



# On the Nature of Legal Understanding and the Quality of Transnational Communication in Law

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Thesis submitted for assessment with a view to obtaining the degree  
of Doctor of Laws of the European University Institute

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**Department of Law**

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I thank Janet Opdyke for her assistance with the language corrections.

## **Abstract**

This project is about the fundamental loss of effective legal understanding in conversations between competent jurists from different national legal systems. It consists of three parts. The first argues for a complex, full and effective legal understanding that is embedded within a socially constituted practice of legal language. This means that those who engage in such a practice of language should be able to communicate with each other in more or less agreement, and this includes the possibility of meaningful disagreement, misunderstanding, or mistake. This account is in line with the view of language and meaning, advanced by Ludwig Wittgenstein in his *Philosophical Investigations*.

The second part demonstrates that in certain conversations about law the participants do not share a socially constituted practice of legal language and as a result cannot communicate effectively. At most they can communicate in terms that collapse into an infinite number of interpretations because there is no shared understanding of them. Ultimately this leads to a paradoxical understanding of the conversation that is not full and effective at all. Hence the quality of communication is fundamentally undermined. Three conversations are analyzed to demonstrate this problem: a non-legal conversation about coffee and two legal conversations about contractual interpretation and the interpretation of a European Court decision.

The third part concludes that when the quality of communication is fundamentally undermined the participants must work together to create a new, shared practice of legal language. This kind of collective undertaking resembles what James Boyd White has described as a process of integration in his *Justice as Translation*. Through this process, which is based on the participants' different understandings of law, a new kind of understanding can be created, one that is both respectful of the original and shared.



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“It is difficult to see *through* rules if one sees through rules”<sup>1</sup>

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<sup>1</sup> MANSELL, W., METEYARD, B. & THOMSON, A. 2004 (1995). *A Critical Introduction to Law*. Cavendish Publishing Limited, p. 30



## Acknowledgements

The leitmotiv for this thesis is a quote from a book assigned by Joep van der Vliet in my first-year course in law (“It is difficult to see *through* rules if one sees through rules”). My journey into the world of language, meaning, and law began with Joep and this course. For this course I wrote my first paper and with Joep’s thorough, thoughtful, and motivating feedback I discovered my philosophical interest in the meaning of law. So I began to study philosophy and in the process developed a specific interest in the philosophy of language. Then I returned to law. The rules mentioned in the quote refer to a tool language philosophers use to explain the nature of our understanding. It speaks of an inherent difficulty that follows from this nature: we are mostly blind to our own understanding. This in turn makes it difficult for us to understand others. I used this insight in my research.

In Florence I continued my journey into the world of language, meaning, and law. But I would not have travelled there if not for Professor Janne Nijman, who at the right moment encouraged me to apply to the EUI, even though I had only two weeks in which to write my proposal. Her support and comments on the proposal were essential.

At the EUI I met the person I had hoped would be my supervisor: Professor Dennis Patterson. He told me that I was “basically illiterate in philosophy” and would have to work hard to write a good thesis. This was during one of our first meetings. True to his assessment, Dennis sent me new book titles almost every week, and I started reading them. And I read them with great pleasure until I got stuck in the works of Stanley Cavell. Then I nearly lost my mind. I could no longer distinguish between Cavell’s Ordinary and my own. Luckily Dennis came through with another suggestion, which turned out to be a crucial one. Reading the works of James Boyd White brought me back to my senses, and for the first time I began to see how I could talk about the problem of lost understanding in law.

Dennis, I thank you for making me read so much and always being supportive of my project. And I am glad that you showed me what it means to be “succinct.” Your style of teaching and presenting a paper, or just providing a comment, is edifying. In one of the first e-mails we exchanged you told me to remember that you are from New York. I do remember, but I have never fully understood your remark. Maybe you were too succinct? I appreciate your directness and unfailing readiness to answer my questions and help me move on. I am guessing this quality comes with being a New Yorker.

My journey next led me to Ann Arbor, where I met James Boyd White. For nine months Jim and I met weekly in his office at the University of Michigan Law School. When I first stepped into his office I could barely talk about the problems of meaning and law. I did have a theory of legal understanding, which allowed me to make a couple of abstract remarks about the complexity of it all, and based on this theory I could predict that competent jurists will lose some of their understanding of law in certain conversations. But I did not realize just how superficial my grip on the phenomenon of legal understanding and the problems of communication was. This I learned from Jim. With his keen questions and kind comments he helped me explore my understanding of these topics. Most important, I have come to understand more fully what the act of saying something meaningful requires. This understanding began to emerge during our very first conversations, the ones in which I tried to explain my project. In response to these explanations Jim always came back with questions, some of them more or less relevant to my project. I tried to answer the relevant ones, which in turn led to new questions or comments by Jim. After a couple of weeks it happened that for the first time our thoughts were fully in line. This meant that we could follow each other without questioning and truly communicate what we wanted to say. Later we lost that alignment and had to begin once more, explaining, questioning, inventing ways of expressing ideas with new examples, and so on.

I have come to realize that full and effective understanding is manifested in the delicate process of communication, in the efforts made at both ends to create clarity. This insight has transformed not just my project but my life. Dear Jim, thank you for all the wonderful Thursday meetings and for being such a brilliant teacher and fine friend.

Dear Sharon, we have walked across the arboretum in Ann Arbor and circled the sunny city of Florence, and hopefully we will walk again elsewhere. As my older and wiser sister you guided me through my last year of writing. Your advice was superb and your company is often missed.

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Marie Louise, I admire the steps you take in life and the strength and courage you show in this.

Dear Peer, it feels like you have travelled with me throughout this journey. You were there from the start. Then I left for Florence and Ann Arbor. I once told you that love makes distance irrelevant. This is not true. Distance is felt in the pain of missing someone you dearly love. I am proud of us for having continued to share our lives over Skype between the short visits. The irony is that in these online conversations I often talked with you about the challenges to meaningful communication. It was not just problems with the internet that made it difficult to communicate well or the differences in climate and time zone and people and food and work and local custom that made it hard. These differences do not communicate well via Skype. Regardless of this we found ways to make even the simplest conversation full of meaning. I would not have come so far without you. You have been the most loving and patient company on my journey, and I hope to continue travelling with you.



# Chapter One – On Language and Understanding

*“the speaking of a language is part of an activity or a form of life”*

Wittgenstein, *Philosophical Investigations*, section 23

## 1. Introduction

An important moment for this research was the day I presented my proposal to the selection committee at the EUI in April 2011. For ten minutes I talked about what I call the phenomenon of transnational communication in law, for instance, what happens when a judge from a particular national legal system cites or applies foreign (non-national) law, such as a German or European Court decision, within his or her own legal system. With the use of language philosophy I proposed to investigate the problem – which is my thesis – that in these conversations across national legal systems the quality of legal understanding could (and probably would) be *undermined*. This means, for example, that a French judge might not fully understand the original “German” or “European” meaning of a German or European Court decision.

This problem is of great importance to the European legal community and those in other regions who participate in transnational communication in law. It is also relevant to those attempting to explain the notion of transnational law and the meaning of law in general.<sup>2</sup> That is, the transnational problem requires me to examine and understand what is going on when a jurist (a judge or lawyer) acts competently within his or her jurisdiction, and this is relevant to the general questions of legal theory.<sup>3</sup>

In my presentation, I tried to visualize the process of transnational communication in law as follows. First, I said, with both my hands at my right side, that I was “holding” the meaning of a particular legal decision (or rule or concept) in one legal system. Then, moving my hands to the left, I demonstrated what can happen in a conversation across legal systems, namely, that the meaning of the law I was holding in my hands had been “transported” from one legal system to another.

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<sup>2</sup> In this work I will not rehearse the advances made in (transnational) legal theory.

<sup>3</sup> Cf. PAVLAKOS, G. 2009. Practice, reasons, and the agent's point of view. *Ratio Juris*, 22, p. 74 – 94.

The excessive simplicity of this image was meant to raise the question that was the main focus of my research at the time: “What happens to the quality of legal understanding in the process of *transporting* it to another legal system?” My intuition was not only that some of the original legal meaning would be lost but also that some new legal meaning might be created. Indeed, my research has shown that this is true in a sense. But it also turned out that my initial research question and proposal were not really intelligible in themselves.

First, the nature of effective legal understanding is actually much more *complex* than the relatively simplistic assumption that legal understanding is a given, that is, something that can be held in the hands or captured in a definition or the language of a legal rule. One consequence of this is that what I am calling *effectively* intelligible communication in law is much more *challenging* than the transportation image suggests. Effective communication is not about crossing distances or bridging gaps,<sup>4</sup> and this is true in conversations about law both within a particular legal system and across different legal systems.

What I mean by the complexity of effective legal understanding and the inherent challenge of it is the basic topic of this work. In this sense my project is different from what I initially thought it would be. In fact I resist a simplistic image of understanding and the related misrepresentation of how communication works. Instead, I argue that effective legal understanding (or meaning or intelligibility) is embedded in a socially constituted *practice* of legal language that cannot be effectively “held” or “captured” or a priori “defined.” This is what makes my notion of understanding complex: it requires a particular kind of *action*, not a relatively simplistic re-statement or re-presentation or translation of a set of words or decisions or rules into different contexts or languages.

The challenge, I will show, is that it is inherently difficult for competent jurists from different systems to actually *work well in agreement* with the actions of other jurists in a particular conversation. In fact it is difficult to do this even within a single legal system. Thus, for me, effectively intelligible communication is not about transporting meaning but about doing things in effective harmony with others. This is inherently difficult and it is often the case that the actions of communicating jurists are not in effective agreement at all. This is what undermines the quality of the conversation and hence of legal understanding.

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<sup>4</sup> Cf. WHITE, J. B. 1990. *Justice as Translation: An Essay in Cultural and Legal Criticism*. Chicago, University of Chicago Press, p. 234.



So in the end, at the most basic level my thesis has remained the same but the presentation in this work is fundamentally different. I attempt to demonstrate that the quality of legal understanding can, and in certain conversations will be, undermined, especially in cross-systemic conversations. This means that some of the effective legal understanding available in one system is always lost in translation.

## 2. Wittgenstein on Language and More and Less Effective Understanding

We all know that conversations are sometimes more and sometimes less effectively intelligible, that they range from barely knowing what other people are talking about to effortless communication in which we seem to understand every detail and part, every connection and exception. How does this experience play out in legal communication? Can we expect that competent jurists, even within a single system, can sometimes engage in rich and complex conversations, ones in which they can communicate well even when a problem arises, although at times these conversations may be forced to remain on the surface, where they can barely continue let alone be fully effective? How are these difficulties multiplied in conversations across different national legal systems, and what is to be done about them? These are my research questions, which I discuss with the use of language philosophy and discussion of examples.

Language philosophers discuss the structure of language in order to identify the relation between human understanding and the world. There is one language philosopher in particular whose work I have found helpful in examining the complexity of language and the effectiveness of understanding. That philosopher is Ludwig Wittgenstein, and here I focus on his so-called later work,<sup>5</sup> *Philosophical Investigations*.<sup>6</sup> In this work, Wittgenstein advanced a philosophical practice (not a theory) that showed, among other things, that traditional theories of philosophy, including theories of language philosophy, built “houses of cards”<sup>7</sup> that

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<sup>5</sup> That is after 1929. See: HACKER, P. M. S. 1996. *Wittgenstein's Place in Twentieth-Century Analytic Philosophy*. Oxford, Blackwell Publishers, p. 1, 97 – 136.

<sup>6</sup> WITTGENSTEIN, L. 1953 (1986). *Philosophical Investigations*. Oxford, Basil Blackwell.

<sup>7</sup> WITTGENSTEIN, L. 1953 (1986). Section 118: “What we are destroying is nothing but houses of cards and we are clearing up the ground of language on which they stand.” For further discussion of the philosophical houses of cards: WILLIAMS, M. 2008. Method and Metaphilosophy in the *Philosophical Investigations*. In: P. FRASCOLLA, MARCONI, D. & OLOLINI, A. (eds.) *Wittgenstein: Minds, Meaning and Metaphilosophy*. Basingstoke, Palgrave Macmillan, Chapter 11.

collapse. That is, the problems these theories addressed and the philosophical solutions they proposed were not really intelligible as problems or solutions. The point of his practice was, Wittgenstein said, “to clear up the ground of language on which they [the houses of cards] stand.”<sup>8</sup> In other words, he aimed to uncover the structure of our ordinary *use* of language in order to show that the structure of this practice of language would not allow these traditional philosophical problems and solutions to work in an intelligible and effective way.<sup>9</sup>

One example of a theory of language philosophy that is not intelligible in this sense is to be found in Wittgenstein’s own “early” work. We could say that his *Tractatus Logico-Philosophicus*<sup>10</sup> is such a house of cards. This work presents a logical system of language that is supposed to tackle the philosophical problem of the relation between language and “true” meaning.<sup>11</sup> According to this system, language (words or names) defines and at the same time represents the true meaning of our world. Wittgenstein said, for instance, “A name *means* an object. The object *is* its meaning.”<sup>12</sup>

In his later work, Wittgenstein repudiates the idea that language both defines and represents meaning. He shows that it makes no real sense to talk about language and understanding in this way.

