed above: we need to raise the general level of language awareness and increase linguistic knowledge among legal professionals and people in public office; in addition, we must be aware that meanings are subjective and that shared meaning must be negotiated.

V. CLOSING REMARKS

Finally, language is often said to be a lawyer's most important tool. However, I wish to challenge this metaphor. To me it says that whoever uses the metaphor sees language as some-

115. For differences in Finnish national laws and international rules, see generally, Tom Southerington, *Impossibility of Performance and Other Excuses in International Trade* (1999) (unpublished LL.M. thesis, University of Turku, Faculty of Law) (on file with Author). See also *Exemptions from Contractual Obligations in International Commercial Law*, in KANSAINVALISESTÄ KAUPASTA [On International Trade] 281–303 (Antti Aine & Anne Kumpula eds., 2000).

116. See, e.g., Teija Poikela, *Conformity of Goods in the 1980 United Nations Convention of Contracts for the International Sale of Goods*, in NORDIC J. OF COM. L. (2003).

thing separate from the law, and if something is not quite right it suffices to sharpen the tool to make the results better. However, I do not accept that our language is somehow defective or insufficient.

In my view, and here I am in accordance with John Searle,¹¹⁷ social reality, including law, is rooted in language. Therefore, we need to adjust our mental models¹¹⁸ by acquiring more multidisciplinary knowledge and paying attention to the implications that can be drawn from the scientific study of legal language.

In this paper I have discussed both creating and interpreting law in bilingual, multilingual, national, supranational and international contexts from a legal linguistic point of view. For solving problems at all these levels I propose an *ex ante* approach. The key to this approach is enhancing our understanding and knowledge in both the legal and linguistic arenas.

117. See generally JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995).

118. A mental model, borrowing from Philip Johnson-Laird's early formulation, is a theoretical construct which represents "objects, states of affairs, sequences, the way the world is ...", and whose function is to enable individuals to make inferences and predictions to understand phenomena ..." such as texts and actions in general. See *LANGUAGE, TEXT, AND KNOWLEDGE: MENTAL MODELS OF EXPERT COMMUNICATION* (Lita Lundquist & Robert J. Jarvella eds., 2000).

TOWARDS A EUROPEAN CIVIL CODE WITHOUT A COMMON EUROPEAN LEGAL CULTURE? THE LINK BETWEEN LAW, LANGUAGE AND CULTURE

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I. INTRODUCTION

In recent years, an intense debate has arisen among European scholars regarding the need to harmonize private and, in particular, contract law in the European Union ["EU"].¹ For some time, the debate has been merely academic, but over the past four years, the issue of harmonizing contract law has been impregnated with a political character. The debate culminated on July 11, 2001, when the European Commission launched a Communication to the Council and the European Parliament on European Contract Law.² This Communication sought information from all interested parties as to whether the co-existence of different national contract laws hindered the internal market's ability to function³ and, if so, what was the most appropriate solution to such a problem.⁴ Among the possibilities was the suggestion to adopt an overall text comprised of provisions on general questions of contract law as well as specific contracts (Option IV) — in other words, a European Contract Code.⁵ Other options were to leave the solution of any identified problems to the market (Option I), to promote the development of non-binding common contract law principles (Option II) and to review and improve existing EC legislation in

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1. See, e.g., Ole Lando, *Why Codify the European Law of Contract?*, 5 EUR. REV. OF PRIVATE L. 525 (1997); Christian von Bar, *A Civil Code for Europe*, JURIDISK TIDSKRIFT VID STOCKHOLMS UNIVERSITET, ÅRGÅNG 13 (2001-02 NR1).

2. Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(01)398 final, 2001 O.J. (C 255) 1.

3. *Id.* at 10–11.

4. *Id.* at 16.

5. *Id.* at 61.

the area of contract law (Option III).⁶ Following from this Communication, the Council⁷ and the European Parliament⁸ reacted in November 2001, the latter calling for the establishment and adoption of a body of rules on contract law in the EU from the year 2010.⁹ Most recently, taking account of the over 181 responses¹⁰ to the Communication from the Commission to the Council and the European Parliament on European Contract Law, the Commission issued a new Communication on February 12, 2003, setting forth an *Action Plan on a More Coherent European Contract Law*.¹¹ This plan suggests, *inter alia*, the adoption of a common frame of reference for contract law (Option III) as an important step towards consistency in EC contract legislation.¹²

The *European contract law project*, as the process described above is known, has been influenced by many scholarly opinions.¹³ Some scholars have argued that a uniform European contract law is needed because the mere existence of different contract laws “may be regarded as a non-tariff barrier to trade” and furthermore, because “it is also here that we find a fragmentary European legislation enacted as directives.”¹⁴ In this

6. *Id.* at 46.

7. 2001.Doc. 13017/01 JUSTCIV 129 (Nov. 16, 2001) at <http://www.register.consilium.edu.int/pdf/en/01/st12/12735en1.pdf>.

8. Report on the Approximation of the Civil and Commercial Law of the Member States, EUR. PARL. DOC. (COM 2001) 84 final [hereinafter Report on the Approximation].

9. *Id.* at 9, para. 11.

10. Reactions to the Communication on European Contract Law (2001), at http://www.europa.eu.int/comm/consumers/policy/developments/contract_law/comments/summaries/sum_en.pdf (last visited Apr. 2, 2004).

11. Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan, COM(03)68 final, 2003 O.J. (C 63) 1, available at http://europa.eu.int/eurlex/pri/en/oj/dat/2003/c_063/c_06320030315en00010044.pdf [hereinafter A More Coherent European Contract Law] (last visited Apr. 2, 2004).

12. A More Coherent European Contract Law, *supra* note 11, at 16, available at http://www.europa.eu.int/comm/consumers/policy/developments/contract_law/comments/summaries/sum_en.pdf (last visited Apr. 2, 2004).

13. See, e.g., Ole Lando & Christian von Bar, *Communication on European Contract Law and the Study Group on a European Civil Code*, at http://www.europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law?comments/5.23.pdf (last visited Apr. 2, 2004).

14. Lando, *Why Codify the European Law of Contract?*, *supra* note 1, at 526.

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regard, the pursuit of an all-embracing European law of contract is embodied in the more ambitious task of codifying private law in Europe and setting up a Working Group to draft a European Civil Code.¹⁵

Nevertheless, the venture of a European Civil Code is a controversial matter, as acknowledged by the European Parliament.¹⁶ A European Code is likely to encounter some obstacles relating to, *inter alia*, the legal basis for such an enterprise, the choice of instrument and scope of the adopted measures, the feasibility of unifying European private law, the crisis of codification, the sociological background of private law institutions and, finally, the link between private law, language and cultural identity.¹⁷ Some scholars argue that, in the absence of a common European legal culture, the chances of achieving legal uniformity are rather slim.¹⁸ Considering the lack of experience regarding the incorporation of EC law into national law, at this point, the idea of a European Civil Code even sounds like a fallacy. Accordingly, this Article suggests that any legislative measure imposed from Brussels should be preceded by, or at least should run parallel to, the promotion of a European legal discourse, which may ultimately crystallize into a European legal culture.¹⁹

II. THE IMPACT OF EC LEGISLATION UPON DOMESTIC PRIVATE LAW

Due to the growing number of EC acts, diverse areas of private law have been partially harmonized, in particular, com-

15. See Von Bar, *supra* note 1, at 9–10.

16. Resolution A5-0384/2001, PARL. EUR. DOC. (Recital D) (Nov. 15, 2001).

17. For an overview of these obstacles see ANA M. LOPEZ-RODRIGUEZ, *LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU* 254 (2003).

18. Pierre Legrand, *Sens et Non-Sens d'un Code Civil Européen [The Sense and Nonsense of a European Civil Code]*, 48 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 779, 798 (1996) [hereinafter Legrand, *Sens et Non-sens*].

19. See also Christoph U. Smid, *Bottom-Up Harmonisation of European Private Law: Ius Commune and Restatement*, in *FUNCTION AND FUTURE OF EUROPEAN LAW* 75–89 (1999); Pierre Larouche, *Ius Commune Casebooks for the Common Law of Europe: Presentation, Progress, Rationale*, 8 *EUR. REV. OF PRIVATE L.* 101, 101–09 (2000).

pany law, labor relations, industrial property, copyright law and contract law.²⁰ As a result of this so-called *communitarization* of private law,²¹ the irruption of new elements in the EC legal acts is increasingly eroding the peculiarities of domestic, private law.²² To the extent that in the overall process of market integration, the legislative intervention of the Community has been driven by specific economic, social or political goals, EC law has been confined to specific issues, working in a fragmentary way. Thus, EC law has been unable to provide an exhaustive or coherent regulation of the core areas of private law. For instance, a consumer may be simultaneously entitled to a right of renunciation²³ under the Doorstep-selling Directive²⁴ and the Timeshare Directive.²⁵ Yet, the length of the period in which the consumer may exercise this right is different in each text, namely, seven days in the former²⁶ and ten days in the latter.²⁷ In addition, such a right is endorsed under the different notions of *cancellation* (Doorstep Directive) and *withdrawal* (Timeshare Directive).²⁸

Such a casuistic approach is also reflected in the specific character of some directives and the use of terms that are unknown or have a different scope in national law. These inconsistencies have led to problems in the implementation and application of national transposition measures.²⁹

A. *Minimum Harmonization*

The legislative intervention of the Community in the field of private law has been generally shaped in the form of direc-

20. See, e.g., ULRICH DROBNIG, PRIVATE LAW IN THE EUROPEAN UNION 4 (22 Forum Internationale 1996).

21. GIANNANTONIO BENACCHIO, DIRITTO PRIVATO DELLA COMUNITÀ EUROPEA 9 (Fonti, Modellie, Regole 1998).

22. *Id.* at 26.

23. See Case 423/97, Travel Vac SL v. Manuel Jose Antelm Sanchis, 1999 E.C.R. I-02195.

24. Council Directive 85/577 art. 5, 1985 O.J. (L 372) 31.

25. Council Directive 94/47 art. 5.1, 1994 O.J. (L 280) 83.

26. Directive 85/577, *supra* note 24, art. 5.

27. Directive 94/47, *supra* note 25, art. 5.1.

28. Directive 85/577, *supra* note 24, art. 5; Directive 94/47, *supra* note 25, art. 5.1.

29. See, e.g., Jurgen Basedow, *The Renaissance of Uniform Law: European Contract Law and its Components*, 18 LEGAL STUDIES 121 (1998).

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tives.³⁰ This intervention consists primarily of minimum standard directives that restrict harmonization to the extent necessary to allow each Member State to establish higher standards of protection.³¹ The unavoidable consequence is that differences arise between the different national laws transposing a given directive. In the case of a cross-border transaction governed by a directive of minimum standards, it is necessary to determine which national law applies.³²

Furthermore, none of the EC acts provide an overall regulation of given legal institutes.³³ These acts consist of a limited number of basic rules that must be implemented within the framework of national private law in one way or another.³⁴ Thus, the adjustment to the national context may be effected differently in each Member State, distorting the uniformity intended by the EC measure.³⁵ For instance, the Doorstep Selling Directive grants the consumer a right of cancellation in an otherwise binding offer or acceptance.³⁶ The consumer may renounce his undertaking by sending notice to the seller within a period of not less than seven days from the consumer's receipt

30. See Annex I Important Community Acquis in the Area of Private Law, in Communication from the Commission to the Council and the European Parliament on European Contract, COM (2001) 398 final at 19.

31. See, e.g., Council Directive 99/44/EC recital 24, 1999 O.J. (L 171) 12 [hereinafter Directive 99/44] on certain aspects of the sale of consumer goods and associated guarantees: "Whereas Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection." See also Council Directive 90/314, 1990 O.J. (L158) 59 (on package travel, package holidays and package tours "for the purpose of protecting the consumer").

32. See, e.g., BERND VON HOFFMANN, RICHTLINIEN DER EUROPÄISCHEN GEMEINSCHAFT UND INTERNATIONALES 45, 47 (Privatrecht, 36 ZFRV 1995).

33. See, e.g., Council Directive 94/47/EC recital 4, 1994 O.J. (L 280) 83 ("[T]his Directive is not designed to regulate the extent to which contracts for the use of one or more immovable properties on a timeshare basis may be concluded in Member States or the legal basis for such contracts.").

34. See Directive 99/44, *supra* note 31, recital 18 ("Whereas Member States may provide for suspension or interruption of the period during which any lack of conformity must become apparent and of the limitation period, where applicable and in accordance with their national law, in the event of repair, replacement or negotiations between seller and consumer with a view to an amicable settlement.").

35. Basedow, *supra* note 29, at 133.

36. Directive 85/577, *supra* note 24, art. 5.

of the written information of his right of cancellation.³⁷ Under Article 5 of the Directive, the consumer's notice is to be effected in accordance with the procedure laid down by national law,³⁸ but this provision has given rise to some divergences between national measures transposing the Directive. For instance, as it is unclear whether the consumer's right of cancellation must be effected in writing, German³⁹ and English⁴⁰ law have embodied the requirement of a written notice, whereas Spanish⁴¹ and Danish⁴² law have allowed for the consumer's will of cancellation to also be implied from his behavior.

B. Transposition of Concepts

Each national legal system uses terminology that does not necessarily correspond with the legal languages of other countries. Hence, a literal translation of a given legal term into another language may not exactly express the same concept. For instance, the English expressions *contract* or *obligation* comprise different concepts than *vertrag*, *contrato* or *obbligazione*.⁴³ Similarly, the French term *cause* is slightly different from the Spanish or Italian *causa*, and there is no corresponding term in other legal systems.⁴⁴ To date, there are 16 legal systems within

37. *Id.*

38. Directive 85/577, *supra* note 24.

39. *Gezetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften* [Statute on Cancellation of Doorstep and Similar Contracts] v.1.16.1986 (BGBl. II s. 122) (amended by a new statute on June 29, 2000). The written requirement has been incorporated into the German Civil Code (§ 355.2 BGB).

40. Cancellation of Contracts Concluded Away from Business Premises (1987) SI 1987/2117, art. 4.5.

41. *Sobre contratos celebrados fuera de los establecimientos mercantiles* [Statute on Contracts Concluded Away from Business Premises], art. 5.2 (B.O.E. 1991, 283).

42. §6.4 *Lov om visse forbrugerftaler (Dørsalg m.v., fjernsalg og løbende tjenesteydelser)* nr. 886, 23 December 1987, *Lovtidende* [the Statute on Certain Consumer Contracts: Doorstep Selling, Distance Selling and Ongoing Services] (LBK nr 866 af 23/12/1987) (Denmark).

43. HUGH BEALE ET AL., *CASES, MATERIALS AND TEXT ON CONTRACT LAW 2* (2002) [hereinafter BEALE, *CASES, MATERIALS AND TEXT*].

44. *See, e.g.*, PRINCIPLES OF EUROPEAN CONTRACT LAW 141 (Ole Lando & Hugh Beale eds., 2000).

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the EU,⁴⁵ expressed in 11 different languages.⁴⁶ As demonstrated by the divergences between the different language versions of EC Directives, these disparities not only hinder the task of the EC legislator in drafting acts,⁴⁷ but they also affect the national legislator effecting community acts and the national judge adjudicating in consonance with EC law.

By way of example, the Directive 13/93 on Unfair Terms in Consumer Contracts only covers clauses concluded by a professional and a consumer.⁴⁸ A consumer is defined in Article 2(b) of the Directive as “any natural person who ... is acting for purposes which are outside his trade, business or profession ...”⁴⁹ Yet, in French law, this Directive has been transposed into Article L 132-1 of the *Code de la Consommation*, which defines unfair contract terms as those contained in a contract concluded “between a seller or supplier and a person who is not acting in the course of his trade, business or profession, or a consumer.”⁵⁰ Does this mean that in French law the definition of consumer is different from that of a person not acting in the course of his trade, business or profession, as defined in the Directive?

In addition to the *European legal babel*, EC acts also embody terms that significantly differ from the terminology internally used in domestic law. Some terms may even be expressions which are used in a given sector of activity but lack any legal character.⁵¹ For example, Article 5 of Directive 98/84/EC⁵²

45. The UK comprises the English and Scottish systems. Sarah Carter, *A Guide to the UK Legal System*, Law Library Xchange, available at <http://www.llrx.com/features/uk2.htm#UK%20Legal%20System> (last visited Apr. 2, 2004).

46. Europa Commission, *Languages in Europe*, at http://europa.eu.int/comm/education/policies/lang/languages/lang/europeanlanguages_en.html#Occial%20eu (last visited Mar. 3, 2004).

47. Robert Huntington, *European Unity and the Tower of Babel*, 9 B.U. INT'L L. J. 321, 325, 328–29, 333–34 (1991).

48. On unfair terms in consumer contracts see Council Directive 93/13/EEC of 5 April 1993, art. 1, 1993 O.J. (L 95) 29–34.

49. *Id.* at art. 2(c).

50. Art. L 132-1 of the Code de la Consommation. See generally Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 27 April 2000, at http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf.

51. BENACCHIO, *supra* note 21, at 42.

includes a provision under which one of the protective measures for providers of protected services is the application “for disposal outside commercial channels of illicit devices” (for whatever that means).⁵³ Likewise, through EC legislation, new legal concepts have been introduced into national law. These changes consist of existing concepts modified by EC law, as well as entirely new concepts.⁵⁴

1. Existing Legal Concepts Affected by EC Law

Certain domestic legal terms are used in the Community framework with a different name or meaning.⁵⁵ As a result, the scope of some traditional domestic concepts has either been restricted or expanded. These modifications may be confined to the interpretation and application of the EC law or may be extended to national law.⁵⁶

For instance, the notion of *diritto di receso* (the right to renounce) has been used both in the Italian version of some consumer Directives and in the laws implementing them into the Italian system.⁵⁷ However, within the EC framework, the right to renounce refers to the cancellation of an otherwise binding offer or acceptance.⁵⁸ In this respect, the cancellation of a binding acceptance amounts to the termination of a contract, which in Italian law has been traditionally termed *risoluzione del contratto* or *rescissione del contratto*.⁵⁹ Consequently, EC law has renamed a domestic concept, although the use of the new name

52. Council Directive 98/84/EC, art. 5, 1998 O.J. (L 320) 57 (providing for different forms of legal protection for potential infringement upon providers of protected services). See also Helen Xanthaki, *The Problem of Quality in EU Legislation: What on Earth is Really Wrong?*, 38 COMMON MARKET L. REV. 651, 670 (2001).

53. For more detail see Xanthaki, *supra* note 52, at 670. “Protective Services” are those which provide “against remuneration and on the basis of condition access” such as television and radio broadcasting. Council Directive 98/84/EC, art. 2(a), 1998 O.J. (L 320) 56.

54. See BENACCHIO, *supra* note 21, at 46–51.

55. *Id.*

56. *Id.*

57. *Id.*

58. See, e.g., Council Directive 85/577/EEC, art. 5, 1985 O.J. (L 372) 31 (providing for the protection of consumers with respect to contracts negotiated away from business premises).

59. *Id.*

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seems to be restricted to the community framework. In the same way, the Spanish version of the Directive on distance selling refers simultaneously to the consumer's right of withdrawal as *rescisión* and *resolución*, concepts which are not exactly interchangeable.⁶⁰

2. New Concepts

A number of legal concepts adopted within the community framework are new in some, if not all, of the Member States legal systems. One of the most well known examples of this phenomenon is the irruption of the principle of good faith into English law after the enactment of the Directive on Unfair Clauses in Consumer Contracts.⁶¹ Pursuant to Article 3 of the Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of *good faith*, the term causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.⁶² This requirement, which limits the effective agreement of the parties by standard contract terms, did not previously exist in English law.

In the UK, the Directive has been transposed by the Unfair Terms in Consumer Contracts Regulations,⁶³ but English courts lack a general legal doctrine to guide the invalidation of consumer contract terms contrary to the principle of good faith.

60. Council Directive 97/7/EC, art. 6 1997 O.J. (L 144) 19 (implemented into Spanish Law through the Act on Contracts Concluded Away from Business Premise of 20 May 1997). *Rescisión* is a mutually agreed termination of a contract, which can, in some circumstances, also be exercised unilaterally, following a statutory provision in that respect. *Resolución* is, by contrast, a remedy for breach which entitles the aggrieved party to escape from the agreement and claim damages, where appropriate. See LUIS DíEZ PICAZO & ANTONIO GULLÓN BALLESTEROS, SISTEMA DE DERECHO CIVIL: VOLUMEN II 268-69 (1993) [Civil Law System, Vol. II. General Theory of Contract].

61. See Council Directive 93/13/EEC, 1993 O.J. (L 95) 29-34 (requiring Member States to ensure that consumers not be bound by unfair terms in contracts which are contrary to the requirement of good faith).

62. *Id.* at art. 3(1). "A contractual term which has not been individually negotiated shall be regarded as unfair, if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." *Id.*

63. (1994) SI 1994/3159, *repealed* by Unfair Terms in Consumer Contracts Regulations, (1999) SI 1999/2083.

Hence, when the Court of Appeals was called on to interpret the good faith requirement under the act transposing the Directive in *Director General of Fair Trading v. First National Bank plc*,⁶⁴ the Court held that “good faith has a special meaning in the regulations, having its conceptual roots in civil law systems.”⁶⁵ Furthermore, the Court referenced the 1976 German Standard Contract Terms Act, alleging the strong impact of said text on the Directive.⁶⁶ Meanwhile, French law has incorporated the Directive into Article L 132-1 of the *Code de la Consommation* with no reference to the principle of good faith whatsoever.⁶⁷ Perhaps, the French legislator deemed the terms “unfair” and “contrary to good faith” to be interchangeable. Finally, in other countries, the transposition of the duty of good faith has not been without problems.⁶⁸

C. A Common Framework for EC Legislation on Contract Law

The incidence of the EC legal patchwork on the Member States' legal systems is deemed to have destroyed the coherence of domestic private law, which has been traditionally characterized by its solid systematic structure or even codification.⁶⁹ In this sense, the duty of national courts to interpret domestic law consistently with EC law should not be forgotten.⁷⁰ The present situation is especially disastrous in the field of contract law,

64. *Director General of Fair Trading v. First National Bank plc*, 2000 Q.B. 672 (Eng. C.A.).

65. *Id.* at para. 27.

66. *Id.*

67. The French statute provides in pertinent part “Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat.” Law No. 95-96 of Feb. 1, 1995, J.O., Feb. 2, 1995, annex. See also BEALE, CASES, MATERIALS AND TEXT, *supra* note 43, at 544.

68. In Denmark, see A. Plesner Björk, *Harmonisering af urimelige kontraktvilkår I europæiske forbrugeraftaler, 5 års erfaringer med direktiv 93/13/EØF, U.2000B.86* [Harmonization of Unfair Terms of European Consumer Contracts; 5 year experience with the Directive 93/13/ECC].

69. Christian Joerges, *European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective*, 18 LEGAL STUD. 146, 161 (1998).

70. Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Directive 68/151/CEE (1990).

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where the Community has been particularly active.⁷¹ As a result, the Community has envisaged the simplification and coordination of the existing EC legislation on contract law in the Communication on European Contract Law (Option III)⁷² and the Resolution of the European Parliament on the Approximation of Civil and Commercial Law.⁷³ This initiative is embodied within the broader endeavor to modernize the body of EC law by consolidating, codifying and recasting existing instruments centered on transparency and clarity.⁷⁴

Yet, the simplification of existing EC legislation on contract law for the purpose of internal consistency requires the formulation of principles of general application which cannot be extrapolated from the legal conglomerate of EC provisions.⁷⁵ Alternatively, the Community could use the general principles of contract law common to the laws of the Member States to assist in the review and re-formulation of existing EC legislation.⁷⁶ However, this possibility must be immediately discarded, since there is no common notion of contract law within the legal systems of the Member States.⁷⁷ While some general principles may be drawn on a comparative basis,⁷⁸ they can hardly provide

71. For a complete overview of the legislative intervention of the Community in this legal field, see Communication from the Commission to the Council and the European Parliament on European Contract Law COM (2001) 398 final (Nov. 7, 2001), *available at* http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/cont_law_02_en.pdf.

72. *Id.* at 15–16.

73. European Parliament Resolution on the Approximation of the Civil and Commercial Law of the Member States, para. 14(c), 2001 O.J. (C 140 E) 541.

74. See Interim Report from the Commission to the Stockholm European Council: Improving & Simplifying the Regulatory Environment, COM (2001) 130 final at 10 (Mar. 7, 2001), *available at* http://europa.eu/int/comm/stockholm_council/pdf/regeny_en.pdf.

75. See, e.g., Communication on European Contract Law: Joint Response of the Commission on European Contract Law & the Study Group on a European Civil Code, COM (2001) 398 final, at 38–39, para. 77 (Nov. 29, 2001), *available at* http://www.europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.23.pdf.

76. Treaty Establishing the European Community, Feb. 7, 1992, art. 288.2, [1992] 1 C.M.L.R. 573, 634.

77. See, e.g., ARTHUR TAYLOR VON MEHREN, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL VII: CONTRACTS IN GENERAL 5 (1982).

78. See, e.g., HEIN KÖTZ & AXEL FLESSNER, EUROPEAN CONTRACT LAW (1997).

a sufficient framework for the systematization of existing community contract law.

Therefore, the improvement of existing EC legislation has been considered in connection with the pursuit of harmonizing domestic contract law in Europe. Indeed, in the long run, the conglomerate of EC provisions may not be sufficiently systematized without being set against the common framework of contract law — a framework which does not yet exist. Leaving the issue of proportionality aside, it is here adduced that a Contract Code should not be intended as *the* one-for-all measure to obtain uniformity in contract law across Europe. Legal uniformity in that regard would require additional conditions prior to, or running parallel to, any aforementioned act of legislative unification imposed.

III. LINK BETWEEN LEGAL UNIFORMITY, LANGUAGE & CULTURE

A recent conception of law has made a distinction between three legal levels.⁷⁹ These are the *surface level of law*, which consists of legal provisions, case law and comparable material; the *legal culture*, which is comprised of legal concepts, general principles and juridical method; and, finally, *a deep structure of law*, which is more static and reflects each historical period.⁸⁰ All three of these levels are normally interrelated so that legal culture and its deep structure influence the surface level of the law and vice-a-versa. In this sense, EC law currently seems to be comprised of the surface level of law, being reduced to a conglomerate of rules with no major systematization. The other levels of law, such as legal culture, are missing. As legal culture plays the crucial role of determining how legal rules are understood and applied, EC law must unavoidably be read through national glasses.⁸¹ An illustrative example is the case *Corte Inglés S.A. v Cristina Blázquez Rivero*, in which the ECJ advised the Spanish court to interpret its domestic law in ac-

79. Kaarlo Tuori, *EC Law: An Independent Legal Order or a Post-Modern Jack-in-the-Box?*, in *DIALECTIC OF LAW AND REALITY: READINGS IN FINNISH LEGAL THEORY* 397, 403 (Lars D. Erikson et al. eds., 1999).

80. *Id.* at 403–06.

81. Thomas Wilhelmsson, *Jack-in-the-Box Theory of European Community Law*, in *DIALECTIC OF LAW AND REALITY: READINGS IN FINNISH LEGAL THEORY* 437, 449 (Lars D. Erikson et al. eds., 1999).

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cordance with the Package Tour Directive which Spain should have, but had not yet, implemented.⁸² In a judgment following this European Court ruling, the *Juzgado de Primera Instancia de Sevilla* refused to use this “interpretation,” as the result was in clear violation of the text of the Spanish Civil Code.⁸³

Meanwhile, the proponents of a common European contract law depart from the idea that an all-embracing codification would palliate the lack of coordination in EC law, providing the necessary framework in which the latter can be systematized.⁸⁴ However, considering the interrelation of the different levels of law previously described, if a Contract Code is ever enacted, the gap between this articulated uniformity and the various legal cultures across the EU — manifested, for example, in terms of local practices — would be once again difficult to bridge.⁸⁵ In other words, the risk would still exist that national courts could interpret a European Code in light of domestic law, thus making actual uniformity impossible.

In contrast, when certain conditions are present, legal uniformity is possible even outside the mandate of positive law.⁸⁶ For instance, in the United States, Congress refrained from exercising broadly its power to pass legislation in the field of private law.⁸⁷ In turn, a certain degree of legal uniformity has been achieved outside federal law.⁸⁸

As in the U.S., a common legal culture is promoted everywhere by the reception of a legal source with authority, the

82. *Corte Inglés S.A. v. Cristina Blázquez Rivero*, 1996 E.C.R. I-1281 at para. 6.

83. See generally Leone Niglia, *The Non-Europeanisation of Private Law*, 4 EUR. REV. OF PRIVATE L. 575 (2001).

84. Von Bar, *supra* note 1, at 9–10.

85. See, e.g., Pierre Legrand, *On the Unbearable Localness of Law: Academic Fallacies and Unseasonable Observations*, 1 EUR. REV. OF PRIVATE L. 61, 74–75 (2002) [hereinafter Legrand, *Localness of the Law*].

86. Axel Flessner, *Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung* [Legal Harmonization through Legal Doctrine and Legal Education], 56 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 243 (1992) [hereinafter Flessner, *Rechtsvereinheitlichung*].

87. Whitmore Gray, *E Pluribus Unum? A Bicentennial Report on Unification of Law in the United States*, 50 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 111, 122–25 (1986).

88. See Detlev F. Vagts, *Harmonizing Divergent Laws: The American Experience*, 1998–1 UNIFORM L. R. 711 (1998).

common-law developed by the judiciary.⁸⁹ In addition, the influence of the “national law schools,” teaching common American law as a unity with local variations, has allowed for the production and use of common legal literature, guided by similar legal thinking and working methods. The possibility of practicing in any state after having passed a complementary local test and the existence of English as a common legal language has further facilitated the gradual approximation of laws.⁹⁰

The Nordic countries constitute another, although rather peculiar, example of uniformity. These countries have neither a political or economic unity nor a common legal source.⁹¹ Yet, there is a strong feeling of normative unity due to geographical proximity, the similarity of lifestyles and languages and parallel socio-political history. Traditionally, an intensive cooperation regarding legal and administrative policies has existed.⁹² Even today, Scandinavian scholars still maintain an ongoing legal debate that is usually presented as a single position when exposed abroad.⁹³ A contradictory case is that of the German speaking countries, Germany, Switzerland and Austria. These countries share a common language and similar socio-economic and cultural backgrounds. However, they lack both political unity and a common legal source and, contrary to the Nordic countries, their legal scholars have no interaction at all.⁹⁴

In view of these examples, it may be deduced that a determinant condition for the achievement of legal uniformity is the existence of a *common legal culture*, generated by a *common legal discourse*. Shared language or similar socio-economic conditions in the countries involved are also influential factors, al-

89. *Id.* at 712. Until 1938, federal courts could apply “a federal common law rule independent of a different practice prevailing in the particular state involved.” *Id.*

90. Arthur Rossett, *The Unification of American Commercial Law: Restatements and Codification*, in *IL DIRITTO PRIVATO EUROPEO: PROBLEMI E PROSPETTIVE* 99 (1993).

91. Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 244.

92. See, e.g., M. Matteucci, *The Scandinavian Legislative Co-operation as a Model for a European Co-Operation*, in *LIBER AMICORUM* 136 (A. Bagge ed., 1956).

93. See, e.g., Gebhard Carsten, *Europäische Integration und Nordische Zusammenarbeit auf dem Gebiet des Zivilrechts* [European Integration and Nordic Cooperation in the Field of Civil Law], 1 *Z EUP* 333 (1993).

94. Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 246.

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though to a lesser extent. In this regard, none of the factors relevant to the achievement of legal uniformity are present throughout the European Union.⁹⁵ While geographic proximity, religious homogeneity and a common philosophical background exist, with the exception of EC law,⁹⁶ Europe lacks a basic legal authority over the whole territory, as well as a common legal thinking. Disparities are not only found between *common law* and *civil law*, but there is also a multiplicity of national codifications which reflect, at most, national uniformity.⁹⁷ Finally, there is obviously no language common to all the Member States of the EU.

A. The Divide Between Common Law & Civil Law

Within the EU, two main legal families co-exist, namely, common law and civil law.⁹⁸ The existing differences of these families reflect the idiosyncrasies of the countries to which they belong and their distinctive mentalities. For instance, civil law tradition privileges the legal rule, whereas common law grants priority to practical experience.⁹⁹ According to Legrand, each approach reflects a world vision deeply anchored in the society in which it arises, possibly drawing a parallel between legal culture and culture in any other form.¹⁰⁰ As a result, legal uniformity does not make any sense without a shared rationality and morality. To the extent that different legal traditions have developed in a way that is historically, sociologically, economically, and politically different — in essence, culturally different — converging them is nearly impossible.¹⁰¹ As a matter of fact,

95. *Id.* at 255.

96. *Id.*

97. *Id.*

98. See PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 44, at xxii.

99. See Sir Otto Kahn-Fruend, *Common Law and Civil Law — Imaginary and Real Obstacles to Assimilation*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 137, 152–53 (M. Capelletti ed. 1978).

100. Legrand, *Sens et Non-sens*, *supra* note 18, at 798.

101. See Legrand, *Localness of the Law*, *supra* note 85, at 63. See also Pierre Legrand, *Are Civilians Educable?*, 18 LEGAL STUD. 216, 222 (1998) (stating “[t]he communion assumed to be epitomized by a European civil code would in effect represent...the excommunication of the common law way of understanding the world...leav[ing] them at odds with the culture they inhabit...[C]ommon law lawyers would find themselves compelled to surrender

different understandings of the law among different legal families make uniform interpretation and implementation of EC law a difficult task.¹⁰² If ever enacted, this difficulty would also exist in a Contract Code.

One could argue that a position which stresses the divide between common law and civil law recognizes that different European legal traditions have long been informed by and exposed to many influences from divergent cultural origins.¹⁰³ Common law is silently permeating continental Europe through business life by means of legal constructions such as leasing agreements, franchises or trusts, which are not embodied in the European civil codes and do not even belong to the civil law tradition.¹⁰⁴ Both legal traditions are indeed converging. However, whereas courts in civil law countries have developed sophisticated standards to be applied in matters of contracts and torts, in common law, contrarily, the number of statutes is increasing.¹⁰⁵ The process of *communitarization* has already put an end to the existence of isolated, coherent legal cultures.¹⁰⁶ The drafting of EC legal texts requires a great deal of legal understanding, and their implementation in the different legal backgrounds of Member States erodes distinctive legal idiosyncrasies.¹⁰⁷ Additionally, the influence of the ECJ and the European Court of Human Rights has reshaped a number of general principles of law embodied in the Member States' legal systems.¹⁰⁸

cultural authority and to accept unprecedented effacement *within their own culture.*") (emphasis in the original).

102. Thomas Wilhelmsson, *Private Law in the EU: Harmonized or Fragmented Europeanisation?*, 10 EUR. REV. PRIVATE L. 77, 81 (2002).

103. Joerges, *supra* note 69, at 152.

104. See Thijmen Koopmans, *Toward a European Civil Code?*, 5 EUR. REV. PRIVATE L. 541, 544 (1997).

105. Anthony Chamboredon, *La Texture Ouverte d'un Code Européen du Droit des Contrats* [The Open Texture of a European Contract Code], JDL 5ff. at 14 (2000).

106. Oliver Remien, *Denationalisierung des Privatrechts in der Europäischen Union? – Legislative und gerichtliche Wege* [Denationalization of Private Law in the EU? – Legislative and Jurisdictional Paths], ZFRV 116 (1995). "Europeanization and denationalization are naturally the two sides of the same coin or, in other words, the same thing seen under different viewpoints. Europeanization stresses what we win; denationalization reflects what we lose." *Id.*

107. Joerges, *supra* note 69, at 152.

108. Koopmans, *supra* note 104, at 545.

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In any case, and in spite of the technical approximation of common and civil law, some reminiscences of legal *chauvinisme* may still be detected across Europe, motivated by the fear of losing the national cultural identity.¹⁰⁹ In this regard, some scholars have even claimed that adopting a European Contract Code would be like renouncing to the European culinary varieties in favor of a McDonald's eating culture.¹¹⁰

B. Language

There is no one language common to all the Member States, but instead, eleven legislative and administrative legal languages: Danish, Dutch, English, Finnish, German, French, Greek, Italian, Portuguese, Spanish and Swedish. After the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic to the EU, the number of official languages will be almost doubled.

Law and language are closely connected in that they usually are products of the same social, economic and cultural influences.¹¹¹ In the same sense, cultural heritage is embedded in law, including the linguistic dimension.¹¹² In this regard, some scholars have affirmed that as legal thinking cannot be easily separated from the language in which it is formed, any future codification of contract law in Europe must be multilingual.¹¹³ Only with a multilinguistic form of contract law will the linguistic and cultural differences within Europe be respected.

109. See, e.g., Response of the UK Government to COM (2001) 398 final, para. 29, available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/1.4.pdf (last visited Apr. 8, 2004).

110. As concluded by Andre Tunc at *Incontro di studio sul futuro codice europeo dei contratti*, Oct. 1990, reported by Rufini Gandolfi, M.L. *Una Condizione Europea sui Contratti: Prospettive e Problemi* [Study Meeting on a Future European Contract Code, reported by Gandolfi M. L.: a European Contract Codification: Perspectives and Problems.]; RIVISTA DEL DIRITTO COMMERCIALE E DE DIRRITO GENERALE DELLE OBLIGAZIONI 658, 683 (1991).

111. Flessner, *Rechtsvereinheitlichung*, supra note 86, at 257.

112. Denis Tallon, *Les Faux Amis En Droit Comparé*, in Festschrift für Ulrich Dornig zum Siebzigsten Geburtstag 677 (Jurgen Basedow, ed. 1998) [False Friends in Comparative Law, in Festschrift in the Occasion of Ulrich Dornig's 70 Anniversary].

113. Flessner, *Rechtsvereinheitlichung*, supra note 86, at 257.

Actually, since the formation of the European Communities, the main point of departure has been that of linguistic equivalence.¹¹⁴ Yet, multilingualism has its costs in that the EU drives the largest translation and interpretation services in the world.¹¹⁵ Furthermore, multilingualism causes a considerable delay in the legislative procedure since texts have to be translated into the different official languages.¹¹⁶ Most importantly, the quality of the final product is impaired by the fact that there is rarely an equivalent word in two different languages. This difficulty is further amplified by the existence of different legal systems and traditions across Europe. The various language versions of EC legislative acts provide sufficient evidence thereof.¹¹⁷

To overcome, to some extent, the difficulties carried out by legal multilingualism, the ECJ has developed a method to interpret the different textual versions of EC law which gives weight to legislative policy rather than language.¹¹⁸ Accordingly, all of the relevant versions are considered, but the ECJ accords only limited significance to textual interpretation.¹¹⁹ When two or more versions of a text differ in meaning, the ECJ has tried to set forth a single interpretation by looking to the purpose and spirit of the provision in question, rather than by using a strictly literal approach.¹²⁰ The problem with this method,

114. EEC Council Regulation, No. 1 art. 1 & art. 1, [1958–1959] OJ SPEC. ED. 385–86 (determining languages to be used by the European Economic Community).

115. Huntington, *supra* note 47, at 334.

116. *Id.*

117. The European Community Council and Commission must often revise texts because of linguistic divergences. See Regulation 1622/87, (1987) O.J. (L 150) 30 (requiring corrections to the non-Spanish version of a wine commerce regulation). Likewise, the ECJ has been confronted in numerous occasions with issues of language interpretation. See COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENES: RECHERCHE ET DOCUMENTATION 106–18, available at <http://curia.eu.int/da/content/outils/tm.pdf> (last visited Apr. 4, 2004).

118. Pierre Pescatore, *Interpretation des Lois et Conventions Plurilingues dans la Communauté Européenne*, 25 LES CAHIERS DE DROIT 989, 1000 (1984).

119. Nikolas Urban, *One Legal Language and the Maintenance of Cultural and Linguistic Diversity?*, 8 EUR. REV. OF PRIVATE L. 51 (2000).

120. See generally Huntington, *supra* note 47, at 334. See, e.g., Stauder v. City of Ulm, 1969 E.C.R. 419, 1970, C.M.L.R. 112, 1969; Case 30/77, Regina v. Bouchereau, 1977 E.C.R. 1999, 2 C.M.L.R. 800 (1977); Worsdorfer v. Raad van Arbeid, 1979 E.C.R. 2117, 2724–25, 1 C.M.L.R. 87, 92–92 (1980); North Kerry

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which may be characterized as *metalinguistic* interpretation,¹²¹ is that the aid of the ECJ is constantly required. To the extent that EC law is multilingual, national courts and administrative authorities cannot rely solely on their own understanding of the European law drafted in their language.¹²² Thus, if an all-embracing European contract law is ever enacted, the same guidance would be required, having potentially disastrous consequences on an already saturated ECJ by multiplying the length of proceedings in domestic law. Additionally, this increase would have a negative impact on the degree of legal security, especially if the Code was enacted by a directly binding instrument, such as an EC Regulation.

C. Absence of a Common European Legal Culture

Currently, a common European legal culture does not exist. In the absence of such a culture, the enactment of a European Code would probably require the over-regulation of contract law. Some scholars argue that the codification of many issues would be nearly impossible in terms of general clauses or standards, since national courts would probably construe them differently.¹²³ Furthermore, even if the ECJ had the competence to interpret the Code, many issues would be left to the evaluation of domestic courts. The European legislator should therefore attempt to bridge the cultural and linguistic divides prior to, or at least in conjunction with, any future comprehensive harmonization of contract law. Once the legal contexts in which uniform rules have to be interpreted and applied begin surfacing, the confidence of domestic courts in their own understanding of the uniform rules will also rise, diminishing the “aiding” role of the ECJ.

Truth be told, legal uniformity is possible in countries with co-existing different legal traditions. Even at the international level, uniform laws, like CISG, have contributed greatly to such uniformity through the substantive law of international sales,

Milk Products Ltd. v. Minister for Agriculture and Fisheries, 1977 E.C.R. 425, 2 C.M.L.R. 769 (1977).

121. Pescatore, *supra* note 118, at 1000.

122. Urban, *supra* note 119, at 55–56.

123. Ulrich Drobniq, *Scope and General Rules of a European Civil Code*, 5 EUR. REV. OF PRIVATE L. 489 (1997).

comprised of contracting nations from very different socio-economic and legal backgrounds.¹²⁴ Yet, the *European contract law project* contemplates an all-embracing, harmonizing enterprise whose ultimate consequence might be the total replacement of the Member States' domestic legislation in the field of contract law. In this sense, a prime illustration is the outcome of the U.S. codification movement in the Nineteenth Century. In 1865, a Civil Code was drafted under the chairmanship of David Dudley Field in a style influenced by the Code Napoleon and contained some civil law content.¹²⁵ The greatest achievement of this Code was its adoption in California.¹²⁶ Yet, as the Code required a major departure from the traditional legal method, California judges quickly became aware that in terms of determining results, their inherited common law method was almost as significant as the Code's content.¹²⁷ Accordingly, judges managed to minimize the innovations carried out by the Code through a variety of techniques, thus, keeping California law in line with the previous rules.¹²⁸

IV. THE DEVELOPMENT OF A COMMON EUROPEAN LEGAL DISCOURSE

The European legislator should, accordingly, promote the development of a *common European legal discourse* through legal research, legal education and the gradual creation of a common legal methodology. Ultimately, a *common legal culture* may crystallize, thereby facilitating the achievement of real uniformity.

A. *Legal Research*

Various private initiatives have recently promoted the mutual interest of European legal diversity and even a strengthened feeling of common heritage. Worth mention are *The Pavia*

124. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 *International Lawyer* 443–83 (1989), available at <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html>.

125. Gray, *supra* note 87, at 115.

126. *Id.* at 116.

127. *Id.*

128. *Id.*

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Group on a European Contract Code,¹²⁹ *The Trento Common Core Approach to European Private Law*,¹³⁰ *The Study Group on a European Civil Code*¹³¹ and *The Commission on European Contract Law*.¹³² This promotion is further supported by works such as Zimmermann's *The Law of Obligations: Roman Foundations of the Civilian Tradition*¹³³ and *Good Faith in European Contract Law*¹³⁴ and new legal reviews such as the *Zeitschrift für Europäisches Privatrecht*,¹³⁵ the *European Review of Private Law*,¹³⁶ the *Europa e Diritto Privato*¹³⁷ and the *Columbia Journal of European Law*.¹³⁸

Similar initiatives should be encouraged by EC institutions, as they promote the mutual understanding of diverse legal traditions existing in Europe. Indeed, a serious debate on the need to harmonize contract law and even private law in the EU can only be conducted if all of the parties are aware of their commonalities and divergences. In this regard, it is relevant to note that research activities in that direction could be undertaken within the Sixth Framework Programme for research and technological development.¹³⁹

129. GIUSEPPE GANDOLFI, *CODE EUROPEEN DES CONTRATS: AVANT-PROJET* (2001).

130. See Mauro Bussani, *The Common Core of European Private Law*, at <http://jus.unitn.it/dsg/common-core/approach.html> (last visited Mar. 12, 2004) for a general description and a list of the participants seeking to create a model "European Law School" in order to shape a truly common legal education.

131. Christian von Bar, *The Study Group on a European Civil Code*, in *TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND* 323 (2000).

132. Hugh Beale, *Towards a Law of Contract for Europe: The Work of the Commission on European Contract Law*, in *NATIONAL AND EUROPEAN LAW ON THE THRESHOLD TO THE SINGLE MARKET* 177 (Günter Weick ed., 1993); *PRINCIPLES OF EUROPEAN CONTRACT LAW*, *supra* note 44, at xi.

133. *See generally* REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1990).

134. *See generally* *GOOD FAITH IN EUROPEAN CONTRACT LAW* (Reinhard Zimmermann & Simon Whittaker eds., 2000).

135. *ZEuP*, from 1993, Verlag C.H. Beck Munich.

136. *EUR. REV. OF PRIVATE L.*, KLUWER LAW INTERNATIONAL, THE NETHERLANDS, KLUWER LAW INTERNATIONAL, THE NETHERLANDS (1993).

137. GIUFFRÈ EDITORE, MILANO (1998).

138. *THE COLUMBIA JOURNAL OF EUROPEAN LAW*, PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA LAW SCHOOL (1994).

139. *See, e.g.*, A More Coherent European Contract Law, *supra* note 11, at para. 68. For a general overview on the Sixth Framework Programme see,

B. Legal Education

The endeavor to converge the private or contract laws of Member States can only succeed if there is a mass of European-minded jurists who are prepared to work in a multi-system environment.¹⁴⁰ Here, European law schools have an important role to play. These schools should educate future lawyers regarding the dilemmas of viewing national legal systems in isolation. Foreign law must be identified as a mere local variation of the rules learned in law school.¹⁴¹ To acquire these analytical tools, students must be educated in the principles and policy frameworks behind the law.¹⁴² In the U.S., for instance, the first year of legal education is dedicated to learning legal methods as well as the social and economic dimensions of law in order to demonstrate the openness of legal solutions.¹⁴³ Such education may be facilitated with the addition of books such as the *Ius Commune Caseworks for the Common Law of Europe*, which puts forward common general principles already present in the Member States' private laws. As stressed by Kötz,

[A]ll that is needed to constitute European private law is to recognise it. For this purpose we need books, books which disregard national boundaries and, freed from any particular national system or systematics, are addressed to readers of different nationalities. Of course national rules must be taken into account, but only as local variations of a European theme.¹⁴⁴

Likewise, the mobility of law students should be encouraged, for example, by means of the already existing SOCRATES and ERASMUS Programs, to improve the recognition of law studies carried out in other EU countries.¹⁴⁵ Some scholars have even

European Commission, *The Sixth Framework Programme in Brief*, at http://www.europa.eu.int/comm/research/fp6/pdf/fp6-in-brief_en.pdf (Dec. 2002).

140. Pierre Larouche, *supra* note 19, at 106–07.

141. See Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 255.

142. Larouche, *supra* note 19, at 101.

143. See W.F. Ebke, *Legal Education in the United States of America*, in *THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION* 107 (Bruno de Witte & Caroline Forder eds., 1992).

144. KÖTZ & FLESSNER, *supra* note 78.

145. See Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 253–54. See generally I. von Münch, *Europarecht ohne Europäisches Rechtsstudium [Euro-*

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suggested the creation of a European Moot Court Competition in the area of private and commercial law.¹⁴⁶

C. A Common European Legal Method

The growth of a genuine uniform contract law in Europe will certainly require the development of a common legal methodology. Awareness regarding the existence of common rules and principles alone will be insufficient to compel the contract laws of the Member States to converge. Thus, it may be opportune to prompt courts throughout Europe to construct and apply domestic law in light of a European comparative method, taking into account the functionally equivalent solutions reached in other jurisdictions.¹⁴⁷ This method would result in the development of a European doctrine of precedents.¹⁴⁸ According to one scholar, the comparison between the facts and the social and economic dimensions of a case vis-à-vis other foreign precedents would not only allow for the development of a European standard,¹⁴⁹ but may also lead to “more sophisticated, more creative and more efficient decision-making because it makes the judge more aware of the specificity of the case before him.”¹⁵⁰

The law of contract is especially adequate for undertaking functional comparisons. This area of the law is dominated by party autonomy and therefore to a large extent free from national public policy constraints.¹⁵¹ This liberty allows judges to

pean Law Without A European Legal Education?], ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 1 (2000).

146. Friedrich Blase, *Leaving the Shadow for the Test of Practice — On the Future of the Principles of European Contract Law*, 3 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 3, 14 (1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/blase.html> (last visited Apr. 2, 2004).

147. See Klaus Peter Berger, *The Principles of European Contract Law and the Concept of “Creeping Codification” of Law*, 9 EUR. REV. PRIVATE L. 30 (2001).

148. See Klaus Peter Berger, *Harmonisation of European Contract Law: The Influence of Comparative Law*, 50 INT’L & COMP. L.Q. 877, 883-94 (2002) [hereinafter Berger, *Harmonisation*]; *Auf dem Weg zu einem europäischen Gemeinschaftsrecht der Methode*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 4, 11 (2001).

149. Berger, *Harmonisation*, *supra* note 148, at 887.

150. *Id.* at 890.

151. Ole Lando, *Why Codify the European Law of Contract?*, 5 EUR. REV. PRIVATE L. 525, 529 (1997).

take account of the socio-economic dimensions of the case at hand.¹⁵² Arguably, courts in the EU Member States should therefore try to coordinate the application of contract law with other jurisdictions.¹⁵³ This method is already used in relation to international conventions, where a uniform interpretation of the text in light of the international character is required.¹⁵⁴

D. Legal Language(s) Common to the EU?

In which language is the development of a common European legal discourse to be conducted? Here, again, we find the linguistic divide. In the Middle Ages, the development of the so-called *Ius Commune* or, at least, of a common legal discourse, was facilitated by the fact that there was a common legal language throughout Europe: Latin.¹⁵⁵ Today, however, unless the predominance of certain languages is acknowledged, even the development of a common legal discourse would have to be multilingual. This multilingual discourse would, of course, presuppose the existence of polyglot lawyers and academics in command of many languages.

Truthfully, the principle of linguistic equality is a fiction, even at the EC level. With the exception of the European Parliament, the number of working languages in the EU institutions has been reduced to French, English and, to a lesser extent, German.¹⁵⁶ Even "private" harmonization enterprises such as the *Commission on European Contract Law* or the *Group for a European Civil Code* have operated in these languages, stressing that although law and language have a cultural component, the two may be disconnected from each other.¹⁵⁷ Another initiative, the *Trento Project on the Common Core of European Private Law*, justified the use of English by postulating that "law has no necessary relationship with the words ordinarily used to give it expression."¹⁵⁸ With the goal of providing

152. Berger, *Harmonisation*, *supra* note 148, at 891.

153. *Id.* at 887.

154. See, e.g., EC Convention on the Law Applicable to Contractual Obligations, art. 7/18, 1980 O.J. (L 266).

155. See Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 246.

156. See Urban, *supra* note 119, at 54.

157. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 44, at xxvi.

158. Nicholas Kasirer, *The Common Core of European Private Law in Boxes and Bundles*, 3 EUR. REV. PRIVATE L. 417, 420 (2002).

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a legal map of European private law, the Trento Project uses visual representations of legal ideas under the premise of the viability of non-verbal communication in law.¹⁵⁹ Under this method, Trento scholars share the view that the law of the common core is fundamentally meta-linguistic.¹⁶⁰

Assuming the impossibility of isolating, to some extent, law and language, citizens and administrations throughout the EU should be advised to adapt to the factual dominance of French, English and German in order to facilitate the development of a common legal discourse in Europe. This measure has already been taken by legal periodicals such as the *European Review of Private Law/Revue Européenne de Droit Privé/Europäische Zeitschrift für Privatrecht*, which is published in these three languages.¹⁶¹ However, since language will always maintain a cultural dimension, the ability to work with other languages would be convenient and respectful of the European linguistic diversity. Accordingly, promoting the education of foreign languages is one of the priorities of the EU. The recent Action Plan *Promoting Language Learning and Linguistic Diversity*¹⁶² set out three broad areas in which action is to be taken: extending the benefits of life-long language education to all citizens, improving language education methods, and creating a more language-friendly environment.¹⁶³ This plan thus proposes a series of actions to be taken at the European level from 2004 to 2006 in order to secure a major step towards promoting language learning and linguistic diversity.¹⁶⁴

159. Mauro Bussani, *Integrative Comparative Law Enterprises and the Inner Stratification of Legal Systems*, 8 EUR. REV. PRIVATE L. 85 (2000).

160. Kasirer, *supra* note 158, at 420.

161. See generally Kluwer Law International Online: European Review of Private Law, at <http://www.kluwerlawonline.com/toc.php?mode=byjournal&level=2&values=European+Review+of+Private+Law> (last visited Apr. 2, 2004).

162. Commission of the European Communities, Communication From the Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions - Promoting Language Learning and Linguistic Diversity: An Action Plan 2004-2006, COM (03)449 final (July 24, 2003), available at http://europa.eu.int/comm/education/doc/official/keydoc/actlang/act_lang_en.pdf.

