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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.

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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 Solan[3] 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)

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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]

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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 version[17]) or exclusively (e.*g.* the German version[18]) 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.

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21. For details on the background for taking this stand, see *infra* Part 2.3.

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B. *The strong language theory*

Not all theories of legal argumentation and statutory inter-
pretation 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 compe-
tence 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: sen-
tences 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 ex-
isting independently of the deciding judge or judges.[24] There-
fore, 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 consti-
tutive 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]

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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 Interpreta-
tion*, *in* 2001 PROCEEDINGS FROM THE CONFERENCE OF LAW AND LANGUAGE –
PROSPECT AND RETROSPECT 1, 5 (Univ. of Lapland CD-ROM) [hereinafter *Or-
dinary 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 cites[28] 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

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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 ac-
tual 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 identi-
cal system built up in the brain of each language user,[35] consti-
tuting the equivalent of an objective meaning existing inde-
pendently of the characteristics of the individual processor.
This is the central characteristic, and a necessary presupposi-
tion, of the strong theory of language: only if sender and re-
ceiver have near identical systems are they able to understand
words in the same way. It is, however, a fairly unlikely constel-
lation. It is difficult to come up with descriptions of actual lan-
guage acquisition processes that may yield such identical sys-
tems in every communicator. The problem is that the meaning
of texts can only exist as a construction in the minds of indi-
viduals, built on the basis of perceived underspecified textual
signs and existing mental models. An objective meaning exist-
ing 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 mean-
ings, agreed to under the conditions that each individual's con-
structed meaning only be communicated to others via texts sub-
ject 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 in-
terest in the cognitive reality and in the actual way language
contributes to communication and mutual understanding, how-
ever, have had to take this discord more seriously. One such
approach, which is the one I will use as my basic descriptive

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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-

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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 ANDWENDUNG 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.
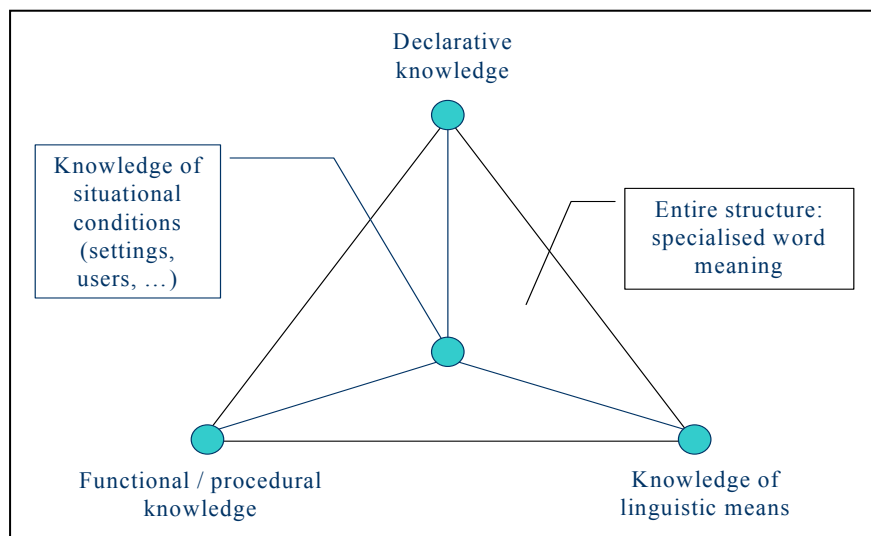
The model shows a stylised picture of different groups or types of knowledge involved in actual text understanding. The intention is to monitor the state of the cognitive system after the meaning of a word in a specific communicative situation is understood, i.e., after interpreting a word in context. 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

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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 Einfuhrende 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

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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.

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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 DATENVERABEITUNG [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

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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-

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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

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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-

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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 scalar[72] rather than a binary (determinate vs. indeterminate), or even one-sided[73] 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

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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 postmodernists' 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

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    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 indeterminancies 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.

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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

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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 determinacy[93] 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-

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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 models[96] 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-

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  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

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98. Wolfgang Mincke, *Die Problematik von Recht und Sprache in der Uberserzung von Rechstexten [Problems of Law and Language in the Translation of Legal Texts], in* 77 Archiv fur Rechtsund Sozialphilosphie [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

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104. *Id.*

105. *Id.*

106. *Id.* §§ 13, 15.