Let us now read the beginning of the *Investigations*, which is an excerpt from Augustine’s *Confessions* dealing with the process of language learning.<sup>13</sup>

When they (my elders) named some object, and accordingly moved towards something, I saw this and I grasped that the thing was called by the sound they uttered when they meant to point it out. (...) Thus, as I heard words repeatedly used in their proper places in various sentences, I gradually learnt to understand

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<sup>8</sup> WITTGENSTEIN, L. 1953 (1986). Section 118.

<sup>9</sup> For further discussion of the relevance of ordinary language philosophy, see for example: BAZ, A. 2012. *When Words Are Called For - a Defense of Ordinary Language Philosophy*. Cambridge, Harvard University Press. CAVELL, S. 1979 (1999). *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy*. Oxford, Oxford University Press. CAVELL, S. 1962. The Availability of Wittgenstein's Later Philosophy. *The Philosophical Review*, 71, p. 67-93. HANFLING, O. 2000. *Philosophy and Ordinary Language, The Bent and Genius of our Tongue*. London, Routledge. HANNA, P. & HARRISON, B. 2004. *Word and World; Practice and the Foundation of Language*. Cambridge, Cambridge University Press. LAUGIER, S. 2013 (2015). *Why We Need Ordinary Language Philosophy*. Chicago, The University of Chicago Press.

<sup>10</sup> WITTGENSTEIN, L. 1922. *Tractatus Logico-philosophicus*. Harcourt, Incorporated.

<sup>11</sup> WITTGENSTEIN, L. 1992 (1961). See for example proposition 4.003: “Most of the propositions and questions of philosophers arise from our failure to understand the logic of our language.” For further discussion, see for example: HACKER, P. M. S. 1996, p. 98 – 99.

<sup>12</sup> WITTGENSTEIN, L. 1992 (1961). Proposition 3.202. (emphasis mine)

<sup>13</sup> WITTGENSTEIN, L. 1953 (1986). Section 1.

what objects they signified; and after I had trained my mouth to form these signs, I used them to express my own desires.

This is a description of the process involved in learning a language as a child. According to this theory, we learn a language by learning the *words* for (names of) objects, that is, we hear these words and see the objects that are simultaneously pointed out. We also learn the *grammar*, the correct order of words, by listening to the sentences of our teachers and parents. This description seems to resemble Wittgenstein's older theory of language in the *Tractatus*. That is, language is a system of words and grammar that defines and represents our true understanding of the world. Later Wittgenstein writes:<sup>14</sup>

These words [i.e., Augustine's excerpt], it seems to me, give us a particular picture of the essence of human language. It is this: the individual words in language name objects – sentences are combinations of such names. – In this picture of language we find the roots of the following idea: Every word has a meaning. This meaning is correlated with the word. It is the object for which the word stands.

Here Wittgenstein describes a relatively simplistic structure (“picture”) of language that is indeed similar to the structure advanced in the *Tractatus*. But this structure builds a house of cards that collapses because it is not really intelligible. To demonstrate this, Wittgenstein tells the following story about the actions of a shopkeeper (I have marked these actions in *italics*).<sup>15</sup>

I send someone shopping. I give him a slip marked ‘five red apples’. He takes the slip to the shopkeeper, who *opens* the drawer marked ‘apples’; then he *looks up* the word ‘red’ in a table and *finds* a colour sample opposite it; then he *says* the series of cardinal numbers – I assume that he knows them by heart – up to the word ‘five’ and for each number he *takes* an apple of the same colour as the sample out of the drawer.

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<sup>14</sup> WITTGENSTEIN, L. 1953 (1986). Section 1.

<sup>15</sup> WITTGENSTEIN, L. 1953 (1986). Section 1. (emphases mine)

We see that the shopkeeper can *do* all kinds of things with just three words: “five red apples.” First he *opens* a drawer (and not just any drawer but one marked ‘apples’), then he *looks* up the word ‘red’ (which he knows is not a name of a thing but a color), then he *finds* a red color sample (picks out a particular color), then he *says* the numbers one through five (utterances that are not just words for things but numbers that indicate a particular amount), and finally he *takes* out of the drawer the correct number of apples of the proper color (“five red apples”).

Wittgenstein’s story suggests that these three small words in their correct order allow the shopkeeper to *do* many complex things. However, the structure of language underlying Augustine’s excerpt and the *Tractatus* suggests that language is a system of words and grammar only. This cannot explain how it is that the shopkeeper can actually *do* all kinds of things. For example, Wittgenstein asks how the shopkeeper can “know where and how he is to look up the word ‘red’ and what he is to do with the word ‘five.’”<sup>16</sup> Words and language rules alone cannot answer this question. It is in this sense that the description of language as a system of words and grammar is not really intelligible; the description leaves out the *action* involved in understanding and using a language. It is a house of cards, or, as Wittgenstein writes, “a haze which makes clear vision impossible.”<sup>17</sup>

If we look at the example in § 1 [i.e., the shopkeeper’s story], we may perhaps get an inkling how much this general notion of the meaning of a word surrounds the *working* of language with a haze which makes clear vision impossible. It disperses the fog to study the phenomenon of language in primitive kinds of *application* in which one can command a clear view of the aim and functioning of words.

What is hidden from our view by the simplistic structure of language is the action or “working of language” or “application” involved in using a language. Thus from Wittgenstein’s study of Augustine’s excerpt we can conclude that a more effectively intelligible and hence more complex description of language includes, besides words and grammar, the capacity for *action*, that is, the fact that we can usually *do* something particular

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<sup>16</sup> WITTGENSTEIN, L. 1953 (1986). Section 1.

<sup>17</sup> WITTGENSTEIN, L. 1953 (1986). Section 5. (emphasis mine)

with language, not just say words in their correct order. I call this complex and effective structure of language the *practice* of language to distinguish it from the relatively simplistic *picture* of language, which consists of mere words and grammar.

To summarize, the first section of the *Investigations* describes a relatively simplistic view of language, namely, language as a set of words and rules of grammar (Augustine's excerpt). This is not completely unintelligible because words do have meaning and the rules of grammar help us make intelligible sentences. But a more complex structure of language that includes the knowledge of how to do particular things with the words in their correct order seems more intelligible. That is, the language is not just words and grammar, as commonly thought, but also knowing how to use those things. In other words, what I call the *practice* of language is more effectively intelligible as a description of language than the simplistic *picture* of language underlying Augustine's excerpt and Wittgenstein's *Tractatus*.

\*

While I think Wittgenstein is especially important, there are of course other ways to discuss the complexity of language in relation to understanding. For example, there is Hans-Georg Gadamer, who argues in *Truth and Method* that understanding is embedded in a social practice of language, that is, in dialogue or conversation.<sup>18</sup> And there is the linguist A.L. Becker, who in *Beyond Translation* advanced an account of language that includes six dimensions, which presumably work together in intelligible communication.<sup>19</sup> Becker's account goes far beyond a mere simplistic understanding of language as a system of grammar and words. He asks, "If you take away grammar and lexicon from a language, what is left?" And he answers, "Everything!"<sup>20</sup>

It is worthwhile to summarize Becker's position, as I will come back to it. The first of the dimensions that Becker recognizes resembles what I call the relatively simplistic picture of language, that is, language as a system of rules of grammar and words. He calls this the "structural relation" of language. The second dimension is the relation between our current use of language and prior texts, that is, the question of how we respond to the body of

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<sup>18</sup> GADAMER, H. G. 1975 (2004). *Truth and Method*. London, Continuum.

<sup>19</sup> BECKER, A. L. 1995. *Beyond Translation: Essays towards a Modern Philology*. Ann Arbor, The University of Michigan Press, p. 141.

<sup>20</sup> BECKER, A. L. 1995, p. 3.

language that we can remember. The third is the form of language in which we represent our conversation, that is, the so-called medial relation (e.g., in writing or orally or in italic or roman script, or on a billboard or radio station).<sup>21</sup> The fourth is the relation created between those who are speaking or using their language and their audience or those who are addressed, that is, the “interpersonal relation.” The fifth is the reference made to the world around us, beyond language. Finally, there is the relation of “silence,” that is, what is not said or cannot be said in language.<sup>22</sup>

### 3. White on Law and More or Less Effective Legal Understanding

Just as Wittgenstein described the structure of language, it is also possible to describe the structure of law. Probably the most simplistic way to do this is to say that it is a system of legal rules. But do rules alone allow for a really intelligible kind of legal understanding? The answer is no. Competent jurists have to know more than the language of rules if they are to effectively conduct an intelligible conversation in law.

For instance, consider the following rule for burglary: “Burglary consists of breaking and entering a dwelling house in the nighttime with intent to commit a felony therein. A person convicted of burglary shall be punished by imprisonment not to exceed 5 years.” Everyone with a basic knowledge of English can probably read this rule and more or less understand what it means. That is, laypeople who are competent English speakers will know the words, except perhaps the word “felony” (which is a legal term), and there is no obvious problem with the order of the words in these two sentences (i.e., the grammar).<sup>23</sup>

However, the effective legal understanding of this rule is not just defined in these two sentences. For example, imagine a situation in which a person pushes open a screen door but has not yet entered the premises.<sup>24</sup> Can we say that this constitutes burglary? Did this person effectively “break in and enter a dwelling house”? Are the premises similar to such a house,

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<sup>21</sup> For these examples I am thankful to J. B. White.

<sup>22</sup> BECKER, A. L. 1995, p. 29, 186, 381.

<sup>23</sup> Cf. WHITE, J. B. 1985b. *The Invisible Discourse of the Law; Reflections on Legal Literacy and General Education. Heracles' Bow; Essays on the Rhetoric and Poetics of the Law*. Madison, The University of Wisconsin Press, p. 64.

<sup>24</sup> Cf. WHITE, J. B. 1985b, p. 64.

that is, in a legally relevant sense? Based on the bare facts of the situation and the mere words of the burglary rule it is hard to know what the intelligible legal answers to these questions are.

But, competent jurists, who know how to *apply* or *interpret* this rule and other rules in different situations, will know the answers. Or, at least, they will know how to argue for an effective answer and how to meaningfully disagree with another competent colleague arguing for a different answer, and so on. The question is of course how this jurist actually applies or interprets the rule in this particular situation and who will make the final judgment, but I shall not go into these questions here.

The point is that competent jurists know how to *do* particular things with a system of rules, that is, they can apply or interpret them in particular ways that are more or less effective, not just a matter of anything goes.<sup>25</sup> This is directly analogous Wittgenstein's account of what competent language users need to be able to *do* with words and grammar. Thus to describe the law simply as a system of rules alone is not fully effective because it leaves out a legally significant kind of action, that is, the competency that allows jurists to actually *do* something legally intelligible with rules. A more intelligible description of the law would include this competency of jurists. In other words, and in line with what I said above, a more intelligible structure of law contains the *practice* of legal language, not just the relatively simplistic language of rules. Now the question is can we effectively describe or talk about this competency or practice of legal language?

According to James Boyd White part of what competent jurists are capable of doing with legal language is *not* visible in the language of rules. White calls it the "invisible discourse of the law."<sup>26</sup> To know this invisible discourse is to know what arguments are effectively available in a particular situation and how to make them, that is, knowing what the next thing to do should be. To be able to do these things (and more) seems essential for a competent jurist. It is, for instance, necessary for the intelligible interpretation of the burglary rule to know what arguments can effectively be made and how to effectively discuss this with colleagues who may disagree and then a competent jurist should also know how to effectively respond, and so on. But this ability to do things effectively is not visible in the language of the rule.

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<sup>25</sup> I will further discuss this claim in the next chapters.

<sup>26</sup> WHITE, J. B. 1985b, p. 60 – 76.

I agree with White that to some extent the competency of jurist is invisible from the perspective of the language of rules alone. In this sense this competency (or legal language practice) is also invisible to those who are not trained in law (laypeople), who can only read the rules of law, not apply or interpret them effectively. But, in line with the later Wittgenstein, a good way to start seeing (uncovering) some of this competency is to look at the *actual* reasoning of competent jurists, that is, at how they argue for a particular case or interpret a particular (set of) rule(s). This is similar to the way in which Wittgenstein looked at how a shopkeeper can *do* particular things with just the three words on his grocery list (see above).