163. *Id.*

164. *Id.*

V. CONCLUSION: A COMMON LEGAL DISCOURSE
AS THE INDISPENSABLE FOUNDATION FOR A
EUROPEAN CONTRACT LAW

The European legal profession must be educated towards uniformity and the advantages of seeking inspiration from foreign colleagues. Within a common legal discourse, even linguistic diversity will be a minor problem, as courts and administrations will feel confident interpreting and applying the EC laws drafted in their own language. Even the solutions for many legal issues could be “taken for granted” without having to constantly resort to the ECJ for a preliminary ruling. In order to facilitate the development of a common European legal discourse, as well as the legislative task of the EC, it would be opportune to acknowledge the *de facto* predominance of certain languages, although the knowledge of other European languages should be encouraged as well.

All in all, the foundations of a genuine European contract law can hardly be set alone by the legislator through the enactment of a Code. The common effort of the European legal profession will have an important role to play here.

NOTES

THE UNITED STATES JORDAN FREE TRADE AGREEMENT, UNITED STATES CHILE FREE TRADE AGREEMENT AND THE UNITED STATES SINGAPORE FREE TRADE AGREEMENT: ADVANCEMENT OF ENVIRONMENTAL PRESERVATION?

I. INTRODUCTION

Most countries agree, at least on some level, that the environment should be preserved.¹ However, the level of environmental protection that is adequate or attainable for a particular country depends on a host of factors and priorities.² A developing country may determine a particular production method is preferable because of its income earning potential despite its deleterious effect on the environment.³ Free trade agreements compound the dilemma of discerning how to adequately protect the environment while preserving sovereignty.⁴

The United States ("U.S.") has entered into a plethora of trade agreements that purport to preserve the environment. First, the North American Free Trade Agreement ("NAFTA")

1. There are numerous international environmental organizations that have created a forum to discuss and exchange information on environmental issues. See International Society for Environmental Preservation, at <http://www.isep.at/about/index.htm> (last visited Apr. 14, 2004); Trade & Environment.org, at <http://www.trade-environment.org/page/about.htm> (last visited Apr. 14, 2004); ICLEI, at <http://www3.iclei.org/member.htm> (last visited Apr. 14, 2004).

2. See generally Jack I. Garvey, *AFTA After NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards*, 15 BERKELEY J. INT'L L. 245, 249–50 (1997) (explaining the relationship between environmental protection and a country's developmental stage).

3. See *id.*

4. See generally George William Mugwanya, *Global Free Trade Vis-à-vis Environmental Regulation and Sustainable Development: Reinvigorating Efforts Towards a More Integrated Approach*, 14 J. ENVTL. L. & LITIG. 401, 402 (1999).

claimed to protect the environment by placing environmental provisions in non-binding side agreements.⁵ Three of the agreements following NAFTA, the Jordan Free Trade Agreement ("JFTA"), the United States Chile Free Trade ("USCFTA") and the United States Singapore Free Trade Agreement ("USSFTA"), employed varied methods allegedly aimed at environmental preservation.⁶ This Note argues that JFTA, USCFTA and USSFTA do not possess the language or enforcement mechanisms necessary to truly protect the environment.

Part II of this Note explains the debate between free trade advocates and environmentalists regarding environmental provisions in free trade agreements. Part III provides background on JFTA, including its legislative history. Further, it analyzes the environmental provisions of JFTA and argues that JFTA will not safeguard the environment because the environmental provisions are ambiguous and are not subject to a binding dispute settlement process. Part IV briefly reviews the treatment of monetary sanctions regarding the environment in the USCFTA and USSFTA that differs from JFTA. It also argues that this mechanism does not advance environmental preservation because it fails to place the environment on the same level as trade. Lastly, in Part V, it provides suggestions for estab-

5. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 8, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC]. NAAEC is a side agreement under the North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA]. NAFTA was met with criticism from environmental groups and agencies. Environmentalists feared NAFTA would promote environmentally insensitive growth, and others thought trade liberalization would be used as a means to preempt domestic environmental regulations. See Beatriz Bugeda, *Is NAFTA Living Up to its Green Expectations? Effective Law Enforcement Under The North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591, 1592 (1999). Environmentalists also feared that polluting industries would move from a country with stringent environmental regulations to countries with fewer environmental standards. *Id.* at 1592.

6. The free trade agreements are available on the website of the United States Trade Representative. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, at <http://www.ustr.gov/regions/eu-med/middleeast/textagr.pdf> (last visited Apr. 14, 2004) [hereinafter JFTA]; U.S.-Chile Free Trade Agreement, at <http://www.ustr.gov/new/fta/Chile/final/> (last visited Apr. 14, 2004) [hereinafter USCFTA]; U.S.-Singapore Free Trade Agreement, at <http://www.ustr.gov/new/fta/Singapore/final/2004-01-15-final.pdf> (last visited Apr. 14, 2004) [hereinafter USSFTA].

lishing an environmental model for future free trade agreements that permit the U.S. and its trading partners to achieve an environmental regime that both advances environmental preservation and preserves sovereignty. While my proposal is not a perfect solution, it is an attempt to balance concerns of sovereignty and environmental degradation.

II. DEBATE BETWEEN FREE TRADE ADVOCATES AND ENVIRONMENTALISTS

The debate between advocates of free trade and environmentalists permeates free trade negotiations.⁷ It is highly probable that future trade agreements will have to withstand criticism from proponents and opponents of free trade.⁸ Therefore, an understanding of the divergent views of these two groups is essential. JFTA, USCFTA and USSFTA endured attacks by both environmentalists and free trade advocates.⁹

Inclusion of environmental provisions within free trade agreements remains controversial.¹⁰ Environmentalists believe that free trade agreements and environmental regulations are reconcilable and work in concert.¹¹ Environmentalists contend that free trade causes a “race to the bottom,” in which companies move their operations to the trading partner with the low-

7. See Bugada, *supra* note 5, at 1591.

8. See Haixiao Huang & Walter C. Labys, *Environment and Trade: A Review of Issues and Methods* (2001) (surveying economic interactions between environmental and trade policies), at <http://www.rri.wvu.edu/pdffiles/labys2001-1.pdf> (last visited Apr. 14, 2004). See also Rene Vossenaar, Ulrich Hoffmann & Jha Veena, *Trade and Environment: Proposals and Their Possible Implications For Developing Countries* (1999) (discussing the role trade and the environment will play in future trade negotiations from the perspective of developing countries), at http://r0.unctad.org/trade_env/docs/te-prop.pdf (last visited Apr. 14, 2004).

9. See Mary Tiemann, Library of Cong., Cong. Research Serv. Report, *U.S.-Jordan Free Trade Agreement: Analysis of Environmental Provisions* (Updated Oct. 16, 2001); Heather Corbin, Note, *The Proposed United States – Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection*, 14 *COLO. J. INT’L ENVTL. L. & POL’Y* 119, 129–34 (2003); National Wildlife Federation, *Promoting Greener Trade with Chile and Singapore*, ENVIROaction, Nov. 20, 2002, available at <http://www.nwf.org/enviroaction/index.cfm?articleID=123&issueId=18>.

10. See Tiemann, *supra* note 9.

11. See Hillary French, *Trade vs. the Environment?*, DEFENDERS (Winter 1999/2000).

est environmental standards.¹² They argue that companies gain a competitive advantage by producing goods in nations with less rigorous environmental standards.¹³ Further, environmentalists argue that trade measures remain the most viable and effective mechanisms available to nations to protect themselves against costs resulting from environmental degradation in other nations, and that they are often the only effective measures available to establish and enforce international conventions on the environment.¹⁴

On the other side of the debate are free trade advocates opposed to attaching environmental standards to trade deals. They fear that environmental regulation is being used as an illegitimate means for unfairly protecting domestic industry against foreign corporations.¹⁵ Their fear is premised on the philosophy of protectionism.¹⁶ Protectionism favors one group at the expense of the general public.¹⁷

Protectionists are interested in constructing barriers to trade in an attempt to "protect" domestic industry and jobs.¹⁸ Free trade advocates contend that the inclusion of environmental provisions in trade agreements is a barrier to trade.¹⁹ This barrier, they argue does not improve environmental protection. They reason that a country cannot afford to protect its environment if it does not have the necessary financial resources.²⁰ Free trade advocates argue that free trade ensures economic growth which will create the financial means to protect the en-

12. Corbin, *supra* note 9, at 121. *See also* Bugada, *supra* note 5, at 1591.

13. Corbin, *supra* note 9, at 121.

14. *Id.*

15. Mugwanya, *supra* note 4, at 424.

16. *See* Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications For International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 540-43 (1993) (explaining the philosophy of protectionism) [hereinafter McGee].

17. *Id.* at 539.

18. Charles T. Haag, Comment, *Legitimizing "Environmental" Legislation under the GATT in Light of the Caf  Panel Report: More Fuel for Protectionists?*, 57 U. PITT. L. REV. 79, 81. *See also* McGee, *supra* note 16, at 540.

19. *See* Tiemann, *supra* note 9.

20. *See* Thomas J. Schoenbaum, Article: Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?, 86 A.J.I.L. 700, n.7 (1992).

vironment.²¹ Thus, the best way to encourage higher standards of environmental protection is through free trade, and the growth it creates.²² The current U.S. President, George W. Bush, promotes the view of free trade advocates.²³

President Bush urges that attaching environmental standards to trade deals “represents a new kind of protectionism” that hampers free trade.²⁴ He contends that including environmental provisions in trade agreements amounts to protectionism and alienates potential trading partners.²⁵ Therefore, he argues that trade and the environment should not be linked.²⁶

21. *Id.* But see Chantal Thomas, *Poverty Reduction, Trade and Rights*, 18 AM. U. INT’L L. REV. 1399 (2003) (arguing that trade does not necessarily lead to a decrease in poverty).

22. Corbin, *supra* note 9, at 123.

23. President George W. Bush, Remarks at a Meeting with the Business Roundtable (June 20, 2001). Speaking before a business roundtable, President George W. Bush made his views on the perils of linking trade with environmental provisions quite clear. President Bush made the following statements:

Now, there are some who are legitimately concerned about the environment and labor, but I remind them that if you believe in trade, you believe that prosperity will spread. If you believe in trading with a country, it will help that country grow economically and a country that is more prosperous is one more likely to be able to take care of their environment. And a one more prosperous is one more likely to take care of their workforce. And if you believe in improving the environment, in helping the labor conditions in countries, don’t wall off those countries. Don’t create- don’t enhance poverty by refusing to allow there to be trade. Now there are some who want to put codicils on the trade protection authority for one reason: they don’t like free trade. They’re protectionist, and they’re isolationists. And we must reject that kind of thought here in America.

Id.

24. Steve Holland, *Bush Warns of New Kind of Protectionism*, Reuters, May 7, 2001, available at <http://www.globalexchange.org/campaigns/ftaa/news2001/reuters050701.html> (last visited Apr. 14, 2004). President Bush stated that

by failing to make the case for trade we’ve allowed a new kind of protectionism to appear in this country. It talks of workers while it opposes a major source of new jobs. It talks of the environment, while opposing the wealth-creating policies that will pay for clean air and water in developing nations.

Id.

25. *Id.*

26. See Holland, *supra* note 24.

The President's outlook on this issue is significant in light of the Trade Promotion Authority ("TPA") power granted to him by Congress.²⁷ TPA enables the President and his advisors to negotiate trade agreements with foreign nations, while curtailing Congress' power.²⁸ Congress can vote to approve or reject the entire agreement, but it cannot amend the text of the agreement.²⁹ Therefore, TPA provides U.S. trade representatives with slight input on the progress of trade negotiations.³⁰ Environmentalists fear that this lack of influence in future free trade negotiations will result in less attention paid to the environment.³¹

III. JFTA

Apart from the tension between environmentalists and free trade advocates, political forces also influence the final text of free trade agreements.³² JFTA was successfully implemented

27. See Globalization.org, *U.S. Congress Grants President Trade Promotion Authority*, Sept. 19, 2002, available at http://www.globalization101.org/news.asp?NEWS_ID=37. In August 2002, Congress granted the President Trade Promotion Authority. *Id.* "The President holds this power until June 1, 2005, with a two-year extension automatically enacted unless Congress adopts a resolution of disapproval." *Id.*

28. *Id.*

29. *Id.*

30. *See id.*

31. See Jonathan S. Blum, Comment, *The FTAA and the Fast Track to Forgetting the Environment: A Comparison of the NAFTA and the MERCOSUR Environmental Models as Examples for the Hemisphere*, 35 TEX. INT'L L.J. 435, 436 (2000).

32. Congress did not undertake any large-scale initiatives in assisting the Jordanian economy until Jordan and Israel achieved substantive progress on their bilateral track for peace. Mary Jane Bolle, Library of Cong., Cong. Research Serv. Report, *U.S.-Jordan Free Trade Agreement* (Dec. 13, 2001) [hereinafter Bolle I]. U.S. foreign assistance to Jordan was limited because of U.S. concern over Jordan's refusal to join the U.S.-led coalition against Iraq during the 1990-1991 Gulf war. *Id.* However, on July 25, 1991, Jordan and Israel signed the Washington Declaration that terminated the state of belligerency between Jordan and Israel and brought forth a peace treaty on October 26, 1991. *Id.* As a result of Jordan's peacekeeping progress, Congress and the Clinton Administration took a number of initiatives intended to benefit Jordan's economy. *Id.* In fact, Congress' primary motivation behind attempting to improve Jordan's economy has been to provide Jordan with a "peace dividend." *Id.* U.S. assistance seeks to specifically provide Jordan with an economic reward designed to demonstrate the benefits of peace to a Jordanian

after the September 11, 2001, attack on the World Trade Center.³³ An understanding of the legislative background and political backdrop in which JFTA was negotiated and ultimately signed is necessary to appreciate its structure and possible application to future trade agreements.

A. Environmental Provisions Debated in Congress

The conflict between proponents of absolute free trade and environmentalists was apparent during JFTA negotiations. Significant congressional debate ensued regarding JFTA's inclusion of environmental provisions.³⁴ JFTA is the first trade agreement directly including provisions on environmental regulation in the agreement's main text which are subject to the agreement's dispute settlement process.³⁵

The Senate Finance committee held a mark-up session for JFTA's implementation bill, during which Republican Senator Phil Gramm offered an amendment that would have restricted the scope of JFTA's dispute resolution mechanism when dealing with environmental issues.³⁶ The amendment was rejected.³⁷ During the Senate debate, Senator Gramm warned that he would oppose any effort to turn JFTA into a model for how future trade agreements should deal with worker's rights and environmental protection issues.³⁸ He argued that "including labor and environmental provisions in all trade agreements would lead to a loss of sovereignty by the U.S. and subject the country to penalties for pursuing its economic self interest."³⁹ Senator Gramm urged environmental protection should be left to each

population, which has at times ridiculed and protested its government's pace and depth of normalizing relations with Israel. *Id.*

33. Emily Harwood, Note, *The Jordan Free Trade Agreement: Free Trade and the Environment*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 509, 529 (2002) [hereinafter Harwood].

34. *Id.* at 525-30.

35. JFTA, *supra* note 6, arts. 5, 17. JFTA's predecessor, NAFTA, in contrast, only includes environmental provisions in non-binding side agreements. See NAAEC, *supra* note 5.

36. Mary Jane Bolle, Library of Cong., Cong. Research Serv. Report, *Jordan-U.S. Free Trade Agreement (FTA) (Sept. 25, 2001)* [hereinafter Bolle II].

37. *Id.*

38. Bolle I, *supra* note 32, at 6.

39. Harwood, *supra* note 33, at 525.

individual country and should not be a part of trade deals.⁴⁰ Others argued that developing nations have resisted pressure to tighten their environmental laws, which in light of JFTA, could eliminate their ability to negotiate agreements with the U.S.⁴¹

On the other hand, Senate Finance Committee Chairman Max Baucus indicated he hoped JFTA would set a precedent for how future trade agreements would address issues like labor and the environment.⁴² Senator Baucus argued JFTA's inclusion of environmental provisions was a positive development.⁴³ He also disagreed with Senator Gramm's statement that the provisions would undermine U.S. sovereignty or prevent lawmakers from enacting and enforcing U.S. environmental laws.⁴⁴ It is fair to say that Senator Gramm concurs with free trade advocates who oppose the inclusion of environmental provisions in trade agreements.⁴⁵ Senator Baucus' views coincide with environmentalists.⁴⁶

The almost year-long combat over the implementation of JFTA came to a halt after the September 11, 2001, attack on the World Trade Center.⁴⁷ Many commentators, as well as the International Trade Commission, deemed the implementation of JFTA a political rather than economic decision for the U.S.⁴⁸

40. *Id.* at 526.

41. Corbin, *supra* note 9, at 129.

42. *Id.*

43. Harwood, *supra* note 33, at 527.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 529.

48. See U.S. International Trade Commission, News Release: A U.S.- Jordan Free Trade Agreement Would Have No Measurable Impact on U.S. Production or U.S. Employment, Says ITC 2000, at <http://www.usitc.gov/er/nl2000/ER0926X1.HTM> (last visited Apr. 15, 2004). The International Trade Commission ("ITC"), an independent, nonpartisan, fact-finding agency completed a report for the United States Trade Representative. *Id.* In the report, the ITC provided an overview of Jordan's economy, data on Jordan's trade patterns with the U.S. and other major trade partners, a description of the tariff and investment relationship between the U.S. and other major trade partners, and an analysis of any sector for which there are significant economic impacts from a U.S.-Jordan Free Trade Agreement. *Id.* The ITC concluded that JFTA would have no measurable impacts on total U.S. exports, total U.S. imports, U.S. production, or U.S. employment. *Id.* See also

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Even President George W. Bush said, “the agreement demonstrates Jordan’s strong commitment to economic reform and sends a strong signal to Jordan, as well as other countries in the region, that support for peace and economic reform yields concrete benefits.”⁴⁹

After the September 11, 2001 attack, Senator Gramm dropped his effort to block the implementation of JFTA.⁵⁰ “Senator Gramm explained that he decided not to oppose the agreement because it was important that the U.S. send a signal of friendship to Jordan, an ally that could be instrumental in building Middle East support for military and other action against the terrorists.”⁵¹ Arguably, if the September 11, 2001, attack on the World Trade Center did not occur, the proposed JFTA would not have been implemented.⁵²

B. Environmental Provisions

Several provisions were included within JFTA that were intended to promote environmental preservation. JFTA’s inclusion of environmental provisions that are subject to JFTA’s dispute settlement provisions is controversial.⁵³ While JFTA is unprecedented in this respect, JFTA fails to provide the powerful and unequivocal language that compels environmental preservation.⁵⁴

1. Preamble

JFTA’s preamble appears to demonstrate concern for environmental protection.⁵⁵ It contains the stipulations agreed to by

CNN.com, U.S., Jordan Link Trade and Peace With New Agreement, Oct. 24, 2000, available at <http://www.cnn.com/2000/US/10/24/jordan.us.trade.02/index.html> (last visited Apr. 15, 2004).

49. United States of America Embassy, *Text: Bush Welcomes Passage of U.S.-Jordan Free Trade Agreement*, at <http://www.usembassy-israel.org.il/publish/peace/archives/2001/september/092512a.html> (last visited Apr. 15, 2004).

50. Harwood, *supra* note 33, at 529.

51. *Id.* at 529–30.

52. *See generally* Harwood, *supra* note 33, at 529.

53. Bolle II, *supra* note 36.

54. *Id.*

55. JFTA, *supra* note 6, preamble.

the U.S. and Jordan.⁵⁶ The preamble also sets the context for interpretation of the environmental provisions contained within the agreement.⁵⁷

At first glance, the preamble appears to reinforce the importance of environmental preservation. Closer examination of the preamble uncovers that it is loosely worded and susceptible of interpretations that do little to protect the environment. The preamble commits the U.S. and Jordan to recognize the objective of sustainable development while seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.⁵⁸

The phrase "sustainable development" is not defined by JFTA. This phrase is ambiguous and has garnered multiple meanings.⁵⁹ The World Commission on the Environment and Development ("World Commission"), a commission established by the United Nations to promote the study and protection of the environment, defined sustainable development as development which "meets the needs of the present without compromising the ability of future generations to meet their own needs."⁶⁰ As one commentator noted, this definition does not provide a fixed target that can be set, pursued and definitively obtained.⁶¹ Further, this definition relies on the projection of future needs that are not discernible.⁶² Arguably, if the definition promul-

The Government of the U.S. and the Government of Jordan, . . . Recognizing the objective of sustainable development, and seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. . . . Wishing to promote effective enforcement of their respective environmental and labor law

Id.

56. *Id.*

57. JFTA, *supra* note 6, preamble.

58. *Id.*

59. Paulette L. Stenzel, *Can NAFTA'S Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 431 (1995). *See also* Martin S. High, *Sustainable Development: How Far Does U.S. Industry have to go to Meet World Guidelines?*, 14 ALB. L. J. SCI. & TECH. 131, 137 (2003).

60. Stenzel, *supra* note 59, at 431.

61. *Id.*

62. *See id.* at 433.

gated by the World Commission is used by a party to interpret JFTA's preamble, a party could interpret the preamble as condoning minimal environmental preservation provided it is not compromising the needs of future generations—a determination that is made solely by the party. Unfortunately, JFTA does not provide measures for evaluating a party's balancing of sovereign concerns and environmental concerns. Therefore, it is near impossible to discern if a party is truly balancing sovereign concerns, or just ignoring environmental concerns.

Under the preamble, both parties are required to promote effective enforcement of their respective environmental laws.⁶³ Even though the preamble sets this lofty requirement for the U.S. and Jordan, measures are not provided within JFTA for ensuring that the parties actually promote effective enforcement of their environmental laws.⁶⁴ The preamble, similar to a majority of the provisions within Article V, relies on voluntary compliance by the parties.⁶⁵

2. Article V: Environment

It is notable that JFTA's environmental provisions are in the body of the agreement (primarily in Article V). However, even environmentalists are skeptical as to whether JFTA embodies the provisions that are necessary to encourage protection of the environment.⁶⁶

First, Article V, section one supposes that both the U.S. and Jordan recognize that it is inappropriate to encourage trade by relaxing domestic environmental laws.⁶⁷ Therefore, it is ex-

63. JFTA, *supra* note 6, preamble.

64. JFTA, *supra* note 6.

65. See Batir Wardam, Researcher at the Jordanian Environmental Water Program, Jordanian Environmental Watch Program 14 (Mar. 2001), available at <http://www.ujrc-jordan.org/English/JEWP/Publications.htm#1>.

66. See *Hearing on U.S.–Jordan Free Trade Agreement Before the Senate Finance Comm.*, 107th Cong. (2001) (statement of Rodger Schlickeisen, President of Defenders).

67. JFTA, *supra* note 6, art. 5(1).

The Parties recognize that it is inappropriate to encourage trade by relaxing domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.

pected that the U.S. and Jordan will strive to ensure that they do not waive or otherwise derogate from, or offer to waive or otherwise derogate from, their domestic environmental laws as an encouragement for trade with the country.⁶⁸ The reasoning of this section is flawed. Even assuming *arguendo*, that a party “recognizes” it is improper to encourage trade while sacrificing the environment, this recognition does not ensure that the party will not derogate from its environmental laws. The former does not guarantee the latter. For example, a party could recognize that it should not detract from its environmental laws, but choose to ignore environmental laws for economic gain.

Secondly, JFTA does not provide a vehicle for enforcing compliance with Article V, section one. Enforcement of this provision will require perpetual monitoring and voluntary compliance by the parties.⁶⁹ Third, Article V, section one only mentions trade as the economic activity not to be encouraged by relaxing domestic laws.⁷⁰ As one commentator noted, since investments are not included, JFTA leaves open the possibility of environmentally damaging investments that do not comply with environmental standards.⁷¹

Article V, section two recognizes the right of each party to establish its own level of domestic environmental protection and development policies.⁷² It further provides that each party shall “strive to” ensure that its laws provide for high levels of environmental protection and shall “strive to” improve its environmental laws.⁷³ While this portion of Article V provides the parties with unlimited discretion to monitor their environmental

Id.

68. *Id.*

69. *See* Batir, *supra* note 65, at 14.

70. *Id.*

71. *Id.*

72. JFTA, *supra* note 6, art. 5(2).

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.

Id.

73. *Id.*

laws, it omits a method for determining what is considered “high levels of environmental protection.” Further, a binding commitment to environmental excellence is not included within this provision.⁷⁴ Thus, a mechanism is not provided within JFTA’s text for measuring whether a party’s environmental laws provide adequate environmental protection. This neglect provides the parties with unchecked discretion that could result in environmental degradation. For example, if a party’s environmental law condoned the pouring of contaminants directly into the soil, it appears that JFTA would validate this law, albeit environmentally damaging, because it falls within the purview of the party’s discretion to establish its own level of domestic protection.

Further, as one commentator noted, the words “shall strive to” in Article V, section two provides a complacent frame for applying and upgrading environmental compliance and enforcement.⁷⁵ JFTA only requires that the parties “strive to” ensure that their laws provide for high levels of environmental protection and “strive to” continue to improve their laws.⁷⁶ Since the parties are only required to “strive to” perform these duties, an inference can be made that JFTA does not compel actual performance. JFTA could have mandated a firmer obligation on the parties by removing the words “strive to” from this section.

Article V, section three, Subsection (b) condones a party’s course of action or inaction as long as the “action or inaction reflects a reasonable exercise of discretion, or results from a *bona fide* decision regarding the allocation of resources.”⁷⁷ This

74. Batir, *supra* note 65, at 15.

75. *Id.*

76. JFTA, *supra* note 6, art. 5(2).

77. JFTA, *supra* note 6, art. 5(3)(b). “A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.” *Id.* art. 5(3)(a).

The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of

section provides the parties with significant discretion and flexibility in prioritizing their environmental needs and allocation of resources.⁷⁸ Further, this portion of JFTA provides the parties with the right to exercise discretion with respect to investigatory, prosecutorial, regulatory and compliance matters, and to make decisions regarding the allocation of resources to other environmental matters.⁷⁹ This section of JFTA subjects the compliance and enforcement components of JFTA to the availability of technical and financial resources.⁸⁰ One commentator noted, Article V, section three is subject to so many caveats that, "in reality, it is hard to imagine any circumstance egregious enough to constitute a violation of the rule."⁸¹

3. Joint Statement on Environmental Technical Cooperation

The U.S. and Jordan issued a Joint Statement on Environmental Technical Cooperation.⁸² It established a Joint Forum on Environmental Technical Cooperation, which works to advance environmental protection in Jordan by developing environmental technical cooperation initiatives. These initiatives take into account environmental priorities, which are agreed to by the U.S. and Jordan, and are consistent with the U.S. country strategic plan for Jordan, and complementary to U.S.—Jordanian policy initiatives.⁸³

4. Dispute Settlement Procedures

The most notable characteristic of JFTA is that the environmental provisions are subject to the dispute settlement procedures of JFTA. JFTA uses a multi-step process for dispute settlement.⁸⁴

Under JFTA, the parties must first make every attempt to arrive at a mutually agreeable resolution through consultations

such discretion, or results from a *bona fide* decision regarding the allocation of resources.

Id. art. 5(3)(b).

78. JFTA, *supra* note 6, art. 5(3)(b).

79. *Id.*

80. Batir, *supra* note 65, at 15.

81. Schlickeisen, *supra* note 66.

82. Harwood, *supra* note 33, at 532.

83. *Id.*

84. *Id.* at 13.

whenever a dispute arises concerning interpretation of the agreement, a party considers that the other party has failed to carry out its obligations under the agreement, or a party considers that measures taken by the other party severely distort the balance of trade benefits accorded by the agreement or substantially undermine fundamental objectives of the agreement.⁸⁵

If the parties fail to resolve their dispute through consultations within sixty days, either party may refer the matter to the Joint Committee, which tries to resolve the dispute.⁸⁶ The Joint Committee is an ongoing body that was established to supervise the proper implementation of JFTA.⁸⁷ If the Joint Committee does not resolve the matter within either ninety days or another period that they have agreed upon, either party can refer the matter to the dispute settlement panel.⁸⁸

In order to resolve the dispute, the dispute settlement panel prepares *non-binding recommendations* in a report.⁸⁹ Within ninety days, the dispute settlement panel has to present a report to the parties containing findings of fact and its determination as to whether either party has failed to carry out its obligations under JFTA, whether a measure taken by either party severely distorts the balance of trade benefits accorded by JFTA or substantially undermines the fundamental objectives of JFTA.⁹⁰ Regrettably, since the report is not binding, JFTA's dispute settlement system really just acts as a mediator between the parties.⁹¹

85. JFTA, *supra* note 6, art. 17(1)(a).

86. JFTA, *supra* note 6, art. 17(1)(b).

87. *See* JFTA, *supra* note 6, art. 15(1). The committee is comprised of representatives of the U.S. and Jordan, and is headed by the USTR and Jordan's Minister primarily responsible for international trade, or their designees. *Id.* art 15(3)(a).

88. JFTA, *supra* note 6, art. 17(1)(c). "Unless otherwise agreed by the parties, the panel shall be composed of three members: each Party shall appoint one member, and the two appointees shall choose a third who will serve as the chairman." *Id.*

89. JFTA, *supra* note 6, art. 17(1)(d). *See also* Mohammad Nsour, *Article-fundamental Facets of the United States-Jordan Free Trade Agreement: E-Commerce, Dispute Resolution, and Beyond*, 27 WASH. U. J.L. & POL'Y 742, 780 (2004).

90. JFTA, *supra* note 6, art. 17(1)(d).

91. Nsour, *supra* note 89, at 780. "Once the parties know the dispute resolution process does not provide the teeth to enforce its own rulings, it will become impossible to resolve disputes through consensus, as neither party

After the dispute settlement panel compiles its report, the Joint Committee then endeavors to resolve the dispute, taking the report into account.⁹² If the Joint Committee does not resolve the dispute within thirty days after receiving the panel report, the affected party “shall be entitled to take any appropriate and commensurate measure.”⁹³ This provision appears to permit the use of trade sanctions as an enforcement mechanism.⁹⁴

5. Side Letters

Side letters exchanged by Jordan and the U.S. weaken any environmental protection provided by JFTA. There was opposition in the House of Representatives (“House”) regarding the language in Article 17 of JFTA that entitles a party “to take any appropriate and commensurate measure” to resolve a dispute.⁹⁵ Members of the House argued that this provision allowed the parties to impose trade sanctions in response to environmental disputes.⁹⁶ In response to this concern, the U.S. and Jordan exchanged letters.⁹⁷ These letters are included within the congressional record of the House.⁹⁸

The letters indicate that both governments “did not expect or intend to apply the agreement in a manner that results in blocking trade.”⁹⁹ The letters further stated that each government considers that appropriate measures for resolving any differences that may arise regarding the Agreement would be bilateral consultations and other procedures, particularly alter-

would compromise, knowing that there would be no serious consequences.” *Id.* at 783.

92. JFTA, *supra* note 6, art. 17(2)(a).

93. *Id.* art. 17(2)(b).

94. Nsour, *supra* note 89, at 778. Nsour also argues that the use of trade sanctions may be called retaliations. *Id.* He defines retaliation as a means of exercising pressure on the offending government to implement the panel or Appellate Body ruling, and in this sense is indirectly beneficial to business. *Id.*

95. 147 CONG. REC. H4871 (2001).

96. *Id.*

97. *See id.*

98. *Id.* *See also* 147 CONG. REC. S9679 (2001).

99. *Id.*

native mechanisms, that will help to secure compliance without recourse to traditional trade sanctions.¹⁰⁰

It is too early to forecast whether these letters will affect the actions of the U.S. or Jordan if a dispute arises. It is likely that the effect of these letters will hinge on the severity of the environmental violation. However, these letters appear to undermine the best attribute of JFTA—the possibility that a party could be subjected to trade sanctions for not complying with the environmental provisions of the agreement.

C. Author's Analysis: Does JFTA advance environmental preservation?

It appears that JFTA with its sweeping and vague language does not contain the ammunition necessary to safeguard the environment.¹⁰¹ JFTA's preoccupation with the preservation of sovereignty overwhelms the text of the agreement. This obsession created numerous loopholes that the parties can easily navigate to avoid their environmental responsibilities.¹⁰²

In fact, it appears that the debate surrounding JFTA's inclusion of environmental provisions subject to the dispute settlement process was overrated. JFTA does not mandate that the parties do anything differently than what they have been doing. Therefore, it is unlikely that there will be many, if any, environmental violations that are subjected to the dispute settlement process. Arguably, this means that if a party pre-JFTA was damaging the environment, it can continue doing so post-JFTA, provided the degradation does not increase. Some commentators have opined that JFTA was an attempt to find a middle ground.¹⁰³ "It commits both countries not to weaken or to fail to uphold their own existing environmental standards, but does not impose any new standards on them."¹⁰⁴ This is not acceptable because environmental degradation transcends na-

100. *Id.*

101. *See supra* Part III.B.

102. *See supra* Part III.B.

103. *See* Richard W. Stevenson, *A Nation Challenged: Trade; Senate Approves Bill to Lift Barriers to Trade with Jordan*, N.Y. TIMES, Sept. 25, 2001, at C1.

104. *Id.*

tional boundaries.¹⁰⁵ While countries should be provided with discretion in deciding how to implement their environmental laws, without an agreed upon standard or measure, countries are likely to keep the status quo. If a country determines that its environment is adequately protected (by its own self-serving standards), it is unlikely to expend any monies towards environmental preservation.

Further, in light of the side letters exchanged between the parties, it is unlikely that either country will impose trade sanctions for violations of JFTA's environmental provisions.¹⁰⁶ Therefore, any environmental disputes would fall under the auspice of the *non-binding* dispute settlement mechanism. In essence, the reports prepared by the dispute settlement panel are advisory. Therefore, it is not mandated that the parties adhere to their recommendations. As one commentator noted, once "parties are aware that the dispute resolution process does not provide the teeth to enforce its own rulings, it will become impossible to resolve disputes through consensus, as neither party would compromise, knowing there would be no serious consequences."¹⁰⁷

IV. UNITED STATES CHILE FREE TRADE AGREEMENT AND UNITED STATES SINGAPORE FREE TRADE AGREEMENT

USCFTA and USSFTA, "as the first free trade agreements negotiated by the Bush administration under TPA, could potentially serve as templates for future free trade agreements."¹⁰⁸ Therefore, they set the mark as to what will probably be a long

105. See generally U.S. Environmental Protection Agency, International Affairs, Environment, Trade and Investment, at <http://www.epa.gov/international/trade/geninfo.html> (last visited Apr. 15, 2004) [hereinafter U.S. Environmental Protection Agency].

106. See *supra* Part III.B.5.

107. Nsour, *supra* note 89, at 783.

108. *The Significance of the Singapore and Chile Free Trade Agreements: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection on Trade in Services and E-Commerce*, 108th Cong. (2003) (testimony of Thea M. Lee, Chief International Economist American Federation of Labor and Congress of Industrial Organizations). See also International Trade Reporter, *Bilateral Agreements: U.S., Singapore Complete FTA 'Substance,' USTR Says; Capital Controls Still Unresolved*, Nov. 21, 2002, available at <http://www.bna.com/itr/arch172.htm>.

war between free trade advocates and environmentalists.¹⁰⁹ USCFTA is the first comprehensive trade agreement between the U.S. and a South American country.¹¹⁰ Similarly, the USSFTA is the first trade agreement with an Asian country.¹¹¹ Both agreements were attacked by free trade advocates and environmentalists.¹¹² Some commentators argued that any expressive progress made in JFTA towards environmental protection was negated by USCFTA and USSFTA.¹¹³ Several environmental organizations sent letters to Congress in opposition to the agreements.¹¹⁴

However, on September 3, 2003, President George W. Bush signed bills for both agreements.¹¹⁵ Many of the environmental provisions of USCFTA and USSFTA mirror JFTA.¹¹⁶ A notable

109. Corbin, *supra* note 9, at 119.

110. See USCFTA, *supra* note 6.

111. The White House, Remarks by the President in Signing Ceremony for Chile and Singapore Free Trade Agreements The East Room, *available at* <http://www.whitehouse.gov/news/releases/2003/09/20030903-3.html> (last visited Apr. 15, 2004).

112. See Grocery Manufacturers of America, Comments Submitted: Re: Comments Regarding Proposed United States-Chile Free Trade Agreement, *at* <http://www.gmabrand.com/publicpolicy/docs/comment.cfm?DocID=789> (last visited Apr. 16, 2004); Center for International Environmental Law, Re: Chile and Singapore Free Trade Agreements are Wrong Models for the Environment, *at* http://www.ciel.org/Tae/Chile_Singapore_10Jul03.html (last visited Apr. 16, 2004).

113. See Citizens Trade Campaign, Letter to Representative regarding U.S.-Singapore Free Trade Agreement May 22, 2003, *at* http://www.citizenstrade.org/pdf/ctc_sing_letter.pdf (last visited Apr. 15, 2004) [hereinafter Citizens Letter].

114. *Id.* See also Citizens Trade Campaign, Letter to Congress Regarding U.S.-Chile and U.S.-Singapore Free Trade Agreements are Bad Policy as they Stand, July 22, 2003, *available at* http://www.citizenstrade.org/pdf/ctc_chile_sing_ltr.pdf (last visited Apr. 15, 2003).

115. Press Release, The White House, President Bush Signs Chile, Singapore Free Trade Agreement Bills (Sept. 2, 2003), *at* <http://www.whitehouse.gov/news/releases/2003/09/20030903-3.html> (last visited Apr. 15, 2004).

116. See, e.g., USCFTA, *supra* note 6, art. 19.1.

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.

Id.

addition to USCFTA and USSFTA is the unique treatment of monetary sanctions and the environment.

A. Monetary Sanctions and the Environment

Unfortunately, USCFTA and USSFTA do not place environmental concerns on par with trade.¹¹⁷ One commentator noted that JFTA provided comparable enforcement through dispute resolution for all environmental provisions, however, only one environmental provision of USCFTA and USSFTA is subject to the dispute settlement process.¹¹⁸ This provision is the obligation that a party enforce its own environmental laws.¹¹⁹

If a country does not enforce its environmental obligations and a financial assessment results, the maximum amount it can be assessed is fifteen million dollars annually.¹²⁰ In commercial trade disputes, the assessment is calculated solely on trade effects.¹²¹ "Whereas monetary remedies provided for commercial violations are uncapped, the remedies for environmental violations are capped at fifteen million dollars regardless of the harm caused."¹²² The USTR reasoned that since the quantifiable trade effect of an environmental violation is likely to be very small, USCFTA and USSFTA include other criteria for the panel to use in determining the assessment.¹²³ Since violations of environmental obligations do not result in trade sanctions, it is possible that a country could perform a cost-benefit analysis and determine that it is economically more sound to pay the financial assessment than fulfill its environmental obligations under the agreement.

117. See Citizens Letter, *supra* note 113.

118. *Id.* See also USSFTA, *supra* note 6, art. 18.7(5); USCFTA, *supra* note 6, art. 19.6(8).

119. USCFTA, *supra* note 6, art. 19.2(1)(a); USSFTA, *supra* note 6, art. 18.2(1)(a).

120. USCFTA, *supra* note 6, art. 22.16(2)(a); USSFTA, *supra* note 6, art. 20.7(2)(f).

121. U.S. Embassy in Tokyo, *USTR on Labor, Environment in Singapore, Chile FTAs*, May 5, 2003, available at <http://japan.usembassy.gov/e/p/tp-20030509a7.html> (last visited Apr. 15, 2004) [hereinafter Embassy Article].

122. Citizens Letter, *supra* note 113.

123. Embassy Article, *supra* note 121.

B. Author's Analysis: Does the monetary remedy in USCFTA and USSFTA advance environmental preservation?

The current U.S. President, George W. Bush, stated that USSFTA obligates the countries to enforce their environmental laws and makes clear that environmental protection will not be reduced in order to encourage trade or investment.¹²⁴ USSFTA and USCFTA have also been characterized as containing an innovative enforcement mechanism that includes monetary assessments to enforce environmental obligations.¹²⁵ However, a monetary penalty is assessed only if a party does not effectively enforce its own laws. This provision effects only a small universe of situations that could potentially cause environmental degradation.

Further, the assessment cap provides the parties with a figure to perform a cost-benefit analysis. This leaves open the possibility that a party could perform a cost-benefit analysis and determine that it is economically more sound to pay the financial assessment than fulfill its environmental obligations under the agreement.

V. SUGGESTIONS FOR FUTURE FREE TRADE AGREEMENTS

A. Placement of Environmental Provisions Within the Text of Trade Agreements

Environmental provisions must be placed within the text of future trade agreements and not in binding side agreements. Environmental provisions that are placed in side agreements that do not have a legal link to the main agreement, do not assure compliance with the side agreement.¹²⁶ Since the parties are not subjected to trade sanctions for violating side agree-

124. President's Message to Congress Transmitting Legislation and Supporting Documents to implement United States-Chile Free Trade Agreement, available at <http://www.whitehouse.gov/news/releases/2003/07/20030715-7.html> (last visited Apr. 15, 2004).

125. Press Release, Office of the United States Trade Representative, (Dec. 11, 2002), at <http://www.ustr.gov/releases/2002/12/02-114.htm>.

126. See Linda DuPuis, Note: *The Environmental Side Agreement Between Mexico and the United States—An Effective Compromise?*, 8 FLA. J. INT'L L. 471, 488 (1993) (discussing environmentalists' criticism of NAFTA's side agreement).

ments, it is easier for the parties to make a cost-benefit analysis that endangers the environment.¹²⁷

B. Negotiation of an Environmental Standard

JFTA, USCFTA and USSFTA went to great lengths to defend sovereignty. However, an extreme position on preserving sovereignty is not compatible with environmental protection. Parties must agree to relinquish even a diminutive amount of sovereignty for true global environmental protection.¹²⁸ Arguably, by entering into a free trade agreement the parties have relinquished some sovereignty.

Instead of providing each party with unlimited discretion to adjust its environmental laws, parties should be required to meet an agreed upon environmental standard ("Standard") within a prescribed time frame. This Standard cannot and should not be boilerplate. The Standard should be negotiated to reflect the economic, environmental and political condition of the respective country. The Standard and time frame to reach the agreed upon standard should also reflect the unique concerns of each country.¹²⁹ This reflection allows the parties to tailor the Standard to sovereign concerns. While the Standard does require some relinquishment of sovereignty, it allows the parties to negotiate their own path. Also, if the Standard, an agreed upon action plan to meet the standard ("Action Plan") and the time frame within which to meet the Standard are negotiated, fears of protectionism should subside because the parties are addressing actual environmental concerns.¹³⁰

127. See Jack I. Garvey, *Article: A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 *UCLA J. INT'L L. & FOR. AFF.* 1, 12 (2000) (arguing that the side agreements to NAFTA were designed not to secure sanctions) [hereinafter Garvey New Evolution].

128. Garvey New Revolution, *supra* note 127, at 35 (arguing that when trade benefits and profits are at issue, governments demonstrate less concern about abstractions like sovereignty).

129. See Garvey New Revolution, *supra* note 127, at 18–23 (discussing the downfall of supranational standards in trade agreements).

130. See Garvey New Revolution, *supra* note 127, at 14 (explaining that imposition of a supranational structure would challenge Mexico's sovereignty and the importance of focusing on enforcement of national law in NAFTA context; the problematic imposition of common legal standards of regulation

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I suggest four categories for determining the period of time each country has to meet the agreed upon Standard, categories A-D (“Category”). Countries falling within Category A are closer to the negotiated Standard than countries falling within Category D. Therefore, countries falling within Category D require a longer period of time to meet the negotiated Standard. During the year or years the country is provided to reach the Standard, the country should not be subject to trade sanctions, provided it is following the Action Plan.

	Time Frame in Years						
Category							
	0-2	2-5	5-8	8-10	10-12	12-15	15-20
A							
B							
C							
D							

C. Compliance and Enforcement

Provisions within trade agreements that provide for environmental protection are worthless if the parties ignore them. Providing countries with the opportunity to negotiate the Standard should help lay the foundation for voluntary compliance.¹³¹ If countries provide input on determining the Category in which they fall, the Action Plan and the applicable Standard, it is

for the contrasting cultures, legal systems and stages of economic development in relation to Canada and Mexico).

131. See generally Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 *YALE L.J.* 2599, 2642 (1997) (discussing Professor Thomas Franck’s theory that the key to compliance is fairness of international rules). “If nations internally perceive a rule to be fair, they are more likely to obey it.” *Id.* at 2645.

more likely that they will be inclined to follow the agreed upon plan.¹³² Further, the Action Plan should be tailored to specifically meet each country's political, economical and environmental needs.

A mechanism that allows citizens or environmental groups to submit complaints should be included within trade agreements.¹³³ NAFTA's environmental side agreement, the North American Agreement on Environmental Cooperation ("NAAEC"), established the Commission for Environmental Cooperation ("CEC").¹³⁴ The NAAEC permits groups or individuals alleging that a party to the agreement is failing to enforce its environmental laws, to file a submission with the CEC.¹³⁵ Based on the success of the CEC to assess the impacts of NAFTA on the environment, a similar citizens' mechanism should be included in all future trade agreements to allow groups or individuals to allege that a specific trade or investment measure has an adverse impact on the environment.¹³⁶

Countries should be subjected to the same ramifications as trade violations if they do not follow the Action Plan, or satisfy the Standard within the allotted time frame. Applying the same ramifications provides countries with an impetus to comply with the provisions of the trade agreement.¹³⁷ Trade sanctions are a cost-effective means of securing compliance with otherwise difficult to enforce standards and agreements.¹³⁸

An organization similar to the bureaucracy provided in the NAAEC should be utilized.¹³⁹ This organization would monitor

132. *Id.*

133. See Greg Block, Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas, 33 ENVTL. L. 501, 504 (2003) (explaining that environmental provisions in the Free Trade Area of the Americas should include a citizen submission mechanism similar to the NAAEC).

134. *Id.* at 508. The CEC is comprised of a Council, Secretariat and Joint Public Advisory Committee. *Id.* The Council is governing body of the CEC. *Id.* The Secretariat acts as the operational arm of the Council, and the JPAC advises the governments on any matter within the scope of the NAAEC. *Id.*

135. *Id.*

136. *Id.* at 504.

137. Garvey, *supra* note 2, at 254.

138. *Id.*

139. See *supra* note 134. See also National Wildlife Federation, *Promoting Greener Trade with Chile, Singapore*, Nov. 2002, available at <http://www.nwf.org/enviroaction/index.cfm?articleId=123&issueId=18>. "Trade

compliance with the negotiated action plan and make sure that each country is on track to reach the negotiated Standard within the prescribed time frame. However, the organization should be given a structure that is easily utilized by the parties to the trade agreement. Some trade agreements may require four governing bodies. Other agreements may require two governing bodies.

VI. CONCLUSION

The U.S., one of the most powerful and influential nations, must lead in attaching standards for safeguarding the environment in trade agreements.¹⁴⁰ It is undisputable that causes of environmental degradation are inextricably tied to trade.¹⁴¹ Further, as the U.S. Environmental Protection Agency explained, the environment and trade are fundamentally linked because the environment provides many basic inputs of economic activity (minerals, forests, etc.), as well as the energy used to process materials.¹⁴² The environment is limited and must be safeguarded for the economic viability of all countries.

agreements should be accompanied by efforts to assess and improve international environmental performance through cooperation, capacity-building assistance and technology transfer." *Id.*

140. James Salzman, *Seattle's Legal Legacy and Environmental Reviews of Trade Agreements*, ENVTL. L. 501, 504 (2001).

141. See, e.g., Elia V. Pirozzi, *Resolution of Environmental Disputes in the United States-Mexico Border Region and the Departure from the Status Quo*, 12 J. ENVTL. L. & LITIG. 371 (1997) (discussing damage to the border of the U.S. and Mexico caused by NAFTA).

142. U.S. Environmental Protection Agency, *supra* note 105.

The two agreements after JFTA demonstrate that the pendulum has shifted back to a position where the environment is not as important as trade. However, it is imperative that the President of the U.S. considers both the environment and trade when he utilizes TPA. Fast track authority should not be used to bypass environmental concerns and just push bills through.

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CONTINUED VIOLATIONS OF INTERNATIONAL LAW BY THE UNITED STATES IN APPLYING THE DEATH PENALTY TO MINORS AND POSSIBLE REPERCUSSIONS TO THE AMERICAN CRIMINAL JUSTICE SYSTEM

INTRODUCTION

On August 28, 2002 the American judicial system took yet another step backwards in the eyes of the international community when the United States Supreme Court issued its opinion denying a stay of execution to Toronto M. Patterson despite the dissenters' urging that it reconsider his claim arising out of the Eighth Amendment to the United States Constitution.¹ With total disregard of international human rights standards, the Court allowed Toronto Patterson to be executed for a crime that he committed as a juvenile.² The Texas Court of Criminal Appeals affirmed his conviction and sentence and the United States Supreme Court denied his petition for a writ of habeas corpus³ ultimately sending Toronto Patterson to his death. This Comment suggests that in doing so, the Court violated international treaties, customary international law, and *jus cogens*.⁴

This Comment explores the tension between the United States Supreme Court's validation of the application of the

1. *Patterson v. State of Texas*, 536 U.S. 984 (2002).

2. *Id.* For the purposes of this Comment a juvenile is any child under the age of eighteen years.

3. *Id.*

4. See Convention on the Rights of the Child, Dec. 16, 1996, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37, U.N. Doc. A/44/49 (1989) (entered into force Nov. 10, 1989; not in force for the United States), 28 I.L.M. 1448, 1456-76 (1989) [hereinafter CRC]; American Convention on Human Rights, open for signature Nov. 22, 1969, art. 4, para. 5, 1144 U.N.T.S. 143, 146 [hereinafter American Convention]; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, para. 5, 999 U.N.T.S. 171, 174-75 [hereinafter ICCPR]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 art. 68, 75 U.N.T.S. 287, 330 [hereinafter Fourth Geneva Convention].

death penalty to children who were convicted of offenses they committed at the ages of sixteen and seventeen and the current treaty obligations of the United States concerning the execution of minors.⁵ Part I examines prior case history involving the death penalty as it relates to minors. Part II provides an in-depth explanation of the effect of reservations and the self-executing treaty doctrine on the United States' ratification and signatory status of several international treaties governing the juvenile death penalty. Subsequent analysis focuses on the international consensus banning the execution of juvenile criminal offenders through customary international law and *jus cogens* in Part III. Thereafter, Part IV turns to an alternative argument focusing on the internal corruption of the American judicial system if it continues to practice juvenile execution. This section will analyze the concept of procedural due process and its application in cases like those of Zacarias Moussawi and Lee Boyd Malvo, where our execution practices may be the reason that other countries do not provide the evidence or witnesses necessary for a full and fair trial of these, and other, individuals in the United States. This would cause irreparable harm to the American judicial system.

I. PRIOR SUPREME COURT CASE LAW ON CAPITAL PUNISHMENT, JUVENILES, AND INTERNATIONAL PRACTICES

In 1972, in *Furman v. Georgia*,⁶ for the first time in history the United States Supreme Court declared the death penalty, as then applied, to be cruel and unusual punishment under the Eighth Amendment.⁷ However, the opinion was per curiam

5. In discussing the execution of minors the author is referring to the juvenile death penalty or the execution of individuals who committed the crimes for which they are sentenced to death as children ages 16 and 17. The term "juvenile death penalty" was taken from a case comment authored by Elizabeth A. Reimels. See Elizabeth A. Reimels, Comment, *Playing For Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the International Human Rights Game, But Only if It Makes the Rules*, 15 EMORY INT'L L. REV. 303, 306 (2001).

6. *Furman v. Georgia*, 408 U.S. 238 (1992) (holding that the arbitrary imposition of the death penalty on felons convicted of rape or murder was cruel and unusual).

7. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VII. See also

with each of the five Justices in the majority writing his own concurring opinion exemplifying vastly different reasoning, ranging from categorical opposition to the death penalty to concern over the arbitrary nature of death sentences at the time.⁸ As a result, thirty-five states revised their Death Penalty statutes in an effort to conform to Supreme Court guidelines⁹ and four years later the Court rejected the view that the death penalty is per se cruel and unusual punishment.¹⁰ In *Gregg v. Georgia*, the Court upheld a Georgia capital punishment law that utilized certain trial procedures and appeals designed to prevent the penalty from being imposed arbitrarily.¹¹ The Court noted that based on the legislative response following *Furman*, indicating society's endorsement of the death penalty, the evolving standard of decency argument, which had prevailed in *Furman*, could not be used to strike down capital punishment,¹² therefore the death penalty should be reinstated.

BARRY LATZER, DEATH PENALTY CASES – LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT 19–44 (Butterworth-Heinenmann 1998).

8. Latzer, *supra* note 7, at 4. In the concurring opinions of Justice Brennan and Justice Marshall both Justices expressly contended that the death penalty was per se unconstitutional. Justice Brennan focused on the unusual severity of the punishment of death because of its “finality and enormity;” *Furman*, 408 U.S. at 289 (Brennan, J., concurring); while Justice Marshall mainly discussed the lack of any legitimate legislative purpose; *id.* at 359 (Marshall, J., concurring). Whereas Justices Stewart and White do not believe that the death penalty is constitutionally impermissible under all circumstances; they instead indicated that given reforms to the statutes, more clearly defining the categories of crimes that require imposition of the death penalty, their votes might be swayed to form a new majority in favor of the death penalty. *Id.* at 306–14 (Stewart, J., concurring).

9. *Id.* at 245.

10. *Gregg v. Georgia*, 428 U.S. 153 (1976). See also Latzer, *supra* note 7, at 4.