107. *Id.*
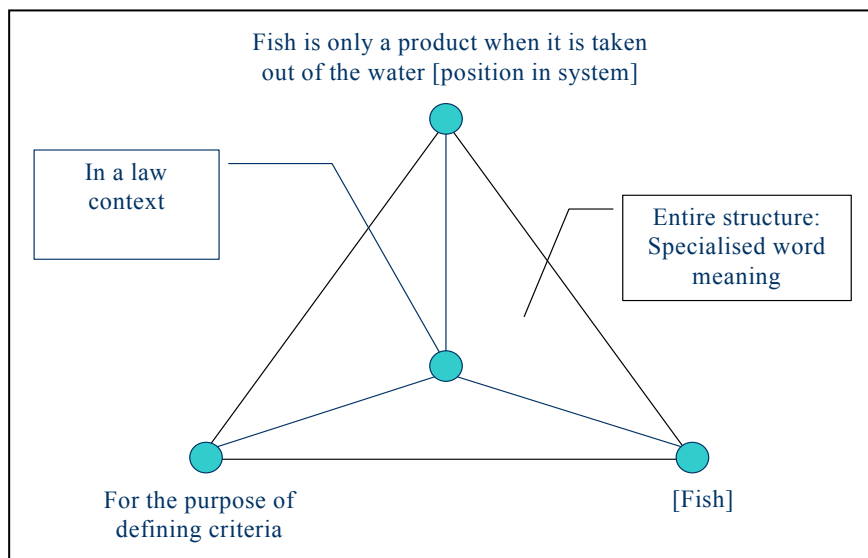
108. *Id.* §§ 9–15.

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:

Fish is only a product when it is taken out of the water [position in system]

In a law context

Entire structure: Specialised word meaning

For the purpose of defining criteria

[Fish]

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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:
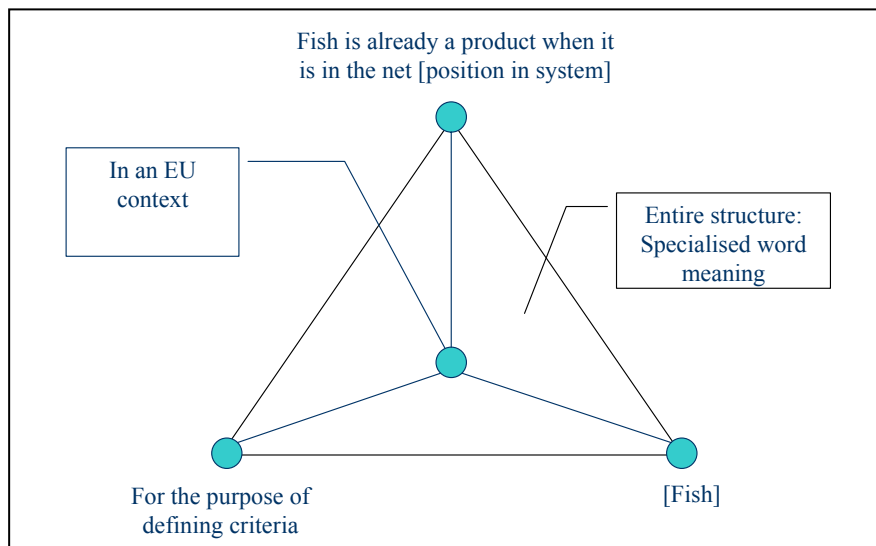
This means that consequent to the decision reached by the Court,[115] all language versions, including the concept referred to by the English word *fish* when used for the purpose of defining criteria for taxation, *in an EU context* contains the characteristics of being a product when it is in the net of the trawler rather than solely after removal from the water. The Court has set up a new declarative knowledge chunk[116] 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

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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 problem[120]

The first two objections have to do with the underlying perception of meaning and the confidence the author has in the

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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

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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). Kjaer 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-

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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 Court[133]). One could say that even the ordinary meaning[134] 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-

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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. Kjaer, *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.