#### **4. Effective Legal Understanding in Actual Conversation**

As competent language users, we all have had the experience that in certain situations we *cannot* continue a conversation effectively, for instance because we disagree with our conversation partner about what to eat for dinner (what should we buy or cook?) or we have conflicting opinions about the best place to have coffee (to which coffee shop should we go?). This does not mean that all that has been said or done before between these partners and all that they will say or do after the disagreement or conflict is unintelligible. The point is that *for a moment* their conversation is not fully intelligible, which means that they cannot go on effectively. This is also the case in law. Competent jurists, for instance, may disagree about how to interpret a particular rule, but this does not undermine the rest of their effective, shared understanding of law.

The complex practice of legal language becomes more visible in moments like this, when there is a loss of effective intelligibility (i.e., a momentary loss in an otherwise intelligible conversation). This is because the disagreeing jurists start *arguing* for their points of view. A typical place to find this practice of legal argumentation is in a legal case in which two parties have brought their disagreement to court, for instance in *Riggs v. Palmer*.<sup>27</sup> Here I will survey the reasoning presented in this case by two competent judges who each supported a different party's position. More precisely, I will look at the opinion handed down by the

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<sup>27</sup> *Riggs v Palmer*. 115 NY 506, NE 118 (1889). Hereafter: *Riggs*.



dissenting Judge Gray and the majority opinion by Judge Earl.<sup>28</sup> The relevant question here is which opinion was most effective in resolving the dispute and hence, in this respect, the most intelligible.

Most law students and legal professionals will be familiar with *Riggs v. Palmer* as it is a well-known case within both the American and the European legal communities. This is because the late professor Ronald Dworkin used this case in his work to develop an argument against legal positivism and to talk about principles of law.<sup>29</sup> I will not go into this now but in the second chapter I will say something about the structure of Dworkin's theory of law. In the following I borrow from Dennis Patterson's analysis in *Law and Truth*.<sup>30</sup>

The conflict in *Riggs* turns on a provision of Francis Palmer's will, which declared that a large share of his estate was to be inherited by his grandson, Elmer Palmer. But Elmer Palmer had poisoned his grandfather in order to obtain the estate. The legal dispute was about whether Elmer Palmer was legitimately entitled to his grandfather's property, under the will, or should be disqualified because of the murder. On the one hand, Elmer Palmer, supported by the dissenting Judge Gray, argued that he was entitled to his grandfather's property regardless of the murder. On the other, Mrs. Riggs (the daughter of Francis Palmer) and others, supported by the majority opinion of Judge Earl, argued that Elmer Palmer should be disqualified because of the murder.

In their opinion both Judge Earl and Judge Gray agreed about the application of the rules of statutory law governing the will of Francis Palmer but they disagreed about what these rules effectively meant in this case (i.e., in light of the facts of the case). Judge Earl began his opinion by recognizing that the language of the rules of statutory law alone would not prevent Elmer Palmer from inheriting his grandfather's estate. Earl says that the rules "if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer."<sup>31</sup> But Judge Earl showed a more complex understanding of law, one that went beyond the language of rules. This understanding ultimately led him to argue that Elmer Palmer was *not* legitimately entitled to

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<sup>28</sup> *Riggs*, p. 508 – 520.

<sup>29</sup> DWORKIN, R. 1986 (1998). *Law's Empire*. Oxford, Hart Publishing. DWORKIN, R. 1977b. *Taking rights seriously*. Cambridge, Harvard University Press.

<sup>30</sup> PATTERSON, D. 1996. *Law and Truth*. Oxford, Oxford University Press, p. 172 – 174.

<sup>31</sup> *Riggs*, p. 509.

his grandfather's estate. In the following we can examine Judge Earl's most important arguments.

First, Judge Earl suggested that it is not just the rules of law that are legally significant but also, or rather, the intentions of the lawmakers. He points out that these intentions are not always fully expressed in the language of the rules. Sometimes this language includes more and sometimes less than what the lawmakers intended. Therefore Judge Earl saw it as the task of judges "to collect it [the intention] from probable or rational conjectures,"<sup>32</sup> or, in my own words, to construct the meaning of law beyond the language of rules. For this he suggested that we imagine a fair and reasonable lawmaker who is present when the case is heard. In *Riggs*, he asked, "Would they [the lawmakers] say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property?"<sup>33</sup> I will return to this question in a moment.

To support his understanding of law as including the intentions of the lawmakers, Judge Earl referred to Blackstone's Commentaries in which he finds the following words by a learned scholar: "If there arise out of them [statutory rules] any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences void ... When some collateral matter arises out of the general words, and happens to be unreasonable, then the judges are in decency to conclude that the consequence was not foreseen by the parliament, and, therefore, they are at liberty to expound the statute by equity and only quo ad hoc disregard it."<sup>34</sup> These words are in line with Judge Earl's view of legal understanding, namely, the scholar's words suggest that law includes the intentions of the lawmakers (parliament) and the scholar gives him (as judge) the freedom to set those rules of law aside to the extent that they would lead to unreasonable consequences (i.e., because these rules do not reflect the intention of the lawmakers in a particular case).

This understanding of law is further supported by actual case law. For example, Judge Earl mentioned a case in which there was a statute mandating that those who drew blood in the streets were to be severely punished. The question in that case was whether or not a barber who had opened a vein in the streets should (following the statute) be severely punished. The answer was no because that would have constituted an unreasonable consequence of law. In

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<sup>32</sup> *Riggs*, p. 509.

<sup>33</sup> *Riggs*, p. 510.

<sup>34</sup> *Riggs*, p. 511.

other words, it could not have been the intention of the lawmakers who drafted this statute to punish a barber. This would have made it impossible for a barber to do his job. Hence, the judge in this case was at liberty to set the statute aside (though only to the extent it led to an unreasonable consequence).<sup>35</sup>

This led Judge Earl to answer the above-mentioned question as follows: “What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the law.”<sup>36</sup>

Still in line with this understanding of law, Judge Earl presented another argument. He argued that there are certain legally significant reasons (“maxims”) that may sometimes override the language of rules or even the intentions of the lawmakers, for example, reasons of justice or public policy.<sup>37</sup> Judge Earl seemed to suggest that one of these legally significant reasons is that “no-one shall profit from his wrong.”<sup>38</sup>

In light of these arguments and examples, Judge Earl came to the most important question, namely: “Did Elmer Palmer actually profit from murdering his grandfather?” If this question could be answered in the affirmative, Judge Earl had good reason (see above) to argue that Palmer was not entitled to his grandfather’s property.

This is how Judge Earl formulated his most powerful argument: “Just before the murder he [Elmer Palmer] was not an heir, and it was not certain that he ever would be. He might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime.”<sup>39</sup>

This argument should be understood in light of Judge Earl’s carefully presented understanding of law as a larger legal culture that is more complex than a system of rules, namely, that it includes the intentions of lawmakers and overriding legal reasons. Moreover,

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<sup>35</sup> *Riggs*, p. 511.

<sup>36</sup> *Riggs*, p. 511.

<sup>37</sup> This is where Dworkin found support for his argument that the law includes legal principles.

<sup>38</sup> *Riggs*, p. 511.

<sup>39</sup> *Riggs*, p. 513 – 514.

he wrote, this understanding is consistent with the interpretation of statutory law over time (previous case law). Hence the conclusion follows naturally: “this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.”<sup>40</sup>

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Let us now look at the dissenting opinion by Judge Gray. The law according to Judge Gray consists of a system of rules that requires strict interpretation. This means that the law should be interpreted on the basis of the language of rules alone; there is nothing legally meaningful beyond this language. For *Riggs* this meant that, as Judge Gray put it, “We are bound by the rigid rules of law, which have been established by the legislator, and within the limits of which the determination of this question [about Elmer Palmer’s entitlement] is confined.”<sup>41</sup>

It is difficult to find an argument in the opinion that supports this legalistic view of law. But one of the reasons seems to have been that the statute concerned the regulation of grave and important matters regarding people’s wills and these should be safeguarded by strict rules that leave no room for interpretation. In Judge Gray’s words, “the legislator has, by its enactments, prescribed exactly when and how wills may be made, altered and revoked, and, apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters.”<sup>42</sup> In other words, the “legislator has assumed the entire control [over the interpretation of statutory law], and has undertaken to regulate with comprehensive particularity.”<sup>43</sup>

Judge Gray’s understanding of law does not imply that there can be no changes in contracts or that they cannot be revoked for reasons of justice or equity. This is what Judge Earl argued for in terms of legally significant reasons that may override the rules. But, according to Judge Gray, changes in contracts, or the revocation of contracts, are only legitimate if they are in accordance with the rules of the statute.<sup>44</sup> To support this view he

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<sup>40</sup> *Riggs*, p. 513 – 514.

<sup>41</sup> *Riggs*, p. 515 – 516.

<sup>42</sup> *Riggs*, p. 516.

<sup>43</sup> *Riggs*, p. 516.

<sup>44</sup> *Riggs*, p. 517.

referred to the following section of the statute: “No will in writing, except in the cases hereinafter mentioned, nor any part thereof shall be revoked or altered otherwise (...).”<sup>45</sup> Judge Gray concluded that the facts in *Riggs* did not constitute a legitimate exception and therefore Francis Palmer’s will remained valid. In other words, regardless of the fact that Elmer Palmer murdered his grandfather in order to become his heir, because *this* fact (the crime) was not mentioned as an exception in the language of the rules (statutory law), the will remained valid.

Judge Gray finally concluded that Elmer Palmer was entitled to his grandfather’s property because “the laws are silent,”<sup>46</sup> that is, there were no relevant *rules* denying him his property. What is more, Judge Gray argued that if Elmer Palmer were to be denied his property he would be punished twice for the same crime.<sup>47</sup> As Judge Gray pointed out at the beginning of his opinion, Elmer Palmer had been tried and convicted of murder in accordance with the rules of criminal law. To punish him again would suggest, contrary to Judge Gray’s view, that the rules of law are not sufficient. According to Judge Gray, the rules of criminal law had dealt with Elmer Palmer’s crime sufficiently and so there was nothing preventing him from inheriting his grandfather’s property (i.e., legalistically speaking, there were no rules preventing him from inheriting).

To sum up: Judge Gray’s argument was pretty straightforward and in accordance with the view that the law is fully provided for by the language of rules. The intention of the lawmakers was presumably expressed in this language. Hence, beyond the language of the rules there is no law. As Judge Earl also recognized, there was no rule preventing Elmer Palmer from inheriting his grandfather’s estate, and so Judge Gray concluded that Elmer Palmer was entitled to his property.

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Comparing these two opinions we can see that the majority opinion constituted a relatively complex and effective answer to the question of Elmer Palmer’s entitlement to his grandfather’s estate in light of the facts of the case. Judge Earl’s main argument was that Elmer could not have been an heir, and probably would not have become one, had he not

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<sup>45</sup> *Riggs*, p. 517.

<sup>46</sup> *Riggs*, p. 519.

<sup>47</sup> *Riggs*, p. 520.

murdered his grandfather. The strength of this argument follows from the carefully constructed legal culture within which the rules of statutory law are to be understood, that is, according to Judge Earl law is more than just a set of rules but includes the intentions of the lawmakers and legally significant reasons that may override the rules of law in certain situations. Thus the reasons that support Judge Earl's argument are embedded within what I called a larger legal culture that is consistent with previous case law and learned scholars' opinions.

By contrast, Judge Gray in his dissenting opinion employed a relatively less complex kind of legal reasoning. It turned on the simplistic idea that law is represented solely in the language of rules. The problem with this legalistic understanding of law is that it was overly simplistic to consider Elmer Palmer's crime only in terms of the statutory law that governed the grandfather's estate. It allowed Judge Gray to consider the crime only in terms of criminal law. Regarding the question of entitlement, Judge Gray could merely say that there was no law. That is, there were no rules preventing someone from inheriting a property after committing a crime with the intention of inheriting that property. This brought Judge Gray to the conclusion that Elmer Palmer remained entitled.

We can see that the dissenting opinion effectively *explains away* Judge Earl's most powerful argument and does *not* effectively answer the question of inheritance in light of the facts of the case. There is simply *no room* for addressing Elmer Palmer's crime beyond the domain of criminal law, that is, from a strictly legalistic point of view. Therefore I conclude that the dissenting opinion of Judge Gray is not really intelligible compared to the majority opinion of Judge Earl. We have seen that Judge Earl could effectively interpret the law and the rules of statutory law in light of the facts of the case, although his arguments could of course be discussed and contested by other competent jurists (i.e., Judge Earl's reasoning was not perfect).