11. *Id.*

12. *Gregg*, 428 U.S. at 155. After the decision in *Furman*, 35 states rewrote their death penalty statutes in an effort to conform to the guidelines that were set forth. Here the Georgia statute was amended to rectify the problem of arbitrariness that plagued Justice Stewart and Justice White in *Furman* by stating that the imposition of the death penalty was only permitted when trial judges and juries were sentencing defendants for homicides having certain characteristics, called aggravating factors, and only where there were insufficient mitigating factors (factors that make the offense less reprehensible). *Id.* at 163. See also Latzer, *supra* note 7, at 45. Moreover the Georgia statute provided for bifurcated trials, which consists of a trial and then a separate sentencing proceeding after the defendant was found guilty,

Thirteen years later, Americans saw the policy of capital punishment further broadened when the Supreme Court upheld the legality of the use of the death penalty for sixteen and seventeen year old offenders in *Stanford v. Kentucky*.¹³ There, the Court looked at two consolidated cases where the defendants were convicted and sentenced to death. In one case, a Kentucky minor was seventeen years and four months old when he and his accomplice raped, sodomized, and eventually killed their victim.¹⁴ The other case involved a Missouri minor who was sixteen and a half years old when, during the commission of a robbery of a convenience store, he killed the sales clerk.¹⁵ Both defendants argued that the application of the death penalty in their respective cases violated the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁶ The Court considered state and federal statutes as well as the behavior of prosecutors and juries as "objective indicia that reflect the public attitude toward a given sanction"¹⁷ to determine if a "societal consensus" against the juvenile death penalty existed. The Court concluded that according to the "evolving standards of decency" the punishment was not cruel and unusual and instead fell within the "demonstrable current standards of our citizens."¹⁸

Of great significance was the fact that the majority's opinion in *Stanford* was devoid of any discussion or analysis of international views and norms, concerning the execution of convicts who committed the punishable offense while they were minors, save for a footnote stating that this type of analysis would not be done.¹⁹ Conversely, only one year prior to the decision in *Stanford*, the Court focused on international law standards

as well as direct appeals of capital convictions to the state's highest court. *Id.* These procedures allayed the Justices' fears and caused Justice Stewart and Justice White to change their anti-death penalty opinions, illustrated in *Furman*, to a pro-death penalty stance here. This resulted in a new majority that upheld Georgia's death penalty statute. *Gregg*, 428 U.S. 153.

13. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

14. *Id.* at 368.

15. *Id.*

16. *Id.*

17. *Id.* at 370.

18. *Id.* at 378.

19. *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989). *See also* Reimels, *supra* note 5, at 306.

when it addressed the similar question of whether or not the execution of children younger than sixteen years of age was constitutional in *Thompson v. Oklahoma*.²⁰ There, the Court concluded in a plurality opinion that imposing the death penalty on a fifteen year old offender would “offend civilized standards of decency” in violation of the cruel and unusual punishment clause of the Eighth Amendment.²¹ The plurality decision relied upon the views of the international community regarding the juvenile death penalty.²² The Court looked to several nations’ attitudes against the juvenile death penalty in reaching its conclusion that a consensus existed among the international community opposing the execution of children.²³ In addition, Justice Stevens noted three current international treaties which prohibit the use of the death penalty on juvenile offenders.²⁴ These treaties included: Article 6 Paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR) — a global civil rights treaty prohibiting the execution of minors

20. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Stevens, J., plurality opinion). *Thompson* stands for the proposition that the imposition of the death penalty on juveniles is too extreme a punishment due to the fact that fifteen year olds do not possess the requisite culpability to be death penalty eligible because “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.” *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 86, 104, 115–16, n.11 (1958)).

21. *Id.* at 821. *See also Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J. plurality opinion) (holding that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”) *Id.* at 100–01.

22. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., plurality opinion).

23. The Court stated that “[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed ... by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.” *Id.* at 830. Subsequently the Court mentioned the fact that several nations had either abolished the death penalty or restricted its use by excluding juveniles, *id.* at 830–31, specifically noting that the United Kingdom, New Zealand, and the Soviet Union prohibit the execution of juveniles; that Canada, Italy, Spain, and Switzerland allow capital punishment only for “exceptional crimes such as treason[;]” and that West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries forbid capital punishment. *Id.*

24. *Id.* at 831 n.34.

under eighteen years of age,²⁵ Article 4 Paragraph 5 of the American Convention on Human Rights — a regional human rights treaty prohibiting the execution of minors under eighteen years of age,²⁶ and Article 68 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) — which prohibits executing minors during wartimes who are under eighteen at the time of their offense.²⁷ Justice O'Connor, in a concurring opinion, also relied on international sources and authority, pointing to the Senate's ratification of the Fourth Geneva Convention to determine that there could be no inference of a senatorial sanction of the juvenile death penalty through past legislation.²⁸

Admittedly, the United States Supreme Court abandoned its reliance on the use of international standards and treaty obligations to determine what “evolving standards of decency” are within the confines of the United States in deciding whether the imposition of the death penalty on juveniles constitutes cruel and unusual punishment in violation of the Eighth Amendment. However, it is significant to note that the Court did in fact use this type of analysis. By mentioning international standards, the Court seems to be indicating that the norms of the global community are important to its determination of a consensus regarding the juvenile death penalty.²⁹ Furthermore, the United States has ratified the ICCPR³⁰ and signed the United Nation's Convention on the Rights of the Child³¹ since the Court last heard a case involving the execution of a juvenile

25. ICCPR, *supra* note 4, at art. 6, para. 5.

26. American Convention, *supra* note 4, at art. 4, para. 5.

27. Fourth Geneva Convention, *supra* note 4, at art. 68. *See also* Reimels, *supra* note 5, at 307.

28. *Thompson v. Oklahoma*, 487 U.S. 815, 821–23 (1988) (O'Connor, J. concurring). In referencing the obligations that the United States had undertaken by ratifying the Geneva Convention, which prohibited the wartime execution of children under the age of eighteen at the time of their offense, Justice O'Connor undermined the dissent's assertion that the Senate had, through other legislation, authorized and approved the death penalty for minors as young as fifteen. *See* Reimels, *supra* note 5, at 308.

29. Reimels, *supra* note 5, at 309.

30. ICCPR, *supra* note 4, at art. 6, para. 5. *See also* Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, 31 I.L.M. 645 (1992) [hereinafter Senate Report].

31. CRC, *supra* note 4, at art. 6, art. 37.

offender, so it is possible that the next juvenile death penalty case it decides will come out differently.³² Thus, this Comment will now turn to an examination of the laws governing treaties in the United States with a focus on treaties concerning the Juvenile Death Penalty.

32. Moreover, in June of 2002, the United States Supreme Court ruled that subjecting the mentally retarded to the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304 (2002). That same year, in *In re Stanford*, the Court denied *certiorari* to Kevin Stanford - another individual sentenced to death for a crime he committed as minor - over a strong dissent authored by Justice Stevens and joined by Justices Breyer, Ginsberg, and Souter. These four Justices wanted not only to revisit the issue of the juvenile death penalty, but they were ready to declare it unconstitutional. *In re Stanford*, 537 U.S. 968 (2002) (Stevens J., dissenting). Justice Stevens went so far as to state that the Court should follow the majority's analysis in *Atkins* and find that executing juvenile defendants offends evolving standards of decency under the Eighth Amendment. *Id.* Justice Stevens opined that most of the reasons supporting the prohibition of executing the mentally retarded in *Atkins* were present regarding the juvenile death penalty and thus, the Court should grant Stanford's habeas corpus petition. *Id.* Interestingly, the only factor present in *Atkins* but absent in *Stanford* was the number of States expressly forbidding the juvenile death penalty; twenty-eight states ban the execution of juvenile offenders whereas thirty states banned the execution of the mentally retarded. *Id.* Regardless, unlike Toronto Patterson, Kevin Stanford's life was spared when the Governor of Kentucky granted him clemency on December 8, 2003 and commuted his death sentence to life imprisonment evincing further evidence of anti-juvenile death penalty sentiments. Thus, not only has the international consensus been solidified against the juvenile death penalty but there also appears to be a concomitant national consensus forming on the subject as well. See also Jeffrey M. Banks, *In Re Stanford: Do Evolving Standards of Decency Under Eighth Amendment Jurisprudence Render Capital Punishment Inapposite for Juvenile Offenders?*, 48. S.D. L. REV. 327, 353 (2003).

II. INTERNATIONAL TREATIES AND THEIR APPLICATION IN THE UNITED STATES COURT SYSTEM

A. Treaties in General and the Impact of Senate Reservations and the Self-Executing Doctrine on Their Implementation

1. Overview of the Laws Governing Treaties in the United States and Abroad

A treaty is “an international agreement concluded between States in written form and governed by international law.”³³ Since treaties are the principal source of international law,³⁴ it was important to codify that law through the Vienna Convention on the Law of Treaties (Vienna Convention).³⁵ Although the United States is not a party to the Vienna Convention, its Department of State as well as its courts have indicated that they consider the Vienna Convention an accurate restatement of the customary international law of treaties; thus the Restatement (Third) of The Foreign Relations Law of the United States (Restatement) adopted most of its text from that treaty.³⁶ However, supplementing governance by the Vienna Convention, treaties are also subject to the constraints of the United States Constitution, customary international law, and domestic and international judicial decisions in addition to the influence of the academic writings of legal scholars.³⁷

According to the Constitution, treaties are the “supreme Law of the Land.”³⁸ While early in our nation’s history treaties were

33. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980; not in force for the United States) [hereinafter Vienna Convention].

34. *Id.* at 332.

35. *Id.*

36. Stefan A. Riesenfeld & Fredrick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusions and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 574 (1991). See also RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS: PART III INTERNATIONAL AGREEMENTS, Introductory Note (1987) (referring to the State Department’s statements that “although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.”) (quoting S. Exec. Doc. L., 92nd Cong., 1st sess. (1971) p.1.) [hereinafter RESTATEMENT].

37. *Id.* See also Reimels, *supra* note 5, at 311.

38. U.S. CONST. art. VI, cl. 2 providing that: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

believed to be extra-constitutional, it is now widely accepted that agreements with foreign nations can only grant power to a branch of our government subject to Constitutional restraints.³⁹ Furthermore, whereas the Constitution takes precedence over a treaty, a treaty is understood to be the equivalent of a federal statute.⁴⁰ Nevertheless, where a treaty and a federal statute are found to be conflicting, the most recently enacted instrument supercedes the other; this gives rise to the “last in time doctrine.”⁴¹ However, the last in time rule only applies to interactions between treaties and federal law; thus a treaty is superior to state law as well as any state constitution.⁴²

Article II Section 2 of the United States Constitution confers on the President the power to enter the United States into treaties with the advice and consent of two thirds of the Senate.⁴³ After a treaty has been negotiated by the Executive branch, it is sent to the Foreign Relations Committee of the Senate, which prepares a report and recommends to the full Senate whether or not to ratify the treaty.⁴⁴ This recommendation can include proposed amendments to the treaty such as reservations, understandings, declarations or provisos.⁴⁵ After assent of the

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *See also* Riesenfeld & Abbott, *supra* note 36, at 576.

39. *See Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (holding that a treaty cannot be used to deprive a citizen of a constitutional right). *See also* Reimels, *supra* note 5, at 310.

40. *Id.* at 18. *See also* RESTATEMENT, *supra* note 36, § 115.

41. *See* Chinese Exclusion Case, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Head Money Cases*, 112 U.S. 580 (1884); *Cherokee Tobacco Case*, 78 U.S. (11 Wall.) 616 (1870). These cases all illustrate the concepts that treaties cannot exceed the boundaries of rights and duties created by the United States Constitution, that a treaty supersedes a prior inconsistent federal statute, and that a subsequent inconsistent federal statute supersedes a treaty; creating the “last in time doctrine.” *See also* Riesenfeld & Abbott, *supra* note 36, at 577; Reimels, *supra* note 5, at 310.

42. *Missouri v. Holland*, 252 U.S. 416 (1920).

43. “He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur.” U.S. CONST. art. II, § 2, cl. 2.

44. Riesenfeld & Abbott, *supra* note 36, at 580.

45. *Id.* *See also infra* pp. 1256–60 on reservations. In United States practice, an “understanding” generally refers to a statement by which the govern-

Senate is given, the President may ratify the treaty as long as any additional conditions attached to the resolution of ratification are fulfilled.⁴⁶ Furthermore, since the President has the power to execute the laws of the land and a treaty is the law of the land, it is the President's role to carry out a treaty's terms.⁴⁷ However, the Supreme Court is granted the final power to interpret treaties under Article III of the United States Constitution.⁴⁸

2. Reservations to Treaties

Part I Article 2 of the Vienna Convention defines a reservation as "a unilateral statement ... made by a state when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that

ment expresses its interpretation, clarification, or elaboration of a particular treaty provision and a "declaration" generally refers to a statement by which the government states its position with respect to the applicability or non-applicability of the rules of a separate treaty or international law to the treaty in question. See Riesenfeld & Abbott, *supra* note 36, at 602. The third type of Senate condition or understanding is a proviso which "includes those [conditions] which are not intended to be included in the formal instruments of ratification because they do not involve the other parties to the treaty but instead relate to issues of U.S. law or procedure." *Id.* at 619 (quoting Congressional Research Service, *Treaties and Other International Agreements: The Role of The United States Senate, A Study Prepared for the Committee on Foreign Relations by the Congressional Research Service, S. Rpt. No. 98-205, 110, 98th Cong., 2d Sess. (1984)*).

46. *Id.* "The Senate does not itself ratify a treaty, but rather passes a resolution of ratification authorizing the President to ratify. Reservations, understandings and declarations are included in the [S]enate's resolution of ratification and transmitted to the President for inclusion in the instrument of ratification" *Id.* at n.59.

47. U.S. CONST. art. II, § 1, providing that: "The executive Power shall be vested in a President of the United States of America." See also RESTATEMENT, *supra* note 36, § 1 reporter's note 2 & § 326 cmt. a.

48. U.S. CONST. art. III, § 1, providing that: "The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, U.S. CONST. art. III, § 2 provides that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"

State.”⁴⁹ Part II Section 2 Articles 19 through 23 of the Vienna Convention govern reservations. Generally, a reservation made by a party to a treaty is valid and effective if it does not defeat the object and purpose of the treaty and it is not prohibited by the terms of the treaty.⁵⁰ Another party to the treaty can object to the reservation but that objection does not necessarily make the treaty, as a whole, per se invalid between the reserving and objecting parties.⁵¹ Instead the objection excludes the provision in the treaty to which the reservation and objection apply as between those two parties.⁵² Only if the objecting party expressly articulates that it does not intend to be bound by the treaty as a whole will the objection preclude the entry into force of the treaty as between the reserving and objecting parties.⁵³ Moreover, if a party to a treaty does not object to the reservation in a timely manner, then that party is presumed to have accepted the reservation and to be willing to be bound with the reserving party.⁵⁴ Therefore, reservations and objections only apply to the parties to whom they have been addressed and have no effect on the treaty obligations of other parties in a multilateral treaty.⁵⁵

The Senate routinely attaches reservations to treaties which it receives for advice and consent.⁵⁶ Recently, the Senate has attempted to expressly reserve the supremacy of the internal law of the United States⁵⁷ by making reservations which modify the results of treaty obligations domestically from the original intent of the treaty negotiators.⁵⁸ As one scholar notes, “[b]y its

49. Vienna Convention, *supra* note 33, at art. 2(1)(d).

50. *Id.* at art. 19. See also RESTATEMENT, *supra* note 36, § 313. Furthermore, according to general international law a reservation is also invalid if it violates customary international law or if it conflicts with a newly emergent peremptory norm of international law (*jus cogens*). Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F.L. L. Rev. 735, 754 (1998).

51. *Id.* at art. 20.

52. *Id.* at art. 21.

53. *Id.*

54. *Id.* at art. 20.

55. *Id.* at art. 21. See also Riesenfeld & Abbott, *supra* note 36, at 586.

56. Riesenfeld & Abbott, *supra* note 36, at 586.

57. *Id.* at 573.

58. Reimels, *supra* note 5, at 311. See also *infra* pp. 1271–75 discussing the United States reservations to the ICCPR.

reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below International standards.⁵⁹ While it is true that some reservations facilitate the ratification of treaties,⁶⁰ as well as help bring them into compliance with the United States Constitution, many reservations recently issued have been much broader than necessary.⁶¹ As reservations have historically identified specific domestic legislation with which the treaty may be incompatible, leading scholars believe that broad reservations might prove impermissible.⁶²

Moreover, if a reservation is deemed invalid,⁶³ it can either be severed from the party's accession to the treaty, in which case the party is still bound by the original treaty provisions, or if the invalid reservation cannot be separated, then the State would no longer be a party to the instrument.⁶⁴ A growing international consensus has concluded that an invalid reservation

59. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 342 (1995). However, Professor William A. Schabas makes a valid point that article 27 of the Vienna Convention does not allow a party to a treaty to invoke the provisions of its internal law as a justification for its failure to perform a treaty. William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 284 (1995). Even though the United States is not a party to that treaty it does use the treaty as a guide for foreign relations law and as such should prohibit the use of domestic law as an excuse for violations of its treaty obligations through reservations. *But See* RESTATEMENT, *supra* note 36, § 115 (stating that the "last in time rule" applies to conflicting treaty and federal statute terms but not state statute or state constitutional terms).

60. Schabas, *supra* note 59, at 287.

61. Reimels, *supra* note 5, at 311 (citing Henkin, *supra* note 59, at 342-44). It is argued that the reason for these over broad reservations is to curtail the effect of the treaty, to which they apply, when implementing it domestically.

62. Schabas, *supra* note 59, at 283, 291. For example, Norway and Ireland both issued reservations to article 6, paragraph 5 of the ICCPR which prohibits the imposition of the death penalty for crimes committed when an individual is younger than eighteen years-of-age. There, both countries identified a specific paragraph in article 6 with which their domestic law did not comply; on the other hand the United States' reservation encompassed practically all of the provision. *Id.* at 291.

63. *See also supra* pp. 1256-57 and n.50 for a discussion of what invalidates a treaty.

64. Schabas, *supra* note 59, at 278. *See also* RESTATEMENT, *supra* note 36, § 311 cmt. b & reporter's notes 2-3.

should be severed from the document of instrumentation.⁶⁵ A noteworthy illustration of this was made by the European Court of Human Rights in the case of *Belilos v. Switzerland* where, in conformity with the Vienna Convention, a Swiss statement to the Court was determined to be an invalid reservation to the European Convention on Human Rights due to its inconsistency with the express terms as well as the object and purpose of the treaty.⁶⁶ There, the European Court of Human Rights held that if a non-essential (derogable) reservation is invalid, it is severed from the treaty and the country submitting the reservation is still a party to the treaty and, as such, is bound by the provision without the reservation.⁶⁷ This marked the first decision of an international tribunal with respect to the international law of treaties and treaty reservations that nullified the reservation and applied the treaty in its totality to the reserving State.⁶⁸

Significantly, with respect to human rights treaties, reservations have frequently been criticized for weakening the overall effectiveness of the norms that they are trying to create as minimum standards.⁶⁹ The difference between human rights treaties and other types of treaties is that “parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties take on obligations con-

65. See Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 SANTA CLARA L. REV. 1041, 1053. See also Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. 347 (1989).

66. *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988), reprinted in 10 Eur. H.R. Rep. 466 (1988).

67. *Id.* See de la Vega, *supra* note 65, at 1053. In deciding whether the reservation was non-essential the Court considered whether the country's overriding intention was to accept the obligations under the treaty. *Id.* See also Bourguignon, *supra* note 65, at 382.

68. Riesenfeld & Abbott, *supra* note 36, at 588–89. Similarly, in an advisory opinion issued by the Inter-American Court on Human Rights, a Guatemalan death penalty reservation was invalidated because it sought to suspend a non-derogable fundamental right of the treaty and thus was incompatible with the object and purpose of the American Convention. de la Vega & Brown, *supra* note 50, at 755 (quoting Edward Sherman, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treat Formation*, 29 TEX. INT'L L.J. 69, 79 (1994)).

69. Schabas, *supra* note 59, at 287.

cerning their actions with respect to each other.”⁷⁰ The object and purpose of human rights conventions are to promote respect for the basic rights of individual human beings by having party states mutually assume legal obligations to ensure those recognized rights within their borders in accordance with international standards.⁷¹ Thus, reservations to human rights treaties that make general allusions to domestic law are disapproved of and often provoke formal objections⁷² because in essence, by adhering to human rights conventions subject to these reservations, the State is “pretending to assume international obligations but in fact ... undertaking nothing.”⁷³

3. The Self-Executing Doctrine in the Application of Treaties to Domestic Law

The self-executing doctrine, like Senate imposed reservations to treaties, has a significant impact on the execution and enforcement of treaties. The Supremacy Clause of the United States Constitution states that treaties are the supreme law of the land.⁷⁴ This Clause effectuated “a wholesale incorporation of U.S. treaties into domestic law, dispensing with the need for retail transformation of treaties into domestic law by Congress.”⁷⁵ The self-executing treaty doctrine is a judicially cre-

70. de la Vega & Brown, *supra* note 50, at 754.

71. Henkin, *supra* note 59, at 343. See also The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Advisory Opinion No. OC-2/82 of Sept. 24, 1982, Inter-Am. C.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983); de la Vega & Brown, *supra* note 50, at 754.

72. Schabas, *supra* note 59, at 284. For example the U.S. reservations to articles 6 and 7 of the ICCPR were answered with objections from eleven party States. *Id.* at 310.

73. Henkin, *supra* note 59, at 344.

74. U.S. CONST. art. VI, cl. 2.

75. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 699 (1995). This was done in response to the rule in Great Britain that all treaties required, and still require, implementing legislation passed by Parliament before they would be enforced by officials applying domestic law, regardless of the treaty's terms or intents. *Id.* at 698. During the time of the Articles of Confederation, Great Britain repeatedly violated the Treaty of Peace. *Id.* Moreover, treaties concluded by the Continental Congress were not enforceable as law in the courts of the states if there was conflicting state legislation and no repealing acts of legislation were passed. *Id.* Therefore, to combat these problems with the implementation of treaties

ated rule developed as a qualification to the Supremacy Clause.⁷⁶ Generally, a self-executing treaty is one that may be enforced, once it is ratified, without requiring prior domestic legislation to take effect, whereas a non-self-executing treaty is one that may not be enforced in the courts without prior legislative implementation.⁷⁷ Courts have applied several different theories in determining whether a treaty is self-executing.⁷⁸

Professor Carlos Vazquez identified four distinct doctrines of self-executing treaties.⁷⁹ The first and most widely accepted of these doctrines is the intent-based doctrine⁸⁰ which was introduced into United States jurisprudence by the Supreme Court in *Foster v. Neilson*.⁸¹ The dispute arose over a claim to a tract of land in Florida on the basis of a grant from Spain.⁸² The Court ultimately held that it could not recognize the grant as valid under domestic law because the language of the treaty indicated the intention that Congress enact legislation confirm-

the Framers adopted the Supremacy Clause declaring treaties as the supreme law of the land and directing courts to give them effect without awaiting actions by the legislatures of either the states or the federal government. *Id.* at 699.

76. *Id.* at 697–98. See generally Connie de la Vega, *Civil Rights during the 1990's: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423 (1997).

77. Vazquez, *supra* note 75, at 695.

78. *Id.* While Professor Vazquez's determination of four distinct doctrines of the theory of self-executing treaties has been the most widely accepted, there are other legal scholars who have discovered different tests of the self-executing nature of treaties. For example, Professor de la Vega has distinguished three tests that courts in the United States have used to decide whether a clause of a particular treaty is self-executing. de la Vega, *supra* note 76, at 448. In the first test, the Court establishes whether or not the treaty is equivalent to a legislative act and if it is then the treaty is self-executing. *Id.* In the second test the Court examines the responsibilities mandated by the treaty provision to see if they require self execution. *Id.* Finally, the third test that Professor de la Vega describes is intent based. *Id.* at 446–47. Here, there has been some debate because courts have differed as to where they find this intent to make the treaty self-executing. Some courts have looked for the "intent of the parties" as reflected in the words of the treaty alone whereas others have determined the intent through looking at the words of the treaty in addition to the circumstances surrounding its execution. de la Vega, *supra* note 65, at 1041.

79. *Id.* at 696.

80. *Id.* at 699–700.

81. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

82. *Id.* at 253.

ing the grant.⁸³ However, the Court also noted that because the Constitution makes a treaty the law of the land it is “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”⁸⁴ The Court narrowed the scope of non-self-executing treaties in *United States v. Percheman* when, by focusing on both the Spanish and English text of the treaty, it held that the treaty did “operate of itself” and could be applied by the courts without legislative implementation.⁸⁵ Thus, the decisions in *Foster* and *Percheman* recognized the general rule that treaties do not require legislative implementation in the United States “by their nature,” but may require legislative implementation through the affirmative agreement of the parties clearly stating that it is the parties’ intent to alter that rule.⁸⁶

Recently, however, the courts have changed their focus when determining intent for self-execution doctrine purposes. Lower courts have sought to discern the intent of the United States negotiators of the treaty, the President and the Senate, instead of the intent of all of the parties to the treaty and have done so by looking beyond the actual terms of the treaty.⁸⁷ Indeed, the courts have begun to perceive the inquiry as a search for the unilateral intent of the President in ratifying the treaty or the Senate in giving its advice and consent.⁸⁸ The Restatement adopts this test of determining intent by reasoning that if there is no language in the international agreement as to its self-executing character and the intention of the United States is unclear, “account must be taken of any statement by the President in concluding the agreement, or in submitting it to the Senate for consent, or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement.”⁸⁹

83. *Id.* at 314.

84. *Id.* See also Vazquez, *supra* note 75, at 700.

85. *United States v. Percheman*, 32 U.S. (2 Pet.) 51 (1833).

86. Vazquez, *supra* note 75, at 702, 704.

87. *Id.* at 705.

88. *Id.*

89. RESTATEMENT, *supra* note 36, § 111 cmt. h. See also RESTATEMENT, *supra* note 36, § 314 cmt. h, d & § 303 cmt. d. However, there has been much debate as to whether the intent of only one of the parties would determine the effect of a particular clause in the case of multilateral agreements. de la Vega, *supra* note 76, at 448.

Moreover, the courts seem to have reversed the *Foster* and *Percheman* principle that, absent a clear statement of intent by the parties to have a treaty be subject to implementing legislation, it is self-executing; courts now look for evidence of an intent on the part of the United States officials to make the treaty self-executing and without it will presume that the treaty is non-self-executing and thus not enforceable in the courts without legislative implementation.⁹⁰ Furthermore, even the intention of the parties that the Court is trying to determine has become confused. For example, recently the intent relevant to the self-execution inquiry has been described as an intent to create “private rights,” or “judicially enforceable private rights,” or as “private rights of action,” or as an intent that the provision be judicially enforceable at the behest of individuals.⁹¹ The problems with this are that it leads to the misassumption that a treaty’s judicial enforceability is always a matter of intent, whereas that is not always the case, and it does not clarify the kind of intent necessary to make a treaty self-executing.⁹²

The second doctrine noted by Professor Vazquez is the justiciability doctrine.⁹³ Under this doctrine, the inquiry does not involve a “search for evidence of an intent regarding whether the ultimate object of the treaty was to be accomplished through future acts of legislation.”⁹⁴ Instead courts have viewed a treaty’s self-executing or non-self-executing nature as “a characteristic that exists independently of any intent to require legislation” and have discerned this essence through any guidance that they find useful.⁹⁵ An illustration of this approach is contained in the decision in *Frolova v. USSR*, where the 7th Circuit Court of Appeals enumerated the factors that it considered relevant to the inquiry into whether the treaty was intended to

90. Vazquez, *supra* note 75, at 708. See RESTATEMENT, *supra* note 36, § 111 cmt. h.

91. *Id.* at 710. While the concepts of the private right of action and the self-executing treaty doctrine are distinct, Professor Vazquez has deciphered at least one self-executing treaty doctrine that considers whether the treaty has created a private right of action for individuals in determining the self-executing nature of that treaty.

92. *Id.* This concept will be further discussed *infra* pp. 1263–69 when we turn to the other three self-executing treaty doctrines described by Vazquez.

93. *Id.*

94. *Id.* at 711.

95. *Id.*

be self-executing.⁹⁶ The Court in *Frolova* did not search for actual intent or even an inference of intent; instead it imputed intent based on factors that addressed reasons, unrelated to intent, as to why the treaty obligation should not have been judicially enforceable.⁹⁷

Other factors that some courts have considered in determining whether particular treaties are self-executing, and therefore judicially enforceable without additional legislation by Congress, are the precatoriness of certain provisions, the indeterminateness of a provision, and the case-by-case analysis of a treaty.⁹⁸ These types of provisions are deemed judicially unenforceable not because of the parties' intent but because in our domestic system of separated powers the object of the provision is considered to be a political task and not one for the courts to perform.⁹⁹ Other provisions have been held unenforceable because they did not set forth "sufficiently determinate standards for evaluating the conduct of the parties and their attendant rights and liabilities."¹⁰⁰ Today, lower courts have tried to answer the self-execution question by inquiring as to whether a

96. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 370–76 (7th Cir. 1985). Those factors included:

(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of the alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (4) the capability of the judiciary to resolve the dispute.

97. *Vazquez*, *supra* note 75, at 711.

98. *Id.* at 712–17. Precatory treaty provisions do not impose obligations but instead set forth aspirations. *Id.* at 712.

99. *Id.* at 713. Moreover, it is interesting to note that this test for discerning the self-executing nature of a treaty was not the same as that originally applied in *Foster* and *Percheman*. There, the question was whether intent to have a self-executing or non-self-executing treaty could be inferred from the text of the treaty itself. *Id.* at n.77. In contrast, using the precatory nature of a provision as a reason to say it is non-self-executing makes the provision judicially unenforceable without regard to the parties' intent concerning judicial enforcement. *Id.*

100. *Vazquez*, *supra* note 75, at 713. This variant on the issue of self-execution originates from dicta in the Supreme Court's decision in the *Head Money Cases*, where the Court said that a treaty can be judicially enforced by private individuals when it "prescribes a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases*, 112 U.S. 580, 598–99 (1884). *See also Vazquez*, *supra* note 75, at 714.

treaty is “too vague for judicial enforcement,”¹⁰¹ or if it “provides specific standards,”¹⁰² or if it is “phrased in broad generalities.”¹⁰³ The Restatement has fortified this modification of the self-executing treaty doctrine by stating that a treaty is self-executing if it “can be readily given effect without further legislation.”¹⁰⁴ Furthermore, some lower courts have treated the self-executing inquiry as a more “free-wheeling inquiry” into the treaty’s judicial enforceability, taking into account many factors in addition to precatoriness and indeterminateness.¹⁰⁵ Thus this third and final variant of the justiciability doctrine seems to ask courts to engage in an “open-ended inquiry to determine on a case-by-case basis whether judicial enforcement of a particular treaty is a good idea.”¹⁰⁶

101. *People of Saipan v. United States Dep’t of Interior*, 502 F.2d 90, 99 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).

102. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). *See also* *American Baptist Churches v. Meese*, 712 F. Supp. 756, 770 (S.D. Cal. 1989).

103. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985).

104. RESTATEMENT, *supra* note 36, § 111 reporter’s note 5. Similar to the line between precatory and obligatory provisions, the line between vague and “judicially discoverable and manageable standards,” *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989), is a domestic constitutional divide that also serves to allocate powers between the courts and the legislature. *Vazquez*, *supra* note 75, at 714–15. For example, in *People of Saipan* the Court listed the following factors as relevant to determining whether a treaty “establishes affirmative and judicially enforceable obligations without implementing legislation: ... the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self or non-self-execution.” *People of Saipan*, 502 F.2d at 97.

105. *Vazquez*, *supra* note 75, at 715.

106. *Id.* Moreover, it is important to note the differences between the “intent-based” branch of self-execution and the “justiciability-based” branch. The justiciability-based branch calls for a constitutional separation-of-powers determination analogous to a political question decision. *Id.* at 717. This kind of determination affects not only the particular treaty or treaty provision in question but also all provisions like it that may come before the court. *Id.* at n.102. In contrast, with regard to the intent-based branch, the parties to the treaty may make a treaty judicially unenforceable for any rational reason and their decision does not have any necessary implications regarding the judicial enforceability of other similar treaties. *Id.*

The third self-executing treaty doctrine identified by Professor Vasquez is the constitutionality doctrine.¹⁰⁷ According to the Restatement “[a]n international agreement cannot take effect as domestic law without implementation by Congress if the agreement would achieve what lies within the exclusive law-making power of Congress under the Constitution.”¹⁰⁸ Although there is no definitive judicial authority endorsing this variant of the self-executing treaty doctrine,¹⁰⁹ Professor Vasquez finds support for it in the Supremacy Clause.¹¹⁰ The test here is whether the treaty - makers possess the power to accomplish what they have set out to do in the treaty; if so the treaty is self-executing and if not, because the power lies with Congress, the treaty is non-self-executing.¹¹¹ However, due to the dearth of case law dealing with the constitutionality version of the self-executing doctrine, this category appears to have limited practical significance.¹¹²

The fourth and final category of the self-executing doctrines documented by Professor Vasquez is the private right of action doctrine.¹¹³ This variant on the doctrine asks the question of

107. *Id.* at 718.

108. RESTATEMENT, *supra* note 36, § 111 cmt. i.

109. RESTATEMENT, *supra* note 36, § 111 reporter’s note 6.

110. Vasquez, *supra* note 75, at 717. By illustrating how treaties are subject to all of the provisions of the Constitution the professor concludes that treaties are unable to accomplish goals which would not be consistent with the freedoms guaranteed by it, thus making those types of treaties unenforceable. *Id.*

111. *Id.* Significantly, this category of self-executing treaty doctrine differs considerably from the intent-based category in that in the latter, the treaty’s non-self-executing character is derived from the intent of the parties or the treaty makers, whereas in the former the treaty is non-self-executing because of the treaty makers’ constitutional disability. *Id.* “Additionally, while the constitutionality version of the doctrine is similar to the justiciability version because both require judgments about constitutional allocations of power, the justiciability version requires a judgment about the distribution of the power to *enforce* particular kinds of treaty provisions between the courts and the legislature and the constitutionality version requires a judgment about the distribution of the power to *accomplish* certain ends between the treaty makers and the lawmakers.” *Id.*

112. *Id.*

113. Vasquez, *supra* note 75, at 719. The concept that a treaty is self-executing and thus judicially enforceable only if it creates a private right of action found its origin in the District of Columbia Circuit Court of Appeals case *Tel-Oren v. Libyan Arab Republic* when Judge Bork in his concurring

whether the treaty at issue confers a “private right of action” such that private parties can maintain an action in court to enforce the treaty.¹¹⁴ However, it is incorrect to assume that a treaty can be enforced in court by private parties only if it confers a private right of action itself.¹¹⁵ Even if a treaty, like many constitutional provisions and federal statutes, imposes primary obligations on individuals without expressly addressing matters of enforcement, it may still be judicially enforceable.¹¹⁶ This is due to the fact that treaties may be supplemented by the common law¹¹⁷ as well as state¹¹⁸ and federal¹¹⁹ statutory law that confer “rights of action.”¹²⁰ Given that the purpose of the domestic courts in our governmental system, since *Marbury v. Madison*,¹²¹ has been to provide a remedy for the infringement of individual rights, “by implication the Supremacy Clause, as it concerns treaties, was intended to confer rights upon individuals.”¹²² Significantly, even without a private right of action private individuals may “enforce such treaties defensively if they

opinion considered “whether a right of action could be found in the treaties invoked by the plaintiffs [to determine the self-executing nature of the treaty].” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

114. *Id.* However, according to the Restatement, “[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.” RESTATEMENT, *supra* note 36, § 111 cmt. h. Professor Vazquez rebuts this by noting that while a treaty that does not itself confer a private right of action can correctly be described as non-self-executing, if the Restatement is read as discussing the distinction introduced in *Foster* regarding self-executing treaties, then the private right of action self-executing treaty doctrine is not in conflict with the Restatement. Vazquez, *supra* note 75, at 719, n.134.

115. *Id.*

116. *Id.*

117. Actions of debt and ejectment are two examples of instances where treaties have been enforced in court through common law forms of action. *See, e.g.*, *Florida v. Furman*, 180 U.S. 402, 428 (1901) (action to remove cloud on legal title); *Botiller v. Dominquez*, 130 U.S. 238, 243 (1889) (action in the nature of ejectment).

118. *See, e.g.*, *Jordan v. Tashiro*, 278 U.S. 123, 125 (1928) (state mandamus action).

119. *See, e.g.*, *Baldwin v. Franks*, 120 U.S. 678 (1887) (civil rights legislation).

120. Vazquez, *supra* note 75, at 720.

121. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

122. Reimels, *supra* note 5, at 315. *See also* *Reid v. Covert*, 354 U.S. 1 (1957); *Missouri v. Holland*, 252 U.S. 416 (1920).

are being sued or prosecuted under statutes that are inconsistent with [the] treaty provisions.”¹²³ This defensive use of a treaty is a judicially accepted means for litigants to successfully enforce treaty provisions without asking courts to determine whether the provisions are self-executing.¹²⁴ Therefore, while a court ruling or Senate proclamation that a treaty is non-self-executing may prevent bringing a direct cause of action under the treaty, the treaty can still be relied upon as a defense to a criminal charge¹²⁵ or the imposition of a sentence such as the death penalty.

Professor Vazquez’s four variants on the self-executing treaty doctrine shed some light on yet another aspect of treaty interpretation and enforcement. While all of the different theories of the self-executing doctrine have played an important part in the history of treaty law, it is the final category, that of the private right of action, that seems to have attracted the most attention lately. As another prominent legal scholar has pointed out, the recent pattern of Senate declarations that a treaty is non-self-executing, and thus does not confer a private right of action on individuals, “threatens to subvert the constitutional treaty system.”¹²⁶ This problem most often arises in the case of human

123. *Id.* For example in *Patstone v. Pennsylvania* the defendant, a foreign born Pennsylvania resident, was convicted under state law for owning a shotgun. *Patstone v. Pennsylvania*, 232 U.S. 138 (1914). The defendant asserted the defense that the statute violated a treaty between Italy and the United States. *Id.* While the Supreme Court recognized the defense under the treaty, it ultimately concluded that there was no conflict between the treaty and the state law. *Id.* at 145. Similarly in *Kolovrat v. Oregon*, the state filed petitions under its law for escheatment to obtain the land of an intestate decedent whose only next of kin lived in Yugoslavia. *Kolovrat v. Oregon*, 336 U.S. 187 (1961). The Yugoslavian relatives of the deceased argued that a treaty between the United States and Yugoslavia allowed for reciprocal rights of inheritance and that they were therefore eligible heirs to the estate. *Id.* The Supreme Court agreed, holding that, under the treaty to inherit property, the next of kin did not have to reside in the United States. *Id.* at 197. *See also de la Vega & Brown, supra* note 50, at 763.

124. *de la Vega, supra* note 65, at 1056.

125. *Reimels, supra* note 5, at 316.

126. *Henkin, supra* note 59, at 348. It is submitted that there is no justification for using a non-self-executing declaration to preserve an inconsistent statute that predates the treaty because this practice would create an indefensible gap between domestic law and international obligations. Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 *CHI.-KENT L. REV.* 515, 530 (1991). The

rights treaties where, in order to achieve the goals set forth in the treaty, the individual signatories must pass subsequent domestic legislation to conform to the treaty requirements.¹²⁷ This insufficiency can result in a whole class of non-self-executing treaties whose main purpose is the protection of individuals who cannot create legislation to protect themselves. This shall be discussed in the next section examining treaties dealing with the juvenile death penalty.

B. International Treaties Governing the Juvenile Death Penalty

There are two central issues involved in any discussion of the domestic impact of an international human rights treaty: the legal implications of reservations and the status of the treaty as self-executing or non-self-executing.¹²⁸ If one would like to invoke a provision of a treaty upon which a reservation has been attached, one must show that the reservation is invalid because it violates both the object and purpose of the treaty as well as the non-derogable nature of the provision.¹²⁹ Moreover, if the reservation declares the treaty to be non-self-executing, it is necessary to introduce counterarguments asserting that the treaty is self-executing and enforceable because either the original intent of the parties was to make it self-executing and to directly confer rights on individuals, or regardless of the treaty's self-executing nature its use as a defense is just.¹³⁰

Modern human rights treaties are not multilateral treaties of the traditional kind that are created to accomplish a reciprocal exchange of rights for the mutual benefit of the contracting

effect of a non-self-executing declaration attached by the Senate to an otherwise self-executing treaty would be to allow prior inconsistent statutory law to prevail, even though the courts would have allowed the treaty to supercede the statute in the absence of the declaration as a result of the last in time doctrine. *Id.*

127. Cele Hancock, *The Incompatibility of the Juvenile Death Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns*, 12 ARIZ. J. INT'L & COMP. L. 699, 715 (1995). This is done because some countries, like Great Britain, require implementing legislation for the execution of any treaty.

128. Reimels, *supra* note 5, at 316.

129. See also Christian A. Levesque, Note, *The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts*, 50 AM. U. L. REV. 755, 782 (2001).

130. *Id.* at 792.

states.¹³¹ The object and purpose of these treaties is “the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.”¹³² In concluding human rights treaties, the party states submit themselves to a legal order by assuming various obligations, not in relation to other states, but for the common good of all individuals in their jurisdiction.¹³³ Multilateral treaties seldom make clear the mechanism by which parties are to incorporate their provisions into national law¹³⁴ due to the fact that some countries require implementing legislation for all treaties whereas others, such as the United States, do not.¹³⁵ Further, while few courts in the United States have considered whether human rights treaties are self-executing,¹³⁶ the test that applies to multilateral treaties¹³⁷ of this nature is whether the treaty provision in question addresses the rights and duties of individuals and has extremely clear prohibitory language indicating that no further legislation is needed for it to take effect;¹³⁸ if the treaty comports with these two requirements, then it is self-executing.

With all of the previously discussed treaty law jurisprudence in mind, this Comment will now more closely examine interna-

131. de la Vega & Brown, *supra* note 50, at 754.

132. *Id.*

133. *Id.* at 755. See also Sherman, *supra* note 68, at 79–80.

134. de la Vega, *supra* note 76, at 449.

135. See *supra* n.75 and accompanying text for a further explanation of this topic.

136. de la Vega, *supra* note 76, at 450. For example, the United States Supreme Court has not directly ruled on whether the United Nations Charter’s human rights clauses are self-executing. *Id.* However, in *Oyama v. California* four Justices did support the idea that the United Nations Charter should be binding on courts in the United States. *Id.* See also *Oyama v. California*, 332 U.S. 633, 649–50 (1948) (Black, J., concurring).

137. Bourguignon, *supra* note 65, at 348.

138. See Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 WHITTIER L. REV. 215, 220 (1999). See also de la Vega, *supra* note 76, at 449 (citing Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT’L L. 548, 550 (1970)). Regardless of which test is applicable for use by the courts in determining whether a treaty is self-executing, recently the United States has taken to declaring all the human rights agreements that it ratifies as non-self-executing. Henkin, *supra* note 59, at 346.

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tional treaties that ban the execution of individuals who committed the crime, for which they were convicted and sentenced, while they were minors. The United States is a party to two treaties that prohibit the execution of persons under the age of eighteen (either at the time of the crime and/or at the time of execution): the International Covenant on Civil and Political Rights (ICCPR) and the Fourth Geneva Convention Relative to the Protection of Civilians. The United States is also a signatory¹³⁹ to the United Nations Convention of the Rights of the Child and the American Declaration of Human Rights. Each treaty will be examined in turn; however, special attention will be given to the ICCPR because it has the greatest potential to be used as persuasive authority in juvenile death penalty defense motions.¹⁴⁰

1. The International Covenant on Civil and Political Rights

a. The United States Reservation to Article 6 of the International Covenant on Civil and Political Rights is Invalid

The International Covenant on Civil and Political Rights (ICCPR) has been categorized as “nothing less than an international bill of rights [which was] part of an effort to codify the Universal Declaration of Human Rights, the United Nations’ post-war proclamation of the rights of man.”¹⁴¹ In 1966, the United Nations General Assembly approved the text of the treaty and opened the ICCPR for ratification.¹⁴² President

139. A signatory to a treaty is a country that has signed the treaty but not yet ratified it. While that State has not yet manifested its intent to be bound by the treaty through its ratification, the State is still required to comply with all the terms and provisions of the treaty. Moreover, once a State signs a treaty it also agrees not to pass any laws that contradict the treaty provisions even though that treaty is technically not the law of the land until ratified. See de la Vega & Brown, *supra* note 50, at 759.

140. Reimels, *supra* note 5, at 317.

141. John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 59 (1993).

142. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

Carter made the United States a treaty signatory¹⁴³ and asked the Senate to give its advice and consent to ratification of the ICCPR in 1977.¹⁴⁴ Nothing was done for the twenty-six years after the United Nations General Assembly unanimously adopted the treaty and the sixteen years after it went into effect internationally. Then, on April 2, 1992 the ICCPR was ratified by the United States Senate, on June 8, 1992 President Bush deposited the signed ratification instrument with the United Nations Secretary General,¹⁴⁵ and three months later on September 8, 1992 the treaty entered into force in the United States.¹⁴⁶ Between 1966 and 1992, many Senate and executive administration debates were held dealing with the treaty, illustrating the tension between the United States' commitment to human rights and its reluctance to implement the ICCPR into domestic law.¹⁴⁷ As a result, when the United States finally ratified the treaty it did so subject to several reservations, declarations, and understandings.¹⁴⁸ Eleven states filed objections to the reservations, asserting that they were invalid because they conflicted with the "object and purpose" of the ICCPR.¹⁴⁹ Further, the United Nations Human Rights Committee concluded that under the Vienna Convention, which is the guiding authority on current treaty law,¹⁵⁰ the United States' reservation to

143. 13 WEEKLY COMP. PRES. DOC. 1488 (Oct. 5, 1977), *reprinted in* 77 DEP'T ST. BULL. Oct. 1977.

144. 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978), *reprinted in* 78 DEP'T ST. BULL. Apr. 1978.

145. 28 WEEKLY COMP. PRES. DOC. 1008 (Sept. 10, 1992), *reprinted in* 92 DEP'T ST. BULL. Sept. 1992.

146. *See* Senate Report, *supra* note 30, at 645. *See* Quigley, *supra* note 141, at 60.

147. M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1170-72 (1993). *See also* United Nations, Multilateral Treaties Deposited with the Secretary General: Status as at 31 Dec. 1999, at 134, U.N. Doc. ST/LEG/SER.E/18 (Vol. I) (1999) [hereinafter ICCPR Status Report].

148. ICCPR Status Report, *supra* note 147, at 134. *See also supra* p. 1255 n.45 and accompanying text on reservations, understandings, declarations, and provisos.

149. *See id.* at 144-48 (listing Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden). *See also* Schabas, *supra* note 59, at 277.

150. *See supra* text pp. 1254, 1256-59.

Article 6 is invalid because it contradicts the ICCPR's "object and purpose."¹⁵¹

The ICCPR, like most human rights treaties, attempts to place legal obligations on how states handle the people living within their borders.¹⁵² The object and purpose of the ICCPR, and in particular Article 6, is to "protect the right to life through prohibiting the imposition of the death penalty on juvenile offenders."¹⁵³ Article 6 paragraph 5 states that the "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age."¹⁵⁴ The United States attached a reservation to this provision of the treaty, stating that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person [other than a pregnant woman] duly convicted under existing or future laws permitting the imposition of capital punishment including such punishment for crimes committed by persons below eighteen years of age."¹⁵⁵ Since a reservation is invalid if it contradicts the object and purpose of the treaty,¹⁵⁶ the Senate reservation, which does just that, is void.

The consequences of invalidating the reservation are two-fold. First, if an invalid reservation can be severed from the treaty as a whole, the United States remains bound by the entire treaty.¹⁵⁷ Thus in the case of the ICCPR, the United States would be bound to the entire treaty including the prohibition against the execution of minors who are sixteen and seventeen at the time of their offense.¹⁵⁸ The other possibility is that, in light of the reservation and subsequent objections, the United

151. de la Vega & Fiore, *supra* note 138, at 217–18. See also Schabas, *supra* note 59, at 278 (citing *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee*; U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg. at 4, U.N. Doc. CCPR/C/79/Add.50 (1995) [hereinafter *Comments of the Human Rights Committee regarding the ICCPR*]).

152. Reimels, *supra* note 5, at 321.

153. de la Vega & Fiore, *supra* note 138, at 218.

154. ICCPR, *supra* note 4, art. 6, para. 5.

155. Senate Report, *supra* note 30, at 653.

156. Vienna Convention, *supra* note 33, at art. 19. See also the accompanying text.

157. Schabas, *supra* note 59, at 278. See also Reimels, *supra* note 5, at 320.

158. *Id.*

States is no longer a party to the treaty.¹⁵⁹ However, as a result of the “growing international consensus that an invalid reservation is severed from the ratification”¹⁶⁰ and the corollary concept that the reserving State is still a party to the treaty, it can be concluded that the United States’ present practice of imposing capital punishment on juvenile offenders is illegal under the ICCPR, to which the United States is still a party.

Moreover, the reservation to Article 6 of the ICCPR can be invalidated due to the fact that it attempts to annul that non-derogable provision. Article 4 paragraph 2 of the ICCPR states that “[n]o derogation from Articles 6, 7, 8 (paragraphs one and two), 11, 15, 16, and 18 may be made under this provision.”¹⁶¹ The Inter-American Commission on Human Rights issued an opinion linking the non-derogable provisions of a treaty with the incompatibility principle of the Law of Nations.¹⁶² That Commission defined the incompatibility doctrine by stating that a reservation which violates a non-derogable fundamental right is incompatible with the object and purpose of the treaty and therefore is not permitted.¹⁶³ Further, “implicit in the ... opinion linking non-derogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.”¹⁶⁴ More telling still is that the United Nations Human Rights Committee, which was established under the ICCPR and is another major international organization dealing with the issue of the juvenile death penalty,¹⁶⁵ declared the United States’ death penalty reservation to be invalid by concluding that some components of the reser-

159. *Id.*

160. *See generally* Bourguignon, *supra* note 65. *See also* Belilos Case, 132 Eur. Ct. H.R. (ser. A) (1988), *reprinted in* 10 Eur. H.R. Rep. 466 (1988) (holding that if a non-essential reservation is invalid it is severed and the country submitting the reservation is still a party to the treaty and bound by the provision without the reservation); de la Vega & Fiore, *supra* note 138, at 219.

161. ICCPR, *supra* note 4, art. 4, para. 2.

162. *See* Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-Am. Ct. H.R., ser. A: Judgments and Opinions, No. 3 (1983), at 23 I.L.M. 320 (1984).

163. *See id.* at 61, 23 I.L.M. at 341. *See also supra* n.67.

164. Sherman, *supra* note 68, at 79.

165. *See* ICCPR, *supra* note 4, art. 28, para. 1.

vation may be incompatible with the non-derogable provision of the treaty that states its object and purpose.¹⁶⁶ In conclusion, because the Senate's reservation conflicts with the object and purpose of the treaty and is in fact in derogation from a non-derogable provision it is void, thus signifying the non-compliance of United States with its international obligations under Article 6.

b. The International Covenant on Civil and Political Rights
is Self-Executing

In addition to the reservation to Article 6(5), in which the Senate attempted to maintain the right of the United States to impose the juvenile death penalty, the Senate declared that the ICCPR is non-self-executing, thus barring the use of any of the treaty provisions as a basis for private causes of action.¹⁶⁷ However, by applying the self-executing treaty test for multilateral human rights treaties as well as the intent-based and justiciability doctrines identified by Professor Vazquez, it becomes clear that the ICCPR should be categorized as a self-executing treaty.

First, Article 6 paragraph 5 of the ICCPR is self-executing because it fulfills the conditions for multilateral human rights treaties, requiring that the provision involve the rights and duties of individuals and that the prohibitory language be extremely clear, indicating that no further legislation is needed for it to take effect.¹⁶⁸ The rights of individuals involved under this provision are those of juvenile offenders and the prohibitory language clearly states that the death penalty "shall not be imposed for crimes committed by persons below eighteen years of age."¹⁶⁹ Consequently, implementing legislation should not be necessary to put into operation the prohibition against the juvenile death penalty for parties to the ICCPR.¹⁷⁰

166. See Comments of the Human Rights Committee regarding the ICCPR, *supra* note 151, at 3. See also de la Vega & Brown, *supra* note 50, at 767 (citing de la Vega, *supra* note 76, at 461).

167. See ICCPR Senate Report, *supra* note 30, at 659. See also Reimels, *supra* note 5, at 322.

168. de la Vega & Fiore, *supra* note 138, at 220.

169. ICCPR, *supra* note 4, at art. 6, para. 5. See also *id.*

170. See de la Vega & Fiore, *supra* note 138, at 221.

Further, under the intent-based self-executing treaty doctrine,¹⁷¹ both the actual language and the meaning of the ICCPR, in addition to the surrounding circumstances of executing the treaty when the language is unclear, make it self-executing.¹⁷² Article 2 paragraph 3(a) of the ICCPR states that, “[e]ach State Party to the present Covenant undertakes: [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”¹⁷³ United States Senate Declaration 1 of the ICCPR states that, “the provisions of articles 1 through 27 of the Covenant are not self-executing.”¹⁷⁴ Due to the fact that Article 2 of the ICCPR mandates that the United States create a system of enforcement, the Senate’s declaration, which lacks the full authority of a reservation,¹⁷⁵ does not alleviate this obligation.¹⁷⁶

171. See Section II.A.3 *supra* for an in depth explanation of the several self-executing treaty doctrines set forth by Professor Vazquez.

172. See *Air France v. Saks*, 470 U.S. 392, 397 (1985) (noting that interpretation of a treaty must begin with the text of the treaty and the context in which words are written and used (citing *Maximov v. United States*, 373 U.S. 49, 53–54 (1963))); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32, (1943) (stating that courts should interpret treaties more liberally than private agreements and that the Court may look at history, negotiations, and practical construction so as to maintain the spirit of the treaty). See also *Levesque*, *supra* note 129, at 772.

173. ICCPR, *supra* note 4, art. 2, para. 3(a).

174. ICCPR Status Report, *supra* note 147, declaration 1, at 139. “Declarations are simply statements of policy, purpose, or position relating to the subject matter of the treaty, but not necessarily affecting its provisions.” *de la Vega*, *supra* note 76, at 452.