## **5. A Fundamental Problem in Legal Communication**

This work is not about what I call a momentary problem in a particular situation such as a legal dispute. Competent jurists can, as we have seen, resolve such a problem more *and* less intelligibly. This work is about the more fundamental problem of losing effective legal

understanding in an entire conversation, not just a particular situation. The problem is that in certain conversations about law the participants, although they are respectively competent in a legal language, have difficulty conducting their conversations well, in any situation.

In *Riggs* we saw that the dissenting Judge Gray was not able to effectively respond to the legal dispute, that is, not in a way that allowed him and other competent jurists to talk intelligibly about the question of entitlement to property that is acquired by means of a crime. From a legalistic perspective there seemed to be nothing meaningful to say about this question except that there is no law. In this sense Judge Gray's opinion undermined the quality of the legal conversation, though only to the extent that it dealt with that particular legal dispute.

There are certain situations, however, in which competent jurists, like Judge Gray and Judge Earl, cannot conduct an intelligible conversation at all. This is because their competency in legal language does not allow them to determine whether they are talking about a legal dispute or something else, let alone how to respond to it in a mutually intelligible way. This is the kind of problem I am going to talk about. It is the result of jurists *not* sharing the same competency in legal language. More precisely, the problem in such a conversation is that the competency of one jurist can *undermine* the effectiveness of the competency of another. This is not a problem in all conversations about law (e.g., it was not a problem in *Riggs*), but it can be in certain conversations, such as those across national legal systems, as I will demonstrate.

For example, when a competent jurist from one legal system is capable of effectively initiating an intelligible conversation about law, let's say about the application of a particular rule, it can be difficult, or even impossible, for a competent jurist from another legal system to continue this conversation in a mutually intelligible way. This occurs when the competency of the first jurist does not effectively *resonate* with the competency of the second, in other words when there is no effective agreement in what the communicating jurists intelligibly *do* with law. As a result, the quality of this transnational conversation is fundamentally undermined, which means that the communicating jurists cannot go on to conduct a deeper and more complex conversation that can effectively show, for instance, how rules can be applied intelligibly. At most we can imagine that these jurists can talk with each other in what I call a relatively simplistic language; for instance, they can exchange ideas in *terms* of rules. In other words, when communicating jurists cannot work well together and as a result the

intelligibility of their conversation is undermined, they can still try to communicate by exchanging superficial ideas in the language of rules.

Another example, consider the shopkeeper who was able to *do* particular things with the simple words “five red apples.” The fundamental problem here is that in certain conversations the shopkeeper can’t do these things because he does not know how to do them with his conversational partner (i.e., in agreement with the way his partner does things with language). In other words, the shopkeeper and his partner might not share a competency in language, and as result, although they can *say* the words “five red apples” they can’t *do* anything meaningful with them.

Or think of the way I initially visualized this project, namely, in terms of *transporting* legal meaning from one context to another. There is a problematic notion that to continue a transnational legal conversation it is sufficient to transport the meaning of the language of rules into different legal systems. Of course, even this is not easy in the European Union, where there are 28 different languages. One solution to this problem would be to translate the different languages into each other and so make it possible to more or less effectively transport the language of rules within the European Union into different legal systems (e.g., translate the original French language of a rule into English, Dutch, German, and so on).

But, as I have suggested, to continue an effectively intelligible conversation is more challenging than simply transporting (and translating) the language of rules. Such a conversation requires the ability to *do* particular things with law, that is, it requires a particular *practice* of legal language. White’s invisible discourse of the law and my discussion of *Riggs* illustrate some of this. One might think that it is difficult, even impossible, to transport such competency in legal language in its entirety into different legal contexts. This would entail “picking up” the competency of the jurist in the original legal context and transporting it to the jurists in the target context, who, once they are in possession of this competency, presumably can proceed in a more or less similarly effective way. This is not possible, as I will demonstrate.

The challenge for every jurist who aspires to participate in an intelligible conversation (national or transnational) is to find ways to effectively do things in harmony with the other participants in the conversation. That is, he or she must manifest a particular practice of legal language, one that will allow for a conversation that is more effective, and hence more intelligible, than simply talking in terms of rules. Thus, in place of the simplistic



transportation image, my research presents a more complex understanding of communication in law. The question is not how to transport legal meaning into a different context but “To what extent do, or can, the participating jurists effectively share the same competency in legal language?”

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If, as I suggest, losing effective legal understanding in certain conversations is a fundamental problem, then it demands an intelligible solution. Given my understanding of communication in law, it is not enough to translate national languages into each other. This will not generate the shared ability to effectively do particular things in law. It seems to me that a good first step would be for communicating jurists to start learning each other’s practices in their legal languages. But this will only allow them to do things in law in the same way the other jurists do them. A second and more challenging step would be for the communicating jurists to create a third way of doing things in law. This language practice should at least be potentially intelligible to all participating jurists, that is, intelligible in a way that does not just resemble their own understanding of the law or the understanding of one participant in particular. Rather, it should be something new, something that resembles the understanding of all participating jurists equally. This is what I think the European legal community should aspire to: the creation of a shared language practice that is effectively European. I will say more about this at the end of this work, but in the meantime let me provide an example.

In *Justice as Translation* White writes about translation in a way that addresses the challenge I described in the second step.<sup>48</sup> He does not write about the translation of natural languages (which would be superficial) but of a kind of translation that is more complex, namely, translation as *integration*. “Integration,” he writes, “is a kind of composition, and that in a literal, and literary, sense: a putting together of two things to make out of them a third, a new whole, with a meaning of its own. In this process the elements combined do not lose their identities but retain them, often in clarified form; yet each comes to mean something different as well, when it is seen in relation to the other. In this sense each element is transformed, as it becomes part of something else, an entity existing at a new level of complexity. At the same

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<sup>48</sup> WHITE, J. B. 1990.

time we ourselves are transformed as well, both as makers of the new object in the world and as those who engage with it.”<sup>49</sup> I will return to this in the fourth chapter.

## **6. Road Map**

The first part of this work discusses the nature of what I call effective legal understanding. The argument is developed in four steps, each of which discusses the structure of legal language in relation to some level of understanding. The complexity of the structure of language increases with each step. I use two philosophical tools to describe this increasingly complex structure: the concepts of “rules” and “rule following.” The least effective level of understanding involves the least complex structure of language, that is, language as a system of rules. This level of understanding cannot support itself without interpretation because (as we shall see) rules need to be interpreted to be meaningful. The problem is that there is no ultimate interpretation of rules. This is what undermines the effectiveness of understanding. In the fourth step, the most effective level of understanding involves the most complex structure of language, that is, language as a socially constituted practice. This level of understanding can support itself without interpretation, and therefore it is the most effective.

The second part of this work demonstrates my thesis, that is, the fundamental problem of losing effective understanding in certain conversations in law. For this I present one non-legal and two legal examples. The first is based on my own experience of communicating with different language users. I can continue a more effective conversation with some people than with others, and with still others I cannot continue an intelligible conversation at all. This shows that to some extent the effectiveness of the conversation has been undermined. Something similar can be seen in the first legal example. For this I borrow from comparative legal research that describes the complex argumentation practices of the French civil law and English common law systems. The third is an actual example of transnational communication in law: a French civil law understanding of a European Court decision. In it we can see that the French jurists were apparently unable to effectively translate the original decision. In fact there appears to be no agreement in the way the French and the European Court do things in

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<sup>49</sup> WHITE, J. B. 1990, p. 4.

law, and the French translation undermines almost completely the effective understanding of the original European Court decision.

In the third and final part of this work I will indicate how to move forward in transnational legal communication in light of the earlier discussions.



## Chapter Two – From Superficial Understanding to Full and Effective Understanding

*“To understand a language means to be master of a technique.”*

Wittgenstein, *Philosophical Investigations*, section 199

### 1. Introduction

At the beginning of the *Investigations* Wittgenstein presented an excerpt from Augustine that describes the experience of language learning. It holds that language learning requires the learning of names (words) for objects in their correct order (grammar). This view sees language as a system of words and grammar that is simply a set of rules governing their use. Interestingly, Wittgenstein did not use this excerpt to claim that there is something obviously wrong with this description of language learning and its underlying view of language.<sup>50</sup> He did not use it, for example, to argue that this experience of language learning and view of language are inconsistent with some theory about how we understand the world, as some modern philosophers (such as Descartes) would have us do.

The genius of Wittgenstein’s philosophical practice is that it shows that, although there is nothing wrong (obviously or in theory) with Augustine’s excerpt and its implied view of language, it is not fully intelligible. Wittgenstein described his philosophy as “a battle against the bewitchment of our intelligence by means of language.”<sup>51</sup> The story of the shopkeeper was meant to show that the simplicity of Augustine’s excerpt follows from a bewitchment by the view of language that underlies it. Namely, this view of language does not include the more complex kind of actions that competent language users (like the shopkeeper) are able to perform, such as *opening* a particular drawer and *counting* five apples. Because this view of language does not include these actions, the description of language learning based on this view does not include *learning* these actions. Hence, Augustine’s excerpt is not fully intelligible.

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<sup>50</sup> Cf. CAVELL, S. 1988b. The Uncanniness of the Ordinary. *In Quest of the Ordinary, lines of skepticism and romanticism*. Chicago, University of Chicago Press, p. 153 – 178.

<sup>51</sup> WITTGENSTEIN, L. 1953 (1986). Section 109.

A much more intelligible (less bewitching) description of language includes, as I have suggested, the capacity for action or, as Wittgenstein puts it, “To understand a language means to be master of a technique.”<sup>52</sup> I said that I would talk about these actions or techniques in terms of the *practice* of language to distinguish it from the mere words and rules of grammar that are usually referred to as language. This means that a much more intelligible description of the experience of language learning (compared to Augustine’s excerpt) would include learning different language practices, such as *putting* things in cupboards and drawers and *taking* them out again, and *eating* apples and *buying* food, and so on. But I shall not go into this here.

My account of effective legal understanding (or meaning or intelligibility) is in line with Wittgenstein’s. Here I discuss different structures of language, ranging from the relatively simplistic to the relatively complex. I use the philosophical notions of “rules” and “rule following.” My discussion of language and understanding can largely be traced back to Meredith Williams’ work on the later Wittgenstein, especially the chapter “Rules, community, and the individual,” in her book *Wittgenstein, Mind and Meaning*.<sup>53</sup> At times I will compliment the discussion with a parallel discussion of different structures of law, thus also ranging from the relatively simplistic to the relatively complex.<sup>54</sup>

My account of *effectiveness* in understanding depends on overcoming two specific problems with understanding and its justification. The first I call the regress problem and the second the paradox problem or paradox of meaning.<sup>55</sup> These problems are introduced in the first discussion, that of the most simplistic view of language and law. But we will see that they are with us until the end of the third discussion, that of a much more complex structure of language and law. They seem to be resolved only in the fourth discussion. But even there it is not the case that this complex understanding of language allows competent language users to always be completely intelligible. Remember the dissenting Judge in *Riggs* whose opinion was not fully intelligible even though he was a competent judge. More urgently, in the next

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<sup>52</sup> WITTGENSTEIN, L. 1953 (1986). Section 199.

<sup>53</sup> WILLIAMS, M. 1999. Rules, community, and the individual. *Wittgenstein, Mind and Meaning - Toward a social conception of the mind*. London, Routledge, p. 157 – 187.

<sup>54</sup> In the following I discuss the views of different philosophers on language and theorists on law. This is not meant to criticize their views per se, as this would require a much more in-depth presentation of their work. The point of discussing their views here is to *illustrate* different structures of law and language that have varying degrees of complexity. Thus, the focus is more on discussing these different structures than on scrutinizing the work of particular language philosophers and legal theorists.

<sup>55</sup> Cf. WILLIAMS, M. 1999, p. 159.

chapter I demonstrate that in certain conversations across different legal systems the effective understanding of the law is lost, fundamentally, even though the participants are all competent jurists.

## 2. Language as a System of Rules

We have seen that describing language as a system of words and grammar, and law as a system of legal rules, is too simplistic to account for effective (legal) understanding. Becker went so far as to say, with respect to one of his six dimensions of language, that if we were to know only the rules of grammar and words we would not know anything. For instance, we would not know how to talk to someone in particular, that is, in what medium (orally or written, say, or on a billboard), based on what prior knowledge (remembered texts), with what attitude (addressed formally or as a friend), and so on. Becker's other five dimensions of language are listed in the preceding chapter.

Here I argue why an overly simplistic view of language *undermines* the effectiveness of legal understanding. For this I discuss language as a system of *rules*. This notion of rules does not refer to the rules of grammar per se. It is an analytical tool that can be used to describe the structure of both language and law and to explain how they relate to (legal) understanding and its justification. The idea is as follows. Understanding can be explained in *terms* of rules, that is, the rules are *definitions* of our understanding, and these definitions, in turn, are *justified* by the rules. In other words, whatever is in the rules *is* meaningful and it is also *correct because* it is in the rules.<sup>56</sup>

Before I continue discussing this view of language and understanding I have to mention an important question concerning a different philosophical matter. Where do these rules, which presumably describe and justify our understanding, come from? Or, more broadly, what is the *origin* of meaning? This question underlies the relation I have suggested exists between language and understanding. It goes beyond the scope of this work to discuss

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<sup>56</sup> As Williams says: "There are two dimensions to rule-governed practices and actions: the *practical, or psychological, dimension*, the way in which the behavior or judgment of the individual is in fact guided or determined; and the *justificatory, or epistemic, dimension*, the way in which the action or judgment is assessed for correctness.(157)" See: WILLIAMS, M. 1999, p. 157 – 161.

the entire branch of philosophy that deals with the origin of meaning. But let me give my impression of this debate.<sup>57</sup>

There are roughly two opposing positions on the origin of meaning: the realist and the anti-realist.<sup>58</sup> The realist position holds that meaning (or rules) exists *independent* of our human minds, whereas the anti-realist position holds that meaning (or rules) is *dependent* on our human minds. For example, Bertrand Russell, a realist, thought that something is meaningful if it *corresponds* to reality and we can presumably grasp that reality with our *senses*. Thus he would say that it makes sense to say “the cat is on the mat” if this corresponds to what we see, namely, that there is a cat on the mat.<sup>59</sup> By contrast, an anti-realist would say that the meaning of “the cat is on the mat” follows *not* from what we see (because this can be delusional) but from what we *believe* is true (or want to be true).<sup>60</sup> A *skeptical* anti-realist would say that there is nothing in the world (outside ourselves) that makes this sentence, or anything else, truly meaningful (and so nothing is truly meaningful).

This fundamental question about meaning is also addressed by legal philosophers, that is, theorists who discuss the origin of law. Again there are two groups into which these theorists can roughly be divided. Natural law theorists, on the one hand, argue that the law depends on what it represents, that is, something that is real in a moral or empirical sense. For instance, a legal realist such as Brian Leiter argues that the meaning of law follows from the best social scientific explanations or empirical facts. On the other hand, legal positivists, such as H.L.A. Hart in *The Concept of Law*, argue that the law comes from lawmakers, that is, those who are officially in charge of making rules.

Let me return to the discussion of the structure of language as a system of rules and explain why this view does not account for effective understanding. Here is an example of a rule: “A chair is a piece of furniture with a seat.” This is one of the basic rules that *define* the meaning of an object that we call “chair.” (A realist would say that this rule corresponds to the world and therefore defines the meaning of this object, and an anti-realist would say that the meaning of this rule comes from us.) This rule also *justifies* part of our basic

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<sup>57</sup> We will see that this question is resolved once we get to a more complex view of language, namely, where language is described as a practice of rule following, not a system of rules.

<sup>58</sup> Cf. MILLER, A. Summer 2015 Edition. *Realism* [Online]. The Stanford Encyclopedia of Philosophy Available: <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=realism> [Accessed 8 – 07 – 2015].

<sup>59</sup> This raises the question of how it is that what we see corresponds to how we can say things in language. Realists like Russell cannot answer this question. What is more, how can a realist be sure that what he or she sees is also *true* and meaningful and not a delusion?

<sup>60</sup> This of course raises the question of what makes our beliefs *true*, but I will not go into that here.



understanding of “chair.” That is, the *correct* meaning of chair (an object called “chair”) presumably follows from this basic rule (and others).

In a similar way it is possible to say that there are rules of law that both define and justify the meaning of law. For instance, consider a basic rule for burglary: “Burglary consists of breaking and entering a dwelling house in the nighttime with the intent to commit a felony therein. A person convicted of burglary shall be punished by imprisonment not to exceed 5 years.”

We can already see that this simplistic description of language in terms of rules does not allow for the kind of particularity embedded in Becker’s complex understanding of language. For example, how does the rule for chair relate to prior rules for chair and in what context is it supposed to be used? Nor does it capture the capacity for action that Wittgenstein calls the mastery of a technique. That is, how does this basic rule for chair explain, for instance, that a competent language user can *take* a chair, *bring* it to the table and *sit* down?

My point is not to suggest that this simplistic idea of a system of rules is incomplete and should therefore be extended to what I called practice (and Wittgenstein calls technique). The problem is that *without* a practice of language or technique a system of rules cannot effectively get off the ground, that is, rules alone cannot account for the intelligible relation between language and understanding. Let me explain.

The problem with rules follows from the fact that rules alone entail multiple interpretations because there are multiple questions about the meaning of rules in relation to their object(s).<sup>61</sup> For example, does the basic rule for chair (“a chair is a piece of furniture with a seat”) apply to an object that looks like a piece of furniture and has a seat but is made of ice? Is this ice thing a chair? What if it is impossible to sit on it? Is it still a chair? The rule alone does not give us conclusive answers to these questions. It seems that in this situation the basic rule for chair tells us too little about the meaning of chair.

Let us consider a different question. Can we intelligibly say, by applying this basic rule for chair, that a table is a chair? We all know that a table is a piece of furniture, and one could argue that a table has a seat because one can sit on it. Hence, by applying the rule “a chair is a piece of furniture with a seat” we can say that a table is a chair. But here the rule for chair tells us too much. It would be absurd to say that a table is a chair; although it is indeed a piece of furniture on which someone can sit, a table is not a chair.

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<sup>61</sup> Cf. WILLIAMS, M. 1999, p. 157 – 161.

One could also argue that a person leading a meeting who is called the “chair” (or “chairman”) falls under the basic rule for chair because the rule applies to an object (in this case is a person) called “chair.” In this situation, again, the rule for chair tells us too much. It does not make sense to say that a “chair” (leading a meeting) is a piece of furniture with a seat. Although it is possible to sit on a person, this does not make him or her a chair in the latter sense.

Further, if there are two (or more) rules for chair, how do we know which one to use? For example, another basic rule for chair is “a chair is a piece of furniture that belongs to a table.” Let us imagine we see an object that is called a “chair.” How do we know that this object is (means) a piece of furniture that belongs to a table (as defined by the second rule) or that it is (means) a piece of furniture with a seat (first basic rule)? And how do we know that it is (means) both these things at the same time? If there is a chair but no table, does the second rule still apply? We cannot know this on the basis of rules alone. Both basic rules for chair tell us too little about the meaning of an object called “chair.”

These questions suggest that the basic rule(s) for chair are *underdetermined*, that is, they tell us both too much and too little. Even a single rule seems to entail multiple contesting interpretations. The result is that based on rules alone we cannot know to which object they apply (e.g., something to sit on or something that belongs to a table), what an object or piece of furniture (and not a person) is, what it means to sit on a chair (and not a piece of ice or a table), and so on. What is more, once we start interpreting rules there seems to be no end to it. The rules do not tell us what the final interpretation is (if one exists at all). This lack of control and the underdeterminacy of rules lead to the first problem with understanding, which I call the regress problem, because rules entail an infinite regress of multiple interpretations and as a result the meaning of something that is supposed to be defined by rules collapses into an infinite regress of multiple interpretations.<sup>62</sup> In other words, as Wittgenstein puts it, “any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.”<sup>63</sup> Thus, the problem is that

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<sup>62</sup> As Williams puts this: “In other words, if our picture of being guided by a rule requires interpretation because the rule as something that can come before the mind and be grasped in a flash – an isolable entity – is subject to multiple interpretation, then *for the same reason* our interpretation requires interpretation, and so on.(p. 160)” See: WILLIAMS, M. 1999, p. 159 – 160.

<sup>63</sup> WITTGENSTEIN, L. 1953 (1986). Section 198.

there are multiple possible meanings but no reliable way to adjudicate the differences between them.

The same problem is found in legal rules. For example, the above-mentioned burglary rule is to a layperson not really intelligible. It entails all kinds of questions that the rule does not answer and the layperson is not capable of answering. For instance, the layperson does not know when a particular rule applies or why *this* rule applies. A particular rule of law entails for a layperson multiple interpretations, and he or she will not know (based on the rule) when to stop interpreting. Hence, for a layperson the meaning of the law (based on rules) collapses into a regress of multiple interpretations. But this is not true of a competent jurist. A competent jurist will know more than the language of the rules and therefore will be able to answer questions about the application of rules more or less effectively, that is, without the meaning collapsing into a regress of interpretations (see, for example, the majority opinion in *Riggs*). In other words, a competent jurist can more or less effectively deal with the differences in meaning that may arise within a legal conversation (including legal disputes). Thus, he or she will know which argument can be made, which authority is to decide, and so on.<sup>64</sup>

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The second problem with understanding that follows from a system of rules is the *justification* of our understanding. This justification is presumably *based* on rules.<sup>65</sup> We have seen that rules entail multiple conflicting interpretations without an internal constraint. This undermines the effectiveness of our understanding in the sense that the meaning defined by the rules collapses into an infinite regress of multiple interpretations (the regress problem). Further, the justification of our understanding is undermined by a paradox of meaning. Let me explain.

In our earlier example, what we know on the basis of the first basic rule for chair is that a chair is a piece of furniture with a seat. Presumably this is also correct knowledge because it follows from a particular rule. The same goes for the kind of legal knowledge that follows from the burglary rule. It is presumably correct on the basis of the rule. But, and here

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<sup>64</sup> I am thankful to J. B. White for this final point.

<sup>65</sup> Cf. WILLIAMS, M. 1999, p. 160. This problem builds on the first problem of regress.

comes the problem, since rules alone tell us both too much and too little about a chair or a burglary, this implies that simultaneously knowing too much and too little is justified. This, of course, is not intelligible. It means that, based on the first rule for chair, a person is justified in saying that something is a chair because it looks like a piece of furniture and has a seat but at the same time it is *not* a chair because it is a piece of ice that cannot be used as a seat. Or, based on the burglary rule, a person is justified in saying that a particular action is burglary because someone entered a house but at the same time it is *not* burglary because nobody entered the house, one just opened a screen door.

The paradox follows from the fact that rules can be interpreted in different, conflicting ways, and thus the understanding justified by the rules simultaneously has different, conflicting meanings.<sup>66</sup> Wittgenstein phrased this problem as follows: “This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.”<sup>67</sup>

The result of the paradox problem is that there is no space for normativity,<sup>68</sup> that is, the correctness of our understanding is fundamentally undermined because there is no way to determine what is correct or what is not. Based on rules, everything we do is correct at the same time; thus effectively *nothing* is justified.

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I conclude that the first description of language as a system of rules is not intelligible because it entails two problems that undermine the effectiveness of our understanding and its justification. First, the understanding that is supposed to be defined by rules is not effective

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<sup>66</sup> As Williams puts this: “Given the fact of multiple interpretations, for any action, that action can be characterized both in a way that accords with a given rule and conflicts with it – even if the interpretation of the rule itself were transparent. This is the source of the paradox: Even if the application of a rule is correct, the action could be made out to conflict with it. Nothing in the application of objectified meaning guarantees what the particular action really is. This renders the notion of accord or conflict, hence of rule-governedness itself, meaningless.(p. 160)” See: WILLIAMS, M. 1999, p. 159 – 160.

<sup>67</sup> WITTGENSTEIN, L. 1953 (1986). Section 201.

<sup>68</sup> As Williams puts this: “The Paradox [problem] shows that the view [i.e., of language as system of rules] cannot account for the *normativity of rules*, for the fact that there is a substantive distinction between correct and incorrect. There is nothing in the mind of the agent or in the behavior of the agent that shows what rule he is following, so long as we think that rules are embodying objectified meaning.” See: WILLIAMS, M. 1999, p. 160.

because it collapses into an infinite regress of multiple interpretations and, second, there is no effective justification of our understanding (or sense of normativity or correctness) because it breaks down into a paradox of meaning. Together these problems constitute my notion of *superficial* understanding and justification.

In the next section I discuss a more complex description of language. Is this description more intelligible, in the sense that it relates to our understanding without collapsing into an infinite regress of interpretations and it provides for a sense of correctness that does not break down into a paradox of meaning? Such a description of language would account for my notion of *effective* understanding and justification.

### **3. Language as a More Complex System of Rules**

The problems that arose in the first description of language and law resulted from the fact that rules tell us at the same time both too little and too much, that is, rules are underdetermined and without internal controls and therefore they allow for a never-ending multiplicity of interpretations. The aim of my second, more complex description of language and law is to do something about this. Is there something that can *control* the meaning of rules so that our understanding can be described more intelligibly? Let me first discuss the structure of Dworkin's theory of law to see how it aims to control the rules of law.