175. *Quigley*, *supra* note 141, at 64. “The declaration has effect only insofar as it bears upon judicial appraisal of the Covenant’s force. This appraisal is not a *fait accompli*; it is not clear how much weight the Senate’s declaration will carry on the courts.” *Id.* See, e.g., *Power Authority of N.Y. v. Federal Power Comm’n*, 247 F.2d 538 (D.C. Cir. 1957) (holding that a qualification statement made by the Senate in a resolution of consent to a treaty, but not made as a reservation, did not have the force of domestic law in the United States).

176. *Id.* See also ICCPR, *supra* note 4, at art. 2, para. 3(b) (the parties agree to provided remedies enforceable “by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibility of judicial remedy”). Additionally, because the United States has not created an enforcement mechanism in other branches of the government, the judiciary is “called

The ICCPR cannot be internationally binding and contain language invoking a remedy for individual violations and yet not create a basis for implementation domestically.¹⁷⁷ However, since a discrepancy between the language and interpreted meaning of the ICCPR is created when reading the Senate's Declaration in conjunction with Article 2, courts must look for intrinsic evidence surrounding the treaty's execution to determine whether the treaty provision is in fact self-executing.¹⁷⁸ While the Senate's Declaration that the treaty is non-self-executing carries weight, the force ascribed to the ICCPR by other states provides substantial support to the notion that the parties to the treaty intended for it to be self-executing.¹⁷⁹ For instance, the United Kingdom, a party to the ICCPR, has permitted private causes of action under the treaty even though it has not expressly written the ICCPR into its domestic law as British law requires.¹⁸⁰ Moreover, many other countries which are a party to the treaty have expressed the view that the ICCPR creates rights that are enforceable without enacting legislation.¹⁸¹ Therefore, it is readily apparent that the other party states believe that direct causes of action are allowed under the ICCPR. Admittedly, under the Restatement approach to treaty interpretations, the only intention considered in determining

upon to enforce the ICCPR's obligations. Quigley, *supra* note 141, at 64. Professor Quigley opines that the courts should decide on this basis that the prescriptive provisions of the Covenant are self-executing." *Id.*

177. Levesque, *supra* note 129, at 773.

178. *Id.*

179. *See* Quigley, *supra* note 141, at 64.

180. *Id.* In the United Kingdom treaties are not the "law of the land," as they are here under the Supremacy Clause. Instead, there, a treaty must be explicitly transformed into law by an act of parliament in order to become domestic law. *See also supra* n.75.

181. *Id.* *See, e.g.,* Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 44, at para. 194 (Netherlands stating that "any legislative act contrary to a provision of the Covenant would become inapplicable"); *id.* para. 549 (Italy stating that the ICCPR is frequently invoked by their courts). Report on the Human Rights Committee, U.N. GAOR, 43rd Sess., Supp. No. 40, para. 368, U.N. Doc. A/43/40 (1988) (France stating that its courts rely on the ICCPR); *id.* at para. 588 (Japan stating that the ICCPR prevails over domestic legislation in Japanese courts). *See also* Cindy A. Cohn, *The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, 13 HUMAN RIGHTS Q. 295, 317-20 (1991).

the self-executing question is that of the United States.¹⁸² However, "it is questionable [as to whether] in multilateral agreements the intent of only one of the parties ... determine[s] the effect of a particular clause."¹⁸³ Further, under the rule promulgated in *Foster v. Nelson*,¹⁸⁴ which introduced the concept of the self-executing treaty doctrine, the intent of all the negotiating parties is most important; under that theory it would be clear that the ICCPR is self-executing.

Moreover, the ICCPR should also be classified as self-executing under the justiciability doctrine introduced by Professor Vazquez. Under this doctrine, the self-executing question is determined based on independent factors and reasons, unrelated to intent, that illustrate why the treaty should or should not be judicially enforceable without implementing legislation.¹⁸⁵ These factors were fashioned by the court in *Frolova v. USSR*¹⁸⁶ and should act as a guideline and not a rigid test of self-execution.¹⁸⁷ However, by applying the factors to Article 6 paragraph 5 of the ICCPR they lead to the conclusion that it is self-executing. First, the language, object, and purpose of the treaty in its entirety are clear: it intends to protect the human rights of individuals.¹⁸⁸ Second, as noted before, the circumstances surrounding the execution of the treaty indicate that it is self-executing due to the fact that many parties to the ICCPR have allowed private rights of action under the treaty without first enacting implementing legislation.¹⁸⁹ Third, Article 2 unmistakably imposes an obligation on party states to supply effective remedies.¹⁹⁰ Fourth, because the United States has not ratified the Optional Protocol to the Convention on Civil and Political

182. RESTATEMENT, *supra* note 36, § 111 cmt.h. *See also* Reimels, *supra* note 5, at 322.

183. de la Vega, *supra* note 76, at 448. *See also* United States v. Toscanino, 550 F.2d 267, 270 (2d. Cir. 1974).

184. *Foster v. Nelson*, 27 U.S. (2 Pet.) 51 (1833).

185. Vazquez, *supra* note 75, at 711.

186. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985). For a more in-depth discussion of the factors see n.96 on p. 1264.

187. Levesque, *supra* note 129, at 772.

188. *See* ICCPR, *supra* note 4. *See also* de la Vega, *supra* note 65, at 1055.

189. Quigley, *supra* note 141, at 64. *See also supra* n.180 and accompanying text.

190. ICCPR, *supra* note 4, at art. 2, para. 3. *See also* de la Vega, *supra* note 65, at 1055.

Rights, which provides for an individual right to petition the Human Rights Committee,¹⁹¹ there are no other enforcement or implementation mechanisms available.¹⁹² Fifth, since the treaty provides rights to individuals, there is no reason to “believe that individuals should not have a private cause of action to enforce the provisions.”¹⁹³ Lastly, as there is no other enforcement mechanism in any other branch of the United States government, this job falls to the judiciary.¹⁹⁴ The judiciary is the most capable institution for addressing the question of whether a treaty has been violated because it has customarily been the means through which individuals in the United States have enforced their constitutional rights.¹⁹⁵ Thus, under the *Frolova* factors of the justiciability variant of the self executing treaty doctrine, the ICCPR should be self-executing.¹⁹⁶

Furthermore, despite the clarity of the ICCPR provisions, if the Senate Declaration that the treaty is non-self-executing is given effect then it should only apply to private causes of action. When the Senate Foreign Relations Committee declared the ICCPR to be non-self-executing, it did so only with respect “to

191. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976; not in force for the United States), 999 U.N.T.S. 302.

192. de la Vega, *supra* note 65, at 1055

193. *Id.*

194. Quigley, *supra* note 141, at 64.

195. de la Vega, *supra* note 65, at 1055. It is important to remember that the courts and not the Senate usually decide when treaty provisions are self-executing. See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 42–47 (1992); Damrosch, *supra* note 126, at 526; David Weissbrodt, *The United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 67 (1978).

196. While they are somewhat weaker arguments, the ICCPR might also be considered self-executing under the constitutionality and private right of action self-executing treaty doctrines. First, under the constitutionality doctrine, banning the execution of minors does not appear to be a goal that lies exclusively within the lawmaking powers of Congress. Therefore, under that limited doctrine the ICCPR may be self-executing. Secondly, while the concepts of a private right of action and the self-execution of a treaty are distinct, according to Professor Vazquez, one can consider the provision of a private right of action through a treaty informative regarding its self-executing nature. The ICCPR appears to provide a private right of action, thus it should be considered self-executing. For more information regarding these variants on the self-executing treaty doctrine, see *supra* Section II.A.3.

private causes of action.”¹⁹⁷ The legislative history of the declaration does not make the same statement regarding the use of the ICCPR provisions as a defense; thus because a party seeking to invoke the treaty provision, such as Article 6 paragraph 5, is not invoking a separate cause of action, the non-self-executing declaration is inapplicable to such parties.¹⁹⁸ Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, whereas parties to other treaties create state to state obligations;¹⁹⁹ therefore, if a right is created in a human rights treaty but there is no corresponding private right of action to enforce it domestically then there will be an individual right without a remedy — that is unless the treaty can be used defensively. Moreover, “the defensive use of a treaty is a judicially accepted means by which litigants have been successful in enforcing treaty provisions without [forcing the courts] to determine whether the treaty is self-executing.”²⁰⁰ Accordingly,

197. S. Exec. Rep. No. 102-23, at 19, reprinted in 31 I.L.M. at 657 (“For the reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts.”). See also Levesque, *supra* note 129, at 775.

198. de la Vega & Brown, *supra* note 50, at 763.

199. *Id.*

200. de la Vega & Fiore, *supra* note 138, at 221. The seminal case regarding this theory is *United States v. Rauscher*, in which the Supreme Court “implicitly held that a direct beneficiary of a treaty may invoke that treaty as a defense even if the defendant was an unintended beneficiary or the treaty does not expressly grant the defendant or individuals in his class any rights.” *United States v. Rauscher*, 119 U.S. 407, 432–33 (1886) (The defendant had been extradited from Great Britain to the United States for allegedly murdering a crewmember aboard an American vessel. However, when he was brought to the United States he was not charged with murder but with inflicting cruel and unusual punishment upon a crew member.). There the Court focused on the defendant’s use of the extradition treaty as a defense and only indirectly discussed the issue of self-executing treaties. *Id.* at 420. The Court held that treaties confer certain rights on private citizens when the treaty prescribes a rule governing a right that is “of the nature” of rights enforceable in the courts. *Id.* at 419. Thus the defendant had a right to raise the treaty as a defense because the Court did not have jurisdiction over those offenses that fell beyond the scope of the treaty under which he was extradited. *Id.* at 430. Further, even the dissent in *Rauscher* supported the contention that an individual may raise a treaty as a defense to a prosecution; it only disagreed with the actual interpretation of the treaty in question in the case. *Id.* at 434 (Waite, C.J., dissenting). See also Levesque, *supra* note 129, at 777.

juvenile offenders sentenced to death should be allowed to use Article 6 paragraph 5 of the ICCPR as a defense to challenge the imposition of the juvenile death penalty.

Thus, since the Senate reservation to Article 6 paragraph 5 of the ICCPR is invalid based on the fact that it conflicts with the object and purpose of the treaty and the fact that the Senate Declaration of non-self-execution is both contrary to the intent of the parties and inapplicable when the treaty is invoked as a defense, the ICCPR should be called upon in cases dealing with the juvenile death penalty. Without bypassing the Senate reservation and declaration, the United States adherence to the ICCPR remains essentially empty by keeping United States judges from ruling on domestic human rights conditions using the more stringent international standards.²⁰¹

2. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War

The first treaty that the United States ratified that explicitly prohibited the application of the death penalty to juvenile offenders was the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).²⁰² The Fourth Geneva Conventions are the most widely ratified treaties in the history of the modern world.²⁰³ The United States is a party to this treaty which was both signed and ratified in 1949.²⁰⁴ Article 68 of the Fourth Geneva Convention states that “[i]n any case, the death penalty may not be pronounced against a protected person [held by a party to the conflict or an occupying force of which he or she is not a national] who was under eighteen years of age at the time of the offence [sic].”²⁰⁵ While the Fourth Geneva Convention applies only in times of international armed conflict, it is important to note that it prohibits the execution of juvenile offenders. The United States did submit a reservation to Article 68,²⁰⁶ but in-

201. Henkin, *supra* note 59, at 346.

202. Fourth Geneva Convention, *supra* note 4, at art. 68.

203. See Reimels, *supra* note 5, at 322. 186 States are parties to the 1949 Geneva Convention. *Id.*

204. Fourth Geneva Convention, *supra* note 4, at art. 68.

205. *Id.*

206. Schabas, *supra* note 59, at 305–06. Article 68, paragraph 2 stating that the death penalty “may not be imposed in wartime on civilian popula-

terestingly it was not to the prohibition of the juvenile death penalty.²⁰⁷

Additionally, the 1977 Protocols to the Geneva Conventions explicitly prohibit the imposition of capital punishment on those who committed the crimes that they were convicted of while they were minors under the age of eighteen.²⁰⁸ The Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I) states in Article 77 paragraph 5 that “the death penalty related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence [sic] was committed.”²⁰⁹ The Additional Protocol relating to the Protection of Victims of Non-

tions by an occupying power if it has previously been abolished in peacetime” has been the only provision in the Fourth Geneva Convention to provoke reservations. *Id.* See also Fourth Geneva Convention, *supra* note 4, at art. 68 para. 2. Reservations were filed by the United States, Australia, Canada, the United Kingdom, New Zealand, and the Netherlands for the purpose of protecting “... the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.” *Id.* at 432.

207. *Id.* This may have been due to the fact that at the time of the signing and ratification of the Geneva Convention the United States federal government had a de facto moratorium on its use of the death penalty against juvenile offenders. See Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1332 (1993). See also VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES 55* (Bloomington, IN: Indiana University Press) (1987). Additionally, it was not until 1962 that the United States Supreme Court ruled that the Cruel and Unusual Punishments Clause of the Eighth Amendment was applicable to the states through the Due Process Clause of the Fourteenth Amendment. Nanda, *supra* note 207, at 1318. Therefore, until that time the state supreme courts heard most, if not all challenges to the death penalty. *Id.* Then, significantly, between 1964 and 1985, the United States did not execute any persons for crimes committed while under eighteen years of age. *Id.*

208. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, art. 77, para. 5, 1125 U.N.T.S. 3, 39 (entered into force Dec. 7, 1978; not in force in the United States); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, art. 6, para. 4, 1125 U.N.T.S. 609, 613–14 (entered into force Dec. 7, 1978; not in force in the United States) [hereinafter Protocol II]. See also Nanda, *supra* note 207, at 1330.

209. *Id.* at art 77, para 5, at 39.

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International Armed Conflicts (Protocol II) states in Article 6 paragraph 4 that “the death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence [sic]”²¹⁰ Despite the United States’ tacit endorsement of the prohibition against the juvenile death penalty by ratifying the Fourth Geneva Convention, it did not become a party to the Additional Protocols of 1977.²¹¹ While the Fourth Geneva Convention, to which the United States is a party, only applies to times of international armed conflict and the Additional Protocols of 1977 were not accepted by the United States, the provisions within those instruments dealing with the juvenile death penalty illustrate the international consensus for the prohibition of the death penalty on juvenile offenders.²¹²

3. The United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) is the first international human rights treaty specifically devoted to children.²¹³ On November 20, 1989, the General Assembly of the United Nations adopted the CRC,²¹⁴ a treaty that consists of fifty-four articles and provides the children of the international community with “civil, political, economic, social and cultural rights.”²¹⁵ The United States signed the CRC in February of 1995²¹⁶ and is one of only two countries worldwide, the other being Somalia — a country without a government,

210. Protocol II, *supra* note 208, art. 6, para. 4, at 613–14.

211. *Id.* See also Reimels, *supra* note 5, at 324–25.

212. This will be very important in the later discussion of customary international law and jus cogens norms. See *infra* pp. 1288–1298.

213. Jennifer D. Tinkler, Note, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L.J. 469, 470 (1992). See also Per Miljeteig-Olssen, *Advocacy of Children’s Rights – The Convention as More than a Legal Document*, 12 HUM. RTS. Q. 148, 148 (1990).

214. The treaty came into force on September 2, 1990. CRC, *supra* note 4, at 44 n.1.

215. Tinkler, *supra* note 213, at 469. See also Michael Jupp, *The UN Convention on the Rights of the Child: An opportunity for Advocates*, 12 HUM. RTS. Q. 130, 130 (1990).

216. See The White House, Office of the Press Secretary, Press Release, Feb. 10, 1995. See also de la Vega & Fiore, *supra* note 138, at 224.

which has not yet ratified the treaty.²¹⁷ The sentiment reflected in the CRC is “that every child deprived of liberty be treated in a manner which takes into account the needs of persons of his or her age [and] calls for a variety of dispositions in criminal convictions that ensure children are dealt with in a manner appropriate to their well-being [that is] proportionate to the circumstances of their offense.”²¹⁸

Article 37 of the CRC specifies the rights that children enjoy when they are deprived of their liberty, including rights granted to children after they are convicted or adjudicated delinquent.²¹⁹ That provision of the CRC explicitly abolishes capital punishment and life imprisonment without the possibility of release for juvenile offenders.²²⁰ Article 37 section (a) states that “[n]o child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of parole shall be imposed for offences [sic] committed by persons below eighteen years of age.”²²¹ Further, Article 18 of the Vienna Convention requires a government that has signed, but not yet ratified, a treaty “to refrain from acts which would defeat the object and purpose of [the] treaty ... until it shall have made its intentions clear not to become a party.”²²² Similarly, under the Restatement “[p]rior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement.”²²³ Therefore,

217. de la Vega & Brown, *supra* note 50, at 753. See also Rights of the Child: Status of the Convention on the Rights of the Child, U.N. ESCOR, Commission on Human Rights, 57th Sess., Agenda Item 13, at 2, Annex I, U.N. Doc. E/CN.4/2001/74 (2000).

218. Barbra Frey, *International Standards and the Execution of Juvenile Defendants*, 22 AM. J. CRIM. L. 261, 262 (1994).

219. Tinkler, *supra* note 213, at 476.

220. Hancock, *supra* note 127, at 699.

221. CRC, *supra* note 4, at art. 37(a), at 55.

222. Vienna Convention, *supra* note 33, at art. 18(a). As mentioned before, while the United States is not a party to the Vienna Convention the RESTATEMENT has adopted most of the language of the treaty. See *supra* text accompanying n.36. Therefore, Article 18(a) of the Vienna Convention applies to the CRC.

223. RESTATEMENT, *supra* note 36, § 312(a) & cmt. i. But see RESTATEMENT, *supra* note 36, § 312 cmt. d (stating that signatures are subject to later ratification of the treaty and thus have no binding effect on the State; however,

the United States is obligated to adhere to the object and purpose of the CRC to protect the youth from harm including that of the most severe kind — the death penalty.²²⁴

Moreover, it is significant that during the drafting of the CRC, there were four areas covered in the treaty that were considered controversial issues in the international community; those issues included “the rights of the unborn child, the right to foster care and adoption, freedom of religion, and the minimum age for participation in armed conflict.”²²⁵ The juvenile death penalty was noticeably lacking in that list of controversial issues.²²⁶ Thus, in considering the large number of states that have ratified and actively observed the CRC, in addition to the fact that as a signatory to the treaty the United States has an obligation to uphold its principles, this treaty should also be applicable as a defense to criminal prosecutions of juvenile defendants. Further, this international consensus gives even more credence to the notion that the United States is violating customary international law because the juvenile death penalty is contrary to the practices of most other states.

4. The American Declaration of Human Rights

The last treaty to be examined in this Comment is the American Convention on Human Rights (American Convention).²²⁷ This agreement was adopted in 1970²²⁸ and states, in pertinent

they are considered to represent political approval and at least a moral obligation to ratify and adhere to the treaty by not passing domestic laws adverse to its object and purpose).

224. de la Vega & Fiore, *supra* note 138, at 224. Furthermore, the death penalty differs from all other types of criminal punishment, not in degree but in kind. Tinkler, *supra* note 213, at 494. It is unique in its total irrevocability, it is unique in its rejection of rehabilitation of the convict (which is central to juvenile justice) and it is unique in its absolute renunciation of all that is embodied in our concept of humanity. *Id.* See also *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Thus we must be extra careful when attempting to impose the death penalty on minors, who by the very nature of their age, are not assumed to have the maturity to be held liable for all of their actions.

225. Cynthia Price Cohen, United Nations: Convention on the Rights of the Child: Introductory Note, 28 I.L.M. 1448, 1450 (1989).

226. Reimels, *supra* note 5, at 323–24.

227. American Convention, *supra* note 4, at art. 4, para. 5.

228. See American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, doc. 65, rev. 1 corr. 2 (1970).

part, that “[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age”²²⁹ Despite being heavily involved in the drafting of the agreement the United States is one of only two members of the Organization of American States (OAS), which is made up of twenty-four member states,²³⁰ that has signed but not yet ratified the American Convention.²³¹ During the drafting phase, the United States did not object to the prohibition of the execution of juvenile offenders in the American Convention.²³² Instead, the United States argued against setting a specific age limit because of the “already existent trend” toward the abolition of the death penalty altogether.²³³ Due to the fact that the drafting Conference would not remove the proscription of capital punishment for certain age groups the United States abstained on Article 4, which dealt with the juvenile death penalty.²³⁴ Interestingly, of the twenty-four OAS member States only Barbados made a reservation to Article 4(5), and even they “brought themselves into line” in 1994.²³⁵

Moreover, the Inter-American Commission on Human Rights (Inter-American Commission), which was established under the

229. American Convention, *supra* note 4, at art. 4, para. 5, at 146.

230. The Organization of American States maintains a list of signatories and ratifications to the American Convention, *available at* <http://www.oas.org> (last visited on Apr. 16, 2004).

231. de la Vega, *supra* note 65, at 1046.

232. See Brief of Amicus Curiae Amnesty International in Support of Petitioner, *Wilkins v. Missouri*, 492 U.S. 361 (1989).

233. *Id.* See also Nanda, *supra* note 207, at 1328.

234. Nanda, *supra* note 207, at 1329. See also American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, doc. 65 rev. 1 con. 1 (1970).

235. de la Vega, *supra* note 65, at 1046. When Barbados ratified the American Convention in 1982, it made a reservation to article 4, paragraph 5 stating that “while youth or old age may be factors to be considered by the Privy Council in deciding whether the death penalty should be carried out, Barbadian legislation allowed the execution of persons over sixteen and set no upper age limit.” Schabas, *supra* note 59, at 303. Similarly, Trinidad and Tobago ratified the American Convention with a reservation to article 4, paragraph 5 noting that its laws do not prohibit the execution of a person over age seventy. *Id.* at 304. Significantly, Professor Schabas points out that the reservations by Barbados and Trinidad and Tobago only attempted “to account for existing legislation not in line with the international obligations being undertaken, [they were] not aimed at preserving a state’s freedom to maneuver on the question [of the death penalty] in the future.” *Id.*

American Convention and is another branch of the OAS,²³⁶ has ruled on the juvenile death penalty in the United States. While the United States is not party to the American Convention, it is still subject to the provisions of the American Declaration of Human Rights and the recommendations of the Inter-American Commission because it is a member of the OAS as well as a signatory of the Charter of the OAS.²³⁷ The Inter-American Commission was concerned with the differences in United States state laws regarding the execution of minors and ruled that “by leaving [these] decisions ... to state legislatures, the United States [was creating] a patchwork pattern of legislation whose arbitrariness violated [the] rights to life and equality before the law.”²³⁸ Indeed, the Inter-American Commission in 1987 found that the United States was in violation of a rule of jus cogens by its practice of executing juvenile offenders.²³⁹

Therefore, in examining the four treaties that the United States has either ratified — the ICCPR and the Fourth Geneva Convention — or signed — the CRC and the American Conven-

236. The Inter-American Commission on Human Rights (Inter-American Commission) is the body responsible for the protection of fundamental freedoms, through the implementation of the American Declaration, in the Organization of American States, of which the United States is a member. de la Vega, *supra* note 65, at 1045. See also American Convention, *supra* note 4, at arts. 52–73 (discussing how the Commission has dealt with the United State’s practice of executing juvenile offenders). *Id.*

237. Schabas, *supra* note 59, at 323.

238. Quigley, *supra* note 141, at 75. See also Terry Roach and Jay Pinkerton v. United States, Res. No. 3/87, Case 9647, Inter-Am. C.H.R., 925th Sess., Mar. 27, 1987. This case involved the executions of James Terry Roach and Jay Pinkerton who were both seventeen at the time of their crimes. Mr. Roach and Mr. Pinkerton filed a complaint requesting the Inter-American Commission consider whether their impending executions violated the American Declaration of the Rights and Duties of Man prohibiting the execution of juveniles. de la Vega & Brown, *supra* note 50, at 765. The Inter-American Commission was most concerned with the fact that each state had its own laws on capital punishment and minimum ages therfor and thus stated that the inconsistent sentencing reflected the location of the crime more than its nature. Nanda, *supra* note 207, at 1330. “Although the Commission did not determine whether the United States had violated customary international law or was bound by article 4 paragraph 5 of the American Convention, the Commission did find that the United States practice violated a newly emerged peremptory norm of international law.” de la Vega & Brown, *supra* note 50, at 765.

239. de la Vega & Brown, *supra* note 50, at 765.

tion — there appears to be a substantial international consensus advocating for the abolition of the use of capital punishment on juvenile offenders. To that end, part III of this Comment will now focus on examining the international consensus banning the juvenile death penalty.

III. THE CONCEPT OF THE ABOLITION OF THE JUVENILE DEATH PENALTY HAS REACHED THE LEVEL OF CUSTOMARY INTERNATIONAL LAW AND MAY HAVE EVEN REACHED THE LEVEL OF A JUS COGENS NORM

A. Customary International Law as Applied to the Juvenile Death Penalty

Customary international law is “an emerging form of international law and is considered by some to be the equivalent [of] treaty law or federal common law.”²⁴⁰ It is defined as law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”²⁴¹ Human rights obligations in customary international law generally are obligations to other countries for the benefit of individuals including nationals, residents, and others subject to the jurisdiction of the promisor country.²⁴² Moreover, the customary international law of human rights is part of the law of the United States and must be applied as such by both the state and federal courts.²⁴³ In order for a treaty obligation to evolve to the level of customary international law, the treaty clause must be a norm creating provision or one which has generated a rule that has since passed into the general corpus of international law, such that it is binding even for countries which are not a

240. Hancock, *supra* note 127, at 718.

241. RESTATEMENT, *supra* note 36, § 102(2). The practice of the states referred to in §102(2) that is necessary to create customary international law may be of comparatively short duration, but it must be “general and consistent.” *Id.* §102 cmt. b. A practice can be general even if it is not universally followed and there is no precise formula to indicate how widespread a practice must be, “*but it should reflect a wide acceptance among the states particularly involved in the relevant activity.*” *Id.* (emphasis added). If a significant number of states do not adopt the practice it may be prevented from becoming general customary international law. *Id.*

242. RESTATEMENT, *supra* note 36, § 701 cmt. c.

243. RESTATEMENT, *supra* note 36, § 702 cmt. e.

party to the treaty.²⁴⁴ Thus, there are two criteria that must be fulfilled before a provision is considered customary law: (1) the provision or prohibition must be state practice evidenced by long-term, widespread compliance by many states; and (2) the provision or prohibition must be *opinio juris*, meaning that states must believe that compliance with the standard is not merely desired but is mandatory and required by international law.²⁴⁵

Enough evidence exists to deem the prohibition on imposing capital punishment on juvenile offenders a customary international law norm.²⁴⁶ The first element of the customary international law doctrine, state practice, which requires widespread acceptance of the abolition of capital punishment for juvenile offenders, is easily established by the fact that scarcely any countries in the world currently retain the juvenile death penalty.²⁴⁷ Only eight countries worldwide have executed juvenile offenders since 1990; those countries include China, the Democratic Republic of the Congo, Nigeria, Pakistan, Saudi Arabia, Yemen, Iran, and the United States.²⁴⁸ Besides those nations,

244. See North Sea Continental Shelf Cases (F.R.G. v. Dem; F.R.G. v. Neth.), 1969 I.C.J. 3. The passage cited to was from the International Court of Justices case and was referring to Article 6 of the Geneva Convention of 1958 regarding the principal of equidistance. See also Reimels, *supra* note 5, at 329.

245. de la Vega & Brown, *supra* note 50, at 756. See also Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 148, 148 (1996).

246. *Id.* at 757.

247. See *id.* See also Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – December 31, 2003*, (Dec. 31, 2002), available at <http://www.law.onu.edu/faculty/streib/juvdeath.htm> (last visited Apr. 16, 2004). One-hundred-seventeen countries are abolitionists either by law or by practice, whereas only seventy-eight countries are retentionist with regard to the death penalty (and only eight countries practice the juvenile death penalty). Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (Feb. 1, 2004) (AI Index: ACT 50/005/2004), available at <http://www.web.amnesty.org/library/index/engact500052004?open> (last visited Apr. 16, 2004).

248. See Amnesty International, *Stop Child Executions! Ending the Death Penalty for Child Offenders* (Jan. 2, 2004) (AI Index: ACT 50/001/2004), available at <http://www.web.amnesty.org/library/index/engact500012004?open> (last visited Apr. 16, 2004). See also *Juvenile Death Penalty in Other Countries*, Death Penalty Info. Center (Aug. 30, 2002), available at <http://www.deathpenaltyinfo.org/juvintl.html> (last visited Apr. 16, 2004); Amnesty Interna-

all other countries have either de facto abolished the juvenile death penalty or enacted legislation to prohibit the execution of juvenile offenders.²⁴⁹ The United Nations reported that Yemen, Barbados, and Zimbabwe changed their law and increased the death penalty age to eighteen in 1994,²⁵⁰ and China and Nigeria followed suit in 1997.²⁵¹ Pakistan promulgated the Juvenile Justice System Ordinance in July of 2000 and in 2001, in furtherance of the new law banning the death penalty for anyone under eighteen at the time of the crime, Pakistan's President Musharraf commuted the death sentences of one-hundred young offenders to imprisonment.²⁵²

Significantly, even though there have been recent reports of juvenile offender executions in Pakistan (1 in 2001), Nigeria (1 in 1997), Saudi Arabia (1 in 1992), the Democratic Republic of the Congo (1 in 2000), Iran (1 in 2004), and China (1 in 2003),²⁵³ most if not all of these countries have either adamantly denied any execution took place or that a minor was sentenced to death.²⁵⁴ These denials are so important because they "indicate

tional, *Democratic Republic of Congo: Killing Human Decency 12 (2000)* (AI Index: AFR 62/007/2000), available at <http://www.web.amnesty.org/library/index/engaf620072000?open> (last visited Apr. 16, 2004).

249. de la Vega & Fiore, *supra* note 138, at 222.

250. Crime Prevention and Criminal Justice: Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary General, U.N. ESCOR, Subst. Sess., para. 21, 90, U.N. Doc. E/2000/3 (2000).

251. *Id.*

252. See Amnesty International, Report 2001 186 (2001) (AI Index: POL 10/001/2001); Juvenile Justice Systems Ordinance 2000, available at http://1hrla.sdnpk.org/link/jul_oct00/JUVENILE_ORDINANCE.HTML (last visited Apr. 16, 2004). See also Press Release, Amnesty International Irish Section, Pakistan: Young Offenders Taken Off Death Row (Dec. 13, 2001), available at <http://www.amnesty.ie/new/2001/pakistan4.shtml> (last visited Apr. 16, 2004).

253. Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990* (2002) (AI Index: ACT 50/007/2002), available at <http://www.web.amnesty.org/library/index/engact500072002?open> (last visited Apr. 16, 2004).

254. See Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990* (2000) (AI Index: ACT 50/010/2000), available at <http://www.web.amnesty.org/library/index/engact500102002?open> (last visited Apr. 16, 2004). See also United Press International, May 29, 2001 (AI Index: ACT 53/003/2001), available at <http://www.web.amnesty.org/library/index/>

that those countries have in fact accepted the customary international norm” prohibiting the execution of juvenile offenders.²⁵⁵ Hence, only the United States has not accepted the norm against the execution of juvenile offenders,²⁵⁶ thus the first criterion of state practice is satisfied.

The second criterion for customary international law demands that nations prohibiting the juvenile death penalty do so because they believe that such a proscription is mandatory and required by customary international law.²⁵⁷ This second element, *opinio juris*, is more complicated but possible to establish.²⁵⁸ As discussed above, at least four international agreements expressly prohibit the execution of juvenile offenders: the ICCPR Article 6 paragraph 5, the Fourth Geneva Convention Article 68, the CRC Article 37, and the American Convention

engact530032001?open, (regarding the execution of a minor in Iran in 2001) (last visited Apr. 16, 2004); Amnesty International, Report 2002 (May 28, 2002) (AI Index: POL 10/001/002), available at <http://www.web.amnesty.org/library/index/engpol10001002?open> (last visited Apr. 16, 2004).

255. de la Vega, *supra* note 65, at 1047.

256. Capital punishment has been abolished in the United States in thirteen states. Streib, *supra* note 247, at 8. However, forty jurisdictions in the United States still authorize the death penalty for capital crimes. *Id.* at 7. Of those forty jurisdictions consisting of thirty-eight states and the federal government (both civilian and military) authorizing the death penalty, nineteen jurisdictions (48%) have expressly mandated that a criminal must be eighteen years-of-age at the time that they committed the crime to be sentenced to death. *Id.* The other twenty-one death penalty jurisdictions permit the execution of individuals who were convicted of crimes they committed while they were sixteen or seventeen years-of-age. *Id.* However, in the United States since 1976 when the juvenile death penalty was reintroduced to American jurisprudence, only twenty-two people have been executed for crimes that they committed as minors. *Id.* at 4. Of these twenty-two executions, Texas has accounted for thirteen (59%), Virginia for three (14%), and Oklahoma for two (9%). *Id.* at 6. Thus, these three states are responsible for 81% of all juvenile executions and no other state has executed a criminal convicted of a crime that they committed as a minor for the past ten years. *Id.* This shows that, like the international community, there is no domestic consensus approving of the juvenile death penalty.

257. de la Vega & Fiore, *supra* note 138, at 221–22. See also Allyssa D. Wheaton-Rodriguez, Comment, *The United States' Choice to Violate International Law by Allowing the Juvenile Death Penalty*, 24 HOUS. J. INT'L L. 209, 214 (2001).

258. de la Vega & Brown, *supra* note 50, at 757.

Article 4 paragraph 5.²⁵⁹ With most nations having signed or ratified one or more of those four treaties prohibiting the juvenile death penalty, it appears that the second element, demanding that nations believe their prohibitions are required by customary international law, is satisfied.²⁶⁰ While it is difficult to distinguish between “those habitual practices that are regarded as binding legal obligations [and] those [practices] that result simply from courtesy or diplomatic protocol, or from domestic policy considerations, and from which departure can ensue without breach of international law,”²⁶¹ sentiments expressed by states when they are preparing treaties are excellent indicators of the parties’ view of the law.²⁶² Therefore, because multilateral treaties in general, and more importantly human rights treaties, clearly enunciate the intentions of the drafters — the countries of the world — their provisions can be interpreted to consist of globally approved international law.²⁶³

Moreover, in addition to proof of customary international law through treaties, the Inter-American Commission on Human Rights and the United Nations Human Rights Committee have both stated that there is a customary international norm prohibiting the juvenile death penalty, though both groups were hesitant in setting the minimum age at eighteen.²⁶⁴ Even though the United States filed a reservation to the relevant provision in the ICCPR, the United Nations Human Rights

259. ICCPR, *supra* note 4, art. 6, para. 5; Geneva Convention, *supra* note 4, art. 68; CRC, *supra* note 4, art. 37; American Convention, *supra* note 4, art. 4, para. 5.

260. Wheaton-Rodriguez, *supra* note 257, at 215.

261. Nanda, *supra* note 207, at 1333. *See also* de la Vega & Brown, *supra* note 50, at 757.

262. de la Vega & Brown, *supra* note 50, at 757. For instance, when the ICCPR was being prepared the parties to it expressed their opinions concerning the juvenile death penalty when they asked the question “what is the source of the nations’ disinclination to execute juvenile offenders other than a shared sense of the moral reprehensiveness of the practice?” Nanda, *supra* note 207, at 1334. *See also* Joan F. Hartman, *Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 671 (1983).

263. de la Vega & Brown, *supra* note 50, at 757.

264. *See* Wheaton-Rodriguez, *supra* note 257, at 215; William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 813 (1998).

Committee concluded that said reservation was invalid.²⁶⁵ Subsequently, on May 3, 2001, the United Nations Human Rights Committee voted to unseat the United States from itself.²⁶⁶ This is even further evidence of a worldwide customary international law norm, banning the juvenile death penalty, which is observed by almost every other country except for the United States.

Furthermore, the United States is not a persistent objector so it cannot evade its responsibilities under customary international law to abstain from executing juvenile offenders. While persistent objectors cannot prevent the development of customary international law norms by the rest of the world, those norms do not bind the State that has persistently objected to them.²⁶⁷ This doctrine allows a “state to avoid being involuntarily subjected to a rule it finds unacceptable” but it does not permit “a state to reap the benefits of being a party to a treaty without having to conform to its terms and undergo domestic change.”²⁶⁸ However, a country cannot use the persistent objector doctrine to make reservations, declarations, understandings, or provisos to treaties with which it suddenly disagrees.²⁶⁹

The United States is not a persistent objector to the practice of executing juveniles for the following reasons: (1) the United States did not object to the prohibition when drafting, signing, and ratifying the Fourth Geneva Convention, (2), the United States did not object to the prohibition in the ICCPR during its drafting and signing, (3) the United States did not object to the prohibition at the drafting and signing of the American Convention and, (4) the United States signed the CRC which contained the prohibition.²⁷⁰ Significantly, during the drafting of the

265. See *supra* pp. 1271–75 on the invalidation of the United States reservation to the ICCPR.

266. See Thalif Deen, *Politics: U.S. Ouster from Rights Body Reflects Hostility*, Int'l Press Serv., May 4, 2001, available at 2001 WL 20829289. This could have been due, in part, to the United States disregard for international treaties and the United Nations as evidenced by its conduct during the ratification process of the ICCPR. See generally Wheaton-Rodriquez, *supra* note 257.

267. de la Vega & Brown, *supra* note 50, at 758.

268. Sherman, *supra* note 68, at 91.

269. de la Vega & Brown, *supra* note 50, at 758.

270. *Id.* See also Wheaton-Rodriquez, *supra* note 257, at 217. The United States could say that it has been a persistent objector to the norm prohibiting the execution of juvenile offenders due to its ratification of the ICCPR with a

American Convention the United States not only failed to object to the prohibition but argued that setting a specific age limit went against the “already existent trend toward the abolition of the death penalty altogether.”²⁷¹ Even more important is the fact that the United States only resurrected the juvenile death penalty after signing the ICCPR and before filing a reservation to Article 6 paragraph 5.²⁷² While a treaty does not become the law of the land until it is ratified, by signing the ICCPR the United States was agreeing to try and follow its provisions and not pass contradictory laws; thus the United States’ reservation is invalid and of no value to the argument that the United States is a persistent objector to the norm.²⁷³

Therefore, “it is fair to argue that under evolving international standards, there is an emerging customary international law under which capital punishment of juveniles is prohibited.”²⁷⁴ Due to the fact that the United States is not a persistent objector, because it has not consistently disavowed the prohibition, it should be held to the customary international law standard concerning the execution of juvenile offenders and is thus in violation of that law.

B. The Prohibition Against the Juvenile Death Penalty Has Reached the Level of a Jus Cogens Norm

Even if considered to be a persistent objector to an emerging rule of customary international law prohibiting the execution of minors, the United States is still bound by established norms of

juvenile death penalty reservation, its refusal to ratify the American Covenant without a juvenile death penalty reservation, and its refusal to ratify the CRC. de la Vega & Brown, *supra* note 50, at 758. However, the better argument is that the United States has not been a persistent objector at all. *Id.* It is particularly important to note that at the time of the negotiation, drafting, and opening for signature of the ICCPR, the Protocols to the Geneva Convention, and the American Convention the United States had discontinued its use of the death penalty on juvenile offenders. *Id.* See also Nanda, *supra* note 207, at 1332. Therefore, “if indeed the prohibition against the juvenile death penalty is customary international law, under any reading of U.S. practice in this area [the United States is not a persistent objector.]” de la Vega & Brown, *supra* note 50, at 758.

271. Nanda, *supra* note 207, at 1329.

272. de la Vega & Brown, *supra* note 50, at 758.

273. *Id.* at 759. See also *supra* n.138.

274. Nanda, *supra* note 207, at 1328.

jus cogens.²⁷⁵ Article 53 of the Vienna Convention defines jus cogens as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²⁷⁶ Jus cogens norms are distinguished from ordinary international law because jus cogens are “based on natural law propositions applicable to all legal systems, all persons, or the system of international law.”²⁷⁷ Thus these norms cannot be avoided by a persistent objector state and they prevail over any conflicting international rule of law.²⁷⁸ The Restatement adopted the Vienna Convention definition and added that “these rules prevail over and invalidate international agreements and other rules of international law in conflict with them.”²⁷⁹ Thus, it follows that jus cogens norms are so important, both internationally and nationally, that they could also invalidate conflicting domestic laws.²⁸⁰ Moreover, Article 53 of the Vienna Convention sets out four criteria for identifying peremptory norms (jus cogens norms): the norm is (1) one of general international law; (2) accepted by the international community as a whole; (3) immune from derogation; and (4) modifiable only by a new norm having the same status.²⁸¹

The prohibition of the juvenile death penalty satisfies the four criteria and therefore reaches the level of a jus cogens norm. First, the prohibition against the imposition of capital punishment on a juvenile offender has become a norm of general international law; as discussed above, treaty law,²⁸² decisions of the Inter-American Commission on Human Rights and

275. de la Vega & Brown, *supra* note 50, at 759. See also Sherman, *supra* note 68, at 74.

276. Vienna Convention, *supra* note 33, at art. 53.

277. de la Vega & Brown, *supra* note 50, at 759 (quoting Johnathan A. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 541 (1993)).

278. *Id.* at 759–60.

279. RESTATEMENT, *supra* note 36, § 102 cmt. k.

280. de la Vega & Brown, *supra* note 50, at 760.

281. Vienna Convention, *supra* note 33, at art. 53. See also de la Vega & Fiore, *supra* note 138, at 225.

282. See *supra* pp. 1291–94 and corresponding footnotes concerning treaty law supporting the concept that the prohibition against the juvenile death penalty has become a customary international law norm.

the United Nations Human Rights Committee,²⁸³ and resolutions passed by the United Nations Commission on Human Rights and the United Nations General Assembly²⁸⁴ exemplify the sentiments of the majority of the world that the juvenile death penalty is a norm from which there can be no derogation. Second, the fact that only eight countries have executed juvenile offenders within the last fourteen years is extremely strong evidence that a very large majority of nations have accepted the prohibition as a norm.²⁸⁵ The Restatement further explained this criterion by requiring that the norm “be accepted and recognized by a very large majority of states even if over dissent by a very small number of states.”²⁸⁶ As previously discussed, the United States is alone, as it is the only nation worldwide to not just allow for the execution of juvenile offenders but to also show no remorse in light of worldwide consensus against the practice.²⁸⁷ Furthermore, while United States courts have found that the prohibition against torture has attained the status of a *jus cogens* norm,²⁸⁸ over one-hundred-twenty-five countries have

283. See *supra* n.264 and corresponding text.

284. The United Nations Commission on Human Rights passed resolutions calling on states to abolish the death penalty generally and has specifically asked countries not to impose it on juvenile offenders. de la Vega, *supra* note 65, at 1044. See, e.g., The Question of the Death Penalty, U.N. Commission on Human Rights, 58th Sess., Res. 2002/77, U.N. Doc. E/CN.4/RES/2002/22 (2002). Similarly in 1985 the United Nations General Assembly, by consensus, adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the “Beijing Rules,” which also prohibited the execution of juvenile offenders. de la Vega, *supra* note 65, at 1044. See also G.A. Res. 40/33, U.N. GAOR, 40th Sess., Annex, Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985).

285. See *supra* pp. 1288–91 and corresponding footnotes dealing with international death penalty statistics proving the worldwide acceptance of the prohibition of the juvenile death penalty.

286. RESTATEMENT, *supra* note 36, § 102 reporter’s note 6.

287. See text and footnotes discussing international death penalty statistics *supra* pp. 1288–91. See also de la Vega, *supra* note 65, at 1047.

288. See, e.g., *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992) (holding that torture was a violation of *jus cogens* but that because the violation was committed by a government outside of the United States, there was no jurisdiction over Argentina under an exception in the Foreign Sovereign Immunities Act). The Court also observed that “because *jus cogens* norms do not depend solely on the consent of states for their binding force, they ‘enjoy the highest status within international law.’” For example, a

violated that norm in 2001.²⁸⁹ By contrast, only three countries have violated the norm prohibiting the juvenile death penalty in the past year.²⁹⁰ Third, the prohibition against the execution of juvenile offenders is a non-derogable norm.²⁹¹ The ICCPR in Article 4 stated that there was to be “[n]o derogation from articles 6, 7, 8, 11, 15, 16, and 18 ... under [that] provision.”²⁹² Thus the international intent for the prohibition against the death penalty for juvenile offenders is per se non-derogable.²⁹³ Finally, there is no emerging norm, of the same status as that of the prohibition of the execution of juvenile offenders, which contradicts or modifies this current norm.²⁹⁴

Additional factors relevant to the determination of whether there is a jus cogens norm prohibiting the execution of juvenile offenders include the strength and conviction of the supporting states and the significance of the opposing states.²⁹⁵ The juvenile death penalty appears to be a perfect example of a jus cogens norm because such an overwhelming majority of the countries support the prohibition.²⁹⁶ While the United States is considered a significant force in the international community, the

treaty that contravenes jus cogens is considered ... to be void” *Id.* at 715. See also de la Vega & Fiore, *supra* note 138, at 227–28.

289. See Amnesty International Report 2001, *supra* note 250. See also de la Vega, *supra* note 65, at 1049.

290. See Amnesty International, *Facts and Figures on the Death Penalty* (2004) (AI Index: ACT 50/008/2004), available at <http://www.web.amnesty.org/library/index/engact500082004?open> (last visited Apr. 16, 2004). Amnesty International recorded two executions of child offenders in 2003, one of them in China and one in the United States. *Id.* Another child offender was executed in Iran in January of 2004. *Id.* See *supra* pp. 1288–91 and corresponding footnotes. See also de la Vega, *supra* note 65, at 1049.

291. de la Vega & Brown, *supra* note 50, at 761.

292. ICCPR, *supra* note 4, art. 4. See also de la Vega & Brown, *supra* note 50, at 761.

293. See de la Vega & Brown, *supra* note 50, at 761. This express provision in the ICCPR, coupled with the wide acceptance of the prohibition against the execution of juveniles, as evidenced by treaties, resolutions such as those of the United Nations Commission on Human Rights calling for the abolition of the death penalty (and the execution of juvenile offenders especially) and national laws and practice, all lead to the conclusion that the anti-juvenile death penalty norm is non-derogable. de la Vega, *supra* note 65, at 1050.

294. de la Vega, *supra* note 65, at 1049.

295. Charney, *supra* note 277, at 542. See also de la Vega & Brown, *supra* note 50, at 761.

296. See Wheaton-Rodriguez, *supra* note 257, at 212.

fact that only three other countries have executed juvenile offenders in the past year gives tremendous weight to the argument that the opposition is insufficient to thwart the establishment of a jus cogens norm.²⁹⁷ Thus, the abolition of the juvenile death penalty rises to the level of jus cogens status from which no state can derogate.

Therefore, the treaty law dealing with the prohibition of the execution of juvenile offenders has, at the very least, risen to the level of customary international law and may very well even be a jus cogens norm. As the United States has recently passed the 100th anniversary of the *Paquete Habana* decision it is important to remember that now, more than ever, “international law is part of our law and must be ascertained [and respected] by the courts of justice of appropriate jurisdiction.”²⁹⁸ As such, the United States is in violation of the international law abolishing the juvenile death penalty and should change its practices to conform to the international norms and standards and the courts should use these laws to determine juvenile death penalty cases like Toronto M. Patterson’s.²⁹⁹

IV. POSSIBLE REPERCUSSIONS THAT THE UNITED STATES JUDICIAL SYSTEM MAY FACE IF IT DOES NOT CHANGE ITS DEATH PENALTY PRACTICES.

While the United States judicial system is obligated under Article VI Section 2 of the United States Constitution to treat all ratified international agreements as the “supreme law of the land”³⁰⁰ as well as to take into consideration the international consensus on a subject in the form of established customary international law and/or jus cogens norms, there are other impor-

297. de la Vega & Brown, *supra* note 50, at 761.

298. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (one of the most influential cases on the application of international law in our domestic courts) (emphasis added). Moreover, the Restatement provides that “[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States” and “[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States.” RESTATEMENT, *supra* note 36, § 102. This principle that customary international law is a part of United States law applies with even greater force when considering a peremptory norm, such as the juvenile death penalty. See de la Vega, *supra* note 65, at 1051.

299. *Patterson v. State of Texas*, 536 U.S. 984 (2002).

300. See U.S. CONST. art. VI, cl. 2.

tant reasons that the United States should amend its death penalty practices. Of the multiple domestic problems which can arise out of the practice of the United States allowing for capital punishment, and more specifically the execution of juvenile offenders, the most troublesome is the potential inability to obtain evidence or witnesses for death penalty cases from countries that prohibit the practice. This issue has played an integral role in the recent developments of the cases against Zacarias Moussaoui (the alleged twentieth September 11th hijacker) and Lee Boyd Malvo (the convicted D.C. area sniper).

With regard to the case against French national Zacarias Moussaoui, there were recent difficulties in obtaining evidence. French and German authorities were in possession of important documents that could establish a link between Mr. Moussaoui and the al Qaeda terrorist network.³⁰¹ These crucial pieces of evidence included records of money transfers from a member of the Hamburg-based terrorist cell that carried out the September 11, 2001 attacks on the World Trade Center and the Pentagon and were vital to the prosecution's case.³⁰² However, the German Constitution forbids "submission of any material that could lead to the death penalty."³⁰³ Since the prosecution planned to seek capital punishment for Mr. Moussaoui, the German government was unwilling to release the documents that they had compiled on Mr. Moussaoui.³⁰⁴ Thus, from a practical standpoint, the prosecution stood the chance of having the case dismissed or transferred to a Military Court if they could not produce enough evidence for the criminal trial.³⁰⁵

Intelligence-sharing in criminal cases involving the death penalty "has long been an issue between the United States and its Western European Allies."³⁰⁶ Fortunately, however, the three countries involved — the United States, France, and

301. Dan Egan, *U.S. to Get Moussaoui Data From Europe; French, Germans Strike Deal Barring Use of Documents to Seek Death Penalty*, WASH. POST, Nov. 28, 2002, at A19.

302. *Id.* See also Philip Shenon, *Threats and Responses: Terror Suspect; Germany Urges U.S. to Drop Death Penalty Plan*, WASH. POST, Oct. 26, 2002, at A9.

303. *Id.*

304. *Id.*

305. *See id.*

306. Shenon, *supra* note 302, at A9.

Germany — were able to reach an agreement with regard to the material. Germany consented to granting the United States the evidence needed, under the condition that the United States would not use that material to seek the death penalty.³⁰⁷ The United States conceded, and, in reality, did not really give up much except for the use of the material obtained by Germany in the sentencing trial after Mr. Moussaoui is convicted,³⁰⁸ but the possible ramifications of this concession by the federal government could have disastrous effects in the future. As a result, there is a question as to how the government will handle other conditions on the acquisition of evidence abroad in cases where the death penalty is sought. This uncertainty could pose an enormous burden on prosecutors and could result in cases being dismissed due to the inability of the prosecutor to obtain enough evidence to make a prima facie case, even if that information is available but located in a country with abolitionist laws. Moreover, a defendant's procedural due process right³⁰⁹ could be infringed upon if the defense cannot obtain exculpatory evidence from foreign countries that are unable or unwilling to supply information that will be used in a trial involving capital punishment. Thus, the death penalty, regardless of the age of the defendant to be tried, has and will continue to bar the effective and efficient implementation of our judicial system.

In considering Lee Boyd Malvo's case, a situation arose that was intricately intertwined with the arguments made in this Comment. Lee Malvo, the seventeen year old suspected "D.C. sniper," was indicted by a Virginia grand jury for capital murder in connection with the death of Linda Franklin, an FBI analyst who was shot and killed as she left a Home Depot™ store in

307. Egan, *supra* note 301, at A19.

308. *Id.* This of course has all become moot, at least for the moment, because presiding judge Leonie M. Brinkema has held that the government cannot seek the death penalty against Mr. Moussaoui because he was denied access to witnesses held overseas who helped plan the September 11th attack and under the Sixth Amendment criminal defendants are afforded the right to confront accusers and seek out testimony that might prove their innocence. Shenon, *supra* note 302, at A9. However, the Justice Department has appealed the judge's ruling, so this issue may reappear again in the future. Philip Shenon, *U.S. to Appeal Ruling on 9/11 Terror Suspect*, WASH. POST, Oct. 8, 2003, at A28.

309. *See* U.S. CONST. amend. IV.

Virginia.³¹⁰ The Court decided to try Lee Malvo as an adult and because Virginia does not specify a minimum age in its capital punishment statute, the seventeen year old would have to face the death penalty if he was convicted.³¹¹ On December 18, 2003, after deliberating for fourteen hours, the jury found Lee Malvo “guilty of capital murder as an act of terrorism for killing [Linda] Franklin and demanding \$10 million from the government, and guilty of capital murder for killing more than one person in three years.”³¹² Although the jury ultimately spared Lee Malvo’s life,³¹³ Lee Malvo almost joined the ranks of Toronto M. Patterson as the newest juvenile offender sentenced to death.

From the perspective of international law, one of the most interesting aspects of this case was the fact that Lee Malvo was an illegal immigrant from Jamaica, who had come to the United States with his mother Una James in late 1999 or early 2000.³¹⁴ His mother was deported on November 20, 2002 after deciding not to appeal a deportation order issued by an immigration judge on November 19, 2002.³¹⁵ This became a significant issue during Lee Malvo’s capital murder trial and later during the sentencing phase. Evidence and witnesses located abroad in the Caribbean were necessary for the defense’s case.³¹⁶ The defense needed the testimony of several Jamaican nationals, friends and family of Lee Malvo, as exculpatory evidence in addition to evidence of mitigating factors that might persuade the jury to spare Lee Malvo’s life.³¹⁷ Such witnesses and evidence

310. See Stephan Kiehl, *Va. Judge Bans Broadcast of Muhammad Trial; He Will Allow Still Cameras If They Aren’t a Distraction*, BALT. SUN., Dec. 13, 2002, at A14.

311. See Va. Code. Ann. § 18.2-31.

312. Tom Jackman, *Malvo Guilty of Capital Murder; Sniper Trial Jury to Choose Life or Death Sentence*, WASH. POST, Dec. 19, 2003, at A01.

313. Tom Jackman, *Malvo is Spared Death Penalty; Jury Gives Teen Life Sentence for His Role in Sniper Slayings*, WASH. POST, Dec. 24, 2003, at A01.