The simplest way to describe the law is to say that it is a system of rules. Legal positivists would argue that the legal understanding of such a system follows from the way the rules are enacted by official lawmakers. In this sense Dworkin is not a legal positivist. He has also a more complex understanding of law, namely, he sees it as a system that includes, in addition to legal rules, "principles" of morality and public policy. These principles are presumably real (Dworkin can be called a realist) and can be discovered by super judges (like Hercules<sup>69</sup>) who can interpret the entire existing body of law (including rules) in its best light.<sup>70</sup> I will say more about this later. Dworkin in this sense is more of a natural law theorist; in his view the origin of law is *represented* by moral principles, which control the understanding of law.

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<sup>69</sup> But Dworkin recognizes that an actual judge can only imitate Hercules in a limited way (nobody is as perfect as Hercules). See: DWORKIN, R. 1986 (1998), p. 239, 245.

<sup>70</sup> DWORKIN, R. 1986 (1998), p. 52 – 53, 65 – 67, 255 – 256.

Although this is a very short outline of Dworkin's theory of law, it does tell us something about how he tries to control the law, including the rules of law. He developed his theory in opposition to legal positivism, and to explain this we have to return to *Riggs*.<sup>71</sup> We saw in this case that the rules of statutory law ran out. In the first chapter I argued that in the majority opinion Judge Earl was able to go beyond the rules of law and effectively find a particular answer to the question of Elmer Palmer's entitlement in this case. *Part* of this answer was built on the recognition of certain principles ("maxims"). For example, Judge Earl pointed out that "all laws [legal rules] as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."<sup>72</sup>

This part of the majority opinion led Dworkin to challenge legal positivism, in particular Hart's version of it. Dworkin says: "Since principles seem to play a role in arguments about legal obligations (witness, again, *Riggs* and *Henningsen*), a model [of law] that provides for that role has some initial advantage over one that excludes it, and the latter cannot properly be inveighed in its own support."<sup>73</sup> Does legal positivism account for the apparent phenomenon of principles *within* the law?

Legal positivists argue that when the rules of law run out it is left to the *discretion* of judges to interpret the law.<sup>74</sup> This means that judges can interpret the law based on what, as Dworkin says, they "make it a principle to do."<sup>75</sup> But what judges make it a principle to do is not legally binding on them, as rules are. That is because when they exercise discretion they go *beyond* what the positivists recognize as law (as it is made by formal lawmakers). Judges are in fact free to apply *extra-legal* principles whenever they see fit. So the answer to the above question is no.

Dworkin's theory of law, as I have summarized it, has the advantage of including principles of law. These principles allow for a correct (justified) legal answer within the law when the meaning of the rules of law is underdetermined but also when the rules of law run out. So there is no need for discretion. But, more importantly, for the purposes of this work, it

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<sup>71</sup> DWORKIN, R. 1977a. Models of Rules 1. *Taking Rights Seriously*. Cambridge, Harvard University Press, p. 14 – 45.

<sup>72</sup> *Riggs*, p. 511.

<sup>73</sup> DWORKIN, R. 1997a, p. 36; HART, H. L. A. 1961 (1994). Postscript, p. 252 – 254.

<sup>74</sup> DWORKIN, R. 1997a, p. 3; HART, H. L. A. 1961 (1994). Postscript, p. 252 – 254.

<sup>75</sup> DWORKIN, R. 1997a, p. 34.

seems possible following Dworkin's theory of law to overcome the problems of legal understanding and its justification that follow from rules. Namely, the correct meaning of the law follows from interpreting all the available legal material (such as rules) in light of the existing ("real") principles of law. In other words, according to Dworkin there are certain principles that ultimately justify the law.<sup>76</sup> For example, in the *Riggs* case, in which the rules of law ran out, the correct legal answer followed from application of the principle that no one shall be allowed to profit from a crime. Hence, the decision had to be that Elmer Palmer was not entitled to his grandfather's property because he had acquired it by committing a crime (in this case murder).

There is more to say about Dworkin's position, which is much more complex than I have suggested. But here the point is to see that adding an external element to the structure of law as a system of rules, namely, principles, provides a *possible* solution to the problems of legal understanding and its justification (i.e., the regress problem and the paradox of meaning). But the important question is whether or not this additional element, which presumably controls the meaning of the law, is really intelligible, that is, intelligible in the sense that it overcomes the problems of regress and the paradox of meaning.

For example, imagine a conversation between two competent jurists about the interpretation of contracts. These jurists are both residents of a civil law country, say, France. They are used to applying the law in order to interpret a particular situation. Let us say that they apply the rules of contract law to interpret the meaning of a particular contract. More particularly, they apply the articles of the French civil code. Now imagine that one of the jurists argues that under article 1108 of the code a particular contract is not valid because it lacks a defined object (one of the conditions of a valid contract defined in article 1108). In response the other jurist argues that the contract is valid because it does not lack an object and fulfills all the conditions of a valid legal contract.

This example seems to suggest that there is a conflict over the meaning of a particular rule (article 1108 of the code). We have seen that to rely on rules alone is not really intelligible. Dworkin's solution to this problem, as we have seen, would be to say that the correct interpretation of this rule follows from its interpretation in light of the principles of justice and public policy. Let us leave aside for the moment what these principles are or where they come from. The important question is whether it is effective to say that this

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<sup>76</sup> For example see: DWORKIN, R. 1986 (1998), p. 221 – 224.

example contains a conflict about a particular rule that needs to be resolved with reference to principles, as Dworkin would have it, or that the example is not about the correct meaning of *rules per se* but rather about *how* competent jurists can effectively *do* things with rules (and other legal concepts). I argue for the latter position in this chapter.

For example, one of the competent French jurists can argue that there is a defined object because the contract concerns a sales agreement that is determined in accordance with the rules governing sales contracts (see articles 1582 – 1701 of the French civil code). In response to this the other jurist can argue that the agreement is not completely determined in accordance with these rules because the parties failed to define the obligation of the seller (e.g., about when and where to deliver the sold good to the buyer). In response the first jurist can argue that this fact of the indeterminacy of the agreement does not undermine the effective fulfillment of a defined object under article 1108 of the code. Namely, he can say that an obligation of a seller that is not completely determined is still a valid object of a sales agreement that falls under article 1108 of the code. The only problem is that the object is not completely determined, but this can be resolved with reference to the articles of the code that deal with the obligation of sellers (I will say more about this in the next chapter). The second jurist in his final response admits that he mistakenly thought that the *object* was not defined and *therefore* there was no valid contract. He recognizes now that although there is no fully determined agreement between the two parties, this problem does not undermine the validity of their contract.

We can see in this example that the first jurists was able to effectively resolve the conflict over the validity of the contract. But pace Dworkin, he did not refer to principles. Rather, the first jurist was able to convince the second on the basis of an agreement regarding the use of arguments. That is, the second jurist at some point accepted the arguments of the first. In this moment of acceptance their disagreement was resolved. There is more to say about this argumentation practice of competent French jurists, as I will do in a moment. But it is important to see that what seems to be most problematic about Dworkin's theory is the fact that it tries to tackle a problem of rules with something that lies beyond rules (i.e., principles) whereas for the jurists it seems more like a conflict over the use of legal arguments than over rules *per se*, that is, they seem to be able to argue in a particular way for or against a particular interpretation of rules and at some point reach an agreement through their shared use of legal arguments.



At the end of the chapter I argue that this shared practice of legal argumentation constitutes the necessary condition for effective legal understanding. But before we get there I must first discuss the intelligibility of Dworkin's solution to the underdeterminacy of rules. For this I turn to a Kripkean description of language. Kripke describes a complex structure of language similar to the one Dworkin suggested for law, namely, as a system of rules with an additional element. We will see that Dworkin's theory of law, or a Kripkean description of language, is not fully effective in the sense that it does not overcome the problems of regress and the paradox of meaning.

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Saul Kripke is one of the many philosophers who have interpreted or commented on Wittgenstein's *Investigations*.<sup>77</sup> Here I focus on a particular element of Kripke's understanding of Wittgenstein, what he calls the fundamental problem of the *Investigations*: the "skeptical paradox."<sup>78</sup>

In our discussion of the most simplistic structure of language we saw that rules alone do not effectively define and justify our understanding. I demonstrated this by arguing that when it is based on rules our understanding collapses into an infinite regress of multiple contesting interpretations and the justification of our understanding breaks down into a paradox of meaning. Kripke would say that because of the latter problem "the entire idea of meaning vanishes into thin air."<sup>79</sup> But, according to Kripke's understanding of Wittgenstein, the problems with the understanding of law and its justification do not follow from *rules* per se. As I understand him, he thinks these problems follow from the fact that the *relation* between rules and our understanding is not properly accounted for in a simplistic discussion of language. That is, Kripke thinks there is a problem with the *justification* of our understanding as this is defined in rules. Remember that in the first discussion the rules are

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<sup>77</sup> For other commentators on Wittgenstein see for example: GOLDFARB, W. 2012. Rule-Following Revisited. In: ELLIS, J. & GUEVARA, D. (eds.) *Wittgenstein and the Philosophy of Mind*. Oxford, Oxford University Press. See for further discussion of the notion of rule following, for instance: EBBS, G. 1997. *Rule-Following and Realism*. Cambridge, Harvard University Press. Ebbs' work and especially his discussion of the "participant's perspective" is in line with the complex view of language that I argue for in this work (i.e., language as a socially constitute practice of rule following).

<sup>78</sup> KRIPKE, S. A. 1982. *Wittgenstein on Rules and Private Language: An Elementary Exposition*. Cambridge, Harvard University Press, p. 78 – 79.

<sup>79</sup> KRIPKE, S. A. 1982, p. 22.

taken to simply *correspond* to our understanding. The names of things represent the correct meaning of these things, and the rule for burglary defines the correct legal meaning of burglary. It is this correspondence, and not the rules themselves, that is, according to Kripke, the cause of the fundamental problem of the *Investigations*. As he puts it: “The skeptical paradox is the fundamental problem of *Philosophical Investigations*. If Wittgenstein is right, we cannot begin to solve it if we remain in the grip of the natural presupposition that meaningful declarative sentences [i.e., rules] must purport to correspond to facts; if this is our framework, we can only conclude that sentences attributing meaning and intention are themselves meaningless. (...) The picture of correspondence-to-facts must be cleared away before we can begin with the skeptical problem.”<sup>80</sup>

To resolve the correspondence issue, Kripke seems to suggest adding an additional *social* element to the simplistic system of rules. As I understand him, Kripke suggests that the community controls the justification of our understanding, that is, the community controls the correctness of what we (as individuals) do when we use rules. As he put it: “each person who claims to be following a rule can be checked by others.”<sup>81</sup> It is this “community check” that presumably provides for a more intelligible description of our understanding and its justification, that is, a *solution* to the “skeptical paradox.”<sup>82</sup> Dworkin’s “principles” have presumably the same function and quality within the law.

But how effective is such an external element in controlling (justifying and determining) our understanding of law? Are the Kripkean “community check” and Dworkin’s “principles” enough to overcome the regress problem and the paradox of meaning? The answer is no because what “community” means or “principles” are is still underdetermined and lacks internal control. Following my view of Kripke’s and Dworkin’s theories, they cannot effectively get off the ground. Let me explain.

Consider the following basic rules for traffic lights: “A red signal prohibits any traffic from proceeding” and “a green signal allows traffic to proceed.” We can imagine that there are multiple ways in which these rules can be interpreted depending on the different situations

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<sup>80</sup> KRIPKE, S. A. 1982, p. 78 – 79.

<sup>81</sup> KRIPKE, S. A. 1982, p. 101. For a detailed description and discussion of Kripke’s position see: WILLIAMS, M. 1999, p. 162 – 164.

<sup>82</sup> As Williams puts it, Kripke’s solution to the “skeptical paradox” is this: “Only public checkability of the individual’s assertions as to whether they conform to community practice can provide the solution to the skeptical challenge.” See: WILLIAMS, M. 1999, p. 163. Child characterizes Kripke’s solution as follows: “a community’s verdict about what a rule requires at each stage that can provide a standard of correctness for the efforts of an individual rule-follower.” See: CHILD, W. 2011, p. 143.

in which they are used or applied. For example, we can say that an ambulance on its way to a life-threatening accident is allowed to ignore a red signal. But an ambulance is not always allowed to ignore red signals, for instance, when this would create an overly dangerous situation for other traffic. Or, interpreting the second rule, ordinary traffic is not always allowed to proceed on a green signal, for example, when an ambulance is approaching on the road that one is about to cross.

Kripke would say that by themselves these rules for traffic lights cannot correctly determine our understanding. The above interpretations of these rules indeed suggest that on the basis of rules alone our understanding of traffic lights “vanishes into thin air.” But to repeat, according to Kripke this is not because there is something wrong with the rules but because rules alone do not correspond intelligibly to our understanding. Therefore, Kripke says, “The picture of correspondence-to-facts must be cleared away before we can begin with the skeptical problem.” Kripke seems to be calling for a more complex relation between rules and our understanding, more complex, that is, than what the correspondence picture provides. Remember, he argues, “every person who claims to be following a rule can be checked by others.” Let us apply this “community check” to a concrete situation to see if it works.

Imagine a particular community of elderly people in Berlin. They think it is meaningful to stop for a red traffic signal, always, even at four in the morning when there is no other traffic, and so they act accordingly. Kripke would say that in light of this community it is also justified to stop for a red traffic signal.<sup>83</sup> This confirms the basic understanding of the rule “a red signal prohibits any traffic from proceeding.” But what should one do in a more exceptional situation, for instance, in case of an emergency? Following my understanding of Kripke’s theory, the correct answer follows (again) from this community of elderly people. But, and here comes the problem, what if *some* of these people think that both ordinary traffic and specialized traffic, such as an ambulance, are allowed to ignore a red signal in case of an emergency but *others* think that in such a case only an ambulance (or a police car or fire truck) is allowed to proceed? This suggests that at least two different interpretations are held by members of this particular “community.” Now what should an

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<sup>83</sup> According to Williams, Kripke would say: “I may not be certain as to what I mean, but I am justified just insofar as I do what I am inclined to do when I reach bedrock and what I am inclined to do conforms with what everyone else does.” Williams concludes that following Kripke’s position “[w]e stand in a mutual policing relation to each other.” See: WILLIAMS, M. 1999, p. 164.

ordinary citizen who, for instance, is driving a car to the hospital with a woman in labor at four in the morning in Berlin do?

This example illustrates that even when we are “checked by others” we still might not know the correct thing to do. With reference to the “community,” the actions of the driver in the above example are justified in two conflicting ways. On the one hand, he is correct to ignore red traffic signals because there is an emergency, even though he is not driving an ambulance. But on the other hand he is not correct to ignore red traffic signals because he is driving a car and not an ambulance. The first line of justification follows from a particular part of the community of elderly people whereas the second follows from a different part of that same community. This is the paradox: at the same time different understandings of a particular rule are justified based on the “community.” Hence, *nothing* is really justified based on the “community.”

What is more, the kind of understanding that is *defined* by Kripke’s community check is also not really effective. Namely, what can be defined as meaningful by *this* part of the community of elderly people, which holds the view that all traffic may ignore red traffic signals in an emergency, is something different from what is defined as meaningful by *that* part of the community, which holds the view that not all traffic may ignore red signals in an emergency. Hence, the understanding of traffic signals as Kripke’s community check defines it collapses into an infinite regress of multiple contesting interpretations, that is, what I call the regress problem.

Kripke’s solution to the “skeptical paradox,” in my view, is not very successful in terms of overcoming the problems with understanding and its justification.<sup>84</sup> We can imagine that for the same reasons Dworkin’s solution fares little better. Dworkin argued about *Riggs* that when legal rules run out principles of law can ultimately provide a single right answer. In this case, the principle “no one shall profit from his wrong” was used to justify a particular answer (Elmer Palmer should be denied his property). But what if there is another principle,

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<sup>84</sup> Kripke’s position has been broadly discussed and also criticized. In line with Williams I argue in the third and fourth discussions about language that there is *no* “skeptical problem” to be resolved, that is, in order to properly account for understanding (pace Kripke). Williams, for instance, says: “Wittgenstein does not replace subjective checkability to public checkability [i.e., Kripke’s position]. Wittgenstein’s alternative is not a skeptical solution at all, for the point of the Paradox of Interpretation [i.e., paradox problem] and related arguments is to show the bankruptcy of a certain philosophical picture, the very picture that makes the skeptical problem possible [i.e., language as a system of rules].” See: WILLIAMS, M. 1999, p. 164. For a further critique of Kripke’s understanding of Wittgenstein, see, for example CAVELL, S. 1988a. *The Argument of the Ordinary. Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism: The Carus Lectures*. Chicago, University of Chicago Press, p. 64 – 100.

for instance, “no one shall be denied his property”? Suddenly there are two right answers. On the one hand, Elmer Palmer should be denied his property (justified by the first principle) but on the other he should not be denied his property (justified by the second principle). This situation resembles the paradox discussed above. It suggests that it is possible to construct something resembling the regress problem as well, but I shall not work that out here.

The problem with Dworkin’s “principles,” as well as the Kripkean “community check,” is that it allows for multiple contesting interpretations without an internal constraint. Even if there were only one principle of law, this would lead to an infinity of interpretations. For example, if Elmer Palmer had been forced to murder his grandfather (say, by someone who threatened to kill him) would he still be “profiting” from his crime? The same goes for a Kripkean notion of “community.” I conclude, therefore, that adding an additional element to the system of (legal) rules is not really intelligible but only meaningful in a weak or superficial sense. That is, Dworkin’s and Kripke’s theories, as I have presented them, are not effective enough to overcome the problems of regress and the paradox of meaning because both “principles” and “community” allow for multiple conflicting interpretations.

#### **4. The Individual Practice of Rule Following**

It would appear that a more complex description of language and law is needed to account for effective (legal) understanding. The descriptions suggested by Dworkin and Kripke are in my view not sufficiently complex to effectively overcome the problem of regress and the paradox of meaning. But I have to admit that I was not completely fair to attack Dworkin in the way I did, that is, by suggesting that there could be more principles or contesting interpretations of a single principle in *Riggs*. Dworkin’s theory of law is not only based on principles of law but also on a *practice* of coherent interpretation, what Dworkin calls “law as integrity.” This refers to the practice of super judges, who interpret the entire body of law in its best light.<sup>85</sup> I will say more about this in a moment. The principles of law are merely the result of this interpretation practice. Hence, I should have noted that in *Riggs*, following Dworkin’s theory

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<sup>85</sup> DWORKIN, R. 1986 (1998), p. 243: “Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair, and just according to the same standards.”

of law, there is one right answer not because there is one principle but because this is what follows from the practice of interpreting all the legal material in its best light. Thus the principle I attacked is merely the result of the much more complex *practice* of interpretation that constitutes Dworkin's view of law. To be fair to Dworkin, I should discuss the structure of law as a practice of interpretation.

This brings me to a third way to describe language and law, not as a system of rules with or without an additional element but as a *practice* of rule following. As always, the question is whether or not this description is sufficiently complex to overcome the problems with (legal) understanding and its justification.

Let me start by describing the structure of Dworkin's theory of law and in particular his view of the practice of interpretation. Dworkin suggests that we think of this practice as a process of different authors, one after another, working on the same novel, that is, writing a so-called "chain novel."<sup>86</sup>

In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity.

The group of novelists in this excerpt stands for a group of competent jurists (trained lawyers and judges) within a particular jurisdiction. The structure of their practice of interpretation is as follows. As competent jurists they first interpret the prior texts (on their own), that is, they interpret the existing body of law (rules and case law). Then they write new chapters (also on their own). That is, in light of the existing body of law, a jurist argues or decides a new case. The increased body of prior texts is then passed on to the next competent jurist, who interprets it and adds another chapter, and so on.

The ultimate goal is that the authors, both singly and as a group, will write the best possible novel. This means, as Dworkin puts it, that each author "must try to make this the best novel it can be construed as the work of a single author rather than, as is the fact, the

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<sup>86</sup> DWORKIN, R. 1986 (1998), p. 229.

product of many different hands.”<sup>87</sup> The best legal novel that could be written in this way would represent, following Dworkin’s theory, the correct meaning of law in different situations, that is, the “law as integrity.” The individual chapters that make up the novel would represent the correct meaning of law in a particular situation (e.g., in *Riggs* the best chapter was presumably written by Judge Earl).

So how do competent jurists create things on their own that, taken together, resemble the work of a single author? The simplest answer is because they all interpret the same body of law in a coherent way. First, Dworkin says that the competent jurists should interpret the law in a new case in a way that *fits* the existing body of law. This means that not all interpretations are correct but only those that “flow throughout the text; [the interpretation] must have general explanatory power, and it is flawed if it leaves unexplained some major structural aspects of the [prior] text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor.”<sup>88</sup>

But what if there are two or more interpretations that fit the existing body of law? Dworkin argues that next to the dimension of fit there is a dimension of evaluation, that is, competent jurists should “make the work in process *best*, all things considered.”<sup>89</sup> The standard for what counts as best does not just follow from the jurists themselves, subjectively, but from a background that Dworkin calls “the standpoint of political morality.”<sup>90</sup> This standard refers to the principles I have been talking about. I explained that the principles of morality and public policy are the result of the process of interpretation, but, according to Dworkin, they guide individual jurists in their actual practice of interpretation as well. That is, as a realist Dworkin thinks that such a standard exists (is real) and can be understood by all competent jurists. Again, in different words, Dworkin describes the process of interpretation in law as follows:<sup>91</sup>

Law as integrity asks of a judge deciding a common-law case like *McLoughlin* to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal

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<sup>87</sup> DWORKIN, R. 1986 (1998), p. 229.

<sup>88</sup> DWORKIN, R. 1986 (1998), p. 230.

<sup>89</sup> DWORKIN, R. 1986 (1998), p. 231. (emphasis mine)

<sup>90</sup> DWORKIN, R. 1986 (1998), p. 239.

<sup>91</sup> DWORKIN, R. 1986 (1998), p. 239.

with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be. (Of course the best story for him means best from the standpoint of political morality, not aesthetics.)

In sum, the structure of Dworkin's theory of law as integrity is an *individual* practice of coherent interpretation performed by competent jurists, who find the *best fit* within the existing body of law and in light of the principles of morality and public policy. This practice presumably *exhibits* the correct (and coherent) meaning of the law in all situations.

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Before I discuss the effectiveness of Dworkin's theory of law I want to present a theory of language that has a similar structure. Gordon Baker and Peter Hacker, two language philosophers, argue that language has a structure consisting of the practice of rule following.<sup>92</sup> In line with Wittgenstein, they depart from the idea that there are rules that define and justify meaning (relatedly, they also depart from the metaphysical question of the origin of rules, but I shall leave this aside). In contrast to what Kripke argues, Baker and Hacker (and many others) take it that the *Investigations* shows that there is a fundamental problem with rules per se rather than with the relation between rules and our understanding (the "skeptical paradox").<sup>93</sup> In my prior discussion of Wittgenstein's philosophical practice we have seen that a description of language as a system of rules ignores the element of what I call *practice*. Recall that Augustine's excerpt on language learning does not describe what it means to *do* something with words in a particular situation. This insight suggests that it is more intelligible to describe language as a practice of language. Baker and Hacker (and others) talk about this in terms of "the practice of rule following" or simply "rule following."

What follows is that our understanding, and presumably also its justification, is no longer dependent on rules per se (with or without external control) but on a particular practice

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<sup>92</sup> BAKER, G. P. & HACKER, P. M. S. 1984. *Scepticism, Rules and Language*. Oxford, Basil Blackwell.  
BAKER, G. P. & HACKER, P. M. S. 1985. *Wittgenstein: Rules, Grammar and Necessity: Volume 2 of an Analytical Commentary on the Philosophical Investigations, Essays and Exegesis 185-242*. Oxford, Basil Blackwell.

<sup>93</sup> Cf. WILLIAMS, M. 1999, p. 174.



that has the structure of following a rule. This means, in other words, that the standard for intelligibility is now the rule-following character of a particular practice. Hence the question becomes what or who determines what rule following is or is not. That is, what is the distinction between *meaningful* and *meaningless* behavior, and is this distinction also effectively *justified*?

Baker and Hacker's answer to this question is in line with Dworkin's view of law. They argue that competent *individuals* know correctly and independently what constitutes rule following and what does not.<sup>94</sup> Dworkin argued that competent jurists can, on their own, correctly interpret the best fit (see his chain novel). To explain Baker and Hacker's position we have to return to Kripke's view of language. But now we will focus not on the additional element that controls the meaning of rules but on the social aspect of this element. It is this social aspect (the community) that Baker and Hacker reject. According to them, the *fact* that the community does things in a particular way does not mean that what it does is *correct*.<sup>95</sup> In other words, why should we, as individuals, do what the community does? Kripke can only answer that we should do it because the community does it. For this Kripke relies on what Wittgenstein wrote in section 202: "Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it." The impossibility of the private understanding of rules leads Kripke to argue for a community view of language. But Baker and Hacker do not find this convincing. They argue that Wittgenstein's later view of language has two premises: "The first is that following a rule is a practice; the second that a practice is something essentially social. We have argued that the second premise is mistaken. What he [Wittgenstein] meant by 'practice' does not make the phrase 'a shared practice' pleonastic, though of course the practices that he found philosophically interesting are indeed shared ones (...)." <sup>96</sup>

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<sup>94</sup> As Williams puts this: "On their view [Baker and Hacker's], with which I am sympathetic, what Wittgenstein shows is that rule-following is a form of *action*, not a thought [e.g., a "community check"]. (...) "What Baker and Hacker emphasize is that a certain behavior just is, e.g., adding or decorating if done in the right surroundings; and that being an instance of adding is *not justified by appeal to what everyone would say, nor is anything made an instance of adding in virtue of everyone saying so.*" See: WILLIAMS, M. 1999, p. 164 – 165. (emphases mine)

<sup>95</sup> As Williams puts it: "An empirical generalization about what most people do is not the same as a norm standing for what people ought to do. What Baker and Hacker are looking for is a way of characterizing norms that is distinct from the Classical View [i.e., language is a system of rules] and yet is not an unmasking thesis." See: WILLIAMS, M. 1999, p. 165.