314. See Mary Beth Sheridan & Maria Glod, *Malvo’s Mother Being Deported to Jamaica; Documents Describe Una James’s Efforts to Leave Homeland, Get U.S. Residency*, WASH. POST, Dec. 14, 2002, at B01.

315. *Mother of Teen Suspect in Sniper Case Deported*, HOUS. CHRON., Dec. 14, 2002, at A15.

316. Tom Jackman, *Malvo’s Prosecutors Resist Video Testimony; Defense Has Witnesses in Caribbean*, WASH. POST, Oct. 15, 2003, at B05.

317. Jackman, *supra* note 312, at A01.

had to be brought to the United States, and Jamaica, a country which does not allow for the execution of juvenile offenders, could have refused to send the evidence or extradite the witnesses (similar to the situation in the Moussau case). This refusal could have, in effect, crippled the defense's efforts in effectively making a case. As it was, defense attorneys filed several motions to either allow key witnesses into the country who were barred from re-entry — like Lee Malvo's mother — or to permit the use of video conferencing for those witnesses.³¹⁸ Ultimately, the necessary witnesses were allowed to testify in court³¹⁹ but if they had not, either due to United States laws or Jamaican laws, and no video conferencing was offered, then there would have been a constitutional violation and possible mistrial.³²⁰

It is not unusual for the United States to seek extradition of criminal defendants or witnesses from other countries. However, the practice of extraditing individuals on the condition that they are not subject to capital punishment also has a long history, originating in the mid-nineteenth century when states began abolishing capital punishment in their domestic legal systems.³²¹ Several model multilateral extradition treaties, such as Article IV of the 1990 Model Treaty on Extradition proposed by the Eighth United Nation's Congress on the Prevention of Crime and Treatment of Offenders,³²² include references to restrictions on extradition in cases where the death penalty could

318. Jackman, *supra* note 316, at B05.

319. Henri E. Cauvin, *At the Core of the Case: Should a Life Be Spared?*, WASH. POST, Dec. 19, 2003, at A01.

320. Jackson, *supra* note 316, at B05. Moreover, Lee Boyd Malvo is not yet out of the danger of the juvenile penalty. He may have to face the death penalty again as he has been charged with capital murder in Prince William and Spotsylvania counties in Virginia, as well as in Louisiana and Alabama. Jackman, *supra* note 313, at A01.

321. William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 LOY. L.A. INT'L & COMP. L. REV. 581, 584 (2003).

322. Model Treaty on Extradition, U.N. GAOR 3d Comm., 45th Sess., Agenda Item 100, at 6, U.N. Doc. A/RES/45/116 (1991) (stating that "Extradition may be refused in any of the following circumstances ... [i]f the offence [sic] for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurances as the requested States considers sufficient that the death penalty will not be imposed, or if imposed, will not be carried out." Article 11 of the European Convention on Extradition also includes such language.

be imposed. The seminal case on this issue was *Soering v. United Kingdom*, where the defendant fled to Great Britain after murdering his girlfriend and her parents in Virginia.³²³ There, the defendant, Jans Soering, petitioned the European Commission of Human Rights to stop his extradition to the United States on the ground that he would be subjected to the death penalty if he were tried there.³²⁴ However, if he were to remain in the United Kingdom, he would not face that punishment.³²⁵ The European Court of Human Rights ultimately held that the extradition of the defendant was barred because it violated the prohibition against “inhuman or degrading treatment or punishment” in the European Convention.³²⁶ After *Soering*, member countries of the Council of Europe would no longer extradite witnesses, evidence, or suspects to states where it was probable that the death penalty would be imposed.

Furthermore, a State sending witnesses, evidence, or suspects to a requesting State could be in violation of the relevant extradition treaty law as well as customary international law if they extradite to a State practicing capital punishment without first acquiring guarantees from that receiving State that the death penalty will not be imposed. For example, Article VI of the 1976 Extradition Treaty between Canada and the United States entitles the sending country to insist upon sufficient guarantees that the death penalty will not be imposed as a condition for extradition.³²⁷ However, Canada had been extraditing individuals to the United States without assurances against the use of capital punishment for many years.³²⁸ This caused a split between Canada and the other members of the United Nations Commission on Human Rights and then in 2001, in *United States v. Burns*, the Supreme Court of Canada reversed its position by refusing to allow extradition of a man who faced murder charges and a death penalty trial in the United States.³²⁹ The

323. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

324. *Id.*

325. *Id.*

326. *Id.*

327. Extradition Treaty Between Canada and the United States of America, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, 1976 Can. T.S. No. 3. *See also*, Schabas, *supra* note 321, at 585.

328. *See* Schabas, *supra* note 321, at 598.

329. *United States v. Burns*, 2001 S.C.C. 7 (Feb. 15, 2001).

Court held that extradition would impose cruel and unusual punishment on the defendant and thus would violate its abolitionist laws.³³⁰

Similarly in the case of Pietro Venezia,³³¹ Italy would not honor the terms of its extradition treaty with the United States to send the suspect to the United States for trial, even though it had been given assurances that capital punishment would not be sought.³³² The Italian Constitutional Court declared that certain provisions of its Code of Penal Procedure, designed to give effect to the extradition treaty between Italy and the United States, were contrary to Article 2 of the Italian Constitution which guarantees to Italian citizens the right to life as an inviolable human right.³³³

Therefore, in cases like Lee Boyd Malvo's, if witnesses or evidence were required then Jamaica, or a country in a similar position, could also argue that it would not send the information because it might ultimately result in the imposition of the death penalty on a juvenile offender, a consequence that offended its domestic laws and customary international law. Thus the death penalty policies of the United States, in regard to both adults and minors, may in effect hamper the very judicial system on which our nation is based. At the very least, the United States should comply with international law standards and abolish the juvenile death penalty.

CONCLUSION

In continuing to execute juvenile offenders the United States has violated its duties under international law. First, since the United States ratified the Fourth Geneva Convention and the ICCPR, both of which call for the abolition of the juvenile death penalty, it has breached its obligations under those treaties by continuing the practice. The fact that the United States filed a reservation to the ICCPR is irrelevant because that reservation goes against the very purpose of the treaty and as such is invalid. Moreover, regardless of whether a defendant can bring a

330. *Id.*

331. Venezia v. Ministero di Grazia e Giustizia, Corte Cost., 27 June 1996, 79 Rivista di Dritto Internazionale 815 (1996).

332. *Id.*

333. See Schabas, *supra* note 321, at 597.

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private action under the ICCPR in a United States court, defendants must still be allowed to use that treaty, in addition to the Fourth Geneva Convention, the American Convention, and the CRC, as a defense to prosecution against them. Furthermore, the prohibition of the juvenile death penalty has reached the level of customary international law and may even be a non-derogable jus cogens norm. Thus, the United States has violated that international norm and must conform to the newly emerged international consensus. Finally, even if the United States refuses to recognize and comply with the international standards that prohibit the juvenile death penalty, it should abolish the practice as a practical matter because of its possible deleterious effects on the American judicial system.

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“I EXPECTED COMMON SENSE TO PREVAIL”: VOWLES V. EVANS, AMATEUR RUGBY, AND REFEREE NEGLIGENCE IN THE U.K.

I. INTRODUCTION

On a boggy field in 1998, Welsh Rugby Union referee David Evans made a fateful decision to allow amateur rugby players to proceed with a risky maneuver known as an uncontested scrum.² The “long, but hard-fought” match between Tondy and Llanharan teams saw several collapsed scrums which left players piled on top of one another.³ Llanharan was up by three points and replaced one of their experienced players in the front row of the scrum with an inexperienced player, thus violating official rugby rules. Evans did not object to an inexperienced Tondy player’s inclusion in the risky maneuver⁴ and the Llanharan coaches perceived no danger to

1. Referee David Evans informed the Tondy team that he “expected common sense to prevail” in the game that brought about the case that this Note will address. Peter Charlish, *Richard Vowles – Rugby Case*, 2 J.P.I. LAW 85 (2003).

2. The rules of rugby are complex and have undergone changes in the last decade. An exhaustive discussion of the game’s rules is beyond the scope of this Note. However, the Welsh Rugby Union website has excellent diagrams and glossaries for the novice rugby player or spectator. The Welsh Rugby Union at <http://www.wru.co.uk>.

3. James Pritchard, *Amateur Rugby Could be Crippled by Injury Ruling, Appeal Court Told*, THE WESTERN MAIL, Feb. 25, 2003

At the end of a hard-fought game in wet and muddy conditions when Tondy were pressing on the Llanharan line in an attempt to erase a 3-0 deficit, a series of collapsed scrums occurred. At the final scrum, well into injury time, Richard suffered life-threatening back injuries as the opposing packs engaged. As a result of his injuries, he is left paralysed and will be confined to a wheelchair for the rest of his life.

Id.

4. Since 1997, inexperienced “props” have been forbidden from playing in the front row during a contested scrum. See *Rugby Player Hopes for Safer Game*, THE WESTERN MAIL, Feb. 26, 2003, available at IC Wales: The National Website of Wales, at <http://icwales.icnetwork.co.uk/0100news/0200wales> (33-year-old Chris Jones of the Tondy team had played prop only twice in his career before he volunteered to in the *Vowles* match.).

the players.⁵ As a result of Evans's deference to the team captains, 24-year-old Richard Vowles broke his neck in the scrum and sustained paralyzing spinal injuries.⁶ Vowles sued the Llanharan team, Evans, and the WRU in negligence and prevailed in his claims against Evans and the WRU.⁷ *Vowles* was the first British case which held that referees owe a duty of care to adult, amateur rugby players to protect players' safety.

Vowles was, like all high-profile tort cases, controversial and polarizing. Tort enjoys what one scholar calls "residual status."⁸ It is a catchall field where actions that do not ring in contract, criminal, or property law may be heard.⁹ Tort encompasses large, multi-party cases with enormous damages at stake as well as ordinary slip-and-fall cases.¹⁰ The specter of compensatory and punitive damages in civil actions reveals the competing goals within tort law: is tort primarily intended to compensate injured plaintiffs? Or to punish and deter tortfeasors? Or both? Several scholars have explored the inherent politics of tort law because it determines whether a plaintiff will be compensated for his or her injury, who should compensate the

5. *Crippled Player's Coach Testifies*, THE WESTERN MAIL, Feb. 26, 2003 available at IC Wales: The National Website of Wales at <http://icwales.icnetwork.co.uk/0100news/0200wales> ("...Derrick Brown, who was Llanharan...coach at the time of the accident said yesterday that he did not think there was any danger to the players."). Interestingly, players on both teams experienced Jones's entry into the game differently: Tondy player Gareth Davies said that scrums had "descended into a joke" after Jones entered the game and that he could "twist [Jones] and bring him down low. He clearly did not have any experience as a prop and we said to the ref that we should have unopposed scrums." Robin Turner, *Legal Claim a Threat to Amateur Rugby*, THE WESTERN MAIL, Oct. 17, 2002 (Vowles testified that "The ideal prop has a bull neck...with plenty of upper body strength...Chris Jones was thinner than the average prop...").

6. *Injured Hooer Awaits Verdict*, THE WESTERN MAIL, Nov. 7, 2002

According to Mr. Vowles, a pushover attempt was repeatedly held up by scrum collapses and, when the two teams finally 'rammed together,' his back 'turned to jelly.' The game was abandoned and he was taken to a hospital. Two vertebrae had been dislocated, leading to serious spinal damage and paralysis of [t]he [sic] legs.

Id.

7. *Vowles v. Evans*, [2003] E.C.C. 240 (Eng.).

8. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 291 (2003).

9. *Id.*

10. *See id.*

plaintiff, and how much that plaintiff's injuries are worth.¹¹ Negligence is particularly fertile ground for such speculation because its elements – duty, breach, cause, proximate cause – require broad discretion by judges and, in the U.S., juries.¹² These elements are not static, rather, their determinations are infused with public opinion and policy considerations. What constitutes a compensable injury has transformed over time and continues to generate public debate about attendant reallocations of risk and cost.¹³

Vowles is no exception to this spirited legacy. Sports law in the U.S. and U.K. is an appropriate locus for such inquiries because of sports' enormous popularity and cultural resonance. An exploration of *Vowles*'s particular circumstances is important to understand *Vowles*'s, and any injured athlete's, stake in the case. The *Vowles* court was explicit in its decision regarding who should bear the cost of *Vowles*'s injuries. Like all tort cases, *Vowles* was not rendered in a historical or cultural vacuum. The *Vowles* court did not blindly apply legal doctrine to the facts but asked the age-old torts question: who will, and should, pay?¹⁴ Exploring the nuances of *Vowles*'s personal

11. See generally JOANNE CONAGHAN & WADE MANSELL, *THE WRONGS OF TORT* 3 (2d ed. 1999). Another tort expert argues that in the U.K. "At bottom, the rules of tort law reflect policy decisions by the judiciary about the interests that are protected and the type of conduct that is sanctioned." JANE WRIGHT, *TORT LAW AND HUMAN RIGHTS* 13 (2001). Wright argues, further, that because the U.K. lacks a bill of rights, that tort law has been a locus for determining which rights to protect. *Id.*

12. See WHITE, *supra* note 8, at 332

Implicit in a collective decision by courts and commentators that tort law should be a vehicle for assessing claims for compensations for certain classes of injuries is a judgment that the costs of those injuries need not invariably lie on those who suffered them, and that some activities have a responsibility for contributing to the costs of injuries they create.

Id.

13. Tobacco litigation is an excellent example of injuries' transformation over time from non-compensable to compensable. See generally Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 *DEPAUL L. REV.* 331 (2001).

14. Robert Rabin argues that cases that "stand the test of time" raise the question of who should pay for "bizarre injuries" such as Mrs. Palsgraf's in *Palsgraf v. Long Island Railroad*. See *TORTS STORIES* 2 (Robert L. Rabin & Stephen D. Sugarman eds., 2003). Rabin's explication of *Palsgraf* reveals that

situation against the backdrop of Welsh rugby's troubled road to professionalization and the nation's widespread economic depression is crucial to understanding the Court's decision to compensate Vowles at the WRU's expense.¹⁵

That Vowles's injuries were emotionally and physically devastating does not distinguish him from any catastrophically injured plaintiff. His loss of livelihood, however, was three-fold: Vowles was a Commonwealth Games boxer who had gone professional in addition to amateur rugby.¹⁶ Like many amateur rugby players, Vowles also had a day job to support himself.¹⁷ His club, Llanharan, was semi-professional which meant that it ranked just below Wales's top leagues.¹⁸ If Vowles received any compensation from the WRU at all, it was insufficient to support himself.¹⁹

The *Vowles* decision emerged amidst widespread criticism of the UK's "compensation culture."²⁰ "Compensation culture" en-

Mrs. Palsgraf was far more seriously injured, both physically and emotionally, than any first-year torts student would infer from reading the case. *See id.* at 2-9.

15. Rabin argues that "Behind each notable case are a host of concerns and considerations that are hidden even from the discerning eye...much more can be learned from digging beneath the surface to find out more about the parties, the events giving rise to the claimed injury, and the corresponding context of socio-economic circumstances in which the case arose. *Id.* at 1.

16. *WRU Wins Right to Appeal Claim*, THE WESTERN MAIL, Feb. 18, 2003.

17. E.g., Vowles was an upholsterer. *See Turner, supra* note 5.

18. *Id.*

19. During the trial, Justice Morland, who had played rugby in his youth, asked whether Vowles received "boot money," meaning a nominal sum to cover his expenses. Vowles responded jokingly, "No, your Honour, I was not that good." *Id.*

20. During the summer of 2003, for example, the U.K. government unveiled a redress plan for victims of clinical negligence, known as medical malpractice in the U.S. *See* Jon Robins, *The Government is Hoping to Dig Itself Out of a Hole with its New 30K NHS Redress Scheme. But Will Victims of Negligence Get Short Changed?*, THE LAWYER, July 21, 2003, available at 2003 WL 61848856. The package of reforms offers payments of up to £30,000 for victims of clinical negligence without litigation. *Id.* While proponents of the reforms claim that foregoing litigation is not a prerequisite to recovering the £30,000, a Nottingham personal injury lawyers said that "...you can bet your bottom dollar the first thing that will happen is that all legal aid is withdrawn, on the basis that you have to go through with the scheme." *Id.* Many personal injury lawyers and victims' rights activists were outraged by the reforms. *See id.* Peter Walsh, chief executive of Action for Victims of Medical Accidents, pointed out that those injured in car accidents or at work have "no

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tered British parlance after the actuarial profession published "The Cost of Compensation Culture" in 2002. Its authors maintained that plaintiffs' recovery had increased fifteen percent annually in recent history.²¹ *Vowles* seemed, to some, an emblem of the erosion of the legal profession generally.²² The report attributed the disappearance of Britons' "stiff upper lip" to litigation and lamented the "rich tapestry of life" that would be "dumbed down and reduced to bland humourless interactions, which is not what we won a war for."²³ Personal injury lawyers, conversely, argued that actuaries, as "well-heeled professionals," value the "rich tapestry of life" while "others...cannot afford that luxury."²⁴

A decade earlier, in the United States similar debates abounded amidst lawsuits against sports officials. States and Congress enacted laws protecting volunteer referees from plaintiffs seeking a windfall.²⁵ The U.K. faces a similar dilemma in

restrictions on...access to justice," yet those injured by clinical negligence have limited recovery. *Id.* A personal injury lawyer who specializes in child plaintiffs argued that how a child sustained an injury does not matter to a child and yet if it is from clinical negligence "they could get diddly squat by comparison." *Id.*

21. *PI and Clinical Negligence – Actuaries Take Swipe at Claimants*, THE LAWYER, March 3, 2003, available at 2003 WL 8525768. See also David Marshall, *Compensation Culture*, J. PERS. INJ. L. 79 (2003).

22. The WRU's lawyer lamented the High Court's decision partly because "It is not difficult to see a legal advert going in a local papers saying, 'Have you been injured in a rugby match – then come to us.'" James Pritchard, *Amateur Rugby Could be Crippled by Injury Ruling, Appeal Court Told*, THE WESTERN MAIL, Feb 25, 2003, available at <http://icwales.icnetwork.co.uk/0100news/0200wales>.

23. Marshall, *supra* note 21, at 83.

24. *Id.* Marshall argues that "...the whole point of health and safety law and of proper risk assessment is to require those responsible to think about how to reduce risk to the lowest achievable level by the taking of all reasonable precautions...society expects the wrongdoer to compensate the victims." *Id.* at 87 n.16.

25. See Volunteer Protection Act of 1997, Pub. L. No. 105-19, 1997 U.S.C.C.A.N. (111 Stat. 218) 152.

The litigation craze is hurting the spirit of volunteerism that is an integral part of American society. From school chaperones to Girl Scout and Boy Scout troop leaders to Big Brothers and Big Sisters, volunteers perform valuable services. But rather than thanking these volunteers, our current legal system allows them to be dragged into court and subjected to needless and unfair lawsuits....Until the

the wake of *Vowles*, which raises the question of whether the U.S.'s legislative solutions should be instructive. Although these debates share similar rhetoric and philosophies, this Note argues that U.S. laws protecting volunteer referees from liability would not result in just decisions for plaintiffs like *Vowles*. U.S. statutes focus on the social utility of volunteer referees, which would not address the difficulties that amateur British rugby players endured during the sport's troubled transition to professionalization over the past five years. Perhaps more important, the Welsh Rugby Union is a far more prosperous organization than the non-profit organizations U.S. volunteering laws seek to protect.

This Note considers *Vowles* in a comparative legal context by testing the viability of U.S. state and federal laws that limit volunteer referees liability. First, it will trace the history of Welsh rugby's painful road to professionalization in the late 1990's. Second, it will chart the genesis of U.K. and U.S. referee liability and their respective standards of care. Third, it will examine the limited success of the assumption of risk defense in *Vowles* and analogous sports cases in the U.K. and U.S. Fourth, it will set out U.S. state law efforts to limit referee liability in amateur competitions. The Note will conclude by arguing that U.S. state and federal law is not an appropriate model for amateur referee liability in the U.K. because of the specific dilemmas inherent to Welsh rugby at the time of *Vowles*'s injury.

mid-1980's, the number of lawsuits filed against volunteers might have been counted on one hand.

Id.

II. THE PROFESSIONALIZATION OF RUGBY IN ENGLAND AND WALES²⁶

A. *The International Rugby Board's Decision to Professionalize Rugby Union*

The International Rugby Board professionalized rugby union in August, 1995.²⁷ The English Rugby Football Union (“RFU”) experienced this change unevenly. Despite being an amateur organization, the RFU paid its administrators to keep abreast of developments in rugby worldwide.²⁸ Until 1995, the RFU adhered strictly to its constitution’s Bylaw 4, which prohibited direct or indirect payment or material gain for rugby-playing.²⁹ Taking its cue from football’s success with satellite television and strategic marketing, the RFU sought sponsorship from a large British brewing conglomerate and a financial services group.³⁰

Although one scholar described amateurism in rugby as an “increasingly flimsy pretence,” most English rugby clubs paid its players only travel expenses.³¹ Players found notoriety and financial security at the national rather than the league level.³² In Wales, even the greatest players traditionally were employed

26. This Note recognizes the rich distinctions between England and Wales but also appreciates the utility of discussing them simultaneously. From a legal perspective, England and Wales share legal doctrine and case law. *See generally* TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* (9th ed. 2001). That their rugby cultures are intertwined is evident in various histories of British sports history which discuss the two nations interchangeably. *See generally* ADRIAN SMITH, *CIVIL WAR IN ENGLAND: THE CLUBS, THE RFU, AND THE IMPACT OF PROFESSIONALISM ON RUGBY UNION, IN AMATEURS AND PROFESSIONALS IN POST-WAR BRITISH SPORT* 178 (2000).

27. *See* SMITH, *supra* note 26, at 146. The International Rugby Football Board declared in 1995 that

Rugby will become an open game and there will be no prohibition on payments or the provision of other material benefit to any person involved in the game. It was also agreed that (1) payment might be made at any level of participation; (2) there should be no pay ceiling imposed by the council; (3) payment for results is not prohibited.

Id.

28. *Id.* at 147.

29. *Id.* at 149.

30. *Id.* at 147-48.

31. *Id.* at 146-47.

32. *Id.*

outside of the sport to support themselves.³³ Historically, amateur rugby players who accepted compensation ruined their careers in the sport or tarnished their reputations considerably.³⁴ By the late 1980's, however, the RFU recognized that many high-profile rugby union players resented amateurism.³⁵ While the 1991 World Cup drew 13.6 million viewers, most of the English team continued to work for wages in addition to rugby.³⁶

B. The Welsh Rugby Union and Professionalization

Unlike English rugby players, Welsh players were notorious for "shamateurism" by accepting inflated "expenses."³⁷ The Welsh Rugby Union turned a blind eye to these practices for fear of losing its most talented players to more lucrative prospects in England's rugby league.³⁸ This fear was likely justified since Welsh players were recruited into English league rugby far more frequently than RFU players.³⁹

33. *Id.* at 149.

34. *Id.*

35. *Id.* at 149. The players' resentment was, no doubt, rooted in the prevalence of rugby players in New Zealand and South Africa who supported themselves through endorsements. *Id.*

36. *Id.* One player collected unemployment to prepare for the World Cup in South Africa in 1995. *Id.* The RFU did not, however, object to lead players working as clubs' "rugby development officers." *Id.*

37. *Id.*

38. *Id.* at 149-50. Players usually found themselves ostracized by the WRU after "switching codes." *Id.* at 150. Contracts in English league rugby were considerably more generous than the WRU: in the 1990's, Martin Offiah left WRU and received £435,000 per annum as an English league player. See generally GEOFFREY MOORHOUSE, A PEOPLE'S GAME: THE OFFICIAL HISTORY OF RUGBY LEAGUE 338 (1996). Some players denounced the WRU's hypocritical "shamateurism": Scott Gibbs, who left Swansea for St. Helens, said that

It grates me that I am called a prostitute while players and officials keep on covering up what's going on in union. Every player in Wales knows that when you play on a Saturday, if you win you can get a few quid. Players get the cash after the game.

Id.

John Duncan & Ian Malin, *Kicked Into Touch*, THE GUARDIAN, May 25, 1995 at 12, available at 1995 WL 7603805.

39. SMITH, *supra* note 26, at 181.

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The last twenty-three years have been pivotal for Welsh rugby.⁴⁰ Two rugby historians deemed those years “decades of doubt, desperation, and near disintegration...” characterized by countless losses and administrative troubles.⁴¹ The 1980’s and 1990’s were particularly painful after the sport’s success in the 1970’s.⁴² Moreover, rugby was fractured on an international scale because of South African rugby’s centennial celebrations which some teams refused to attend because of the persistence of apartheid.⁴³ The WRU left the decision to play to individual players, which proved calamitous to the organization.⁴⁴ Secretary David East resigned in 1989.⁴⁵ By 1993 the entire general committee walked out and had to be replaced.⁴⁶ The WRU had six secretaries within eleven years.⁴⁷ Further, the WRU capped seventy-five players and fired four national coaches between 1988-92.⁴⁸ Instability governed the game at an administrative and playing level.

1. Wales’s 1980’s Economic Crisis and the WRU’s Resistance to Professionalization

This instability reverberated beyond the playing field. In the 1980’s, Wales suffered Depression-era reductions in manufac-

40. See generally Dai Smith & Gareth Williams, *Beyond the Fields of Praise: Welsh Rugby 1980-99*, in MORE HEART AND SOUL: THE CHARACTER OF WELSH RUGBY 207-32 (Huw Richards et al. eds., 1999). (“In 1980-1 Welsh rugby, walking tall, crossed the threshold of its second century...The next twenty years would see it flailing to stay upright, when it was not flat on its face.”). For an account of Welsh rugby’s early 20th Century history, see DAVID PARRY-JONES, *PRINCE GWYN: GWYN NICHOLLS AND THE FIRST GOLDEN ERA OF WELSH RUGBY* (1999).

41. Smith & Williams, *supra* note 40, at 208-9.

42. *Id.* at 210. Smith and Williams attribute much of the decade’s success to WRU secretary Ray Williams who urged the WRU to establish a national league rather than “small group[s] of clubs putting up barriers and saying that things must always stay the same.” *Id.*

43. *Id.* at 211. Wales attended the fetes in South Africa and internal disputes consumed the WRU. *Id.* The New Zealand Rugby Union faced the same divisiveness. *Id.* See also SMITH, *supra* note 26, at 150-52.

44. Smith & Williams, *supra* note 40, at 211.

45. *Id.* at 212.

46. *Id.*

47. *Id.*

48. *Id.*

turing and mining.⁴⁹ In 1981, there were 27,000 Welsh coal miners employed in 36 pits nationwide. By 1989, there was a single operating coal mine in Wales.⁵⁰ The steel industry was similarly decimated: by 1991, the steel workforce was one-third what it was in 1979.⁵¹ While manufacturing troubles plagued the entire U.K., many Welsh people felt abandoned by their more powerful and prosperous neighbors.⁵² This resentment seethed in Welsh rugby because of the sport's working-class roots.⁵³ As coal mines closed and workers struck, rugby's fan base was either forced to migrate to areas where coal had never been the primary economy or remain and live in isolation and poverty.⁵⁴ Likewise, many Welsh rugby players migrated to English teams for larger salaries and, presumably, a more stable profession.⁵⁵

Welsh fear of being dwarfed by England was exacerbated by the International Rugby Board's 1995 decision to go professional after nearly a century of amateurism.⁵⁶ The WRU did not support the IRB's decision and distributed a 23-point document arguing against professionalization.⁵⁷ While many high-profile rugby players decried the inequity of "shamateurism" and their inability to make a living solely from playing the sport, professionalization posed a serious threat to WRU's finances and morale.⁵⁸

Further, the decision to professionalize occurred against the backdrop of physical education reforms in Welsh grammar schools, which were the traditional spawning grounds for rugby

49. *Id.* at 213.

50. *Id.*

51. *Id.*

52. *Id.* ("In the 1980s when you left the train at Paddington you almost tasted the indifference of prosperity to deprivation.")

53. In 1978, national coach Phil Bennett listed various ways in which England had oppressed Wales to urge his team to victory against England. *Id.*

54. *Id.* at 214.

55. *Id.* Between 1980 and 1991, eighteen Welsh players migrated to English teams. *Id.*

56. *Id.* at 207-8.

57. *Id.* at 208. Interestingly, the International Rugby Board's chairperson at the time of the decision was Welsh. *Id.* at 207.

58. Six months after professionalization, Llanelli lost £900,000 and sold Stradey Park to WRU for £1.5 million. *Id.* at 221. The majority of Welsh clubs continue to operate at a deficit. *Id.* at 221.

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talent.⁵⁹ Welsh education, including physical education programs, became more nationalized and exam-driven and less devoted to extra-curricular and team sports.⁶⁰ As a result, the rhythm of Welsh schoolchildren's weeks changed drastically because of the national curriculum as they directed their free time toward national exams. By the early 1990's, fewer than thirty public schools in the south of Wales played rugby at the traditional Saturday morning time.⁶¹ These reforms narrowed Welsh rugby's recruiting base considerably.⁶²

C. Rugby's Troubled post-1995 Transition to Professionalization in the United Kingdom

The earliest years of professionalization were troublesome to Welsh rugby, and to Wales generally, though rugby historians consider the Welsh victory over South Africa in the summer of 1999 a national watershed.⁶³ The national team brought the nation six international victories by the summer of 1999 and heralded the newly-christened Millenium Stadium.⁶⁴ Historians consider 1999 a pivotal year in Welsh history, generally. The establishment of the National Assembly for Wales in 1999 gave the nation symbolic and actual autonomy from England – indeed, the Welsh victory over England in Wembley stadium that spring embodied the nation's fighting spirit.⁶⁵

The Rugby Football Union ("RFU") in England was always a stalwart supporter of amateur sport – indeed, there is still resistance to professionalization within the organization.⁶⁶ The movement toward professionalization signaled a shift in focus from players' needs to those of spectators.⁶⁷ Rugby union had

59. *Id.* at 219-20.

60. *Id.* at 220.

61. *Id.* at 220.

62. *Id.* at 220-21. ("For Wales, like eighteenth-century Holland, a country with too narrow a demographic base for it to remain naturally competitive in rugby terms...").

63. *Id.*

64. *Id.* at 231.

65. *Id.* at 6-7.

66. *Id.* at 123.

67. *Id.* at 152. "Television is, of course, the key to understanding why...the International Rugby Board...made its surprise announcement that: 'Rugby will become an open game and there will be no prohibition on payments...'" *Id.* A British legal scholar points out that referee interference often means that

never matched the fan base of soccer or rugby league.⁶⁸ Through professionalization, the RFU hoped to improve playing standards to compete with South American teams, to serve commercial interests by participating in more formal competitions, and, perhaps most important to *Vowles*, to support the RFU's dependence on revenue from gate receipts, media coverage, advertising, and sponsorship.⁶⁹

The road to professionalization created enormous rifts between England and the "Celtic nations" of Wales, Scotland, and Ireland.⁷⁰ Within a year of the IRFB's decision to professionalize, the elite English clubs formed the English Professional Rugby Union Clubs and pushed unilaterally for enormous television contracts.⁷¹ The RFU eventually compromised with Wales, Scotland, and Ireland by compensating their respective Unions and promising not to execute its next television contract unilaterally.⁷² This RFU decision was particularly devastating to the WRU since professionalization had nearly bankrupted it.⁷³ The Chair of the RFU Management Board ultimately convinced the WRU to accept the RFU's decision by conceding that widely-broadcasted games would improve the sport's financial situation immensely.⁷⁴

"Spectators are disappointed, pundits frustrated, and competitors endangered by inconsistent application of ineffective rules...the careful player is a bore..." Paul Rice, *Fair Play or Spoiled Sport: The Legal Obligations of the Referee*, 28 LIVERPOOL L. REV. 81, 89 (1996).

68. SMITH, *supra* note 26, at 174.

69. *Id.*

70. *Id.* at 193.

71. The clubs encouraged the RFU to sign a contract with the British Broadcasting Company, giving it the sole rights to broadcast games between 1996-2001. SMITH, *supra* note 26, at 154. This decision was made without negotiating with other Home Nations and Scottish, Welsh, and Irish Rugby Unions were outraged. *Id.* at 155. Most of the RFU was also angry because scarcely any RFU members were EPRUC members. *Id.* The root of their anger was the possibility of exclusive pay-per-view access to a game that had always prided itself on free access for its fan base. *Id.*

72. *Id.*

73. *Id.*

74. IAN MALIN, MUD, BLOOD AND MONEY: ENGLISH RUGBY UNION GOES PROFESSIONAL 36-37 (1997).

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D. Professionalization's Effect on Individual Rugby Players

The centrality of television broadcasting put immense pressure on professional and amateur players because broadcasters would only cover club rugby games with high-profile players.⁷⁵ Top players could not be injured lest they lose their opportunity to reap the benefits of television revenue.⁷⁶ By 1998, there were two new trends in British rugby union: more frequent rugby code swaps between league and union players and increased recruitment of foreign players to English club rugby.⁷⁷ In 1998, rugby clubs were “desperate for success” and were willing to pay foreign players exorbitant sums of money at the expense of aging or injured players.⁷⁸ After professionalization, rugby league players who switched to Welsh rugby union for the possibility of compensation faced uncertain futures.⁷⁹ Within a year, only half of them were playing for top Welsh teams.⁸⁰ During that year, two English clubs went bankrupt and many clubs began canceling player contracts.⁸¹ Welsh rugby was particularly vulnerable, with only two of its clubs financially capable of maintaining professional status.⁸²

These financial afflictions within Welsh rugby encouraged bitter rifts within WRU, particularly because the national team's disappointing 1997-98 season dragged morale to an “all-time low.”⁸³ The two highest-profile Welsh clubs broke off from the national Premier Division to play in the English Premiership to attract larger crowds and higher revenue.⁸⁴ Further, the dissident clubs argued that Welsh rugby had a lower playing

75. SMITH, *supra* note 26, at 157.

76. MALIN, *supra* note 74, at 34.

77. *Id.*

78. SMITH, *supra* note 26, at 163.

79. *Id.*

80. *Id.* at 184.

81. *Id.* For more on the financially precarious state of rugby clubs in the U.K. in the late 1990's, see Peter Bills, *Players Pay Price as Family Silver Sold Off*, SUNDAY TIMES (London), Mar. 15 1998, at 45. See also Ian Malin, *Moseley Left on Rugby's Back Burner*, THE GUARDIAN, Mar. 14 1998, available at 1998 WL 3083644. See also MALIN, *supra* note 74, at 166-7.

82. The Cardiff and Swansea clubs were scarcely able to remain afloat in 1998. SMITH, *supra* note 26, at 157.

83. *Id.* at 167. See also Owen Slot, *Wales Hit Crisis Point as World Cup Looms*, SUNDAY TELEGRAPH, Oct. 4, 1998, at 31.

84. SMITH, *supra* note 26, at 167.

standard than English rugby.⁸⁵ The WRU imposed hefty fines and the renegade clubs returned to the WRU in 1999.⁸⁶ The conflict between elite and struggling clubs continued through the 1999 World Cup, which illuminated the disparities between the “stars and journeymen” of professional rugby.⁸⁷ Players who could propel teams to global success could potentially triple their salaries while others sought team vacancies because their squads had dissolved.⁸⁸

While professionalization gave a select few players the potential for high earnings, rugby salaries continued to lag far behind those of soccer players in the U.K.⁸⁹ The highest-paid English rugby player was ranked 100th in 1999 listing of the U.K.’s top-earning athletes.⁹⁰ Clubs also began recruiting star players from the southern hemisphere for costly short-term contracts, thus constricting opportunities for players in the Home Nations.⁹¹ Clubs renegotiated and capped their local players’ salaries to fund transitory foreign players.⁹² By 1999, British rugby union’s treatment of its players was “too often demeaning” in the transition to professionalization.⁹³

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. An English World Cup victory would increase a player’s salary from £32,000 to £90,000. *Id.* This compensation is about twice what an English cricket player in a similar position would earn. *Id.* For athlete compensation rankings in the U.K., see Julia Finch, *Chelsea Fuel Wage Explosion*, THE GUARDIAN, Apr. 30, 1999, available at 24 1999 WL 16877888.

91. SMITH, *supra* note 26, at 172.

92. *Id.* In response to the caps, the Professional Rugby Players Association charged the elite English First Division Rugby organization with “restraint of trade” under EU law. Ian Malin, *Players May Go to Law Over Rugby Wage Cap*, THE GUARDIAN, Mar. 27, 1999, at 13, available at 1999 WL 14125761.

93. SMITH, *supra* note 26, at 172 (“Clubs’ treatment of individual players...merely contributed to the appalling image professional rugby had acquired after four years of incessant squabbling and near universal malevolence.”).

E. The Link Between Professionalization and Higher Incidence of Injury

Perhaps not surprisingly, increased professionalization and commercialization of rugby led to a higher incidence of injury.⁹⁴ Vowles' particular injury had been prevalent in rugby football for decades but has increased dramatically within the past thirty years.⁹⁵ The reason for this increase in spinal injuries is curious since many of the sport's governing bodies have created laws to "depower the scrum."⁹⁶ Studies of the injury, and of rugby injuries generally, reveal that higher skill level increases the likelihood of injury.⁹⁷ British sports medicine experts agree that the IRB's decision to professionalize rugby union has increased the likelihood of injury for professional and amateur players alike,⁹⁸ but disagree about whether to attribute this increase to greater physical force within the game or an increased emphasis on players' strength and speed.⁹⁹ An ethnographer recently interviewed players on a Welsh rugby team during

94. Dominic Malcolm and Kenneth Sheard, "Pain in the Assets": *The Effects of Commercialization and Professionalization on the Management of Injury in English Rugby Union*, 19 SOC. OF SPORT J. 149, 152 (2002).

95. J.R. Silver, *The Impact of the 21st Century on Rugby Injuries*, 40 SPINAL CORD 552 (2002) ("I became concerned when I began to see players with tetraplegia as a result of rugby accidents...between 1965 and 1970...There was a dramatic increase...from 1970 onwards."). Silver is a physician at the National Spinal Injuries Centre, Stoke Mandeville Hospital in the U.K. *Id.* He has also been an expert witness in three rugby injury cases. *Id.* at 558.

96. *Id.* at 556. (These efforts included the uncontested scrum's advent.)

97. *Id.* ("My limited figures suggest that greater skill does not protect [players]..."). Silver's study of schoolboy rugby revealed that skilled rugby players were four times more likely to sustain injury than unskilled players. *Id.* A study of Scottish rugby found that between 1993-94, when rugby union was entirely amateur, and 1997-98, when the sport turned professional, injuries doubled even though the number of hours played was lower. See also Garraway WM, *Impact of Professionalism on Injuries in Rugby Union*, BR. J. SPORTS MED. 348, 348-51 (2000). Thirty percent of professional rugby players injured between 1997-98 abstained from playing for the rest of the season. Silver, *supra* note 95, at 556.

98. Silver, *supra* note 95, at 556 ("The penalties for accepting the financial and other rewards accompanying professionalism in rugby union appear to include a major increase in player morbidity.")

99. For the argument that increased injuries are a result of more forceful tackles, see Garraway, *supra* note 97, at 173. Silver argues that his studies reveal that an increased emphasis on strength and speed is the reason for increased injuries. Silver, *supra* note 95, at 557.

their professionalization process which increased training time and injuries.¹⁰⁰ As a result, players were more prone to injury and, yet, less likely to disclose pain and injury.¹⁰¹ Professional rugby union players face the two-fold pressure of performing for their club and the prospect of being recruited for the Welsh national team, as revealed by a high-profile player's comment that "[t]he fact that I am paid to play the game places great stress on me...It would be devastating when Wales comes calling if I am out with an injury."¹⁰²

Clearly, rugby in the U.K., and Wales in particular, is in flux. Its players and clubs face uncertain futures. Players also grapple with the cultural and financial pressure accompanying the RFU's decision to go professional. The following discussion of case law in the U.S. and U.K. concerning referee liability will ground *Vowles* in a broader historical and jurisdictional context.

III. CASE LAW IN THE U.S. AND U.K.

The U.S. shares the U.K.'s longstanding reticence toward holding sports officials liable for personal injuries.¹⁰³ Cases concerning amateur referees and players raise similar controversies in the two nations. Unsurprisingly, the U.K. and U.S. have intertwined legal histories, particularly in tort law. For clarity, this section will first discuss U.K. case law and proceed to a discussion of U.S. case law.

100. P. David Howe, *An Ethnography of Pain and Injury in Professional Rugby Union: The Case of Pontypridd RFC*, 36 INT'L REV. FOR THE SOC. OF SPORT 289, 292 (2001).

101. *Id.* at 295. Howe conducted several revealing interviews with rugby players and their troubled road to professionalism. *Id.* at 289. One player confided to Howe that "You may think I'm thick, but the pressure for me to play is unbelievable. When no fracture showed [on the X-ray] I thought hell it [the pain] must be in my mind...Now with the injury like it is I may lose my spot on the Welsh squad." *Id.* at 297.

102. *Id.* at 298.

103. "On the whole, although referees are often included as defendants in personal injury suits resulting from sporting activities, they are rarely found negligent." WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW §4:1 (2004).

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A. Vowles v. Evans

1. Events Leading to Vowles' Injury

Vowles sustained his injury while playing hooker for the Llanharan Rugby Football Club 2nd against the Tondu Rugby Football Club 2nd XV on a boggy field in the winter of 1998.¹⁰⁴ The players and Evans, the referee, were all amateurs and the match was "hard fought" but "fair."¹⁰⁵ The muddy field caused a large number of set scrums and, within thirty minutes of play, the Llanharan opposing loosehead prop dislocated his shoulder.¹⁰⁶ Llanharan had only an untrained front row forward to replace their injured player and had nobody trained as a front row forward in the second or back row of their pack.¹⁰⁷

Evans knew that Llanharan had no replacement on the bench and told the team forward that he could either replace the front row forward from a player within the scrum or have non-contestable scrummages for the rest of the game.¹⁰⁸ An inexperienced player within the scrum said he would "give it a go" as a front row forward since he had played the position a few years earlier.¹⁰⁹ Evans accepted Llanharan's decision and did not ask about the replacement's previous experience.¹¹⁰ During a scrum later in the game, Vowles collapsed and suffered permanent incomplete tetraplegia and was confined to a wheelchair.¹¹¹

104. *Vowles*, E.C.C. 240 at 243.

105. *Id.* at 243.

106. *Id.* at 243. A loosehead is the prop in a scrum because his head is outside the other team's tighthead prop's shoulder. Scrum.com: The Perfect Pitch for Rugby, at <http://www.scrum.com/dictionary> (last visited June 25, 2004).

107. *Vowles*, E.C.C. 240 at 243-44.

108. *Id.* at 244. A non-contestable scrum is the same as a scrum except that there is "no contest for the ball, the team putting in the ball must win it, and neither team is permitted to push." *Id.* at 245. Evans's course of action is promulgated by the 1997 version of the "Laws of the Game" of the Council of the International Rugby Football Board, which mandate that "in the event of a front row forward being ordered off, the referee...will confer with the captain...to determine whether another player is suitably trained/experience to take his position...when there is no other front row forward available...then the game will continue with non-contestable scrummages." *Id.* at 245.

109. *Id.*

110. *Id.*

111. *Id.*

2. The Court's Decision in *Vowles v. Evans*

In rendering its decision, the Court applied the test of duty used in *Caparo Plc. v. Dickman* to *Vowles* and asserted that the relationship between Vowles and Evans was sufficiently proximate and that it was reasonably foreseeable that Evans' failure to exercise reasonable care may have resulted in Vowles' injury. Evans breached this duty when he failed to take reasonable care for the safety of the Tondy and Llanharan players by "sensible and appropriate application of the laws of rugby."¹¹² The debate centered on whether it was reasonable to impose a duty of care on an amateur referee for rugby players.¹¹³ In determining what was reasonable, the lower court did not consider Evans' amateur status relevant because he was extensively trained and because an amateur front row forward is more likely to sustain serious injuries than his professional counterpart.¹¹⁴ The court held, further, that amateur rugby players are "young men mostly with limited income" who should not have to bear the cost of their injuries due to a referee's negligence.¹¹⁵ In response to the defense's arguments, the court contended that imposing a duty on Evans was "consistent with the spirit of the laws of rugby" which is "an important part of Welsh culture."¹¹⁶

3. United Kingdom Referee Negligence Case Law

Vowles had two high-profile precedents concerning severe rugby injuries: *Agar v. Hyde*, and *Smoldon v. Whitworth & Nolan*.¹¹⁷ The Welsh Rugby Union relied on *Agar*, where the High Court of Australia held that the International Rugby Football Board owed no duty of care to frame the rules of the game to reduce the risk of severe spinal injuries during

112. *Id.* "The threshold of liability must properly be a high one." *Id.* at 252.

113. *Id.*

114. *Id.* at 247.

115. *Id.* The court maintained that the Welsh Rugby Union was well-funded enough to insure itself and its referees in the event of players' claims despite the defense's insistence that the Union was so heavily in debt that public liability insurers were contemplating discontinuing sporting injury coverage *Id.*

116. *Id.*

117. See *Agar v. Hyde* [2000] H.C.A. 41, available at 2000 WL 1249551; see *Smoldon v. Whitworth & Nolan* [1997] P.I.Q.R. P133.

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scrums.¹¹⁸ *Vowles* looked, also, to the *Smoldon* holding which imposed a duty of care on a referee to enforce the rules and “...ensure that the players were not exposed to unnecessary risk of injury” when a seventeen-year-old rugby player broke his neck during a collapsed scrum.¹¹⁹ The *Agar* and *Smoldon* decisions questioned whether a rugby player assumes the risk of his or her injuries by engaging in high-risk play.¹²⁰ The *Agar* court discussed the confusion of determining whether a rugby play is “rough” or “dangerous” and a concurring judge contended that the plaintiffs “could not possibly have been ignorant” of the possibility of injury.¹²¹

The WRU pointed to these cases to absolve itself of duty, yet the *Vowles* court found that the *Agar* decision turned on the attenuated relationship between the plaintiffs and the defendants.¹²² The court distinguished *Vowles* from *Agar* because the relationship between Evans and *Vowles* was far closer than that of the *Agar* plaintiffs and the Board.¹²³ In rendering its decision, the *Vowles* court contended that the *Agar* court did not want to find that the Board, as promulgator of rules, owed a duty to each rugby player in the world.¹²⁴ The court contended that *Vowles* was more analogous to *Smoldon* because it established a duty of care for rugby referees with liability grounded in “full account...of the factual context in which a referee exercises his functions.”¹²⁵ Thus, the liability threshold that the *Vowles* court inherited from *Smoldon* was high and would not

118. See *Agar*, H.C.A. 41 at 60.

119. See *Smoldon*, P.I.Q.R. at P140.

120. “[Rugby] is a tough, highly physical game, probably more so than any other game widely played in this country. It is not a game for the timid or fragile. Anyone participating in serious competitive games of rugby football must expect to receive his or her fair share of knocks, bruises, strains, abrasions, and minor bony [sic] injuries.” *Smoldon*, P.I.Q.R. at P135.

121. See *Agar*, H.C.A. 41 at 46.

122. *Id.*

123. *Id.*

124. See *Vowles*, E.C.C. 240 at 250.

125. *Smoldon*, P.I.Q.R. at P138-39. The Union attempted to distinguish *Smoldon* because the players were very young, but to no avail. *Vowles*, E.C.C. 240 at 250. The Court held that the age difference of the players does not determine whether a referee owes any duty of care to the players. *Id.*

hold a referee liable for errors of judgment or oversights “in the context of a fast-moving and vigorous contest.”¹²⁶

B. United States Referee Negligence Case Law

The standard of care in the U.S. and the U.K. is similar: a referee has a duty to supervise a game properly and to enforce safety rules.¹²⁷ By far the most high-profile U.S. case involving referee negligence in professional sports is *Brown v. National Football League*, where the referee threw a penalty flag weighted with pellets which hit Brown in the eye and ended his career.¹²⁸ Less publicized, though fiercely contested, in the U.S. are cases like *Vowles* brought by amateur athletes against volunteer referees. In *Vowles*, the dissenting judges maintained that it was in the public interest to shield amateur referees from liability in negligence so as to encourage voluntarism in officiating.¹²⁹ Fearing the same, many states in the U.S. have

126. *Vowles*, E.C.C. 240 at 250.

127. See CHAMPION *supra*, note 103, §4.1. See *Vowles*, E.C.C. 240 at 251-52.

128. *Brown v. National Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002). Brown, unlike Vowles, brought his action unsuccessfully in contract, yet the opinion suggests that he potentially could prevail in state court under a negligence theory against the referee and the NFL. *Id.* at 389-90. The circumstances and extent of Brown's and Vowles's injuries differ greatly. While both Brown and Vowles lost their careers in sports because of their injuries, Brown's injury was far less severe than Vowles's. His sight loss prevents him from playing professional football, but not from a broad swath of employment, unlike Vowles who is, confined to a wheelchair. Further, Brown's injury was the direct result of a referee's momentary carelessness while Vowles's resulted from a series of decisions in which he, his team captain, and fellow players were complicit. See also Darrell M. Halcomb Lewis, *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L. J. 263 (2002). There are additional circumstantial differences between *Brown* and *Vowles* rooted largely in the distinctions between American and British sports culture. Brown was a highly-compensated, unionized, professional football player suing an enormously profitable sports league. Questions of contract and workers compensation governed the holding in *Brown* without addressing the action's viability in tort. Vowles was a modestly-compensated amateur rugby player suing a profitable sports league with an enormous fan base. In rendering his decision, Lord Phillips noted that “Amateur rugby players will be young men mostly with very limited income” and that the Welsh Rugby Union, with its gate receipts and television contracts, was the best party to bear the cost of Vowles injury. *Vowles*, E.C.C. 240 at 248.

129. *Vowles*, E.C.C. 240 at 248.

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adopted a gross negligence or recklessness standard for amateur referee liability.¹³⁰

The notion of referee negligence, at times called “malpractice,” is a less recent phenomenon in the U.S. While this Note concentrates on referee liability for players’ personal injuries, several commentators identify a broad range of emotional and economic injuries resulting from officials’ carelessness.¹³¹ U.S. courts are generally hesitant to allow plaintiffs to recover in referee liability actions, though some courts have recognized the grave impact careless refereeing can have on players and coaches.¹³² Typically, players in the U.S. bring actions against referees in negligence, though players may also allege criminal and statutory violations or breach of contract.¹³³

Carabba v. Anacortes School District sets the standard of care for sports officials in the U.S. The *Carabba* court held a wrestling referee liable for negligently supervising a match where the plaintiff was paralyzed by his opponent’s illegal move.¹³⁴ The standard of care in *Carabba* was that of an ordinary pru-

130. This Note uses “amateur” fluidly as it is defined fluidly in the U.S.: in some states, a referee must not receive any compensation to have amateur status while other states permit nominal compensation within the amateur category. See generally Lewis, *supra* note 129.

131. See generally Scott Parven, *Judgment Calls – Sports Officials in Court*, 9 ENT. & SPORTS LAW, 9 (1991). Interesting cases claiming economic injuries include Georgia High School Association v. Waddell, 285 S.E.2d 7 (Ga. 1991) (defendant verdict on appeal in action brought by players’ parents for referee negligently imposing a penalty that cost the team their spot in the state playoffs) and Bain v. Gillespie, 357 N.W.2d 47 (Iowa Ct. App. 1984) (defendant verdict on appeal in action where store owner who sold University of Iowa apparel and souvenirs sued a referee for losses he sustained because of the referee’s bad call that resulted in Iowa’s loss to Purdue University).

132. In *Tilelli v. Christenberry*, the court held that a boxer who alleged negligent officiating had standing to sue because the referee’s action “affect[ed] his record so prejudicially...[that it] impair[ed] economic rights and interests sufficiently to give petitioner legal standing to sue.” *Tilelli v. Christenberry*, 120 N.Y.S.2d 697, 699 (1953).

133. See Shlomi Feiner, *The Personal Liability of Sports Officials: Don’t Take the Game into Your Own Hands, Take Them to Court!*, 4 SPORTS L. J. 213, 214-15 (1997).

134. *Carabba v. Anacortes School Dist. No. 103*, 72 Wash.2d 939 (1967) (referee glanced away from the match while he was tending to a mat that went askew, a task within his enumerated duties, when the plaintiff’s opponent used a “full-Nelson” in violation of the rules and paralyzed the plaintiff).

dent referee.¹³⁵ Officials may be liable for negligence when their conduct does not comport to this standard of care and injures participants.¹³⁶ A referee's scope of duty includes assessing whether a field is suitable for playing, whether inclement weather poses a risk to players, equipment inspection, and determining whether equipment is being worn or used properly by players.¹³⁷ A referee's primary duties, however, are to enforce the rules of the game and control players' conduct.¹³⁸ The *Vowles* decision also identifies these twin duties as primary for officials in the U.K.¹³⁹ These duties are intertwined because referees have authority over players' conduct by virtue of their duty to enforce rules.¹⁴⁰

Though longstanding, *Carabba's* "prudent referee" standard has been widely contested. Many courts and commentators advocate, instead, for a recklessness or gross negligence liability threshold.¹⁴¹ Liability in contact sports is a complicated question because of inherent participatory risks.¹⁴² Many state laws hold referees liable only in gross negligence, recklessness, or intentional conduct.¹⁴³ The public policy for an ordinary negligence standard is preventive in that it encourages officials to be cautious in executing their duties.¹⁴⁴ A gross negligence standard risks barring recovery to plaintiffs who sustain injury for a referee's deviation from the standard of care that falls short of gross negligence.¹⁴⁵ Conversely, a negligence standard for liability may impose substantial liability on a volunteer or amateur referee who officiates simply for the love of the sport.¹⁴⁶

135. See CHAMPION, *supra* note 103, at §4.1.

136. See Feiner, *supra* note 133, at 215.

137. *Id.* at 218.

138. See ROBERT C. BERRY & GLENN M. WONG, 2 LAW AND BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS 512 (2d ed. 1993).

139. *Vowles*, E.C.C. 240 at 251.

140. See Feiner *supra* note 133, at 218.

141. See *id.* at 219.

142. See *id.* at 220.

143. See Kenneth W. Biedzynski, *Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 376 (1994) [hereinafter Biedzynski, *Is That the Right Call?*].

144. Feiner, *supra* note 133, at 220.

145. *Id.*

146. *Id.* at 221.

Defendant's counsel in *Vowles* expressed the same concern that amateur referees would stop volunteering their time to avoid liability.¹⁴⁷ The court dismissed this concern and noted that the injury in *Vowles* was the result of Evans's failure to implement a rule and that such a failure would be rare, particularly in a game with many inherent risks taking place during play.¹⁴⁸ A referee's conduct during and apart from play are held to different standards in the U.K.¹⁴⁹ Evans' decision was deliberate and outside of the context of play, unlike the wrestling referee in *Carabba*.¹⁵⁰ A U.S. expert on referee liability has advocated making this distinction in his argument for grounding referee liability in recklessness.¹⁵¹ He suggests a two-tiered approach for recovery: a player must prove that a referee acted in reckless disregard for his or her safety and make a separate determination of whether the defendant's conduct was "part of the game."¹⁵² In doing so, courts would reduce the threshold for referee liability from simple negligence without equating the duty referees owe to players with the duty players owe to one another.¹⁵³

These standards govern who should take care in sporting events by imposing tort liability on the party responsible for players' injuries. The importance of this determination is not confined to athletes, coaches, spectators, or fans but articulates the boundaries of individual responsibility in risky endeavors. In *Vowles*, the players were engaged in what the dissent described as an "inherently risky" sport and chose a dangerous play to maximize their ability to earn points. The assumption of

147. See Paul Cullen, *Sports Litigation a "Growing Trend,"* 6/14/03 IR. TIMES 8, 2003, available at WL 56611675.

148. *Id.* at 4.

149. *Vowles*, E.C.C. 240 at 253.

150. Cullen, *supra* note 147.

151. Mel Narol, *Sports Participant with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. SPORT L. 29, 30 (1991).

152. See *id.* at 39-40.

153. In the U.S., players have a duty not to act with reckless disregard of another player's safety. See CHAMPION, *supra* note 103, §4:1. Whether a player acts with reckless disregard is heavily contested, particularly in the context of inherently dangerous sports like rugby. The duty of care a player owes a referee is the same as his or her duty to another player. *Id.* Thus, in some states and in the U.K., the referee is the only person on the field who faces potential liability for negligence.

risk defense and *volenti non fit injuria* defenses in the U.S. and the U.K., respectively, have a potent history in sports law, yet the *Vowles* majority did not give that traditional defense much credence. In placing the responsibility to protect players from one another in the referee's hands, rather than the players', the *Vowles* court articulates the value of physically risky competition to British culture. Several scholars have explored the inherent politics of tort law because it determines whether a plaintiff will be compensated for their injury, who should compensate the plaintiff, and how much that plaintiff's injuries are worth.¹⁵⁴ Sports law in the U.S. and U.K. is particularly fertile ground for such inquiries.

C. The Absence of Traditional Tort Defenses in Agar, Smoldon, and Vowles

Despite different holdings, *Agar*, *Smoldon*, and *Vowles* share similar factual circumstances. A particularly curious trait these cases share is that no plaintiff brought an action against a fellow player or captain despite the fact that each claimant sustained injuries because of rough bodily contact and captains' decisions.¹⁵⁵ In this sense, claimants locate the cause, both in fact and proximate, with agents who are not team-affiliated. This relocation of cause is particularly interesting because the flip side of referee negligence when players hurt each other is, of course, assumption of risk and contributory negligence. These defenses were unsuccessful in *Vowles*, curiously, even though a series of decisions led to *Vowles*'s injury. Why hold a referee negligent when there are, potentially, several tortfeasors? The court's lack of attention to these defenses suggests a broader policy reason for hesitating to hold athletes responsible for the

154. See generally CONAGHAN & MANSELL, *supra* note 11, at 3. One tort expert argues that in the U.K. "At bottom, the rules of tort law reflect policy decisions by the judiciary about the interests that are protected and the type of conduct that is sanctioned." WRIGHT, *supra* note 11, at 3. Wright argues, further, that, because the U.K. lacks a bill of rights, tort law has been a locus for determining which rights to protect. *Id.*

155. A player injured because of a deliberate and unprovoked assault may recover from the Criminal Injuries Compensation Board. *Silver*, *supra* note 95, at 557. A player cannot receive double compensation, meaning that if a player prevails in a civil action against another player, the damages he or she receives will offset Board compensation. *Id.*

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harm they do to one another. A historical and comparative overview of the defenses in British and American law is instructive in probing this broad policy in each country.

IV. *VOLENTI NON FIT INJURIA*, ASSUMPTION OF RISK, AND CONTRIBUTORY NEGLIGENCE DEFENSES IN THE U.K. AND U.S.

A. *Volenti Non Fit Injuria and Contributory Negligence in the U.K.*

Tort defenses in the U.K. typically fall into three categories: those based on plaintiff conduct that proportionally relieve the defendant of liability, those based on defendant's contention that the plaintiff assumed the risk of injury, and those excusing the defendant's conduct.¹⁵⁶ The first type of defense is called contributory negligence and was codified by the Law Reform Act, 1945.¹⁵⁷ Under the Act, the court must apportion liability.¹⁵⁸ Contributory negligence is available when a plaintiff's carelessness contributes to his or her injury, even if a defendant is entirely responsible for the events leading to the plaintiff's injuries.¹⁵⁹ A particularly delicate aspect of contributory negligence

156. CLERK & LINDSELL ON TORTS §3-57 (Anthony Dugdale, ed., 18th ed. 2000). This Note will be concerned with the first two types of defenses.

157. The Law Reform Act maintains that

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable...

Law Reform (Contributory Negligence) Act, 1945, 8 & 9, Geo. 6, c. 28, §1(1) (Eng.). The Act broadened the use of the defense beyond nuisance on the highway and statutory duty, which had been the exclusive torts for which the contributory negligence defense was available. *Id.* at §3-28.

158. CLERK AND LINDSELL, *supra* note 156, §3-23.

159. *Id.* A classic example of when a plaintiff contributes to injuries rather than to tortious conduct occurs most frequently when a plaintiff sustains injuries in a car accident caused entirely by the defendant's negligence, yet the extent of the plaintiff's injuries was lengthened by his or her not wearing a seatbelt. *Id.* If a plaintiff sustains an injury where his or her negligence would not have affected the injury, such as if he or she was burned when a car exploded while not wearing a seat belt, then a contributory negligence defense does not apply. *Id.*

is causation, which many scholars merge.¹⁶⁰ The 1945 Act applies the following principles with respect to causation and contributory negligence: the same rules of causation should apply to determining whether the plaintiff's carelessness contributed to her injury and whether the defendant caused the injuries. Whether the plaintiff's carelessness preceded or followed the defendant's wrongdoing is irrelevant. Foreseeability of the manner of injury is also irrelevant.¹⁶¹

Plaintiffs' potential culpability extends to intentional torts. A plaintiff's carelessness must be sufficiently careless as compared to the defendant's wrongdoing to result in fault on the plaintiff's part. Under the 1945 Act, "fault" includes the plaintiff's intentional acts where the defendant is duty-bound to prevent the plaintiff's self-inflicted harm.¹⁶² Contributory negligence, in this context, turns on foreseeability of harm to oneself.¹⁶³ If a plaintiff should have foreseen that he may suffer injury through his carelessness and proceeds nonetheless, he is contributorily negligent.¹⁶⁴ A potentially negligent plaintiff is held to an objectively reasonable standard,¹⁶⁵ which includes taking precautions to guard against others' carelessness.¹⁶⁶ A plaintiff taken by surprise by a defendant's conduct who believed, reasonably, that she may proceed safely is held to a lower standard of care.¹⁶⁷

160. *Id.*

161. *Id.* §3-26. ("Broad common sense should be used to judge cause and effect on the facts of each particular case.")

162. *Id.* *Reeves v. Commissioner of Police for the Metropolis* illustrated this aspect of the 1945 Act when the House of Lords held a decedent who committed suicide in police custody contributorily negligent after he had been declared a suicide risk. Although the police had a duty to protect the decedent from himself, the decedent was sane when he killed himself and, thus, had some responsibility for his death. *See Reeves v. Commissioner of Police for the Metropolis*, [1999] 3 W.L.R. 365 (Eng.).

163. CLERK AND LINDSELL, *supra* note 156, §3-37.

164. *Id.*

165. *Id.*

166. *Id.* §3-39.

167. *Id.*

1. The Failure of *Volenti* and Contributory Negligence
Defenses in *Vowles*

The nuances of contributory negligence defenses are particularly important in contact sports cases. A fast-moving game with constant risk of injury presents a host of possible tortfeasors depending on the moment when the injury took place. In a sense, imposing liability under such circumstances is a temporal decision. In *Vowles*, Evans's decision to allow the team captains to proceed with an uncontested scrum occurred apart from the game and, thus, was not subject to a lower standard of care. In eschewing contributory negligence and assumption of risk defenses, the Court broadened the temporal span and deemed Evans's decision the cause-in-fact and proximate cause of Vowles's injuries. Had the Court constricted its analysis to the moment of injury, it could have found cause-in-fact and proximate cause in the captains' decision to engage in a more dangerous game or with the Tondu player's decision to play regardless of his inexperience.

The broadest temporal approach the Court could take would, of course, consider rugby players' decision to engage in an inherently risky game as *volenti non fit injuria*, or assumption of risk. The Nineteenth Century *Smith v. Baker* case declared that "One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."¹⁶⁸ The *Vowles* defendants would have had to prove three things to bring a successful *volenti* defense: first, that Vowles agreed to absolve the Rugby Union from legal responsibility for its negligence, second, that Vowles acted freely and voluntarily, and, third, that Vowles had full knowledge of the risks.

This high threshold makes a defendant's successful use of *volenti* rare and difficult – and perhaps rightfully so. *Volenti non fit injuria* differs from the defense of contributory negligence in that a *volenti* defense denies, rather than apportions, liability and damages. Defendants' reliance on *volenti* defenses has decreased significantly since the 1945 Act's enactment because courts could apportion culpability rather than take an all-or-

168. *Smith v. Baker*, [1891] A.C. 325, 360 (Eng.).

nothing approach to liability and damages.¹⁶⁹ In contact sports like rugby, players are typically taken to consent impliedly to bodily contact occurring within the context of the game.¹⁷⁰ This becomes a murkier question, however, in sports as inherently risky as rugby.

Vowles illuminates this tension between consent and *volenti* defenses. In *Vowles*, the central question was whether Evans had a duty to amateur players and whether Evans breached that duty by not insisting on non-contestable scrums.¹⁷¹ The absence of a strong contributory negligence defense is curious under *Vowles's* circumstances.¹⁷² Evans attempted, unsuccessfully, to balance his duty as guardian of the players with allowing players to compete as heartily as they wished. Evans' post-match notes asserted that "In discussion, I explained to them that the decision was theirs" and that he "did not want them to try to put [Johnson] under undue pressure but appreciated that it was still a contest."¹⁷³ Evans's assessment of the events leading to *Vowles's* injury reveals much about the policy articulated by the *Vowles* court.

A dissenting lower court judge maintained that Evans was not liable because the Llanharan coach and captain improperly "allow[ed] the desire not to forfeit points to override considerations of safety" and that the majority was wrong in holding that Evans breached his duty by not asking Tondu's substitute player whether he was properly trained and experienced.¹⁷⁴ On appeal, after intense scrutiny of the moments leading to *Vowles's* injury, the Court held that there was sufficient evidence to support a judge's finding that Evans was the cause of the accident.¹⁷⁵ The appellate court found Evans "the" cause, rather than "a" cause, of *Vowles's* injury, yet a glance through the events leading to the ill-fated scrum reveals a range of po-

169. CLERK AND LINDSELL, *supra* note 156, §3-72.

170. *Id.* §3-97.

171. *Vowles*, E.C.C. 240 at 255.

172. Determining referee liability is a case-by-case endeavor in which "full account must be taken of the factual context in which a referee exercises his functions, and he could not properly be held liable for errors of judgment, oversights, or lapses of which any referee might be guilty...The threshold of liability is a high one. It will not easily be crossed." *Id.* at 250.

173. *Id.* at 253.

174. *Id.*

175. *Id.*

tential tortfeasors.¹⁷⁶ Indeed, the appellate court closes its opinion by pointing out that serious injuries are among the game's risks that "those who play rugby believe [are] worth taking."¹⁷⁷

Why would the court acknowledge strong potential for contributory negligence and assumption of risk defenses and still hold Evans solely responsible? A torts scholar in England asked the same question and considered the court's refusal to consider negligence on the part of Vowles, his team captain, and inexperienced teammate "extraordinarily paternal" since participants in the contest were consenting adults.¹⁷⁸ The same scholar analyzes Vowles's potential liability through the lens of employment law and explores holding Vowles partially liable because he had free will and chose to engage in what he knew to be dangerous play and, thus, consented to his injury.¹⁷⁹ Conversely, the scholar considers the possibility of Vowles not having the option to consent because of the intense pressure he would have felt to engage in a contested scrum to avoid forfeiting points.¹⁸⁰

A brief comparative glance at the success and failure of similar defenses in the U.S. where, historically, sports participants assumed all inherent risks. U.S. courts have not been as willing to hold amateur referees liable. Because this Note tests the viability of U.S. solutions to referee liability, the next section will address assumption of risk and contributory negligence defenses in the U.S.

176. *Id.*

177. *Id.* at 259-60.

178. Charlish, *supra* note 1, at 85. "The fact that in the case in hand, it was the players themselves who expressly chose the option of continuing the game with contested scrums, despite knowing that one of the front row forwards was inexperienced in the position is surely the issue of most interest arising from this case rather than the extension of referee's liability to adult rugby union." *Id.* Charlish also raised the provocative point that the game rules refusing points for an uncontested scrum could have provided another ground for liability because "It is clear that this rule had an effect on the decision by the Llanharan players to reject the referee's offer of uncontested scrums." *Id.*

179. *Id.* For examples of the success and failure of the volenti defense see *Baker*, [1891] A.C. at 325 (defense failed in case where worker was injured when stone fell on him from a crane after his employer told him to work under the crane) and *ICI v. Shatwell* [1965] A.C. 656 (defense successful where employee disobeyed employer's orders to finish work more quickly and subsequently sustained injury).

180. Charlish, *supra* note 1, at 87.

B. Assumption of Risk and Contributory Negligence in the U.S.

The defenses of *volenti non fit injuria*, assumption of risk, and contributory negligence in the U.K. and U.S. are, for the most part, similar historically and practically. Historically, a U.S. plaintiff's contributory negligence was a complete defense which barred a careless plaintiff from recovery.¹⁸¹ Modern comparative fault regimes permit a careless plaintiff's recovery if a defendant's harm was intentional, wanton, or reckless, if the defendant had the last clear chance to avoid harm, and if the defendant was duty-bound to protect the plaintiff from his or her own risky behavior.¹⁸² Comparative fault reduces a careless plaintiff's recovery in proportion to her culpability and is followed by most U.S. states as well as the U.K., Australia, Canada, and New Zealand.¹⁸³

Like *volenti non fit injuria*, assumption of risk in the U.S. bears a strong resemblance to, and is invoked far less often than, contributory negligence.¹⁸⁴ Traditionally, plaintiffs who assumed the risk of a defendant's negligence could not recover, regardless of age.¹⁸⁵ Courts in the U.S. distinguish between con-

181. DAN B. DOBBS, *THE LAW OF TORTS* 494 (2000).

182. *Id.* at 498.

183. *Id.* at 504. If a plaintiff's damages are estimated to be \$10,000 and the plaintiff is 25% at fault for her injuries, then the plaintiff recovers \$7,500. *See id.* Historically, the same plaintiff would not have been able to recover any of her damages. *Id.* at 498. There are variations of systems of comparative fault in the U.S., however, so there is not a systematic national approach to damages. *Id.* at 505. In a pure comparative fault state, a plaintiff is never barred from recovery because of contributory negligence. *Id.* Under modified comparative fault, a plaintiff is barred from recovery if his fault exceeds that of the defendant or if his fault is equal to or exceeds the defendant's. *Id.* In a modified comparative fault state, a plaintiff who is 51% negligent would be barred from recovery. Legislators and commentators differ on their views of which system is more just. *Id.* at 505-06.

184. *Id.* at 534. Cases that were traditionally analyzed under the assumption of risk doctrine are now resolved with comparative fault rules by holding that the defendant had no duty or that the defendant did not breach that duty. *Id.* Assumption of risk is sometimes referred to as *volenti non fit injuria* in the U.S., as well. *Id.* at 535. Scholars and judges hold widely that assumption of risk should be collapsed within comparative fault and abolished entirely as a defense. *See generally* Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 *UCLA L. REV.* 481, 482 (2002).

185. DOBBS, *supra* note 181, at 535. In the Minnesota case *Greaves v. Galchutt*, eleven and twelve-year-old plaintiffs were barred from recovery because

tributory negligence and assumption of risk because the former concerns a plaintiff's carelessness while the latter concerns a plaintiff's risky conduct.¹⁸⁶ Many commentators question this distinction because it does not account for the necessity of a plaintiff's consent to a known risk in raising an assumption of risk defense.¹⁸⁷ Since the 1950's, several states have stopped struggling with the distinction between the two defenses by merging assumed risk into comparative negligence and avoiding the harsh outcome of a plaintiff being barred from recovery when he is determined to have assumed the risk.¹⁸⁸

In the sports context, players historically assumed the risk of all inherent dangers.¹⁸⁹ Courts today typically apply the limited duty rule, which holds players liable to one another only in the event of recklessly or intentionally-inflicted injuries.¹⁹⁰ The limited duty rule posits the negligence of competitive athletes as an inherent sporting risk.¹⁹¹ Under the limited duty rule, even a rule violation does not result in liability per se if such a violation is typical.¹⁹² The limited duty rule requires consent and analysis of the reasonable expectations of the parties involved, which raises questions with rugby injuries where participants' reasonable expectation may include intense physical aggression and force.¹⁹³

In the U.S. and the U.K., assumption of risk, *volenti*, and contributory negligence defenses have become limited. In the U.S., state legislatures and Congress enacted laws protecting volunteer referees from liability as these defenses became less available.

they assumed the risk of a gun being loaded that they thought was unloaded. *See generally* Greaves v. Galchutt, 184 N.W.2d 26 (1971).

186. DOBBS, *supra* note 181, at 536.

187. *Id.*

188. *Id.* at 539.

189. *Id.* at 548.

190. *Id.*

191. *Id.* at 548-49. In the U.S., the limited duty rule has been applied to football, hockey, horseracing, soccer, softball, and informal games. *Id.* at 549. Commentators suggest, however, that the limited duty rule should be confined to professional sports. *See generally* Stephen D. Sugarman, *Assumption of the Risk*, 31 VAL. U. L. REV. 833 (1997).

192. *Id.* at 549.

193. *Id.* at 550.

V. U.S. STATE AND FEDERAL EFFORTS TO LIMIT VOLUNTEER
REFEREE LIABILITY

A. *State Law and the Federal Volunteer Protection Act*

A referee's "amateur" status in the U.S. is a more complicated question than in the U.K. Evans was an "amateur" in the eyes of the *Vowles* court because he was officiating an amateur match. The National Collegiate Athletic Association ("NCAA") defines amateurism as the "clear line of demarcation between college athletics and professional sports."¹⁹⁴ The NCAA's definition pivots on an athlete's non-acceptance of pay or the promise of pay.¹⁹⁵ Beyond collegiate sports, whether an "amateur" referee is an employee differs from state to state for workers compensation purposes.¹⁹⁶ Some states determine a referee's employment status by whether he or she gets paid or by whether the match itself is amateur.¹⁹⁷

State and federal laws limit their applicability to volunteer sports officials and do not address the ambiguity of whether an official is an amateur. Generally, volunteer referees get far less press exposure and recognition than their professional counterparts.¹⁹⁸ In the late 1980's, however, lawsuits aimed at volunteer referees increased significantly¹⁹⁹ and officials began considering their inherent liability.²⁰⁰ The two actions most frequently brought against volunteer officials in the U.S. are

194. National Collegiate Athletic Association Manual, 2002-03, art. 12.01.2. Available at http://www.ncaa.org/library/membership/division_i_manual/2003-4_d1_manual.pdf (last visited June 25, 2004).

195. *Id.* at art. 12.02.3. ("Pay is the receipt of funds, awards, or benefits not permitted by the governing legislation of the Association for participation in athletics.")

196. See Darryll M. Halcomb Lewis, *After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L. J. 249, 254 (1998).

197. *Id.*

198. Parven, *supra* note 131, at 13. See also Tomsho, *More Referees Play Defense - In the Courts*, WALL ST. J. Aug. 11, 1989, at B1.

199. See generally Lewis & Forbes, *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673 (1990).

200. Mel Narol, *Protecting the Rights of Sports Officials*, TRIAL, Jan., 1987, at 65. Interestingly, sports officials in the early 1980's became more common as plaintiffs, bringing suits in contract, libel, and slander. See Mel Narol and Dedepoulos, *Potential Liability: A Guide to the Referee's Rights*, TRIAL, March, 1980, at 42.

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claims in negligence for players' personal injuries and for "bad calls."²⁰¹ While this Note concentrates on personal injury claims, it is interesting to note that courts rarely find for plaintiffs in "bad call" cases, suggesting that courts uphold referee discretion and expertise as an important social policy.²⁰² Courts are not as deferential, however, when referee negligence results in personal injuries.²⁰³ As one official complained, "[w]e're supposed to be out there being impartial arbiters of the game. Now referees spend much of their time thinking about risk awareness."²⁰⁴

In response to officials' fears of liability, many states passed statutes requiring plaintiffs to prove at least gross negligence in suits against volunteer or professional referees.²⁰⁵ Such statutes were enacted because of larger national concerns with declining voluntarism.²⁰⁶ Statutes immunizing, or limiting liability of, volunteers reflected the centrality of voluntarism to recrea-

201. *Id.*

202. Lewis & Forbes, *supra* note 199, at 676. In New York, courts' reluctance to question referees' judgments has a longer history: "In more than one sense, such officials are truly judges of the facts, since they are closer to the actual situation and characters involved, at the time." *Shapiro v. Queens County Jockey Club*, 53 N.Y.S.2d at 135 (1945). "Surely, their immediate reactions and decisions of the questions which arose during the conduct of the sport should receive greater credence and consideration than possibly the remote, subsequent matter-of-fact observation by a court in litigation." *Id.* at 138. *See also Tilleli*, 120 N.Y.S.2d at 698 (boxer's victory revoked after the New York Athletic Commission reviewed referee's challenged records and court held that "...judges and referees possess specialized skills and experience which are essential, because the scoring of a prize fight is not a routine nor mathematical process, but instead one which is influenced by numerous factors.").

203. Parvin, *supra* note 131, at 31.

204. Tomsho, *supra* note 198, at B1.

205. Parvin, *supra* note 131, at 53. Among the earliest statutes was Tennessee's, which immunized officials from suit so long as they were acting within the scope of their responsibilities: "A sports official who administers or supervises a sports event at any level of competition should not be liable to any person or entity in any civil action for damages to a player, participant, or spectators as a result of the sports' official's duties or activities." Tenn. Code Ann. §49-7-2101 (1979).

206. *See generally* Lede E. Dunn, "Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism?, 61 *FORDHAM L. REV.* 451, 452 n.13 (1992) (discusses declining rates of voluntarism).

tional sports in the U.S.²⁰⁷ Despite state legislatures' views that volunteer officials were essential to the success of recreational sports, there are vast inconsistencies among state laws governing voluntarism.²⁰⁸ Some states provide total immunity to volunteer sports officials while others provide qualified immunity.²⁰⁹ Intrastate volunteer liability may vary.²¹⁰ Further, many state laws have internal inconsistencies.²¹¹

These variations, along with scant statutory interpretation, spurred Congress to enact the Federal Volunteer Protection Act ("FVPA"), which sought to safeguard volunteers and non-profit organizations from liability. The FVPA immunizes volunteers from liability who act within the scope of their activities without committing a crime of violence, a hate crime, a sex offense under state law, a civil rights violation, or acting under the influence of drugs or alcohol.²¹² The FVPA also eliminated joint and several liability for non-economic damages²¹³ and limited punitive damages.²¹⁴ Many commentators welcomed Congress's initiative because the FVPA includes a lucid definition of "volunteer."²¹⁵

Most important in light of *Vowles* is the FVPA's focus on declining voluntarism as a national problem which outweighed the competing social policy of compensating injured participants

207. See generally Joseph H. King Jr., *Exculpatory Agreements for Volunteers in Youth Activities – the Alternative to “Nerf” Tiddlywinks*, 53 OHIO ST. L. J. 683, 686-87 (1992) (“It is unthinkable that we could afford to pay for the services currently provided by volunteers.”). For an interesting article arguing against immunity for Little League coaches, see Jamie Brown, *Legislators Strike Out: Volunteer Little League Coaches Should Not Be Immune from Tort Liability*, 7 SETON HALL J. OF SPORT L. 559, 569 (1997).

208. Parvin, *supra* note 131, at 327-28.

209. *Id.* at 327.

210. *Id.* at 326.

211. Kenneth Biedzynski, *The Federal Volunteer Protect Act: Does Congress Want to Play Ball?*, 23 SETON HALL. LEGIS. J. 319 (1999) [hereinafter Biedzynski, *Does Congress Want to Play Ball?*].

212. Federal Volunteer Protection Act of 1997, 42 U.S.C.A. §14503(a)(1) (1997).

213. *Id.*

214. *Id.* §14503(e)(1). Under the FVPA, a plaintiff may not recover punitive damages unless he or she “establishes by clear and convincing evidence that the harm was proximately caused by...willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.” *Id.*

215. Biedzynski, *Does Congress Want to Play Ball?*, *supra* note 211, at 344.

in recreational sports. As one commentator points out, the FVPA may unfairly bar plaintiffs bringing meritorious claims from recovering.²¹⁶ The FVPA and state statutes emphasize the centrality of volunteers to recreational sports in the U.S., yet fail to address the possibility of a decline in sports participation if players are barred from compensation because of a referee's negligence. The Act's blind spot is particularly curious because state and federal legislation is aimed largely at youth sports.²¹⁷

This distinction is important in considering the applicability of U.S. law to referee liability in the *Vowles* context: the stakes for an amateur rugby player with potentially professional aspirations are very different from those in U.S. youth sports.²¹⁸ The performative aspects of rugby in the U.K. are crucial to its commercial success. Conversely, amateur sports in the U.S., outside of the context of college sports, generate far less publicity and revenue.²¹⁹ Individual participants in amateur sports in the U.S. may enjoy a riskier game, but the level of risk does not enhance a participant's national reputation or livelihood. In *Vowles*, rugby was in such a state of flux that a judgment in the WRU's favor would have left Vowles bereft of a potential future in professional rugby after he took risks necessary to securing WRU's fan base.

VI. CONCLUSION

In both the U.S. and the U.K., sports have enormous cultural resonance that exceed the boundaries of the playing field. Referees play a unique role in sports in both nations as they are, presumably, the single entity not invested in which team pre-

216. See generally Henry Cohen, *The Volunteer Protection Act of 1997*, 45 FED. LAW. 40 (1998).

217. See generally Biedzynski, *Is That the Right Call?*, *supra* note 143.

218. See generally Hayden Opie, *The Sport Administrator's Charter: Agar v. Hyde*, 12 SETON HALL LEGIS. J. 199 (2001) (Opie explores alternative motives for the *Agar* court's decision not to hold the IRFB liable, all stemming from international sports bodies' desire to increase spectatorship.).

219. Of course, there have been highly-publicized incidents of violence in youth sports in the U.S. See generally Douglas E. Abrams, *The Challenge Facing Parents and Coaches in Youth Sports: Assuring Children Fun and Equal Opportunity*, 8 VILL. SPORTS & ENT. L. J. 253 (2002). One cannot deny, however, that these skirmishes, though violent, do not approach the magnitude of spectator melees in the U.K. which led, ultimately, to legislation curtailing spectator violence. Football Spectators Act 1989, c. 37 (Eng.).

vails. In contact sports, they are simultaneously participant and spectator, active when they run up and down the field alongside players, yet detached when they make swift, impartial decisions in the midst of intense competition. Whether referees are held to a professional standard of liability, as in *Vowles*, or whether their tort liability is relaxed for public policy reasons under U.S. state law determines who will bear the cost of players' personal injuries.

The WRU's legal team criticized *Vowles* because of its risk to the WRU and, they argued, the Court's designation of the WRU as the appropriate cost-bearer was inappropriate in an amateur context.²²⁰ This distinction between amateurism and professionalism should not, however, determine the standard of care that the WRU and referees must meet. Professionalization placed an enormous amount of pressure on professional and amateur rugby players to win and risk grave injury in the process.²²¹ The WRU's history of shortchanging players and mismanaging teams suggests their historical reluctance to protect players, both amateur and professional, from injury. The fluidity between amateur and professional rugby and the ascent of amateurs to professional status requires a uniform standard of care to protect rugby players at all levels.

Further, since the *Vowles* "windfall," few of the WRU's fears have been realized. For example, no amateur rugby players have sued the WRU successfully since *Vowles*.²²² The WRU's fears of bankruptcy also never came to pass. After *Vowles*, sev-

220. James Pritchard, *Amateur Rugby Could be Crippled by Injury Ruling, Appeal Court Told*, THE WESTERN MAIL, Feb. 25, 2003 ("...Mr. Leighton-Williams started the appeal against...[the] ruling...in [the Court's] judgment [they] concluded that as the game was funded by gate receipts and television revenues, there was no reason the WRU could not pay increased premiums to insure their referees. But for second team rugby at this level, I have to say there is not a lot by way of gate receipts.").

221. *Id.*

222. In the recent *Allport v. Wilbraham* case heard in the Birmingham County Court in December of 2003, a catastrophically injured amateur rugby player failed in his claim against the referee, prompting the RFU to note that "Notwithstanding the high profile decisions of Smolden and Vowles, these claims remain difficult to prove and with the appropriate evidence a successful defence can be maintained." *Allport v. Wilbraham* is unreported, but details about the case are available at the Rugby Football Union's website at http://www.rfu.com/index.cfm/fuseaction/RFUHome.Refereeing_Detail/StoryID/5522 (last visited June 27, 2004).

eral Welsh junior games were cancelled because referees hesitated to officiate for fear of being sued.²²³ Interestingly, parents' fears of their children playing a violent game also contributed to the cancellations.²²⁴ As a result, the Sports Council for Wales provided grants for referee training.²²⁵ To date, the WRU has increased the training of nearly 800 referees.²²⁶ One commentator regards these post-*Vowles* measures as a "boost for Welsh rugby" rather than the death knell the WRU heralded.²²⁷

Though amateur players like *Vowles* still shoulder a heavy burden, the WRU, along with other rugby unions, has taken significant measures to shield themselves from liability by insuring player safety.²²⁸ Unlike the FVPA in the United States, Wales has managed, in the wake of *Vowles*, to support voluntarism without barring amateur rugby players from suing in tort. Such organizational nuances mean that amateur British rugby is not amenable, at present, to U.S. legislative solutions. Although voluntarism is a concern in Wales, the nation's approach to resolving this conundrum has been to insure player safety and referee training rather than simply to shield amateur refe-

223. After *Vowles*, many junior games in Wales were cancelled because referees hesitated to officiate in a hostile legal climate. S. Thomas, *Litigation Fear Brings Shortage of Refs*, THE WESTERN MAIL, Jan. 15, 2003 ("Teachers who voluntarily referee school matches at all age groups up to second-year sixth levels are becoming increasingly loathe to officiate – such is their concern they may be open to increasing litigation."). Evans himself vowed never to referee again after the House of Lords denied the WRU's appeal. *Vowles Official: I'll Never Referee Again*, THE WESTERN MAIL, Aug. 1, 2003 ("I would never pick up a whistle again. I wouldn't want to put myself or my family through this again.").

224. Thomas, *supra* note 223 ("Parents, too, are becoming anxious and are asking themselves if they should let their sons play a game of sometimes violent contact.").

225. *Id.* ("With the WRU being more than £73 m. in debt and strapped for cash, the SCW agreed to fund the training programme to the tune of £39,600.").

226. *Id.*

227. *Id.* (Rob Yeman, the WRU's referee director noted that "For many years, recruitment and retention of referees has been one of our biggest problems. There was a lot of concern with the verdict in the *Vowles* case. But now we can ensure referees are covered by the WRU umbrella.").

228. The Irish RFU ordered passive, rather than contested, scrums after *Vowles*. See *Passive Scrums Order for Ireland*, THE WESTERN MAIL, Mar. 14, 2003.

rees and organizations from liability.²²⁹ At this stage of professionalization, the WRU is the most appropriate bearer of injured players' costs. Immunizing volunteer referees from suit would leave injured players little recourse while permitting the WRU to reap the financial benefits of the spectacle of competitive, aggressive rugby play.

In this sense, contrary to public outcry in both the U.S. and U.K., the tort system benefited all parties in the wake of *Vowles*. At this pivotal moment in Welsh rugby and national history, *Vowles* provides the most just approach to determining compensation for gravely injured amateur athletes.

Erin Elizabeth McMurray*

229. The Sports Council and Wales's Director of National Development noted that

The Sports Council is committed to supporting sports volunteers in Wales. They encourage young people, and others, to take part in sport. We are almost entirely dependent on volunteers. We were concerned a number of junior fixtures had to be cancelled at the end of last season, so we looked at the best way to increase the number of qualified referees as soon as possible."

Andy Howell, *Council Boost for Referees' Training*, THE WESTERN MAIL, Sept. 5, 2003.

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ISRAEL'S CONFLICTED EXISTENCE AS A JEWISH DEMOCRATIC STATE: STRIKING THE PROPER BALANCE UNDER THE CITIZENSHIP AND ENTRY INTO ISRAEL LAW

I. INTRODUCTION

States once had unfettered discretion over whom may become their citizens. That discretion was thought to be unfettered because it was regarded as an element of sovereignty. Indeed, it was not uncommon for States to exercise it even by excluding foreigners on the basis of race, color, or national origin.

The past fifty years have changed all that. International law now limits a State's discretion over matters of citizenship. The growth and recognition of democracy and human rights since World War II obligates States to guarantee equal, fundamental rights to citizens and non-citizens alike, without distinction on the grounds of race, color, religion, or national origin. Hence, democratic¹ States have not typically been founded or predicated upon maintaining a certain racial or religious character; to do so externally by denying entry into the State on grounds of race or ethnicity is no more legitimate than implementing an internal system of systematic racial discrimination such as apartheid.

Israel, thus occupies an anomalous position among democratic states. On May 15, 1948, the State of Israel was founded on two fundamental yet irreconcilable principles. It was established as a Jewish State which, as held by Israel's highest court, embodied "three tenets: 1) the right of return, i.e., the right of every Jew to immigrate to Israel; 2) the maintenance of a Jewish majority in the State, and 3) a connection between the Dias-

1. The term "democracy" is defined as a "[g]overnment by the people, exercised either directly or through elected representatives" and "the principles of social equality and respect for the individual within the community." THE AMERICAN HERITAGE DICTIONARY 380 (2d College ed. 1982).

pora and the State of Israel.”² Yet, Israel was also founded as a democratic State which aimed to ensure “complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.”³ This paradoxical combination of commitments to a racial and religious character and to democracy and human rights initially went unquestioned, in part, because of the resurgence of the Zionist movement after the Nazi holocaust, and, in part, because of the Arab-Israeli conflict. Israel has thus, for its relatively brief existence, tried to pursue these irreconcilable goals.

The recent enactment of the Citizenship and Entry into Israel Law, 5763-2003 was Israel’s attempt to balance the Jewish character of Israel against the democratic principles upon which it was founded. The law denies Palestinians in the Occupied Territories Israeli citizenship and residency. It also prohibits Palestinian spouses of Israeli citizens from obtaining Israeli citizenship or residency, thus separating inter-racially married couples or those contemplating marriage. In addition to stopping “terrorism,” the purpose of the law is to preserve the Jewish majority in Israel by preventing the influx of Palestinians from the Occupied Territories. It therefore seeks to serve one of Israel’s defining principles while contradicting the other. This Note will argue that the Citizenship and Entry into Israel Law represents Israel’s inability to exist as a Jewish democratic State in conformance with its human rights obligations.

Part II of this Note will survey several Israeli citizenship laws which constitute Israel’s citizenship policy. Part III will recount the evolution of Israel’s citizenship policy and its effects upon Palestinians residing in the Occupied Territories. Part IV

2. See David Kretzmer, *Constitutional Law*, in INTRODUCTION TO THE LAW OF ISRAEL 39, 42 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995) (citing Ben Shalom v. Central Elections Committee for the Twelfth Knesset, 43(4) P.D. 221, 248 (1989)). It is often argued that “Israel is Jewish only in the sense that England is English, so that those who (vainly) insist on the facts are uniquely rejecting the rights of Jewish nationalism...” NOAM CHOMSKY, FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL, & THE PALESTINIANS 157 (Updated ed., 1999) [hereinafter CHOMSKY, FATEFUL TRIANGLE]. However, this argument is flawed, since a “citizen of England is English, but a citizen of Israel may not be Jewish,” a situation described by Professor Chomsky as “a non-trivial fact, much obscured in deceptive rhetoric.” *Id.* (footnote omitted).

3. The Declaration of the Establishment of the State of Israel, 5708-1948, 1 L.S.I. 3 (1948).

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will examine the level of discretion accorded to the State in devising its own citizenship policy and the possible limitations placed upon the State by international law. Part V will analyze the legality of the Citizenship and Entry into Israel Law under international human rights law and Part VI will conclude the Note with some possible solutions that may be implemented to bring Israel into conformance with its international legal obligations.

II. THE BIRTH OF ISRAEL: THE LAW OF RETURN AND THE NATIONALITY LAW

Israel's citizenship policy is based on two pieces of legislation, the Law of Return, 5710-1950 and the Nationality Law, 5712-1952.⁴ In a statement by Prime Minister David Ben-Gurion to the Knesset, Israel's parliament, before the passage of the two laws, he stated that:

The Law of Return and the Nationality Law which are before you are closely connected and have a common ideological basis, that derives from the historical uniqueness of the State of Israel, a uniqueness that relates to the past and the future.... These two laws determine the special character and purpose of the State of Israel which carries the message of the redemption of Israel....⁵

A. *The Law of Return*

The Law of Return grants "every Jew ... the right to come to [Israel] as an *oleh*."⁶ The status of an *oleh* is granted to any Jew

4. Law of Return, 5710-1950, 1 L.S.I. 114 (1949-1950); Nationality Law, 5712-1952, 6 L.S.I. 50 (1951-1952).

5. DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 31 n.3 (1990) (quoting D.K. (1950) 2036-37). The "historical uniqueness" Prime Minister Ben-Gurion speech was not discovered until 1942, the year in which the Zionist movement was "officially committed to the establishment of a Jewish State." CHOMSKY, *FATEFUL TRIANGLE*, *supra* note 2, at 160. Indeed, prior to that time, "Prime Minister Ben-Gurion and others declared that they would never agree to a Jewish state, 'which would eventually mean Jewish domination of Arabs in Palestine.'" *Id.* (quoting NOAM CHOMSKY, *TOWARDS A NEW COLD WAR* 439 (1982)). These concerns, however, were "reduced to a minority" in the midst of World War II and the Nazi holocaust. *Id.*

6. Law of Return § 1, 5710-1950, 1 L.S.I. 114. "*Oleh*" as defined in the Law of Return "means a Jew immigrating, into Israel." *Id.* While the definition of an *oleh* does not make a direct reference to a right of citizenship, it will

who immigrated to Israel prior to 1950 and any Jew who was born in Israel, before or after 1950.⁷ A 1970 amendment to the Law of Return liberalized the immigration policy in Israel by conferring the rights of an *oleh* to “a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew.”⁸ However, in keeping with the founding principles of Israel as a Jewish state, “a person who has been a Jew and has *voluntarily* changed his religion” is disallowed from obtaining citizenship in Israel.⁹ The Law of Return is often viewed “as a fundamental principle of the State of Israel, possibly even its very *raison d’etre* as a Jewish state.”¹⁰

be seen below that attaining the status of an *oleh* greatly enhances, if not conclusively establishes the ability of an individual to become an Israeli citizen under the closely related Nationality Law. *See infra* text accompanying note 13.

7. Law of Return § 4, 5710-1950, 1 L.S.I. 114.

8. Law of Return (Amendment No. 2) § 1, 5730-1970, 24 L.S.I. 28 (1969-1970) (amending Law of Return, 5710-1950, 1 L.S.I. 114 (1949-1950)). Since 1995, the Ministry of Interior has narrowly interpreted section 4(A) in its application to non-Jewish spouses of Israeli nationals:

Under the new interpretation, the Law of Return will not ... apply to the Non-Jewish spouse of a person who already is an Israeli national, so that he or she will no longer receive the benefits of a Jewish new immigrant, including the right to automatically acquire Israeli citizenship.

Thus, the Ministry of Interior no longer favors Jewish Israeli nationals by automatically granting a citizenship to their foreign national spouses. At present, the foreign spouses of persons who are already Israeli national, whether Jewish or Non-Jewish may attain Israeli nationality by way of naturalization.

Second Periodic Report of Israel under article 40 of the Covenant, U.N. Hum. Rts. Comm., 66th Sess., ¶17, at 7, U.N. Doc. CCPR/C/ISR/2001/2 (2001), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase> [hereinafter 2001 Israel ICCPR Report]. It is notable that the 1970 Amendment to the Law of Return introduced, for the first time, a statutory definition of the term “Jew” as “a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.” *Id.*

9. *Id.* (emphasis added).

10. *See* KRETZMER, *supra* note 5, at 36. Several other fundamental Israeli laws such as the Declaration of the Establishment of the State of Israel, 5708-1948, and the World Zionist Organisation – Jewish Agency (Status) Law, 5713-1952, also reaffirm the principle that Israel is a state created for the Jewish people where “[t]he commitment to Jewish immigration [is] the function of [Israel].” *See id.* at 32, n.7, 45 n.5; *see also* ARIEL BIN-NUN, THE LAW OF THE STATE OF ISRAEL 56 (1990) (stating that “[t]he unconditional conferral

2004] *CITIZENSHIP AND ENTRY INTO ISRAEL LAW* 1349*B. The Nationality Law*

The Nationality Law¹¹ passed two years after the Law of Return, expands on the requirements for obtaining citizenship in Israel for Jews and non-Jews.¹² In particular, section 2 of the Nationality Law automatically grants an *oleh*, as deemed under the Law of Return, the right to Israeli citizenship by return.¹³ However, non-Jews generally cannot acquire citizenship by return and can only do so by residence, birth or naturalization.¹⁴

upon every Jew, everywhere, of the right to immigrate is a peculiarity of the Israeli Constitution and virtually unparalleled in other rule-of-law states... The Zionist idea of the State and the special circumstances of its establishment prompted the lawmaker to promulgate [the Nationality Law].”).

11. The meanings of both “nationality” and “citizenship” have been distinguished among commentators. See BIN-NUN, *supra* note 10, at 40 n.15 (distinguishing “citizenship” from “nationality” in which the former refers to the status of “Israeli” while the latter refers to a “Jew[], Arab, Druze, Samaritan, etc.”); ARYEH GREENFIELD, *ENTRY, RESIDENCE, AND CITIZENSHIP 2* (1996) (distinguishing “nationality” as carrying an “ethnic rather than legal connotation” which is more accurately reflected by the terms “citizenship”); Norman Bentwich, *Nationality in Mandated Territories Detached From Turkey*, 7 BRIT. Y.B. INT’L L. 97, 102 (1926) (HeinOnline, Brooklyn Law School Library) (differentiating between “citizenship” which describes one’s “allegiance to the state” and “nationality” which is “a matter of race and religion”). For the purposes of this Note the terms “nationality” and “citizenship” will be used interchangeably, defined as “[a person’s] quality of being a subject of a certain state and therefore its citizen.” P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 6* (Sijthoff & Noordhoff International Publishers B.V., 1979) (1956) [hereinafter WEIS, *STATELESSNESS*] (quoting L.V. OPPENHEIM, *INTERNATIONAL LAW 642–43* (8th ed. 1955)). The primary purpose of using the two terms interchangeably is to adhere to the differing official English translations of the same terms provided by the Israeli Government. For example, the Nationality Law as translated officially in the Laws of the State of Israel (L.S.I.) is called the “Nationality Law” while the Knesset has recently referred to the same law as the “Citizenship Law.” See *Citizenship and Entry into Israel Law* (temporary provision) § 1, 5763-2003, at http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm (unofficial translation) (last visited Apr. 11, 2004).

12. See generally Nationality Law, 5712-1952, 6 L.S.I. 50.

13. See *id.* § 2; see also KRETZMER, *supra* note 5, at 36.

14. See Nationality Law §§ 3–5, 5712-1952, 6 L.S.I., at 51. Sections 3 and 5, which govern the conferral of citizenship vis-à-vis residence and naturalization respectively, contain various criteria that must *all* be met before a non-Jew is allowed to obtain Israeli citizenship. *Id.* This is a marked difference from the ability of Jews to automatically obtain citizenship by way of return without having to satisfy any such conditions. *Id.* § 2. See also KRETZMER, *supra* note 5, at 36. The discriminatory treatment between Jews and non-

While acquiring citizenship by naturalization is difficult due to the requisite criteria, which must all be met in addition to its discretionary nature, the Nationality Law provides an alternative avenue for non-Jewish spouses to obtain citizenship in Israel as a means of facilitating family unification. Section 7 of the Nationality Law allows for a “spouse of a person who is an Israel national...[to] obtain Israel nationality by naturalization ...even if he does *not* meet the requirements [otherwise required for obtaining Israeli citizenship by naturalization].”¹⁵

The legislation governing Israeli citizenship policy, namely the Law of Return and the Nationality Law, overtly discriminates¹⁶ between Jews and non-Jews.¹⁷ However, a non-Jew,

Jews in granting a right of return to Jews has been alleviated somewhat by section 4 of the Nationality Law in which non-Jews as well as Jews born in or out of Israel to a parent who is an Israeli citizen may obtain citizenship by birth. See Nationality (Amendment No. 2) Law § 4(A), 5728-1968, 22 L.S.I. 241, 242 (1967-1968) (amending Nationality Law §4, 5712-1952, 6 L.S.I. 50 (1951-1952)). Thus, as Kretzmer rightly concludes, “there is no discrimination in the method of acquiring citizenship for Jews and non-Jews born to parents one of whom is a citizen,” and “the real ‘citizenship beneficiaries’ of section 4(a)(1) regarding citizenship by birth are Arabs born to parents one of whom is an Israeli citizen.” KRETZMER, *supra* note 5, at 39. However, for a Jew born in Israel, the right of return as a means of attaining Israeli citizenship still remains if obtaining citizenship by birth is not a viable alternative. *Id.*

15. See Nationality Law § 7, 6 L.S.I., at 52 (emphasis added). The naturalization process under section 5 of the Nationality Law requires compliance with the following six conditions before Israel citizenship is granted:

- (1) he is in Israel;
- (2) he has been in Israel for three out of the five years that preceded the submission of his application;
- (3) he is entitled to reside in Israel permanently;
- (4) he has settled or intends to settle in Israel;
- (5) he has some knowledge of the Hebrew language;
- (6) he renounced his prior citizenship or proved that he will cease to be a foreign citizen when he becomes an Israel citizen.

Id. §§ 5(a)(1)-(6).

16. The characterization of the Nationality Law and the Law of Return as overtly discriminating between Jews and non-Jews is not meant to denote a sense of illegality in the present context but rather to describe a legally significant distinction premised upon Israel’s foundation as a Jewish state. See W. A. McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT’L. L. 177, 177-78 (1970) (distinguishing between

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while subject to more restrictive conditions than those applied to a Jewish immigrant, is still afforded access to the legal means of attaining Israeli citizenship.¹⁸ Whether, as a practical matter, Israeli authorities actually confer citizenship on non-Jews, particularly Palestinians born or residing in the West Bank and Gaza, is not clear since the majority of these Palestinians must be naturalized and the Interior Minister has discretionary authority in granting citizenship to naturalized individuals.¹⁹ While the means by which one obtains citizenship in Israel, i.e., return, residence, birth, or naturalization, has no

the several meanings attached to “discrimination.” One being a neutral term meaning “distinction” or “differentiation” and the other being more restrictive term denoting “an unfair, improper, unjustifiable or arbitrary distinction,” the definition which is commonly employed in the international law context.)

17. See KRETZMER, *supra* note 5, at 36 (“The right given in the Law of Return to Jews to immigrate to Israel is one of the only cases in which an *overt distinction* is made between the rights of Jews and non-Jews.”) (emphasis added), 89 (“[The Law of Return and the Nationality Law] are the only instances of legislation that expressly uses the criterion of ‘Jew’ as a condition for a right or privilege.”); see also sources cited *supra* note 10. From a domestic perspective, the constitutional principle of equality may be infringed by the will of the Knesset without adverse legal consequences, as Israel adheres to the doctrine of parliamentary supremacy:

As the Israeli parliament and embodiment of its sovereignty, the Knesset is supreme over the other branches of the State. On the legislative level, this supremacy means that the will of the Knesset, under the cloak of law, obligates all other authorities of the State. It also indicates that the source of power of the other branches stems, directly or indirectly, from the Knesset.

Allen Zysblat, *The System of Government*, in PUBLIC LAW IN ISRAEL 1, 6 (Itzhak Zamir & Allen Zysblat eds., 1996). See also KRETZMER, *supra* note 5, at 89. An official state of emergency also provides the Knesset and Government with substantial authority in enacting restrictive measures. See text accompanying *infra* note 164.

18. See KRETZMER, *supra* note 5, at 40 (noting that “today the law grants the *right* of citizenship to virtually all Arab residents of [Israel].”) (emphasis added).

19. See Nationality Law § 5(b), 5712-1952, 6 L.S.I., at 52 (“Where a person has applied for naturalisation, and he meets the requirements of [naturalisation in subsection (a)], the Minister of the Interior, *if he thinks fit to do so*, shall grant him Israel nationality....”) (emphasis added). See also Ammon Rubinstein, *Citizenship*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE 275, 281 (Alon Kaplan & Paul Ogden eds., 1996) (“The number of cases in which the Minister [of Interior] is prepared to grant citizenship through naturalization is very small and it is only in exceptional cases that the request is granted.”).

bearing on the rights which may be exercised such as the right to vote or seek employment in civil service,²⁰ several fundamental Israeli laws only confer certain benefits upon Jews who obtain Israeli citizenship automatically by virtue of their status as an *oleh*.²¹

This unique citizenship policy reflects Israel's commitment in establishing a State for the Jewish people. It is evident, however, that as of result of this commitment, Israel's foundation of democracy, guaranteeing equal, fundamental rights to citizens and non-citizens, has begun to erode. And as the non-Jewish population continues to grow, externally (immigration) or internally (birth), Israel will need to adopt increasingly restrictive measures to preserve its Jewish identity, bringing into question the viability of Israel as a democratic state.

III. EVOLUTION OF ISRAEL'S CITIZENSHIP POLICY

On July 31, 2003 the Knesset passed the Citizenship and Entry into Israel Law, 5763-2003²² which severely restricted the ability of Palestinians to obtain citizenship or residence in Israel.²³ The Citizenship and Entry into Israel Law codified the

20. See Rubinstein, *supra* note 19, at 283–86; see also BIN-NUN, *supra* note 10, at 41 (“The right to vote for and be elected to the Knesset, and employment in the civil service, are reserved to citizens.”).

21. See generally Basic Law: Israel Lands, 5720-1960, 14 L.S.I. 48 (1960) and World Zionist Organisation – Jewish Agency (Status) Law, 5713-1952, 7 L.S.I. 3 (1952-1953). Kretzmer also reports of other instances of *de facto* as well as *de jure* discriminatory policies in which rights or benefits are conferred depending on whether an individual is Jewish or non-Jewish, the former being the beneficiaries of rights solely because of their religious faith. See generally KRETZMER, *supra* note 5, at 89–134; see also CHOMSKY, FATEFUL TRIANGLE, *supra* note 2, at 157–60.

22. See Citizenship and Entry into Israel Law (temporary provision) § 1, 5763-2003, at http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm (unofficial translation) (last visited Apr. 11, 2004).

23. While much of the discussion on the beneficiaries of Israel's citizenship policy has focused on the dichotomy between Jews and non-Jews, the Citizenship and Entry into Israel Law establishes an additional classification scheme by delineating certain “areas,” collectively known as the Occupied Territories (Gaza and the West Bank), in which inhabitants thereof are prohibited from citizenship or residency in Israel. See *infra* text accompanying note 67.

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restrictive immigration policy which had been implemented in Government Decision 1813 in May 2002.²⁴

A. *The Beginnings of the Freeze on Family Unification Requests and Its Justifications*

The change in Israel's immigration and citizenship policy implemented by Minister of the Interior, Eli Yishai since May 2002, effectively "[froze] all family unification requests involving Palestinians...."²⁵ The freeze created two classifications of

24. See Draft Bill of Proposed Nationality and Entry into Israel (Temporary Order) Law, Jun. 4, 2003, Reshumot (2003), available at http://www.adalah.org/eng/features/famuni/2003family_uni_prop_bill_rev.pdf (last visited Apr. 11, 2004) (explaining that the proposed bill is enacted "in accordance with Government Decision 1813, of 12 May 2002" to limit the granting of residents of designated areas citizenship in Israel). The Government, which may be characterized as the executive branch in Israel's governmental system, is authorized to enact "subsidiary legislation." See Asher Maoz, *The Institutional Organization of the Israeli Legal System*, in INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 2, at 11, 22–23. The Government's authority to promulgate legislation stems from Israel's relatively liberal adherence to the doctrine of separation of powers. See *id.* at 23 ("[T]he most serious deviation from the doctrine of separation of powers concerns the authority that is vested in the ministers to promulgate emergency regulations, which may alter, suspend, or modify any law of the Knesset."). The overriding oversight mechanism is the principle of legality which is an "extension of the rule of law" where "the Government must base its actions on a law authorizing it to act, or its activities will not have the force of law." Zysblat, *supra* note 17, at 8.

25. Haim Shapiro, *Yishai Freezes Arab Naturalization Requests*, JERUSALEM POST, May 13, 2002, at 1, available at LEXIS, News Library, Jpost File; see also Peter Beaumont, *Israel Fears Wave of Immigrants*, THE OBSERVER, June 16, 2002, at 19, available at LEXIS, News Library, Obsrvr File; Matthew Kalman, *Why Isn't My Baba at Home?*, TIMES (London), Sept. 2, 2002, at 8, available at LEXIS, News Library, Ttimes File; Davan Maharaj, *Israeli Ruling Puts a Freeze on Family Ties; Mideast: The Decision, Called Racist By Some, Keeps Palestinians from Israeli Arab Spouses*, L.A. TIMES, May 24, 2002, at 3, available at LEXIS, News Library, Lat File. It should be noted that the Government has, for some time prior to its May 2002 decision, been denying a substantial number of Palestinian applications seeking residency permits for family reunification purposes. See Glenn Frankel, *Israel Assailed for Family Separation; Palestinians Barred From Joining Relatives in Occupied Areas*, WASH. POST, Feb. 8, 1987, at A25, available at LEXIS, News Library, Wpost File; *Israeli Visa Policy on Arabs Keeps Families Apart*, N.Y. TIMES, July 13, 1987, at A11, available at LEXIS, News Library, Nyt File ("In recent years, Israeli military officials said only hundreds out of thousands of applications [for family reunification] submitted annually had been ap-

Israelis married to non-Israelis adversely affected by the government's policy.²⁶ The first group consisted of "non-Israelis (mainly Palestinians) who have received a permit to live in Israel and [were] in the midst of a two-phase naturalization process lasting four-and-a-half years."²⁷ As a result of the freeze, applications currently pending in the naturalization process would be frozen, but the applicants would not be forced to leave Israel.²⁸ The second group consisted of "non-Israelis who have married Israelis but had not applied for family unification before the" May 2002 freeze of applications.²⁹ Those constituting the second group were barred from applying for family unification and were considered illegal residents who had to leave Israel regardless of the whereabouts of their families.³⁰

In justifying the restrictive measure Israel claimed that "some 100,000 Palestinians have fraudulently received [Israeli] citizenship, and tens of thousands of others have attempted to do so."³¹ Particularly, the freeze was allegedly aimed at pre-

proved."); Doug Struck, *Israeli Shift Breaks Up Families; Non-Jewish Spouses Told To Leave And Apply For Immigration*, WASH. POST, Mar. 9, 1998, at A16, available at LEXIS, News Library, Wpost File. The systematic expulsion of Palestinians from the Occupied Territories, resulting in the separation of families, is also a long-standing practice. See, e.g., Jackson Diehl, *Israeli Officials Announce Easing of Rule for Residing in Territories; Policy of Expelling Spouses, Children Had Drawn Criticism*, WASH. POST, June, 7, 1990, at A30, available at LEXIS, News Library, Wpost File; Jackson Diehl, *Israel Said To Be Expelling Palestinians; About 20 Women Ordered To Leave Occupied Land, Groups Report*, WASH. POST, Aug. 15, 1991, at A37, available at LEXIS, News Library, Wpost; Jackson Diehl, *'Non-Resident' Palestinians Forced Out; Rights Groups Assail Deportation As Being Politically Motivated*, WASH. POST, Jan. 30, 1990, at A1, available at LEXIS, News Library, Wpost File.

26. David Izenberg, *Court Hears Petitions Against Palestinian Naturalization Freeze*, JERUSALEM POST, July 18, 2003, at 6A, available at LEXIS, News Library, Jpost File.

27. *Id.* For an in-depth look at this four-year process, see Brief for Petitioner para. 40, at 13–14, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03).

28. Izenberg, *supra* note 26.

29. *Id.*

30. *Id.*

31. Shapiro, *supra* note 25 (statement by Herzl Gedj, Director of the Interior Ministry's Population Registry); see also Izenberg, *supra* note 26 (according to a Ministry of Justice attorney "after the signing of the [Oslo Accords in 1993], when Israel began to impose regular closures on the disputed territories and import foreign workers, Palestinians began to value citizenship,

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venting a situation in which “a Palestinian marries an Israeli, brings in children from a previous marriage, then fictitiously divorces the Israeli and brings in another Palestinian spouse.”³² In addition, the Interior Minister justified the decision by citing to 1) demographic, 2) security, and 3) economic concerns.³³

1. The Demographic Justification: Maintaining a Jewish Majority

There is a growing concern in Israel that its Jewish majority may become a Jewish minority within thirty years.³⁴ This concern is compounded by claims of “a right of return” to areas of Israel from which Palestinians were displaced during the Arab-Israeli conflict in 1948 and 1967.³⁵ Israel has consistently rejected such claims.³⁶ It is feared that “allowing a ‘right of return’ for Arabs would amount to the suicidal destruction of Israel.”³⁷ Minister of the Interior Yishai confirmed the demographic concerns of the Israeli community, stating that it may be a “deliberate policy on the part of [Yasser Arafat’s] Palestinian Authority, to change in a sophisticated way the demographic structure of Israel” by “[realizing] ‘the right of return’ through the back door [of family unification].”³⁸

which allowed them to receive [various benefits],” thus resulting in many sham marriages between Israelis and Palestinians since 1993).

32. Shapiro, *supra* note 25.

33. See *id.* (statement by Interior Minister Eli Yishai) (“The [freeze] is motivated by demography, security, and economics in equal measure,” in addition to the corresponding concerns of “the increasing number of Palestinians becoming Israelis, that this population could become a base for terrorism, and about the increasing cost of payments to Palestinian families.”).

34. See Beaumont, *supra* note 25.

35. See John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT’L L. J. 171, 173 (1998) (“Palestinians were displaced from their home areas at various times beginning in 1948, with two major episodes of hostilities marking the greatest periods of Palestinian flight in 1948 and 1967.”) [hereinafter Quigley, *Right of Return*].

36. See *id.* at 184–93 (describing Israel’s justifications for its non-conformance with the U.N. General Assembly Resolution 194 which explicitly recognized “‘that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date...’”) (quoting G.A. Res. 194, U.N. GAOR, 3d Sess., pt. 1, ¶ 11, at 24, U.N. Doc. A/810 (1948)).

37. See Maharaj, *supra* note 25.

38. *Id.*

The potential displacement of Israel's Jewish majority has been viewed, from a legal perspective, as a security threat to the State.³⁹ Classified as such, Israel would have greater flexibility in complying with its international legal obligations, limiting the exercise of human rights to preserve national security.⁴⁰ However, a national security justification based primarily on demographic concerns necessarily contravenes principles of non-discrimination – a non-derogable obligation in international human rights law.⁴¹ Moreover, international humanitarian law requires that any policies directed at areas under military occupation be enacted for purposes of terminating such occupation rather than prolonging it.⁴² Thus, Israel's demographic justification for its “freeze” is contrary to international law.

2. The Security Justification: Saving the Lives of Israelis

On March 31, 2002, a suicide bomber attacked a restaurant in Haifa, resulting in fifteen deaths.⁴³ It was later discovered that the suicide bomber had been granted an Israeli residence permit because his mother was married to an Israeli national.⁴⁴

39. Quigley, *Right of Return*, *supra* note 35, at 200 n.163 (quoting Kurt René Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 613 (1978)) (“[I]t can fairly be stated that the return of potentially some one and one-half million Palestinians of doubtful allegiance to a state whose population itself numbers only somewhat more than three million is as valid a threat to that state's ‘general welfare’ as there is likely to exist.”).

40. *See id.* (citing as an example, Article 29 of the Universal Declaration which provides a State with authority to limit the applications of certain human rights provisions to meet the needs of national welfare).

41. *See* text accompanying *infra* notes 168–71.

42. *See* text accompanying *infra* notes 54–55.

43. *See* Beaumont, *supra* note 25.

44. *See* Maharaj, *supra* note 25; Beaumont, *supra* note 25. Non-citizens can legally enter and/or reside in Israel under a visa or residence permit, issued by the Minister of Interior under the Entry into Israel Law. Entry into Israel Law, § 1(b), 5712-1952, 6 L.S.I. 159 (1951-52) (“The residence in Israel of a person other than an Israel citizen and other than the holder of an *oleh* visa or *oleh* certificate shall be by residence permit under [the Entry into Israel Law].”). However, in issuing visas and residence permits under the Entry into Israel Law, the Minister of the Interior is granted wide discretion to establish:

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This incident prompted the Interior Ministry to stop considering Palestinian requests for residence permits,⁴⁵ thus preventing the infiltration of prospective suicide bombers into Israel.⁴⁶

In a larger context, Israel has often invoked national security as a justification for its “legally dubious policies.”⁴⁷ It is beyond dispute that Israel has a legitimate concern for the security of its inhabitants as well as its very existence as a state.⁴⁸ However, it is equally clear that any restrictive practices taken against the Palestinian inhabitants of the West Bank and Gaza must conform to the mandates of international humanitarian law, namely the Hague Regulations and the Geneva Conventions, which require any such measures be necessary and proportional to the provoking actions.⁴⁹ Moreover, “interference with legally protected rights imposes a heavy burden upon an occupying power to connect its use of force and other suppressive policies with the requirements of occupation *per se*.”⁵⁰

(1) categories of persons who are disqualified from receiving visas or residence permits...;

(2) conditions to be met before a visa is granted, or before a residence permit is granted, extended or substituted...;

[...]

(4) fees for granting different categories of visas and permits...;

[...]

Id. §§ 14(1)-(2) & (4). The discretion accorded the Minister of the Interior thus increases the potential for the enactment of discriminatory entry policies. *See, e.g.*, Beaumont, *supra* note 25 (reporting that after the suicide bombing in Haifa the Interior Ministry increased “sixfold” the application fee for residents of the West Bank and Gaza seeking residency and citizenship for ‘family reunification,’ from \$100 to \$600, an equivalent of six weeks salary for a mid-level Palestinian civil servant.).

45. *See* Maharaj, *supra* note 25 (“The Interior Ministry said it decided to stop considering residency requests for Arabs after a suicide bomber attack March 31 in a restaurant in the northern port city of Haifa, killing 15 people and injuring 44 others.”).

46. *Id.*

47. Richard A. Falk and Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 125, 138–39 (Emma Playfair ed., 1992) [hereinafter Falk & Weston].

48. *Id.* at 137–38.

49. *Id.* at 137.

50. *Id.* In this context, it is stated by Falk and Weston that:

However, the increasingly repressive policies directed at the Occupied Territories have often been associated with Israel's annexationist designs in the West Bank and Gaza rather than with protecting the security of Israelis and Palestinians.⁵¹ In addition, the institutionalized nature of Israel's restrictive practices in the Occupied Territories coupled with the unprecedented length in which such measures have been in place "virtually invalidate any Israeli claim to use force for any reason other than the discriminating and proportionate requirement of direct defence against attack."⁵² Thus, the "freeze", as a blanket measure directed against the millions of Palestinians in the Occupied Territories without addressing the specific problem of "direct defence against attack," cannot be shielded by a claim of military necessity.⁵³

Even if the "freeze" of all family unification requests is necessary and proportional to the security threat posed by the Palestinian population, an additional requirement must also be met before Israel's practices are to pass muster. The doctrine of "justness or fairness" requires that Israel's actions necessitated by its role as a belligerent occupier must not be "an expression of unreasonable or illegitimate purpose."⁵⁴ In essence, the re-

The whole point of the framework of belligerent occupation is to remove this status from the more wide-ranging tolerance of force associated with belligerent operations in general – and the more this is true the more the occupation is prolonged. Whatever security concerns Israel may raise in defence of its policies and practices, they must bend to this fundamental precept.

Id. at 139.

51. Some examples of restrictive Israeli practices directed towards the Palestinians are:

[E]xtra-judicial demolition and sealing of suspect houses; indiscriminate administrative detention of individuals without charge or trial for renewable periods of six months; intensive interrogations by prison personnel coupled with serious beatings and other forms of maltreatment and humiliation; the prevention of reunification of families; the confiscation of land; the destruction of crops ... and the diversion of scarce water resources.

Id.

52. Falk & Weston, *supra* note 42, at 139.

53. *Id.* For a factual basis of the Citizenship and Entry into Israel Law, codifying the "freeze," see *infra* p. 1389.

54. *Id.* at 140. This requirement may be predicated on "the modern-day version of the just war doctrine or in some general principal of estoppel recog-

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quirement of “justness or fairness” may prevent a State from “bootstrapping the defence of military necessity to exonerate acts meant to advance improper or illegal objectives.”⁵⁵

Providing evidence of one suicide bombing resulting in fifteen fatalities is insufficient to justify a sweeping measure placed upon thousands of Palestinians who may not be affiliated with any criminal acts against Israel. Indeed, such violent acts may be an invariable response to the suppressive measures implemented by the Israeli Government for the purpose of combating such acts. Therefore, the security justification advanced by the Israeli Government may not pass muster as “Israel is estopped from pleading a defence in respect of acts that, for the most part, its own illegality has provoked, and for which it has ultimately itself to blame.”⁵⁶

3. The Economic Justification: Preventing Further Public Expenditures

Palestinian families successfully entering and residing in Israel are entitled to certain financial and social benefits.⁵⁷ Thus, it is claimed that the growth in payments will present a strain on Israel’s economy.⁵⁸ However, the validity of such a justification is limited since any payments made to Israeli citizens or residents are largely discretionary.⁵⁹ In addition, the negative

nized by civilized nations that insists upon ‘clean hands’ in the assertion of justificatory claims.” *Id.*

55. *Id.*

56. *Id.* at 142.

57. See Hisham Jabr, *Financial Administration of the Israeli-Occupied West Bank*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES*, *supra* note 47, at 377, 395 (enumerating examples of social benefits paid to Israeli residents such as “payments for widowhood, dependent children, general disability, and unemployment....”).

58. See Shapiro, *supra* note 25.

59. See, e.g., KRETZMER, *supra* note 5, at 117 (“Unless bound by statute in allocation of benefits, the ministries enjoy a wide degree of discretion in the detailed allocation of funds approved in the budget. Room is thereby created for budgeting policies which discriminate between different sectors of the population.”). In terms of local government funding, Kretzmer cites the findings of research conducted by al-Haj and Rosenfeld which “found that in recent years the average ratio of ordinary central government contributions to local government budgets in the Jewish and Arab sectors was 3:1. The ratio in development grants was 5:1.” *Id.* at 118 (citing M. Al-Haj and H. Rosenfeld, *Arab Local Government in Israel* (Tel Aviv: International Center

economic impact allegedly created by an increased immigration of Palestinians to Israel is potentially absorbed by Israel's lopsided collection and expenditure policy.⁶⁰ While the source of funding for such benefits is derived equally from Palestinian as well as Israeli workers only the latter are entitled to receive any benefits.⁶¹ Moreover, the Jewish settlements located in the Occupied Territories are also accorded preferential financial benefits in relation to the rest of the Occupied Territories.⁶² Therefore, the claim that Israel's economy will suffer from a growing Palestinian population is subject to many variables, the majority of which weigh in favor of Israel.

B. The Citizenship and Entry into Israel Law

Continued concerns by Israelis over their physical, demographic, and economic security lead to the enactment of the

for Peace in the Middle East 1988)). Once the focus is directed solely at Israeli residents the services rendered between the Jewish and Arab sectors are presumably unequal. The Arab community constitutes 12 percent of the Israeli population but only receives 2.3 percent of the funds distributed to local governments from the central government, controlled by the Ministry of Interior. *Id.* at 118.

60. See Jabr, *supra* note 45, at 394 (inferring that the inability of the Minister of Finance to provide statistics on the annual revenues collected from the Israeli occupation is actually due to the widely-held belief that "not only is the occupation financed by the inhabitants, but that the fiscal burden of occupation of the West Bank is negative, and that Israel has in fact benefited from the occupation").

61. See Jabr, *supra* note 45, at 395-96. It is estimated that, since 1970, approximately 20 percent of the income of Palestinian workers from the Occupied Territories and employed in Israel, is collected by the Government Employment Service to pay for social benefits, to which the Palestinian workers are not entitled. *Id.* at 395.

62. Jabr, *supra* note 45, at 397 ("In 1981 alone, when 30,000 settlers lived in Judea and Samaria and Gaza, more money was invested on their behalf than had been invested for all the Arabs in the previous decade and a half.") (quoting Haim Ramon, West Bank Data Project, *Press Release: Study on Population and Public Funding on the West Bank* 10 (1985)). While the current analysis of governmental expenditures focuses on Israel proper (Israeli territory excluding the Occupied areas), reviewing evidence of lopsided governmental funding in the Occupied Territories between the Jewish settlements and the local Arab populations is instructive, as providing further indication of Israel's treatment of the Jewish and Arab populations.

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Citizenship and Entry into Israel Law.⁶³ The Citizenship and Entry into Israel Law was passed by a vote of 53 in favor and 25 against, with one abstention.⁶⁴ The law states in pertinent part:

During the period in which this law shall remain in force, despite what is said in any legal provision, including article 7 of the Citizenship [Nationality] Law, the Minister of the Interior shall not grant the inhabitant of an area citizenship on the basis of the Citizenship [Nationality] Law, and shall not give him a license to reside in Israel on the basis of the Entry into Israel Law, and the Area Commander shall not grant a said inhabitant, a permit to stay in Israel, on the basis with the security legislation in the area.⁶⁵

The Citizenship and Entry into Israel Law applies to “inhabitants” of certain areas, namely “Judea, Samaria, and the Gaza Strip.”⁶⁶ An “inhabitant of an area” is defined as “anyone residing in the area ... *excluding* the inhabitant of an Israeli settle-

63. See generally James Bennet, *New Law Raises Obstacles to Israeli-Palestinian Marriages*, N.Y. TIMES, Aug. 1, 2003, at A3, available at LEXIS, News Library, Nyt File; Nina Gilbert, *Palestinians Who Wed Israelis Will No Longer Receive Citizenship*, JERUSALEM POST, Aug. 1, 2003, at 4A, available at LEXIS, News Library, Jpost File; Peter Hirschberg, *Israeli Law on Residency Criticised as Discriminatory*, IRISH TIMES, Aug. 15, 2003, at 10, available at LEXIS, News Library, Itimes File; Justin Huggler, *Israel Imposes 'Racist' Marriage Law; Palestinian-Israeli Couples Will Be Forced to Leave or Live Apart*, INDEPENDENT (London), Aug. 1, 2003, at 1, available at LEXIS, News Library, Indpnt File; Laura King, *New Law Aims to Keep Out Palestinian Spouses of Israelis; The Measure Passes the Knesset By More Than a 2-1 Ratio. Critics Denounce it as Racist*, L.A. TIMES, Aug. 1, 2003, at 3, available at LEXIS, News Library, Lat File; Chris McGreal, *Israeli Law Will Split Families, Say Critics*, GUARDIAN (London), at 15, available at LEXIS, News Library, Guardn File; Joshua Mitnick, *Israeli Law Targets 'Mixed' Families*, WASH. TIMES, Aug. 18, 2003, available at <http://www.washtimes.com/world/20030818-122330-9856r.htm>.

64. See Bennet, *supra* note 63.

65. Citizenship and Entry into Israel Law § 2, 5763-2003 (emphasis added).

66. *Id.* § 1. The Judea and Samaria region is defined by the Israeli government as “identical in meaning for all purposes ... to the term ‘the West Bank Region.’” Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 47, at 25, 41. The Israeli government’s adherence to the historical titles of Samaria and Judea stems from its “rejection of a name that was seen as implying Jordanian sovereignty over the area.” *Id.*

ment....”⁶⁷ The ban on obtaining citizenship and residence permits is subject to several exceptions. Permission to reside in Israel may be granted by the Minister of the Interior or Area Commander “for the purpose of work, or in order to receive medical treatment, [or] for some other temporary purpose” with the length of stay limited to six months.⁶⁸ In order to facilitate family unification, residency may also be granted to an “inhabitant of an area” with a child, aged up to twelve, in Israel.⁶⁹ This reservation, however, does not apply to a parent who is illegally residing in Israel.⁷⁰ The other exception to the ban is the discretionary conferral of citizenship or a residence permit by the Minister of Interior to an “inhabitant of an area” who identifies with the State of Israel and its goals, and has (or a member of his family has) “performed a significant act to promote the security, economy, or some other important matter of the State,” or if the grant is otherwise in the “special interest” of Israel.⁷¹ It should also be emphasized that the law is only valid for one year, and must be reexamined by the Knesset at the end of each year in which case the law may be extended for additional one-year periods.⁷² In essence, the Citizenship and Entry into Israel Law prohibits the inhabitants of certain geographical regions, namely the West Bank and Gaza, from obtaining citizenship or a permit to reside in Israel. The Law does not however, facially discriminate on the basis of race, religion or sex.⁷³

67. Citizenship and Entry into Israel Law §1, 5763-2003 (emphasis added).

68. *Id.* § 3(1).

69. *Id.*

70. This exception would most likely exclude the majority of applicants seeking to take advantage of the family unification reservation, *id.* § 3(1), since anyone affected by the Citizenship and Entry into Israel Law is presumably without Israeli citizenship or a valid residence permit and the law suspends the application for such methods of entry for all other persons, thus rendering them illegal residents of Israel. In other words, anyone staying legally in Israel would not be affected by Citizenship and Entry into Israel Law.

71. *Id.* §3(2).

72. *See id.* § 5.

73. The Law’s racial motivations and effects will be discussed in further detail below. *See infra* Part V.A.2.

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The law also makes an express reference to section 7 of the Nationality Law as a now prohibited basis for obtaining citizenship in Israel.⁷⁴ Section 7 of the Nationality Law provides:

The spouse of a person who is an Israel national or who has applied for Israel nationality and meets or is exempt from the requirements of section 5(a), [acquiring citizenship by naturalization] may obtain Israel nationality even if she or he is a minor or does not meet the requirements of section 5(a).⁷⁵

Prior to the enactment of the Citizenship and Entry into Israel Law, a non-Israeli marrying an Israeli citizen could obtain citizenship in Israel by virtue of a spouse being Israeli.⁷⁶ Furthermore, the non-Israeli spouse seeking Israeli citizenship would not be required to meet the conditions otherwise required for those seeking Israeli citizenship by naturalization.⁷⁷ This liberalized considerably the scope of persons who were able, legally and practically, to acquire citizenship in Israel.⁷⁸ Thus, the passage of the Citizenship and Entry into Israel Law struck a fatal blow to the hopes of Palestinians seeking unification with their spouses in Israel.⁷⁹

Proponents of the new law, while conceding the “tragic reality” associated with having to pass such a harsh measure, nevertheless justified its enactment as “a contingency forced by the

74. See Citizenship and Entry into Israel Law §2, 5763-2003.

75. Nationality Law § 7, 5712-1952, 6 L.S.I., at 52.

76. A differentiation is made between a Jewish and non-Jewish citizen for purposes of obtaining Israeli citizenship vis-à-vis, section 7 of the Nationality Law. In particular, the spouse of a Jewish citizen is “vested” with the rights of an *oleh* under the 1970 Amendment to the Law of Return and thus able to acquire citizenship automatically. See Law of Return (Amendment No. 2) § 1, 5730-1970, 24 L.S.I., at 28 (amending Law of Return § 4, 5710-1950, 1 L.S.I. 114 (1951-52)). The spouse of a non-Jewish citizen, however, “must obtain a resident’s visa to live in the country and may acquire citizenship only by way of naturalization.” See KRETZMER, *supra* note 5, at 47 n.17.

77. This applies primarily to persons marrying a non-Jewish citizen since a spouse of a Jewish citizen obtains the rights of an *oleh* and is conferred citizenship automatically. See Law of Return (Amendment No. 2) § 4(A), 5730-1970, 24 L.S.I. 28 (1969-70). See also Jules L. Coleman & Sarah K. Harding, *Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders*, in JUSTICE IN IMMIGRATION 18, 33 (Warren F. Schwartz ed., 1995).

78. Nationality Law § 7, 5712-1952, 6 L.S.I., at 52.

79. See Citizenship and Entry into Israel Law § 2, 5763-2003.

brutality of the Israeli-Palestinian conflict.”⁸⁰ The justifications advanced in support of the Israeli government’s freeze on Palestinian family unification requests were relied upon in defense of the newly enacted law. Thus, the Government again raised its security⁸¹-demographic⁸² shield to ward off attacks upon the legality of the Citizenship and Entry into Israel Law. And, to further enhance its credibility the Government cited to the statistic that approximately 20 suicide bombing attacks killing 49 Israelis were attributed to “Palestinians who had entered Israel through family unification.”⁸³

80. King, *supra* note 63 (reporting the view of Yuri Stern, the head of the “parliamentary panel” that advanced the Citizenship law toward its eventual passage). In attempting to downplay the harsh nature of the new Citizenship law, Yuri Stern stated that “[t]his is merely a law that for one year restricts the right of Palestinians to settle in our midst. We are at war. I hope the war will end during this year, but I am not optimistic.” *Id.*

81. Gideon Starr, a representative of the dominant Likud party and supporter of the new Citizenship Law, cast the law as a “necessary bulwark against infiltration by terrorists.” Bennet, *supra* note 63. Another supporter of the Citizenship Law, Gideon Ezra, an Israeli cabinet minister, stated that “[t]his law comes to address a security issue. Since September 2000 we have seen a significant connection, in terror attacks, between Arabs from the West Bank and Gaza and Israeli Arabs.” Huggler, *supra* note 63. The Interior Minister, Avraham Poraz sponsored the legislation despite his uneasiness associated with the sweeping nature of the law. Mitnick, *supra* note 63. Speaking through an aide, Mr. Poraz acknowledged that the “law doesn’t distinguish between those really involved in terrorism and those not involved. But because it’s impossible to filter there needs to [be] something sweeping.” *Id.*

82. Indeed, many of the arguments made in support of the Government’s May 2002 decision to freeze all family unification requests have arisen once again as Yuval Steinitz, a Likud party member, reaffirmed the Israeli concern that the Palestinians are deliberately attempting to “change the demographic balance in Israel in order to destroy [the Jewish majority in Israel].” Bennet, *supra* note 63; Mitnick, *supra* note 63 (“Some analysts say the law’s significance goes beyond national security. Though designed as a bulwark in Israel’s war against Palestinian militants, the [Citizenship and Entry into Israel Law] will also serve to limit the growth of Israel’s Arab minority, which makes up just under 20 percent of the population.”). According to MK Azmi Bishara, the law “has no connection to security” and “is tied to demography [in which it attempts to] limit the number of Arabs in Israel.” Hirschberg, *supra* note 63.

83. Bennet, *supra* note 63; Hirschberg, *supra* note 63. The Jerusalem Post reports that “19 cases of Palestinians, especially in east Jerusalem, who used blue identity cards obtained through family reunification to carry out terrorist attacks [have] claimed the lives of 87 people.” Gilbert, *supra* note 63.

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Critics have referred to the Citizenship and Entry into Israel Law as “a racist measure that threatened to divide thousands of families or force them out of Israel.”⁸⁴ Furthermore, opponents claim that the bill contravenes domestic⁸⁵ and international law.⁸⁶ Indeed, criticism of Israel’s citizenship policy as violating international law has come from the highest levels. The United Nations Committee on the Elimination of Racial Discrimination, examining the Citizenship and Entry into Israel Law, adopted a decision which called for Israel to “revoke [the law] and reconsider its policy with a view of facilitating family unification on a non-discriminatory basis.”⁸⁷ In particular, the

84. Bennet, *supra* note 63; Gilbert, *supra* note 63 (statement of MK Muhammad Barakei) (“[The Israeli people who have] suffered so much from racism should be ashamed to bring such a bill.”); Huggler, *supra* note 63 (statement of Hanny Megally of Human Rights Watch) (“This law blatantly discriminates against Israelis of Palestinian origin and their Palestinian spouses.”).

85. See Gilbert, *supra* note 63 (statement of MK Ahmed Tibi) (describing the law as “inhumane” as it “bans marriage between Palestinians and Israelis,” contravening the Basic Law: Human Dignity and Liberty); Hirschberg, *supra*, note 63 (describing the argument of human rights groups that the new citizenship law violates fundamental Israeli laws and principles such as the Basic Law: Human Dignity and Freedom and certain principles enunciated in Israel’s Declaration of Independence). Adalah, an independent human rights organization in Israel, testified before the Knesset Committee prior to the passage of the Citizenship and Entry into Israel Law, challenging the constitutionality of the proposed bill. Press Release, Adalah: The Legal Center for Arab Minority Rights in Israel, Adalah Testifies Before Knesset Committee: Proposed Government Bill Imposing Severe Limitations on Family Unification is Unconstitutional (July 16, 2003), available at http://www.adalah.org/eng/pressreleases/pr.php?file=03_07_16. Adalah’s challenge against the proposed bill was premised with several points, including the disproportionate nature of the law’s potential effects, the lack of a clear factual basis for imposing such a measure, and the illicit (demographic) motives behind drafting the law. *Id.*

86. See Huggler, *supra* note 63 (statement by Amnesty International) (“A law permitting such blatant racial discrimination, on grounds of ethnicity or nationality, would clearly violate international human rights law and treaties which Israel has ratified and pledged to uphold.”).

87. Press Release, U.N. CERD, 63rd Sess., Committee on the Elimination of Racial Discrimination Concludes Sixty-Third Session: Issues Observations on Reports of 11 Countries (Aug. 22, 2003), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase>. See also Press Release, U.N. CERD, 63rd Sess., Committee on Elimination of Racial Discrimination Considers Periodic Reports From Latvia: Committee Calls on Israel to Revoke Nationality and Entry into Israel Law; Appeals to States Parties to Adopt Amendments to

Committee stated in its decision that the Citizenship and Entry into Israel Law “raises serious issues under the International Convention on the Elimination of all Forms of Racial Discrimination” and the restrictive policy implemented by Israel in May 2002 has already “adversely affected many families and marriages.”⁸⁸ Therefore, while Israel’s restrictive citizenship and immigration policies have passed muster with the Knesset, its foundation remains unstable.⁸⁹

Article 8 (Aug. 14, 2003), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase>.

88. U.N. CERD, 63rd Sess., Decision 2 (63), U.N. Doc. CERD/C/63/Misc.11/Rev.1 (Aug. 14, 2003), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase>. For information regarding Israel’s status as a state party to the Convention on the Elimination of All Forms of Racial Discrimination, see *infra* text accompanying note 144.

89. Several court challenges against the Citizenship and Entry into Israel Law as well as the government’s May 2002 “freeze” on family unification applications are currently pending in the High Court of Justice. See, e.g., Ina Friedman, *Three Groups Urge Supreme Court to Strike Down Citizenship Law*, JERUSALEM REP., Sept. 8, 2003, at 6, available at LEXIS, News Library, Jport File; Izenberg, *supra* note 26; Moshe Reinfeld, *ACRI Petitions Court on Palestinian Citizenship Amendment*, HAARETZ, Sept. 8, 2003, available at <http://www.haaretz.com>. See also Press Release, ACRI: The Association for Civil Rights in Israel, ACRI Petitioned Supreme Court Against Amendment to Law of Citizenship (Nov. 10, 2003) (emphasizing in its petition to the Court that the new citizenship law “results in a sweeping denial of new requests by Israeli citizens for legal status for the Palestinian spouse, and dictates a forced separation on numerous families.”), available at <http://acri.org.il/english-acri/engine/story.asp?id=152>; Press Release, Adalah: The Legal Center for Arab Minority Rights in Israel, Supreme Court to Hear Petitions Challenging New Law Banning Family Unification (Nov. 6, 2003) (arguing in its petition filed on August 4, 2003 that the Citizenship and Entry into Israel Law “violates the constitutionally protected rights of equality, personal liberty to maintain a family life, privacy, and due process”), available at http://www.adalah.org/eng/pressreleases/pr.php?file=03_11_06; Press Release, Adalah: The Legal Center for Arab Minority Rights in Israel, Supreme Court to Hear Family Unification Cases Tomorrow (July 16, 2003) (petitioning against the government’s May 2002 decision to freeze naturalization requests which “severely harms Palestinian citizens of Israel, as overwhelmingly it is they who marry Palestinians from the Occupied Territories”), available at http://www.adalah.org/eng/pressreleases/pr.php?file=03_07_16-2.

The High Court of Justice, recognizing the potential illegality associated with the Citizenship and Entry into Israel Law, has issued an interim order mandating the Israeli government to set forth its reasons for amending the citizenship policy and preventing the unification of families by prohibiting a Palestinian spouse of an Israeli citizen from obtaining residency or citizenship status in Israel. See Yuval Yoaz, *Court Orders States to Explain Amend-*

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IV. THE INTERPLAY BETWEEN DOMESTIC AND INTERNATIONAL REGULATION OF CITIZENSHIP

Before embarking on a substantive legal discussion of the Citizenship and Entry into Israel Law it is necessary to lay the proper foundation for such an analysis. The premise of this Note relies upon the proposition that a State's ability to confer citizenship on certain individuals is not unfettered, but must conform to certain international legal norms.⁹⁰ This section will examine the developments which have contributed to the increasing limitations international law has placed upon domestic citizenship matters. It will be argued that international law, at its present stage, requires that citizenship policies conform to certain international legal norms, particularly international human rights law.

A. *The Traditional View: Exclusive State Jurisdiction in Matters Relating to Citizenship*

At the end of the Nineteenth Century, authorities and commentators of international law recognized the State as the sole arbiter of citizenship.⁹¹ Most notably, Oppenheim declared that

ment to Citizenship Law, HAARETZ, Nov. 9, 2003, available at <http://www.haaretz.com>. Petitions were lodged against the Israeli government in the High Court of Justice by Adalah – The Legal Center for Arab Minority Rights, ACRI – The Association for Civil Rights in Israel, and Knesset members from the Meretz and various Arab parties. *Id.* Additionally, the Court issued an injunction preventing the deportation of three Palestinian spouses of Israeli citizens who have been illegally residing in Israel since the passage of the new citizenship law. *Id.* Due to the importance of the issue, the Court will convene “a special session of ‘as broad a panel as possible’ [to] hear the petition within a month [from its rulings of November 9, 2003].” *Id.*

90. This is not advanced as a bright-line rule but as an evolving norm within the international community.

91. See RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 26–28 (2d ed. 1994) (stating that international law commentators from the end of the nineteenth century to the early twentieth century adopted the position that “the determination of nationality is held to be one of the discretionary powers of the sovereign state.”); WEIS, *STATELESSNESS*, *supra* note 11, at 65 (“Nationality is one of the subjects which are considered as falling within the domestic jurisdiction, within the legislative competence, of the individual State. That rule is recognized by both customary and conventional international law.”). Justice Gray accurately summarized the view of the international legal community at this time:

“[i]t is not for international law but for municipal law to determine who is and who is not to be considered a subject.”⁹² This rule was based on a logical⁹³ and historical foundation.⁹⁴

[I]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 63–64, 70–75 (2d ed. 1988) (quoting *Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

92. YAFFA ZILBERSHATS, THE HUMAN RIGHT TO CITIZENSHIP 8 (2002) (quoting LASSA F. OPPENHEIM, INTERNATIONAL LAW – A TREATISE 348 (1905)). Cf. OPPENHEIM’S INTERNATIONAL LAW 852 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“In principle, and *subject to any particular international obligation which might apply*, it is not for international law but for the internal law of each State to determine who is, and who is not to be considered its national.”) (emphasis added), *quoted in* ZILBERSHATS, *supra*, at 8.

93. The logical premise of reserving the right to determine the identity of its citizens to the State is expounded upon by Professor Weis:

There cannot be any doubt that [the right of a State to determine who are its nationals] is a concomitant of State sovereignty. Sovereignty, in its modern conception, is described as the supreme and independent authority of States over all persons and things in their territory; independence and territorial and personal supremacy are considered as the elements of sovereignty. Personal supremacy is the power exercised by a State over its nationals wherever they may be. The right to delimit this group of individuals termed nationals, and to determine their status in the sense of their rights and duties, is indeed – unless personal supremacy were to become co-extensive with territorial supremacy – a prerequisite of personal supremacy and therefore, of sovereignty.

WEIS, STATELESSNESS, *supra* note 11, at 65. See also PLENDER, *supra* note 91, at 63 (deconstructing the Grotian theory of the principle of sovereignty in relation to the just war doctrine, in which “[o]ne of the two legitimate causes for which a sovereign might...engage in war was the defence of the sovereign’s own subjects.” Thus, “[i]t followed *a fortiori* that a sovereign might exclude foreigners from his kingdom in defence of the personal or proprietary rights of his people.”).

94. See PLENDER, *supra* note 91, at 62–63. See also DONNER, *supra* note 91, at 6–8 (discussing the doctrine of independence and nonintervention in a state’s affairs); WEIS, STATELESSNESS, *supra* note 11, at 65 (“The right of a State to determine who are, and who are not, its nationals is an essential element of its sovereignty. This is recognized by theory and practice.”); Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L. L. 1141, 1151 (1998) (“[I]t has long been axiomatic that under international law ...

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Granting States sole discretion in matters of nationality had several effects, politically and legally.⁹⁵ In the political context, a State would be shielded from “intervention” by international organizations such as the United Nations for its actions relating to nationality.⁹⁶ Similarly, in the legal context, the State would not be subject to the scrutiny of international tribunals and would essentially have an affirmative defense for actions which may offend other States.⁹⁷ Hence, under the traditional view, a State had, for better or worse,⁹⁸ unfettered authority in the governance of matters concerning nationality.

1. The Traditional View as Evidenced in Treaties and Conventions

The notion that the sovereign state has sole discretion in determining the identity of its citizens is also evidenced in several primary sources of law. For example, Article 1 of the 1930 Geneva Convention on Certain Questions relating to the Conflict of Nationality Laws (hereafter “1930 Hague Convention”) states that “[i]t is for each State to determine under its own law who are its nationals.”⁹⁹ In addition, Article 2 provides that “[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.”¹⁰⁰ The Protocol Relating to Military Obligations in Certain Cases of Double Nationality which accompanied the 1930 Convention also emphasizes the states’ sovereign power to determine the scope and extent of its citizenship policy.¹⁰¹

questions of nationality fall within the domestic jurisdiction of individual states.”).

95. GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 52 (1978).

96. *Id.*

97. *Id.*

98. Some of the negative effects produced by the traditional conception of regulating nationality, aside from the inevitably discriminatory citizenship policies which were implemented by States, were “the anomalies of dual and multiple nationality and statelessness.” *Id.* at 6.

99. Apr. 12, 1930, 179 L.N.T.S. 89, 99 (1937).

100. *Id.* at 101.

101. See Apr. 12, 1930, art. 2, 3, 178 L.N.T.S. 227, 231 (1937). However, the Protocol Relating to a Certain Case of Statelessness, Apr. 12, 1930, 179 L.N.T.S. 115 (1937), signed together with the 1930 Hague Convention, does not contain any assertion regarding a state’s discretion in citizenship matters.

2. The Traditional View as Evidenced in Judicial Authorities

The international legal community's recognition of a state's discretion in devising its own citizenship policy was not only evidenced in legislation. Several decisions handed down by the Permanent Court of International Justice (hereafter "PCIJ") also affirmed the orthodox approach of international law. In its advisory opinion concerning the Nationality Decrees in Tunis and Morocco,¹⁰² the PCIJ stated, albeit with qualification, its position with respect to a state's freedom to regulate matters of nationality:

The question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.¹⁰³

In another advisory opinion issued the same year, the PCIJ reaffirmed its previous position, concluding that "generally speaking ... a sovereign state has the right to decide what persons shall be regarded as its nationals...."¹⁰⁴ Hence, it is readily

See also Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, art. 1, 360 U.N.T.S. 117, 136 ("[T]he term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.") (emphasis added).

102. Advisory Opinion No. 4, Nationality Decrees in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 24. The question to be answered in the Nationality Decrees case was whether "the nationality Decrees issued in Tunis and Morocco [enacted by France] and their application to British nationals" was a matter to be regulated by international law or rather, within the exclusive domestic jurisdiction of France. WEIS, STATELESSNESS, *supra* note 11, at 71. While the PCIJ held that the issue in the Tunis and Morocco Nationality Decrees case was not solely a matter of domestic jurisdiction, its holding was based exclusively on the facts of the case and thus, was not a general pronouncement on the state of international law. *See* WEIS, STATELESSNESS, *supra* note 11, at 71-73. For further analysis on the Nationality Decrees in Tunis and Morocco case see text accompanying *infra* notes 119-21.

103. It should be noted that the quoted statement "is concerned with the competence of the Council of the League of Nations and not with relations of nationality in general international law." Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L. L. 284, 286 (1963).

104. Advisory Opinion No. 7, Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 16. *See also* Advisory Opinion No. 10, Exchange of Greek and Turkish Populations, 1923 P.C.I.J. (ser. B) No. 10, at 19 ("[T]he national

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apparent that the maxim of state sovereignty over matters of nationality had received wide recognition among the international legal community during the late-nineteenth, early twentieth century.

Domestic case law did not deviate much from the view of the international tribunals. A leading British case that dealt with nationality in the context of international law was *Stoeck v. Public Trustee*.¹⁰⁵ In *Stoeck*, the plaintiff sought a declaratory judgment that he was not a German national within the meaning of Article 297 of the Treaty of Versailles and Section 1 of the Treaty of Peace Order, thus allowing the plaintiff to dispose of certain property without incurring certain additional charges.¹⁰⁶ In holding that the plaintiff was not a German national under German or English law, Lord Russell analyzed the underpinnings of the traditional view regarding a state's power to regulate matters of nationality:

Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person is a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law....¹⁰⁷

Lord Russell's view was shared by other jurisdictions. In *United State v. Wong Kim Ark*, the United States Supreme

status of a person belonging to a State can only be based on the law of that State.”).

105. [1921] 2 Ch. 67. The *Stoeck* case is also notable for its recognition of the phenomenon of the possibility of “statelessness.” *Id.* at 79–82. *See also* *Musgrove v. Chun Teeong Toy*, 1891 App. Cas. 272, 282–83 (appeal taken from Vict.) (holding that an alien had no “legal right, enforceable by action, to enter British territory,” in part because rendering such a decision would involve “delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of [Britain] to her self-governing colonies.”).

106. *Stoeck*, [1921] 2 Ch., at 70.

107. *Id.* at 82.

Court announced a similar rule, recognizing “the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what classes of persons shall be entitled to its citizenship....”¹⁰⁸

B. The Diminishing Freedom of the State to Govern Matters Concerning Nationality

The armor of domestic sovereignty protecting the State from the limitations of international law began to erode during the early-to-mid 1900's. This section will analyze the gradual establishment of international law as a recognized restriction upon the State's discretion in determining the identity of its citizens, arriving at the conclusion that a State must now adhere to certain international legal norms, especially those associated with international human rights, when devising its citizenship policies.

1. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

As the “first comprehensive convention to be devoted entirely to issues of citizenship”¹⁰⁹ the events preceding the codification of the 1930 Hague Convention can be seen as “highly indicative of the attitude of States ... to the question of the relationship between municipal and international law in the field of nationality law.”¹¹⁰ The Preparatory Committee for the Hague Conference of 1930 for the Codification of International Law requested several State governments to provide their view of whether any restrictions existed on a state's sovereign authority to legislate

108. 169 U.S. 649, 668 (1898). *See also* *Fong Yue Ting v. United States*, 149 U.S. 698, 705–08 (1893); *Chae Chan Ping v. United States* (The Chinese Exclusion Act cases), 130 U.S. 581, 609 (1889); *Inglis v. Sailors' Snug Harbor*, 28 U.S. 99, 162 (3 Pet. 99) (1830) (“Each government [has] a right to decide for itself who should be admitted or deemed citizens.”). It should be noted that these cases have not been overruled by the Supreme Court and is still considered good law. *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6–7 (1998) (explaining that the “plenary power doctrine” espoused by the Court in the Chinese Exclusion Act cases “is said to make racial discrimination in the immigration context lawful per se.”).

109. ZILBERSHATS, *supra* note 92, at 12.

110. *See* WEIS STATELESSNESS, *supra* note 11, at 82.

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with respect to matters of nationality.¹¹¹ The government of the United Kingdom replied:

The mere fact ... that nationality falls in general within the domestic jurisdiction of a State does not exclude the possibility that the right of the State to use its discretion in legislating with regard to nationality may be restricted by duties which it owes to other States [citing the Nationality Decrees in Tunis and Morocco case]. [...] It is only in exceptional cases that this divergence between the right of States to legislate at its discretion with regard to the enjoyment or non-enjoyment of its nationality and the duty of other States to recognise such legislation would occur. The criterion is that the legislation must not infringe the *rights* of the State as apart from its *interests*.¹¹²

In response to the same question, the United States government answered:

While, as indicated, the Government of the United States has always recognised the fact that the acquisition or loss of the nationality of a particular State are matters which pertain primarily to domestic policy and are therefore to be determined by the domestic law of that State, it does not admit that a State is subject to no limitations in conferring its nationality on individuals. [...] [N]o State is free to extend the application of its laws of nationality in such a way as to reach out and claim the allegiance of whomsoever it pleases. The scope of municipal laws governing nationality must be considered as limited by consideration of the rights and obligations of individuals and of other States.¹¹³

The above statements as well as those of the majority of the other responding States represents the budding acceptance of

111. *Id.* The following statements by the governments of the United Kingdom and the United States while not itself a source of international law constitutes “proof of the practice of individual States in matters of nationality which itself is a source for the *ascertainment* of international law. [In addition the statements also] contain important information as to existing international law in the field of nationality.” *Id.* at 28 (emphasis added).

112. *Id.* at 82 (quoting League of Nations, Hague Conference for the Codification of International Law, Bases of Discussion drawn up by the Preparatory Committee (1929), League of Nations Doc. C. 73, M. 38, at 118).

113. *Id.* at 83 (quoting League of Nations, Hague Conference for the Codification of International Law, Bases of Discussion drawn up by the Preparatory Committee (1929), League of Nations Doc. C. 73, M. 38, at 16, 145–46).

the principle “that [a State’s] right to determine nationality was not unlimited.”¹¹⁴

The 1930 Hague Convention itself also provides evidence of the diminishing authority of a State regarding questions of nationality. As stated above, Article 1 of the 1930 Hague Convention affirms the age-old principle that “[i]t is for a State to determine under its *own* law who are its nationals.”¹¹⁵ However, in an important reservation immediately following this statement, the Convention also mandates that “[t]his law shall be recognised by other States *in so far as it is consistent with international conventions, international custom, and the principle of law generally recognised with regard to nationality.*”¹¹⁶ Thus, taken as a whole, Article 1 explicitly provides for a limitation,

114. Brownlie, *supra* note 103, at 298. See also WEIS, STATELESSNESS, *supra* note 11, at 83 (listing Austria, Czechoslovakia, Denmark, France, Germany, the Netherlands, Norway, Poland, and South Africa as States “recognis[ing] [explicitly] that the right to determine nationality was not unlimited.”). Article 2 of the Harvard Research Draft Convention on the Law of Nationality, 1929, prepared in anticipation of the International Conference on the Codification of International Law, provides:

Except as otherwise provided in this convention, each state may determine by its law who are its nationals, *subject to the provisions of any special treaty to which a state may be a party; but under international law the power of a state to confer its nationality is not unlimited.*

23 AM. J. INT'L. L. SPEC. SUP. 1, 13 (1929). The explanatory comments accompanying Article 2 delineate certain situations in which matters of nationality may be ripe for regulation by international law, i.e., when the nationality laws of one State conflicts with another state or when States voluntarily enter into treaties governing the conferral of nationality among the State parties. See *id.* at 24–25. In its most general statement regarding the relationship between international law and State law in the field of nationality law the explanatory comments on Article 2 of the Draft Convention provides:

It may be difficult to precise the limitations which exist in international law upon the power of a state to confer its nationality. *Yet it is obvious that some limitations do exist.* They are based upon the historical development of international law and upon the fact that different states may be interested in the allegiance of the same natural persons.

Id. at 26 (emphasis added).

115. Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, *supra* note 99, at 99 (emphasis added).

116. *Id.* (emphasis added).

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through international law, on a State's discretion in determining its nationals.¹¹⁷

It is evident from the work of the Preparatory Committee as well as the resulting 1930 Hague Convention that the international community no longer regarded the State as the sole arbiter in matters relating to nationality. Moreover, both the views of the various States elicited by the Preparatory Committee and the subsequent codification of such views in the 1930 Hague Convention constitute evidence of the prevailing relevance of international law in matters of nationality.

2. Opinions of the Permanent Court of International Justice and the International Court of Justice – Limiting a State's Ability to Devise Its Own Citizenship Policy

During the period in which the opinions of the PCIJ cited above were handed down¹¹⁸ international law emphasized the traditional view of exclusive domestic jurisdiction over matters of nationality. Nonetheless, one must recognize that the PCIJ, in the same opinions, qualified the potential reach of the traditional rule. For example, in its advisory opinion concerning the Nationality Decrees issued in Tunis and Morocco, the PCIJ found that whether France had exclusive domestic jurisdiction over the conferral of French nationality upon residents of Tunis and Morocco was “essentially a *relative question*; depend[ing] upon the development of international relations.”¹¹⁹ While the PCIJ found that questions of nationality were indeed within the sole jurisdiction of the State during the period in which the case was decided, it emphasized that “the right of a State to use its discretion [in matters of nationality was] restricted by obligations which it may have undertaken towards other States.”¹²⁰

117. Brownlie, *supra* note 103, at 299. It should be noted that the 1930 Hague Convention and its accompanying Protocols “make law only as between the contracting States” and do not make “general or universal, international law.” WEIS, STATELESSNESS, *supra* note 11, at 27. Nonetheless, the “indirect significance [of the 1930 Hague Convention] is considerable, as [it] may be taken to reflect the views of two-thirds, or at least of the majority, of the Governments represented at the [International Conference on the Codification of International Law].” *Id.*

118. *See supra* text accompanying notes 102–04.

119. 1923 P.C.I.J. (ser. B) No. 4, at 24 (emphasis added).

120. *Id.*

Therefore, it can be said that even though situations exist where a State, "in principle," retains sole jurisdiction to regulate certain matters, such discretion is invariably "limited by rules of international law."¹²¹ In its advisory opinion on the Acquisition of Polish Nationality, the PCIJ reaffirmed its position regarding the ability of international law to limit a state's discretion in determining who shall be a national.¹²²

One may notice two important aspects of the advisory opinions cited above. First, it is evident that during the period in which the cases were decided the international community still regarded the regulation of nationality as within the exclusive domain of the State. However, it should be no less apparent that the PCIJ, during the same period, also regarded international law, not as *de minimis* in its limiting effect, but as a viable check upon a State's discretion in the field of nationality law, in which the strength of any such limitation is governed by the evolution of international relations.¹²³

121. *Id.* There are two important corollaries regarding the holding and statements of the PCIJ in the Nationality Decrees in Tunis and Morocco case. First, as stated above, the PCIJ's holding is limited to the facts of the case which involved the scope of sovereignty exercised by a Protecting State in a Protectorate and the invocation of international agreements. WEIS, STATELESSNESS, *supra* note 11, at 73. Second, the resolution of the dispute reached after the issuance of the PCIJ opinion is indicative of an emerging limitation vis-à-vis international law on a domestic discretion in regulating matters of nationality. *Id.* at 75. An agreement was reached between Britain and France, providing the residents of Tunis and Morocco, who would have been subjected to France's "unilateral imposition" of French nationality, the right of an "option" to choose between British or French nationality. *Id.* at 74-75. This resolution signified an emerging limitation imposed by international law emerged on a State's discretion in the "compulsory conferral" of nationality. *See id.* at 75, 107.

122. 1923 P.C.I.J. (ser. B) No. 7, at 16 ("Though, generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the [relevant] Treaty obligations [of the disputing States].").

123. *See* 1923 P.C.I.J. (ser. B) No. 4, at 24. For an examination of the decisions of other international courts regarding the question of nationality see WEIS STATELESSNESS, *supra* note 11, at 75-78. *See also* Brownlie, *supra* note 103, at 301 (listing several eminent jurists who adopt the view that matters of nationality are regulated by international law).

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3. Opinions of the Regional Courts – An Emerging Human Rights Approach to Regulating Citizenship Policies

The position of the PCIJ and the ICJ is also echoed in the several opinions of regional courts concerning nationality laws. Most notably, in the Advisory Opinion concerning the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, the Inter-American Court of Human Rights upon request by the Costa Rican Government, issued an advisory opinion on whether certain proposed amendments to the Constitution of Costa Rica governing nationality were in conformance with article 17 (rights to family), article 20 (right to nationality), and article 24 (right to equal protection) of the American Convention on Human Rights.¹²⁴ Before determining whether the proposed amendments contravened any relevant provision in the American Convention on Human Rights, the Court provided a brief survey of the evolving relationship between international law and domestic regulation of nationality matters:

[D]espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights. [Thus,] [t]he classical doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to

124. Advisory Opinion concerning Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Inter-Am. Ct. H.R. paras. 1-8, OC-4/84/ser. A/No. 4 (1984). The proposed amendments to the Costa Rican Constitution essentially allowed members of certain racial and ethnic groups preferential treatment in obtaining Costa Rican citizenship over other aliens. *Id.* at para. 39. Thus, the Court noted the possible motivations in Costa Rica's drafting of the proposed amendments, which may have involved a "negative nationalistic reaction...to the problem of refugees, particularly Central American refugees." *Id.* at para. 40.

the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.¹²⁵

This statement by the Inter-American Court on Human Rights is indicative of the current trend in international law requiring domestic compliance with human rights norms in matters of nationality and immigration.

The European Court of Human Rights as well as its predecessor, the European Commission of Human Rights, have also attempted to reconcile the conflict between domestic jurisdiction over citizenship policies with the possible limitations imposed

125. *Id.* at paras. 32, 33. In proceeding to “reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state ... with the further principle that international law imposes certain limits on the state’s power, which limits are linked to the demands of [international human rights law]” the Court ultimately struck the balance in favor of Costa Rica, stating that:

[I]t is within the sovereign power of Costa Rica to decide what standards should determine the granting or denial of nationality to aliens who seek it, and to establish certain *reasonable differentiations based on factual differences which, viewed objectively*, recognize that some applicants have a closer affinity than others to Costa Rica’s value system and interests.

Id. at para. 59 (emphasis added). Thus, the Court found that “the preferential treatment in the acquisition of Costa Rican nationality ... which favors Central Americans, Ibero-Americans and Spaniards over other aliens, does not constitute discrimination contrary to the [American Convention on Human Rights].” *Id.* at para. 2 (conclusion of opinion). One may argue that the Court’s holding seems to undermine the force of its statements regarding the increasing role of international law in regulating a State’s implementation of its citizenship policies in a human rights context, and thus, supports the proposition that States may continue to enact restrictive citizenship policies. However, the Court reached its holding primarily on the basis of its concern that Costa Rica should be allowed to determine who would have the closest “historical, cultural, and spiritual bonds” with the Costa Rican people, and hence would be conferred expedited naturalization procedures to obtain Costa Rican citizenship over other aliens. *Id.* at para. 60. The Court did not opine upon a State’s outright refusal to admit persons of a certain ethnic or racial group with presumably a strong bond, i.e., a spouse in the naturalizing country, due to demographic, economic, or national security concerns and whether such a policy would potentially be subject to greater scrutiny or be deemed *per se* discriminatory under international human rights law. Moreover, the Court was steadfast in its insistence that any differential treatment with relation to citizenship policies be supported by factual differences which are objectively reasonable, the touchstone of the principles of non-discrimination and equal protection of the law. *See id.* at paras. 57–60.

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upon such policies by international human rights law.¹²⁶ Two opinions handed down by the Commission and the Court in 1973 and 1985 respectively, provide evidence that State discretion in devising citizenship policies is not unfettered but subordinate to its treaty obligations. The Commission, in *East African Asians v. United Kingdom*, considered the applications of several residents of former British colonies in East Africa who were refused admission to the United Kingdom even though the applicants were British citizens.¹²⁷ In ruling against the United Kingdom, the Commission found that the citizenship and immigration policies at issue contravened the European Convention on the Protection of Human Rights and Fundamental Freedoms as discriminatory on the basis of race and sex, interfering with the right to respect for family life.¹²⁸

Similarly, in the leading case of *Abdulaziz v. United Kingdom*, the Court found that the British government breached Articles 8 and 14 of the European Convention on Human Rights by implementing a discriminatory immigration policy which infringed upon the applicants' right to respect for their family lives.¹²⁹ It is important to emphasize however, that even though the Court found Britain's various immigration policies illegal, the Court continued to adhere to the traditional notion that "as a matter of well-established international law and subject to its

126. See generally Nicola Rogers, *Immigration and the European Convention on Human Rights: Are New Principles Emerging*, 2003 EUR. HUM. RTS. L. REV. 53 (2003).

127. See *East African Asians v. United Kingdom*, App. Nos. 4403/70-4419/70, 4422/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70, 4526/70-4530/70, 3 Eur. H.R. Rep. 76 (1973) (Commission report).

128. See *id.* at 83, 91.

129. See *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81 and 9474/81, 7 Eur. H.R. Rep. 471, 499-504, paras. 74-83 (1985) (Court judgment). The Court found that the effect of the 1980 Immigration Rules as applied to the applicants, which made it "easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the [United Kingdom] for settlement," to be in contravention with the European Convention on Human Rights. *Id.* at 499, para. 74. In considering the admissibility of the applications the European Commission of Human Rights reached a similar holding as the Court, finding a violation of Article 8 (right to respect for family life) in conjunction with a violation of Article 14's prohibition on sexual discrimination. See *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81 and 9474/81, 6 Eur. H.R. Rep. 28, 41, para. 109 (1983) (Commission Report).

treaty obligations, a State has the right to control entry of non-nationals into its territory.”¹³⁰ However, the Court’s later jurisprudence signaled a retreat from the traditional position, broaching the idea that a State must adhere to human rights norms in enacting its citizenship and immigration policies:

[T]he Convention does not in principle prohibit Contracting States from regulating the entry and length of stay of aliens. Nevertheless, the Court also reiterates that, while [Article 8] contains no explicit procedural requirements, the decision making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by [Article 8].¹³¹

The *East African Asians* and *Abdulaziz* opinions also laid the foundation for the Court to consider subsequent cases involving challenges to the legality of the Contracting States’ citizenship and immigration policies as violating the right to respect for family life under Article 8 of the European Convention on Human Rights.¹³²

130. *Abdulaziz*, Eur. H.R. Rep., at 497, para. 67. In further restricting the applicability of its decision, the *Abdulaziz* court stated that “[t]he duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. *Id.* at 497, para. 68. This led to the eventual creation, in the Court’s jurisprudence, of a distinction between a State’s negative obligation to refrain from expulsion of non-nationals already residing within a State and a State’s positive obligation to admit a non-national to reside within a State, in which the latter duty was “less established,” according to the States a “margin of appreciation in determining the steps to be taken to ensure compliance.” See *Rogers*, *supra* note 126, at 59 (footnote omitted).

131. See *Rogers*, *supra* note 126, at 60 (quoting *Ciliz v. Netherlands*, App. No. 29192/95, para. 66 (Eur. Ct. H.R. Jul. 11, 2000), available at <http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200207/ciliz.batj.doc>).

132. See, e.g., *Yildiz v. Austria*, App. No. 37295/97, 36 Eur. H.R. Rep. 32 (2002) (finding breach of Article 8); *Amrollahi v. Denmark*, App. No. 56811/00 (Eur. Ct. H.R. Jul. 11, 2002) (finding breach of Article 8), available at http://www.sbg.ac.at/oim/orig/02_4/Amrollahi%20v%20DK.PDF; *Sen v. Netherlands*, App. No. 31465/96, 36 Eur. H.R. Rep. 7 (2001) (finding breach of Article 8); *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 50 (2001) (finding breach of Article 8); *Ahmut v. Netherlands*, App. No. 21702/93, 24 Eur. H.R. Rep. 62 (1996) (finding no breach of Article 8); *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228 (1996) (finding no breach of Article 8); *Gül v. Switzerland*, App. No. 23218/94, 22 Eur. H.R. Rep. 93 (1996) (finding no breach of Article 8).

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4. The Present State of International Law in Regulating a State's Citizenship Policies

The central argument of this Note is that the Citizenship and Entry into Israel Law is in direct contravention with legal duties imposed upon Israel vis-à-vis its treaty obligations and also customary international law, and thus, must be amended or perhaps more practically, repealed. As a result, the threshold question of whether international law imposes any limitations at all upon a State's discretion in the determination of who may or may not become its national must be answered. One may arrive at several conclusions from the preceding survey and analysis of the various international legal authorities dealing with the extent international law may be able to circumscribe nationality policies. First, States still retain considerable authority in regulating matters of nationality which necessarily result in measures based on race or ethnicity. Second, domestic jurisdiction over nationality policies is not impermeable and will, in certain situations, bend to the mandates of international legal norms. Third, a State, at a minimum, must not breach its treaty obligations when devising and implementing its citizenship policies. And fourth, international human rights law is emerging as an effective supplement to treaty obligations in piercing the State's veil of domestic jurisdiction over nationality matters.

V. EXAMINING THE CITIZENSHIP AND ENTRY INTO ISRAEL LAW UNDER INTERNATIONAL HUMAN RIGHTS LAW

A. *The Citizenship and Entry into Israel Law: Potential Violation of Specific Rights Under International Human Rights Law*

Whereas traditional international law focused primarily on the rights and duties of the State,¹³³ the basic premise underlying

133. Professor Henkin, describing the development of international human rights law, offered the following characterization of the state of international law prior to the establishment of the modern human rights regime:

[F]or hundreds of years international law and the law governing individual life did not come together. International Law, true to its name, was law only between States, governing only relations between States on the State level. What a State did inside its borders in rela-

ing human rights law is that the “*individual* is to have direct rights and duties in international law.”¹³⁴ The focus upon promoting human rights intensified after the discovery of the numerous atrocities which took place during World War II.¹³⁵ Thus, the United Nations which came into being after World War II, declared as one of its purposes, “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, or religion.”¹³⁶ While

tion to its own nationals remained its own affair, an element of its autonomy, a matter of its ‘domestic jurisdiction.’

Louis Henkin, *International Law: Politics, Values and Functions*, in 216 COLLECTED COURSES OF HAGUE ACADEMY OF INTERNATIONAL LAW (vol. 4) 13, 209 (1989).

134. DONNER, *supra* note 91, at 183 (emphasis added). In a particularly powerful statement by Judge Tanaka concerning the universality and uniqueness of human rights as a body of law that is separate and distinct from any other body of law which may require recognition from States it was stated:

Human rights have always existed with the human being. They existed independently of, and before, the State. Alien and even stateless persons must not be deprived of them. [...] There must be no legal vacuum in the protection of human rights. Who can believe, as a reasonable man, that the existence of human rights depends upon the internal or international legislative measures, etc., of the State and that accordingly they can be validly abolished or modified by the State?

South West Africa Cases (Second Phase) (Eth. v. S. Afr. & Liber. v. S. Afr.), 1966 I.C.J. 6, 297–98 (July 18) (dissenting opinion of Judge Tanaka).

135. The birth of the modern human rights movement can be traced to the London Agreement and the accompanying Nuremberg Charter, signed by the Allied Powers on August 8, 1945, which allowed for the imposition of “individual responsibility” against persons violating certain international crimes perpetrated during World War II. See Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics respecting the prosecution and punishment of the major war criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, E.A.S. No. 472 [hereinafter Nuremberg Charter]. See also JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 408 (2002) (explaining that in the context of human rights violations “[r]eliance on the doctrine of state responsibility was clearly insufficient to deal with abuses committed by a state against its own nationals since no state could be expected to bring an action against itself.” Thus, the post-World War II decision by the Allied Powers to bring to justice those individuals who committed atrocities during the war “marked a turning point in attitudes toward the individual’s status in international law.”).

136. U.N. Charter art. 1 para. 3.

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the Charter does not enumerate the various “human rights” which are to be protected by the Member States it has been said that the Universal Declaration of Human Rights¹³⁷ (hereafter “Declaration”) is an amendment to the U.N. Charter in this respect.¹³⁸ Thus, it may be argued that a violation of a right enumerated in the Declaration is *a fortiori* a violation of the U.N. Charter. Moreover, certain human rights obligations, especially those prohibiting State sponsored “systematic racial discrimination” have attained the status of customary international law.¹³⁹

As the seminal document on human rights, The Declaration shall provide a framework for the ensuing analysis of the legality of the Citizenship and Entry into Israel Law. In particular it will be argued that the Citizenship and Entry into Israel Law violates the right of equal protection and prohibition against

137. See generally G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. I, Resolutions, at 71-79, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html> [hereinafter Declaration]. It is still debated whether the Universal Declaration of Human Rights is legally binding, as evidenced in the language of the Preamble where the States are called upon to “teach,” “educate,” and “promote” respect for human rights rather than “safeguard,” “protect” and “guarantee” human rights, see DONNER, *supra* note 91, at 191, as well as its nature as a General Assembly resolution. Nonetheless, the Universal Declaration of Human Rights “has force as a morally ... binding document [in which] its authority is enhanced by the universality of its acceptance by Members of the United Nations.” *Id.* If any question remains regarding the significance of the Universal Declaration of Human Rights the statement by Vere Evatt of Australia, President of the General Assembly, made at the time of the adoption of the Declaration may put the matter to rest: “It is the first occasion on which the organized community of nations has made a declaration of human rights and fundamental freedoms, and it has the authority of the body of opinion of the United Nations as a whole...” *Id.* at 189 (quoting The Impact of the Universal Declaration of Human Rights, U.N. Dep’t of Social Affairs, at 7, U.N. Doc. ST/SOA/5/Rev.1 (June 29, 1953)).

138. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 cmt. d (1987) (“Almost all states are parties to the United Nations Charter, which contains human rights obligations. There has been no authoritative determination of the full content of those obligations, but it has been increasingly accepted that states parties to the Charter are legally obligated to respect some of the rights recognized in the Universal Declaration.”).

139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(f). In clarifying the scope of the “systematic racial discrimination” covered under customary international law of human rights, the Restatement provides that “[r]acial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, e.g., apartheid in the Republic of South Africa.” *Id.* § 702 cmt. i.

discrimination on the basis of race, color, or national origin¹⁴⁰ as applied to the right against arbitrary interference with the family;¹⁴¹ and the right to protection of the family as the fundamental unit of society.¹⁴²

Since there is no definitive answer on whether the Declaration is legally binding, this Note will also focus upon two human rights conventions governing the legality of the Citizenship and Entry into Israel Law; the International Covenant on Civil and Political Rights (hereafter "ICCPR")¹⁴³ and the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter "CERD").¹⁴⁴

140. Declaration, *supra* note 137, art. 2 & 7.

141. Declaration, *supra* note 137, art. 12.

142. Declaration, *supra* note 137, art. 16.

143. *See generally* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Israel became a signatory to the ICCPR on December 19, 1966 and ratified the ICCPR on October 3, 1991. *See* Multilateral Treaties Deposited With the Secretary-General, Status as at Dec. 31, 2002 at 164, U.N. Doc. ST/LEG/SER.E/21, U.N. Sales No. E.03.V.3 (2002). Israel also indicated its reservation with Article 23:

With reference to Article 23 of the [ICCPR], and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned.

To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law.

Id. at 169. Article 23 provides in pertinent part:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

[...]

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.

ICCPR, *supra* note 143, at 179.

144. *See generally* International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]. Israel became a signatory to the CERD on March 7, 1966 and ratified the CERD on January 3, 1979. *See* Multilateral Treaties Deposited With the Secretary-General, Status as at Dec. 31, 2002 at 131, U.N. Doc. ST/LEG/SER.E/21, U.N. Sales No. E.03.V.3 (2002). Israel also

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1. Application of Human Rights Law to Territories Under Military Occupation

Since the Citizenship and Entry into Israel Law is directed at persons residing within certain “areas,”¹⁴⁵ which are deemed Israeli-occupied territories resulting from the Arab-Israeli War of June 1967,¹⁴⁶ one must determine whether human rights law is applicable in circumstances of military occupation in which armed conflict may be present. The overriding concern with the application of human rights law to regions under military occupation is that “human rights law – unlike international humanitarian law – applies in peacetime, and many of its provisions may be suspended during an armed conflict.”¹⁴⁷

One issue that arises is the “convergence of humanitarian law and human rights law” in the context of military occupation.¹⁴⁸ Whereas the applicability of humanitarian law in situations of military occupation is undisputed,¹⁴⁹ it is less clear whether hu-

submitted a reservation upon ratification, stating that “[t]he State of Israel does not consider itself bound by the provisions of article 22 of the [CERD].” *Id.* at 135. Article 22 of the CERD provides:

Any dispute between two or more States Parties with respect to interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

CERD, *supra* note 144, at 238.

145. As stated above, the Citizenship and Entry into Israel Law applies exclusively to an “inhabitant of an area” in which the “area” is designated in the law as the West Bank and Gaza. Citizenship and Entry into Israel Law § 1, 5763-2003.

146. See Roberts, *supra* note 66, at 40–41.

147. International Committee of the Red Cross, Fact Sheet: What is International Humanitarian Law? (“Fact sheet providing a summary description of the sources, content and field of application of international humanitarian law.”), available at http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:IHL_in_brief?OpenDocument [hereinafter ICRC Fact Sheet].

148. John Dugard, *Enforcement of Human Rights in the West Bank and the Gaza Strip*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES*, *supra* note 47, at 461, 467.

149. International humanitarian law is defined by the International Committee of the Red Cross as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.” ICRC Fact Sheet, *supra* note 147. The Geneva Conventions of 1949 which mark an important milestone in the codification of international humanitarian law and may be viewed, with its

man rights law exudes an equally strong legal force.¹⁵⁰ In particular, occupying States must often derogate from its obligations under human rights law because of the threat to public safety in times of armed conflict.¹⁵¹ Thus, the *raison d'être* of enforcing human rights law, to protect the fundamental rights of individuals, is essentially compromised where a State is allowed to and often does derogate from its obligations during armed conflict.

Indeed, the Israeli Government has seized upon the deficiencies in sustaining a viable military occupation while protecting fundamental human rights to advance its preference for applying only humanitarian law to the Occupied Territories.¹⁵² In

almost universal acceptance, as customary international law, see Roberts, *supra* note 66, at 35, expressly provide for its application “to all cases of partial or total occupation ... even if the said occupation meets with no armed resistance.” See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T.S. 3114, 75 U.N.T.S. 287, 288. [hereinafter Fourth Geneva Convention]. The other three Geneva Conventions of 1949 all contain the same Articles 1 through 4 including Article 2 as cited above.

150. For an analysis of the applicability of human rights law to military occupations, and more specifically, to the Israeli Occupied Territories see Roberts, *supra* note 66, at 53–57. The U.N. General Assembly has consistently stated that the Universal Declaration of Human Rights is applicable to the territories occupied by Israel. See, e.g., G.A. Res. 3005, U.N. GAOR, 27th Sess., Supp. No. 30, at 30–31, U.N. Doc. A/8730 (1972); G.A. Res. 2851, U.N. GAOR, 26th Sess., Supp. No. 29, at 48–49, U.N. Doc. A/8429 (1971); G.A. Res. 2727, U.N. GAOR, 25th Sess., Supp. No. 28, at 36–37, U.N. Doc. A/8028 (1970); G.A. Res. 2443, U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7218 (1968).

151. See ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES: 1967-1982 5 (1985).

152. In support of its position that only humanitarian law applies to the occupied territories, the Israeli government has viewed the “unique political circumstances” in addition to the “emotional realities” existing in the occupied territories as “clearly not a classical situation in which the normal components of ‘human rights law’ may be applied....” Roberts, *supra* note 66, at 55 (quoting Memorandum from the Office of the Legal Adviser of the Israeli Foreign Ministry (Sept. 12, 1984) (written in response the author’s inquiry concerning the applicability of various human rights conventions to the occupied territories). In the view of the Israeli government, the lack of “the relationship between the ‘citizen’ and his government present in “any standard, democratic system” renders the occupied territories as unsuited for the application of human rights law. *Id.* It argued further that only humanitarian law, “which balances the needs of humanity with the requirements of international law to

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addition, the absence of any definitive opinion regarding the compatibility of human rights law to situations of military occupation substantiates the Israeli position.¹⁵³

Nonetheless, the unique nature of Israel's prolonged occupation of the West Bank and Gaza warrants a reconsideration of the argument that the "classical" situation for applying human rights law does not exist in the Israeli-occupied territories, or at least, the situation as it currently stands is ill suited for the application of human rights law. The traditional conception of a military occupation was that the occupying state would temporarily control the occupied state until the disputing parties reached a mutual agreement or some other shift occurred in the

administer the [occupied territories] whilst maintaining public order, safety, and security" should be applied. *Id.*

153. Two notable cases before international tribunals lend tacit support to the proposition that international human rights law is applicable in situations of military occupations. First, in the advisory opinion issued by the ICJ on the legal consequences of South Africa's occupation of Namibia member States of the United Nations were advised to refrain "from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia" and also abstain from "invoking or applying" any existing bilateral treaties entered into "by South Africa on behalf of or concerning Namibia which involve active intergovernmental cooperation." *Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, 55, ¶ 122 (Advisory Opinion of Jun. 21). However, the ICJ added an important exception to the above prohibitions stating that "certain general conventions such as those of humanitarian character" in which "the non-performance of may adversely affect the people of Namibia" should continue to be recognized and adhered to. *Id.* (emphasis added). The European Commission of Human Rights's ruling in the admission of applications by the Cyprus government regarding the Turkish occupation of Cyprus also affirms the applicability of human rights law in situations of military occupations. *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 4 Eur. H.R. Rep. 482, 509, para. 83 (1976) (Commission Report) (finding that under Article 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, Turkey was responsible for its obligations under the Convention as long as Turkish armed forces "brought any persons or property [in Cyprus] within the jurisdiction of Turkey ... to the extent that they exercise[d] control over such persons or property.") (internal quotation marks omitted). *See also* *Cyprus v. Turkey*, App. No. 8007/77, 15 Eur. H.R. Rep. 509, 522–23, para. 63 (1983) (Commission Report) (reaffirming the responsibility of Turkey to comply with the Convention in its military occupation of Turkey).

sovereign control of the occupied state.¹⁵⁴ This was the scenario envisioned by the drafters of the Geneva Conventions of 1949, which “was designed to protect the civilian population under an essentially temporary occupation.”¹⁵⁵ However, the situation *sui generis* created by the Israeli occupation of the West Bank and Gaza requires that the application of humanitarian law be supplemented with human rights law in order to adequately protect the rights of those under occupied rule.¹⁵⁶

154. See Roberts, *supra* note 66, at 28 (concluding that the applicability of the law of occupations assumes “that military occupation is a provisional state of affairs, which may end as the fortunes of war change, or else will be transformed into some other status through negotiations conducted at or soon after the end of the war”). See also COHEN, *supra* note 151, at 189 (“[T]he occupant’s power is circumscribed by the conventional law of belligerent occupation and by the underlying customary principle that the occupant is not the sovereign in the occupied territory and may not annex it.”).

155. COHEN, *supra* note 151, at 29.

156. See Dugard, *supra* note 148, at 466–67 (citing International Center for Peace in the Middle East, *Human Rights in the Occupied Territories 1979–1983* (study conducted by the International Center for Peace in the Middle East) (Tel Aviv, 1985)). To be sure, many other situations of prolonged occupation, which Roberts tentatively defines as “an occupation that lasts more than five years and extends into a period when hostilities are sharply reduced, i.e., a period approximating peacetime,” have taken place throughout history. See generally Roberts, *supra* note 66, at 29–32 (enumerating and describing situations of prolonged occupation, most notably the Allied occupation of Germany and Japan after World War II and the South African occupation of Namibia after the termination by the United Nations of its international mandate in 1966). However, very few if any of the previous “prolonged military occupations” have approximated the length, and more importantly, the extensiveness, i.e., settlement activity, quasi-independent governmental administrative structures, that is exemplified by the Israeli occupation of Palestinian territories, especially the West Bank, which is often viewed as territory under de facto annexation by Israel. See RAJA SHEHADEH, *OCCUPIER’S LAW: ISRAEL AND THE WEST BANK* 11 (1985) (“While the [West Bank] as a whole is not in theory annexed to Israel the settlements are subject to de facto annexation and apply Israeli law and are served by the Israeli infrastructure and administrative structure.”). With the harsh conditions confronting the Palestinian residents of the occupied territories, those who are not able to tolerate such conditions will eventually be forced to move thus allowing Israel to accomplish its eventual goal of annexing the occupied territories. *Id.* Indeed, the United States has already given the green-light to an eventual annexation of portions of the Occupied Territories by Israel:

In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to

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First, Israel has occupied the West Bank and Gaza for over thirty-five years which cannot be described as a temporary situation.¹⁵⁷ Second, while the occupation still involves use of force by both the occupying state and the occupied state, it cannot be said that the force perpetrated has consistently reached the scale of an armed conflict throughout the thirty-six years of the occupation.¹⁵⁸ Thirdly, the prospects for political compromise from Israel or Palestine are bleak if not non-existent.¹⁵⁹ Therefore, the protections offered by humanitarian law are insufficient and not contemplated to protect the fundamental rights of individuals in all aspects of life; an imperative in any long-term governance by one state over another.¹⁶⁰

The case for applying human rights law to the Occupied Territories is even stronger when reference is made to views of the

the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.

The White House, President Bush Commends Israeli Prime Minister Sharon's Plan (Apr. 14, 2004) (letter from President Bush to Prime Minister Sharon), available at <http://www.whitehouse.gov/news/releases/2004/04/20040414-3.html>.

157. See Dugard, *supra* note 148, at 466 ("There is undoubtedly much validity in the argument that belligerent occupancy is intended as a temporary, provisional measure and not one that continues for over twenty years."); Roberts, *supra* note 66, at 42 ("For the most part, the Israeli occupation of territories since 1967 does belie the assumption that occupation is temporary").

158. See Dugard, *supra* note 148, at 467.

159. See Roberts, *supra* note 66, at 43 (analyzing the substantial political obstacles involved in reaching a potential peace agreement between Israel and Palestine).

160. See Dugard, *supra* note 148, at 467. The inadequacy of the protections offered by humanitarian law in a regime of prolonged occupation is also asserted by one commentator as a possible basis for the application of human rights law:

While the [Geneva Conventions] remain[s] applicable to a large extent during the prolonged occupation phase, it is insufficient to ensure adequate protection for the needs of the civilian population during that phase. Further protection is called for. It is submitted that the Universal Declaration and the International Covenants on Human Rights may be used to guide the belligerent occupant in the administration of the territory occupied, just as civilian governments may be guided by these laws in the administration of their own territories.

COHEN, *supra* note 151, at 29.

various Committees established by the human rights conventions to which Israel is a State party. In particular, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination established by the ICCPR¹⁶¹ and the CERD¹⁶² respectively to monitor and enforce compliance with the conventions have recognized the applicability of human rights law to the occupied territories.¹⁶³

161. ICCPR art. 28, *supra* note 143, at 179.

162. CERD art. 8, *supra* note 144, at 224.

163. In the Concluding Observations of the Human Rights Committee with respect to Israel's compliance with its legal obligations under the ICCPR issued in 1998 it was emphasized that "the applicability of rules of humanitarian law does not by itself impede the application of the [ICCPR]" and its application must be extended to "the occupied territories and those areas ... where Israel exercises effective control." Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 63d Sess., 1694th mtg., at ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (July 28, 1998), available at <http://domino.un.org/UNISPAL.NSF?OpenDatabase> [hereinafter 1998 ICCPR Concluding Observations]. The Committee reaffirmed its position with regard to the applicability of the ICCPR to the Israeli occupied territories in 2003:

The Committee reiterates the view...that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the [ICCPR]...Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties...for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the [ICCPR] and fall within the ambit of State responsibility of Israel under the principles of public international law."

Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 78th Sess., 2128th – 2130th mtgs., at ¶ 11, U.N. Doc. CCPR/CO/78/ISR (2003), available at <http://www.unhchr.ch/tbs/doc.nsf>.

The Committee on the Elimination of Racial Discrimination has adopted a similar view of whether human rights law should apply to the Israeli-occupied territories. In its Concluding Observations issued in 1998, the Committee on the Elimination of Racial Discrimination stated, under the heading of "The Occupied Palestinian Territories," that "Israel is accountable for implementation of the [CERD] ... in all areas over which it exercises effective control." Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, U.N. CERD, 52d Sess., 1272d mtg., ¶12, U.N. Doc. CERD/C/304/Add.45 (1998), available at <http://www.unhchr.ch/tbs/doc.nsf>; see

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As a related yet distinct matter is the effect of an official declaration of a state of emergency upon the declaring state's human rights obligations. Israel has, since May 19, 1948, four days after it was established, been in an official state of emergency.¹⁶⁴ The original declaration of emergency was based primarily on the war then existing between Israel and its neighboring states in addition to the continuing insurgencies of the Jewish and Arab populations.¹⁶⁵ However, the official state of emergency still remains in effect for reasons of, as expressed by the Israeli government, "the ongoing conflict between Israel and its neighbors, and the attendant attacks on the lives and property of its citizens."¹⁶⁶ Indeed, upon ratifying the ICCPR on October 3, 1991, Israel submitted a notice of derogation stemming from its state of emergency.¹⁶⁷

also Concluding Observations/Comments, Prevention of Racial Discrimination Including Early Warning and Urgent Procedures, U.N. CERD, 45th Sess., 1067th mtg., paras. 83, 86, U.N. Doc. CERD/A/48/18 (1994) (advancing a similar "position of principle that, since Israel is a party to the [CERD], the Committee is competent to examine the manner in which Israel is fulfilling its obligations under the [CERD] with respect to everyone falling under the jurisdiction of Israel including all persons living in the territories occupied by Israel." In a more general statement the Committee emphasized Israel's obligation "to protect fully the life and security of the Palestinian civilians in the occupied territories."), *available at* <http://www.unhchr.ch/tbs/doc.nsf>.

164. *See* Initial Report of States Parties due in 1993 Addendum submitted by Israel, U.N. Hum. Rts. Comm., 63d Sess., ¶106, at 31, U.N. Doc. CCPR/C/81/Add.13 (1998), *available at* <http://domino.un.org/UNISPAL.NSF?OpenDatabase> [hereinafter 1998 Israel ICCPR Report]. The Government's authority to declare a state of emergency is based upon Basic Law: Government § 38, (2003) (replacing Law and Administration Ordinance § 9(a)-(d), 5708-1948, 1 L.S.I. 7, 8-9 (1948)). While the Government, particularly through its ministers, is granted substantial authority in promulgating emergency regulations, such measures must not infringe upon "human dignity." *See* Maoz, *supra* note 24, at 23-24. *See also* Basic Law: Government § 39(d) ("Emergency regulations may not...allow infringement upon human dignity.").

165. *See* 1998 Israel ICCPR Report, *supra* note 164, para. 106, at 31.

166. *Id.*

167. *Id.* It is instructive for one to read the full text of Israel's notice of derogation under the ICCPR as it provides the reader with an analogue of the often-advanced "security justification" for Israel's conduct:

Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

Numerous human rights conventions allow for the derogation from certain legal duties in times of “public emergency.”¹⁶⁸ For purposes of the ensuing discussion a “public emergency” may be defined as a state of affairs “which threatens the life of the nation.”¹⁶⁹ A state derogating from its human rights obligations must adhere to several requirements. First, it must only take measures “strictly required by the exigencies of the situation.” Second, such measures taken by the State may not violate its other obligations under international law. And third, the derogation cannot be discriminatory.¹⁷⁰ Furthermore, a declaration of an emergency under human rights law must be temporary.¹⁷¹

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the [ICCPR]. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercises of powers of arrest and detention. Insofar as any of these measures are inconsistent with article 9 of the [ICCPR], Israel thereby derogates from its obligations under that provision.

Id.

168. See, e.g., American Convention on Human Rights, Nov. 22, 1978, art. 27, 1144 U.N.T.S. 143, 152 (entered into force July 18, 1978) [hereinafter American Human Rights Convention]; ICCPR art. 4, *supra* note 143, at 174; Convention Relating to the Status of Stateless Persons art. 9, *supra* note 101, at 140; European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221, 232, 234 (entered into force Sept. 3, 1953) [hereinafter European Human Rights Convention]; Declaration art. 29(2), *supra* note 137.

169. ICCPR art. 4(1), *supra* note 143, at 174. This definition is in accord with those existing in other human rights conventions and opinions of international tribunals. See John Quigley, *The Right to Form Trade Unions under Military Occupation*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 37, at 295, 310–12 [hereinafter Quigley, *Trade Unions*].

170. The derogation provision of the ICCPR provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measure derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not

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Bearing the above requirements in mind, Israel would be unable to rely upon its officially proclaimed *de facto* emergency situation to justify non-adherence to its human rights obligations. While Israel, including the Occupied Territories, has been the site of continuing conflict, it is hard to concede that the same areas have been under a public emergency situation in which the life of the State has been threatened for almost half a century. Of course, taking into account the Arab-Israeli War of 1948 following the establishment of the State of Israel,¹⁷² the Arab-Israeli War of 1967 resulting in the Israeli occupation of the West Bank and Gaza,¹⁷³ the peak periods of the 1987 and 2000 *intifada*,¹⁷⁴ and other instances of armed conflict within Israel, a state of public emergency may have existed for twenty to thirty years. However, this would still leave another twenty to thirty years unaccounted for in which a state of “public emergency” could not have existed under the strict standards mandated by international authorities.¹⁷⁵ Furthermore, by officially pronouncing a state of “public emergency” for the past fifty-five years, Israel has violated the requirement in human rights law that an emergency be temporary.¹⁷⁶

Derogation provisions require that all restrictive measures taken by a State be limited “to the extent strictly required by the exigencies of the situation....”¹⁷⁷ It follows that even if the situation in Israel rises to the level of a “public emergency” the

inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour sex, language, religion, or social origin.

ICCPR art. 4(1), *supra* note 143, at 174. The CERD does not have any derogation provision which may indicate the universal rejection of any state-sanctioned racial discrimination even in times of national emergency. *See generally* CERD, *supra* note 144. *See also* COHEN, *supra* note 151, at 3 (“If a government did succeed in establishing the existence of [an] emergency, it would remain bound ... by its obligation not to discriminate on grounds of race, colour, sex, language, religion or social origin.”).

171. *See* Quigley, *Right of Return*, *supra* note 35, at 204.

172. Emma Playfair, *Introduction*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF THE OCCUPIED TERRITORIES*, *supra* note 47, at 1, 4.

173. *Id.* at 4–5.

174. WENDY PEARLMAN, *OCCUPIED VOICES* 37–40, 59–62 (2003).

175. *See* Quigley, *Trade Unions*, *supra* note 169, at 312.

176. *See* Quigley, *Right of Return*, *supra* note 35, at 204.

177. ICCPR art. 4(1), *supra* note 143, at 174. *See also* sources cited *supra* note 168.

restrictive measures adopted during such periods must be limited in "scope and territorial application," proportional to the seriousness of the "public emergency."¹⁷⁸

As demonstrated above, Israel has not been in a *de facto* state of "public emergency" for the *entire* fifty-five years of its existence. Therefore, any action taken by Israel which may contravene its obligations under human rights law must be struck down as illegal since no derogation is possible in a non-emergency situation.

2. Articles 12 and 16 of the Declaration: The Protection of the Family as the Fundamental Unit of Society

The family¹⁷⁹ is recognized in the Declaration and the ICCPR as "the natural and fundamental group unit of society ... entitled to protection by society and the State."¹⁸⁰ As such, States

178. See 1998 ICCPR Concluding Observations, *supra* note 163, at para. 11.

179. The U.N. Human Rights Committee, states that it is "not possible to give the concept [of family] a standard definition" under Article 23 of the ICCPR, which often differs "from State to State, and even from region to region within a State." See Protection of the Family, the Right to Marriage and Equality of the Spouses (Art. 23): CCPR General Comment 19, U.N. Hum. Rts. Comm., 39th Sess., para. 2 at 29, U.N. Doc. HRI/GEN/1/Rev.3 (Jul. 27, 1990) [hereinafter ICCPR General Comment 19], *available at* <http://www.unhchr.ch/tbs/doc.nsf>. However, a family should, at a minimum, consist of "spouses and minor children." ZILBERSHATS, *supra* note 92, at 46; THE AMERICAN HERITAGE DICTIONARY 488 (2d College ed. 1982) (defining "family" as a "fundamental social group in society consisting [especially] of a man and woman and their offspring."). Israel has acknowledged the difficulty in defining "family" due to the "significant demographic changes in the structure of families in Israel. 1998 Israel ICCPR Report, *supra* note 164, para. 694, at 219. However, the liberal interpretation by Israel of the types of relationships, including single-parents, non-marital cohabitants, and homosexual couples, which may fall under the rubric of family in terms of entitlement to benefits and recognition by Israeli law, is at least an implicit concession that the traditional structure of spouses and their minor children be included within the definition of "family." See *id.* para. 694-97, at 219-21. Moreover, the Citizenship and Entry into Israel Law, in one of its exceptions, defines a "member of family" as consisting of a "spouse, parent, [and] child." Citizenship and Entry into Israel Law, § 3(2), 5763-2003.

180. Declaration, art. 16(3), *supra* note 137; ICCPR art. 23(1), *supra* note 143, at 179. This principle is contained in other international and regional human rights conventions. See, e.g., African Charter on Human and People's Rights, June 27, 1981, art. 18(1), 1520 U.N.T.S. 217, 249 (entered into force Oct. 21, 1986) [hereinafter African Human Rights Charter]; American Human Rights Convention art. 17(1), *supra* note 168, at 150; International Covenant

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are required to maintain and facilitate the creation of the family which includes the negative obligation of protecting against the unlawful and arbitrary interference with the family¹⁸¹ as well as the positive obligation of ensuring persons within the State the right to marry and found a family.¹⁸² These rights are to be guaranteed to all individuals without distinction as to race, colour, religion, national origin, birth, or other such status.¹⁸³

The Citizenship and Entry into Israel Law creates substantial limitations on the right of Palestinians to marry Israeli nationals and vice-versa.¹⁸⁴ Section 2 of the Citizenship and Entry into Israel Law prohibits Palestinian spouses of Israeli citizens from obtaining Israeli citizenship or from acquiring an Israeli

on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 10(1), 993 U.N.T.S. 3, 7 (entered into force Mar. 23, 1976). In its Initial ICCPR Report, Israel recognized that “the family is firmly acknowledged, under both religious and civil law, as the basic, natural group unit in Israeli society....” 1998 Israel ICCPR Report, *supra* note 164, ¶ 694, at 219.

181. *See, e.g.*, ICCPR art. 17(1), *supra* note 143, at 177 (“No one shall be subjected to arbitrary or unlawful interference with his ... family....”); Declaration art. 12, *supra* note 137 (“No one shall be subjected to arbitrary interference with his ... family.... Everyone has the right to the protection of the law against such interference or attacks.”). Similar provisions are provided in other international and regional conventions. *See, e.g.*, American Human Rights Conventions art. 10(2), *supra* note 168, at 148; European Human Rights Convention art. 8(1), *supra* note 168, at 230.

182. *See, e.g.*, CERD art. 5(d)(iv), *supra* note 144, at 220 (States Parties undertake to ... guarantee the right ... without distinction as to race, colour, or national or ethnic origin ... to marriage and choice of spouse.”); ICCPR art. 23(2), *supra* note 143, at 179 (“The right of men and women of marriageable age to marry and to found a family shall be recognized.”); Declaration art. 16(1) *supra* note 137 (“Men and women of full age, without any limitation due to race nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.”). Similar provisions exist in other international and regional human rights conventions. *See, e.g.*, African Human Rights Charter art. 18(1)-(2), *supra* note 146, at 249; American Human Rights Convention art. 17(2), *supra* note 168, at 150; International Covenant on Economic, Social, and Cultural Rights art. 10(1), *supra* note 156, at 7; European Human Rights Convention art. 12, *supra* note 168, at 232.

183. *See* CERD art. 5(d)(iv), *supra* note 144, at 220; ICCPR art. 2(1), *supra* note 143, at 173.

184. *See generally* Citizenship and Entry into Israel Law, 5763-2003. *See also* text accompanying *supra* notes 74–79.

residence permit¹⁸⁵ — both of which were previously available to Palestinians as a means of facilitating their marriages with Israeli citizens.¹⁸⁶ In order to appreciate the restrictive nature of the Citizenship and Entry into Israel Law, one must consider the practical effects emanating from the implementation of the Law. First, for Palestinian spouses of Israeli nationals planning to apply for citizenship or residency in Israel, their applications will no longer be considered, barring access to the only legal means of entry into Israel.¹⁸⁷ Second, for Palestinian spouses of Israeli citizens who have already begun the application process, their statuses will be undetermined as long as the new Citizenship Law is in effect.¹⁸⁸ Third, for Palestinian spouses currently residing in Israel on a residence permit (many of whom are also in the process of applying for Israeli citizenship), the new law

185. Citizenship and Entry into Israel Law § 2, 5763-2003. For the full text of section 2 of the Citizenship and Entry into Israel Law see *supra* text accompanying note 60.

186. See Entry into Israel Law, §§ 1-6, 5712-1952, 6 L.S.I. 159 (1951-52), reprinted in GREENFIELD, *supra* note 11, at 11 (granting of Israeli residence permits); Nationality Law § 7, 5712-1952, 6 L.S.I., at 52 (providing that “the spouse of a person who is an Israel national ... may obtain Israel nationality by naturalization even if she or he is a minor or does not meet the [criteria otherwise required for obtaining Israel nationality by naturalization]”).

187. See Citizenship and Entry into Israel Law § 2, 5763-2003. The story of Zuhdi Samada represents such a predicament:

Zuhdi Samada is not certain when his wife, Siam, and their six-week-old daughter will be back living with him in their home in [Israel]. For now they are with Siam’s family in the West Bank.... Mr. Samada, an Israeli-Arab, says his wife and child went for a three-week visit. But he is not sure how Siam, who does not have a permit to live in Israel, will get through the West Bank army roadblock she will have to traverse on her way back to [Israel]. Even if she succeeds, and returns to her husband, she will be breaking the law. If she is not willing to do that, then Siam and Zuhdi have two other alternatives — separate or live abroad.

Hirschberg, *supra* note 63.

188. An example of such a situation is detailed in Brief for Petitioner paras. 15–22, at 8-9, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03), in which one of the petitioners, a Palestinian woman, married an Israeli citizen, and applied for “a status in Israel.” *Id.* at 8, para. 19. The petitioner’s application was rejected as mandated by Government Decision 1813. *Id.* In a separate attempt in July 2003 to renew her residence permit, the Government stated in its rejection letter that the request could not be considered “until approval of family unification by the Ministry of Interior was obtained.” *Id.* at 8, para. 20.

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prevents them from renewing their residence permits, thus requiring them to leave Israel.¹⁸⁹ As a result, the family will have to relocate outside Israel or abandon the prospect of living together.

These prohibitions, directed specifically at the inhabitants of the Occupied Territories (West Bank and Gaza excluding Israeli settlements),¹⁹⁰ have effectively denied Israelis and Palestinians the right to marry and found a family in contravention with article 23(2) of the ICCPR.¹⁹¹ Moreover, the restrictions imposed by the Citizenship and Entry into Israel Law also violate article 17 of the ICCPR, which protects the family from arbitrary and unlawful interference.¹⁹²

189. See Entry into Israel Law §§ 13, 13A(b), 5712-1952, *reprinted in* GREENFIELD, *supra* note 11, at 13 (providing for the conditions under which persons without a valid residence permit may be deported and expelled from Israel).

190. See Citizenship and Entry into Israel Law § 1, 5763-2003.

191. See ICCPR art. 23, *supra* note 143, at 179. Protection of the family under article 23 requires a State party to “adopt legislative, administrative or other measures” which may be implemented by the State itself or through other social institutions. ICCPR General Comment 19, *supra* note 179, at para. 3, at 29. In clarifying and expanding upon the principle of the “right to found a family” the U.N. Human Rights Committee stated:

The right to found a family implies, in principle, the possibility to procreate and live together. When States parties [to the ICCPR] adopt family planning policies, they should be compatible with the provisions of the [ICCPR] and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic, or similar reasons.

Id.

192. Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

ICCPR art. 17, *supra* note 143, at 177. The term “family” under article 17 is “given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.” The Right to Respect of Privacy, Family, Home, and Correspondence, and Protection of Honour and Reputation (Art. 17): CCPR General Comment 16, U.N. Hum. Rts. Comm.,

It may be argued that historically, States have had the right to control the entry of non-nationals into their respective territories and the Citizenship and Entry into Israel Law is a product of this wide-ranging discretion.¹⁹³ Moreover, the situation *sui generis* confronting Israel, in its prolonged military occupation of the West Bank and Gaza, should provide it with even greater discretion in matters of immigration and nationality.¹⁹⁴ Indeed, Israel has defended its enactment of the Citizenship and Entry into Israel Law on such grounds.¹⁹⁵

It is not disputed that Israel may take decisive action to protect its national welfare, especially where the threat of violence is omnipresent. Indeed, human rights conventions allow States to legislate according to their security needs even if it may result in the *de facto* violation of human rights law.¹⁹⁶ However, any State action which potentially violates fundamental human rights on the basis of fortuitous traits such as race, ethnicity, or sex, must be supported by a factual foundation that provides an

32d Sess., at 21, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 8, 1988) [hereinafter ICCPR General Comment 16], *available at* <http://www.unhchr.ch/tbs/doc.nsf>. Furthermore, an official, State-sponsored interference with family may still be "arbitrary or unlawful" if the interference does not comply with the "provisions, aims, and objectives of the [ICCPR]." *Id.* It is notable that the duties imposed on a State party under article 17 also fall within the rubric of the protection of the family under article 23 of the ICCPR. *See* ICCPR General Comment 19, *supra* note 179.

193. *See supra* Part IV.A.1 & 2.

194. *See supra* Part V.A.1.

195. The Ministry of Foreign Affairs advanced the following as part of its defense of the Citizenship and Entry into Israel Law:

Inasmuch as no sovereign nation permits the entry into its territory of foreign nationals who may pose a danger to its security, nor to take up residency, so is Israel entitled to restrict its immigration policies. Similarly, no rule of international law obligates a state to grant legal status to nationals of other nations or entities when such nations or entities are in a state of armed conflict or war with that state and when there exists a genuine threat that they would pose a danger to the security of the state and its citizens.

Israel Ministry of Foreign Affairs, Israeli Legislation Regarding Citizenship and Residence Rights for Palestinian Residents of the Territories (Aug. 10, 2003), *at* <http://www.mfa.gov.il/mfa/go.asp?MFAH0nqf0>.

196. *See, e.g.*, ICCPR art. 4, *supra* note 143, at 174; European Human Rights Convention art. 15, *supra* note 168, at 232, 234.

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objectively reasonable basis for the proposed limitations.¹⁹⁷ To couch the measure as a means of furthering State security may strike the balance in the State's favor, but it does not eliminate the need for an objectively, reasonable justification altogether.¹⁹⁸

197. See, e.g., *Beharry v. Reno*, 183 F.Supp.2d 584, 604 (2002) (finding that the "summary deportation of [the petitioner] a long term legal alien without allowing him to present the reasons he should not be deported violates the ICCPR's guarantee against arbitrary interference with one's family...."), *rev'd sub nom. on unrelated grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2003); *Maria v. McElroy*, 68 F.Supp.2d 206, 232 (E.D.N.Y. 1999) ("[T]he ICCPR prevents a nation from separating families in a manner that, while in accordance with its domestic law, is nonetheless unreasonable and in conflict with the underlying provisions of the ICCPR."); *Yildiz v. Austria*, App. No. 37295/97, 36 Eur. H.R. Rep. 32, 561 (2002) ("[A State's] power to deport aliens convicted of criminal offenses ... must, in so far as [it] may interfere with [the right to respect for family life guaranteed under Article 8 of the European Convention of Human Rights] be necessary in a democratic society, that is to say justified by a pressing social need and, in particular proportionate to the legitimate aim pursued.").

198. During World War II, the United States Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944), considered the constitutionality of several laws which operated to exclude persons of Japanese ancestry from designated military areas in the United States for the "protection against espionage and against sabotage." The petitioner in *Korematsu*, an American citizen of Japanese heritage, was convicted of remaining in a restricted military area where his home was located. *Id.* at 215–16. Prior to assessing the constitutionality of the law at issue, the Court stated:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. This is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Id. at 216. Noting that "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [the exclusion of persons of Japanese ancestry from a threatened area]" the Court upheld the law as a valid exercise of the war power by Congress and the Executive necessarily relying on the expertise of military authorities in a time of war. *Id.* at 218, 223–24. Justice Murphy, in his dissent, reiterated the importance of assessing governmental actions, even those taken in a time of war, for reasonableness:

Individuals must not be impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must be subject itself to

Even assuming that the Citizenship and Entry into Israel Law is effective in enhancing Israel's security, the factual basis advanced by Israel to support the sweeping nature of the law is insufficient. The Ministry of Interior, in a submission to the Knesset Internal Affairs Committee which considered the justifications for the Citizenship and Entry into Israel Law, reported that 20 out of 140,000 persons entering Israel for family reunification purposes were involved in terrorist-related activities (including those involved in weapons trade).¹⁹⁹ This statistic represents the Government's primary factual justification for the Citizenship and Entry into Israel Law as a means of protecting the Israeli population from threats of terrorism.²⁰⁰ The restriction of a population of almost 1.3 million Palestinians in the Occupied Territories²⁰¹ from applying for an Israeli residence permit or Israeli citizenship on the basis of twenty terrorist-related cases involving Palestinians cannot be viewed as a measure reasonably commensurate to the security risk confronting Israel.

Claims that the Citizenship and Entry into Israel Law is based on geography, and hence not discriminatory should fail, since there is clear evidence that the Law is racially motivated.

the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

[...]

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.

Id. at 234 (citations omitted).

199. Brief for Petitioner paras. 61–63, at 20, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03).

200. Throughout the Knesset Internal Affairs Committee hearings on the Citizenship and Entry into Israel Law, the Government repeatedly failed to provide requested information regarding the factual background of the Law. *See id.* paras. 61–76, at 19–24.

201. The 1997 First Palestinian Census taken by the Palestinian Central Bureau of Statistics reports a total of 1,286,947 Palestinians between ages 15 – 64 residing in the West Bank and Gaza, which constitutes 49.5% of the entire Palestinian population in Occupied Territories. *See* Palestinian Central Bureau of Statistics, *Population by Age Groups in Years, Region, and Sex*, at <http://www.pcbs.org/inside/selcts.htm> (last modified May 12, 2002).

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On its face, the application of the law is directed at specific geographic “areas” namely the Occupied Territories of the West Bank and Gaza.²⁰² To be sure, Palestinians are not the only residents of these “areas,” which also includes many Jewish settlers.²⁰³ However, as an almost implicit admission of the law’s racial motivations, the definition of “areas” excludes Israeli settlements, essentially restricting its application to Palestinians.²⁰⁴ Moreover, members of the Knesset have expressly stated that the Law specifically targets the Palestinians who pose a security threat to Israel.²⁰⁵ The Citizenship and Entry into Israel Law, thus, limits the exercise of fundamental, human rights based solely on distinctions of race and national origin.

As a racially discriminatory measure, the justifications for the law are subject to a more searching inquiry.²⁰⁶ The proof offered in support of the law cannot sustain this heavy burden.²⁰⁷ Therefore, Israel has breached its obligations under the ICCPR and CERD to guarantee the exercise of fundamental human rights, without distinction as to race, national origin, or religion.²⁰⁸

202. Citizenship and Entry into Israel Law § 1, 5763-2003.

203. According to the latest Israeli population census, there are approximately 228,000 Jewish settlers residing within the Occupied Territories. Central Bureau of Statistics of the State of Israel, Population in Urban Localities and Other Geographical Divisions, (Sept. 30, 2003) (table providing population data by district, sub-district and area), available at http://www.cbs.gov.il/population/popul_eng.htm (last modified Sept. 30, 2003).

204. Citizenship and Entry into Israel Law § 1, 5762-2003.

205. See text accompanying *supra* notes 81-82.

206. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (“Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.... Such classifications are subject to the most exacting scrutiny.”) (citations omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“At the very least, the Equal Protection Clause demands that racial classifications especially suspect in criminal statutes, be subject to the ‘most rigid scrutiny.’”) (citation omitted); *Abdulaziz v. United Kingdom*, App Nos. 9214/80, 9473/81, 9474/81, 6 Eur. H.R. Rep. 28, 39, para. 103 (1983) (Commission Report) (“It is generally recognised that classifications based on sex are to be carefully scrutinised, in order to eliminate invidious disadvantages.”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

207. See text accompany *supra* note 199.

208. See CERD art. 5(d)(iv), *supra* note 144, at 220; ICCPR art. 2(1), *supra* note 143, at 173.

VI. THE FINAL RECONCILIATION: A JEWISH DEMOCRATIC STATE

As the one-year deadline²⁰⁹ for the Citizenship and Entry into Israel Law approaches, Israel must decide whether to renew a law, discriminatory in nature and purpose, or whether to preserve Israel's democratic principles by amending or repealing it. It is apparent that Israel's democratic foundation cannot support a measure which restricts, on a large-scale, the exercise of fundamental human rights based on fortuitous traits of race and ethnicity.

The Citizenship and Entry into Israel Law should be amended, affording Palestinian applicants for residency or citizenship in Israel an individualized screening process. Indeed, such a practice had been in place until the passage of the new citizenship policy²¹⁰ and there is no indication that the outright ban on citizenship and residency in Israel has enhanced its overall security.²¹¹

By prohibiting Palestinians from seeking citizenship and residency in Israel solely because of race and national origin the measure violates principles of non-discrimination enshrined in the Universal Declaration of Human Rights, ICCPR, and the CERD. Moreover, the law prevents Palestinians from joining their spouses in Israel thus infringing on the right to the establishment and protection of the family. And, without further justification, the racially discriminatory motive and effect of the law constitutes an arbitrary interference with the family. Thus, Israel is in breach of its international human rights obligations.

However, it is not only Israel's increasingly restrictive citizenship policy which is problematic. These discriminatory,

209. Section 5 of the Citizenship and Entry into Israel Law provides:

This law shall remain in force until the end of a year from the day on which it is published, but the Government is entitled, with the approval of the Knesset, to prolong its validity by order, from time to time, for a period that shall not exceed one year on each occasion.

Citizenship and Entry into Israel Law § 5, 5763-2003.

210. See Brief for Petitioner para. 40, at 113-14, *Adalah v. Minister of Interior*, High Court of Justice (H.C. 7052/03).

211. Since the implementation of the "freeze" under Government Decision 1813 in May 2002 there have been thirty-six "terrorist attacks" in Israel proper and Jerusalem resulting in 272 deaths and 1,300 injured. Anti-Defamation League, *Recent Terrorist Attacks In Israel*, available at http://www.adl.org/Israel/israel_attacks.asp (last visited Apr. 11, 2004).

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anti-democratic measures are inherent in Israel's character as a Jewish state and will continue to propagate as long as the status quo is maintained. Israel must decide whether its democratic principles are worth sacrificing to preserve its Jewish character, thus creating an apartheid-like State, or whether its Jewishness shall give way to the security of racial harmony and social equality. If history may be a guide, the answer is clear.

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* B.S., New York University – Leonard N. Stern School of Business (2001); J.D. Brooklyn Law School (expected 2005). I would like to thank my family for their continued support and encouragement throughout the law school process. Moreover, I am appreciative of the guidance given to me by Professors Nathaniel Berman and Samuel Murumba in writing this Note. And finally, I would like to thank my dear friend, Ms. Mary Geday, who needs no reminder that her cause is just, and given time, justice will prevail.