<sup>96</sup> BAKER, G. P. & HACKER, P. M. S. 1985, p. 169-181.

Thus Baker and Hacker see no reason why the practice of rule following should be shared. In other words, as Williams put it: “the relation between a rule and the instances of its application is, as they repeatedly assert, an *internal* relation.”<sup>97</sup> Competent language users and their actions, which show what is and is not correct, constitute this internal relation. According to Baker and Hacker, the internal relation between being competent and doing what is or is not correct makes it possible to make a justified distinction between what is rule following (meaningful) and what is not (meaningless).<sup>98</sup> As they put it: “Since mastery of a technique is exhibited in acts which satisfy the criteria of correctness internal to the technique (doing what is called ‘applying the rule’; PI 201), this manifestly guarantees the possibility of distinguishing between a person’s thinking that he is following a rule and his actually doing so.”<sup>99</sup>

What follows is the supposition that competent language users know when they are doing something correctly simply because they are competent.<sup>100</sup> For this reason Baker and Hacker see no need to include an external social element in their description of language in order to justify our understanding. They argue, for instance, that even someone like Robinson Crusoe, who spent his entire life on an isolated island where he never met another human being can distinguish between following and not following a rule.<sup>101</sup>

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We are now in a position to discuss the structure of language and law as Baker and Hacker and Dworkin have described it. The question is whether or not competent individuals (jurists or language users in general) can effectively distinguish between meaningful (rule following)

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<sup>97</sup> WILLIAMS, M. 1999, p. 165. (emphasis mine)

<sup>98</sup> BAKER, G. P. & HACKER, P. M. S. 1985, p. 155: “Two fundamental points must be born in mind. (i) The concept of a rule interlocks with the concept of guiding oneself, justifying and criticizing actions, teaching techniques, and giving teleological explanations of behavior. These conceptual connections are summed up in the observation that the concept of a rule is a dynamic or functional concept. (ii) The relation of accord between an act and a rule is an internal relation. The rule itself, not some third entity, determines what accord and conflicts with it. Hence to understand the rule is to know what accords with it.”

<sup>99</sup> BAKER, G. P. & HACKER, P. M. S. 1985, p. 164.

<sup>100</sup> Williams is critical of this writing, “We seem to be going round a rather tight circle. It is not clear how the appeal to grammar [i.e., internal relation] gets us any further than traditional appeals to acts of meaning, which in some mysterious way encompass their objects. Unless the notion of grammar is spelled out, it threatens to become another candidate for a ‘philosophical superlative,’ the quest for which Wittgenstein seeks to undermine.” See: WILLIAMS, M. 1999, p. 166. In line with Williams I argue that Baker and Hacker’s theory of language allows for meaning only in a weak or superficial sense.

<sup>101</sup> Cf. WILLIAMS, M. 1999, p. 172 – 177.

and meaningless (non-rule-following) behavior based on nothing but their own individual competency and actions. The answer is no because what individuals know is correct, together with what they do (based on their individual “competency”), is still too underdetermined to effectively justify our understanding. This means that it entails the paradox problem and hence also the problem of regress.

To illustrate, imagine that there is a group of singers rehearsing for an upcoming concert when a new person arrives. This person is much like Crusoe. He has never been in contact with other human beings. He grew up on his own and is able to move, make sounds, and do other things to stay alive. He managed to position himself among the singers. When they start singing he starts making weird sounds, and when they come to the end of their song he stops. The question is when are we justified in saying that this person is singing. In terms of rule following, can we say that when the person makes sounds he is in some way following the rule for singing or going against it? Or is he not following the rule for singing nor going against it?

The singers would probably *not* say that his person is singing correctly or even incorrectly. As trained singers they know a lot about their craft, such as what it means to sing in or out of tune and alone or in a group. They can distinguish between a good or better voice, they know how to breathe correctly or incorrectly, and they know how to make a crescendo or decrescendo. Based on this complex kind of know-how, it is likely that they will reject the stranger for disturbing their rehearsal. More significantly, they will probably reject his sounds because they do not resemble any song, singing technique, or sound that a singer would make. To them this person sounds like a baby who makes random noises with no particular meaning. So according to the competent singers this person is not exhibiting normative, intelligible behavior: he is not following the rule for singing, but he is not going against it either. He is merely producing incomprehensible sounds.

Baker and Hacker would say that the justification for this person’s actions does not depend on whether others know how to do something correctly or incorrectly. They argue that the justified understanding of this person’s actions depends purely on his own knowledge of correctness (his individual “competency”) and his own actions. We can imagine that this person is convinced that his actions are in accordance with or go against a particular rule. Let’s call it the rule for zinging. As long as he is following this rule he is zinging correctly, and when he goes against it he is zinging incorrectly. In this light we can say that the sounds

that he is making (or occasionally not making) are meaningful; they correctly mean zinging. But we can also imagine that this person does not understand that he is following a rule. This implies that the sounds he is making (or not making) are not meaningful; they mean nothing in particular.

What this example shows is that the actions of the person can be meaningful or meaningless; what they are is *dependent on his will or disposition*. In other words, based on one interpretation of his actions he can correctly say that he is following the rule for zinging or going against it (zinging more or less meaningfully), but based on a different interpretation he can also correctly say that he is not following a rule at all, that what he is doing is meaningless. This suggests that his *individual* understanding of his actions breaks down into a paradox of meaning. That is, different meanings are simultaneously justified. This means that nothing this person does is effectively justified because everything he does is justified. Thus, Baker and Hacker's theory of language does not allow for the normativity of our actions. In other words, there is nothing we really should do based on our individual "competency" because we should do everything we think we should do.

It does not help that Baker and Hacker think that some actions of this person, as opposed others, have "sufficient complexity to yield normativity."<sup>102</sup> Again we can imagine that this person's *individual* understanding of which actions have "sufficient complexity" is too underdetermined to resolve the paradox problem

Now we can imagine that because of this paradox problem there is also a regress problem. That is, what an isolated individual thinks he should do allows for different conflicting interpretation. Hence, what for this person feels is meaningful to do collapses into a regress of multiple interpretations.

In light of this, I conclude that Baker and Hacker's theory of language is not really intelligible because it does not effectively overcome the two problems with our understanding and its justification. Let us turn to Dworkin's theory. The effectiveness of Dworkin's theory of law seems to be undermined for the same reason that Baker and Hacker's theory of language is. Namely, his individualistic view of the practice of interpretation is threatened by the fact that what individual jurists understand in law as the *best fit* is open to multiple conflicting interpretations or judgments. For example, on the one hand, a jurist might be convinced that his or her interpretation of law fits the prior body of law and is also the best

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<sup>102</sup> BAKER, G. P. & HACKER, P. M. S. 1984, p. 42.

interpretation in the light of the principles of morality or public policy. But on the other hand this jurist might be convinced that his or her interpretation fits no prior body of law at all. Based on the first conviction, the jurist interprets the law meaningfully, but based on the second he or she does not interpret the law at all. So we see that Dworkin's individualistic theory of law entails the paradox problem as well, and hence I conclude that his theory is not really intelligible either. It seems to entirely ignore the part of legal practice in which competent jurists meaningfully disagree with one another about law.

It does not help that Dworkin assumes that the principles of morality and public policy are common knowledge and real. Presumably this would guide competent jurists who interpret the law on their own into the single right direction (i.e., they can all find the *real best fit*). We have seen that individuals can interpret even a single principle in different ways, and hence they do not really know what the best fit is. Dworkin's standard of public morality is too underdetermined to effectively resolve the problems with understanding and its justification.

In sum, I have examined the individualistic practice of law and language and I have concluded that it is not complex enough to overcome the regress problem and the paradox of meaning. This conclusion follows from the fact that what individuals believe is correct or incorrect (based on their individual "competency") and what they actually do (in law or language) allows for multiple conflicting interpretations. This fact undermines the effectiveness of the justification of our legal understanding (the paradox problem) and hence also the effectiveness of legal understanding itself (the regress problem).

I will now discuss one more description of law and language. This discussion shows that it is possible to effectively account for legal understanding and its justification without entailing the multiple conflicting interpretations that lead to the regress problem and the paradox of meaning. As Wittgenstein says: "there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases."<sup>103</sup>

## **5. The Socially Constituted Practice of Rule Following**

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<sup>103</sup> WITTGENSTEIN, L. 1953 (1986). Section 201.

In the previous discussion we saw that individuals like Crusoe have a weak or superficial understanding of rule-following behavior, namely, one that allows for multiple conflicting interpretations. Here I discuss the question, “How can competent individual language users in general effectively distinguish between meaningful rule-following behavior (correct or incorrect behavior) and behavior that is *not* meaningful because it lacks a rule-following structure (neither correct nor incorrect)?” In legal terms, the question is, “What enables competent jurists to have a more or less effective conversation about law that includes the possibility of meaningful disagreement?” Again, *effectively* means without entailing the two problems with understanding and its justification.

To answer this question I advance a more complex image of the structure of language. I began this chapter by discussing the simplest structure of (legal) language, namely, language as a system of rules. But we saw that this structure entails two problems with (legal) understanding and its justification: the regress of interpretations and the paradox of meaning. In an attempt to resolve these problems, I introduced a slightly more complex structure of (legal) language, namely, language as a system of rules with an additional element (the Kripkean “community check” and Dworkin’s “principles of law”). We saw that this structure still entails the problems with (legal) understanding and its justification. Therefore I introduced an even more complex structure, though this time not as a system of rules but as a practice of rule following or legal interpretation. This did not overcome the two problems either.

Here I discuss the practice of rule following or law that includes a *socially* constituted structure. For this I borrow from Williams’ interpretation of Wittgenstein.<sup>104</sup> Wittgenstein wrote: “a person goes by a sign-post [a rule] only in so far as there exists a regular use of sign-posts, a custom. (...) To obey a rule, to make a report, to give an order, to play a game of chess, are customs (uses, institutions).”<sup>105</sup> We shall see that this custom or socially constituted practice of rule following, allows competent individuals to effectively distinguish

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<sup>104</sup> WILLIAMS, M. 1999, p. 167 – 187. For further discussion of the community view of language and our understanding, see for example: DESCOMBES, V. 1996 (2014). *The Institutions of Meaning; A Defense of Anthropological Holism*. Cambridge, Harvard University Press. PAVLAKOS, G. 2008. Non-Individualism, Rights, and Practical Reason. *Ratio Juris*, 21, p. 66 - 93. I agree with Pavlakos about the fact that normativity or the justification of our understanding is located in shared rule-following practice (p. 69 - 71). PETTIT, P. 1996. *The Common Mind: An Essay on Psychology, Society, and Politics*. Oxford, Oxford University Press, especially chapters 3 and 4. WILLIAMS, M. 2010. *Blind Obedience: Paradox and Learning in the Later Wittgenstein*. Routledge.

<sup>105</sup> WITTGENSTEIN, L. 1953 (1986). Section 198 – 199.

between correct and incorrect behavior in themselves and others (assuming that the rule-following behavior is more or less intelligible) but also to effectively distinguish this correct or incorrect behavior from behavior that is neither correct nor incorrect (i.e., behavior without a rule-following structure that is not intelligible at all).

Let me return to the group of competent singers and their rehearsal. I suggested that these singers would reject the new person and his weird sounds because they could not accept him as a singer or his sounds as singing based on their understanding of singers and their knowledge of singing. The relevant question now is whether an individual singer who distinguishes between *meaningful* behavior that is more or less in accordance with the rule for singing (such as singing in or out of tune) and behavior that is *meaningless* because it is not in accordance with the rule for singing (such as making weird sounds) is justified in doing so. Let us see first how a socially constituted account of language allows for effective (justified) understanding, that is, behavior that *is* more or less in accordance with, for instance, the shared rule-following practice of singing.

There is a crucial difference between an isolated person and a trained singer or language user who has grown up in a social environment. Whereas the latter person had the opportunity to acquire a way of *doing* things that is *more or less in agreement* with how other trained people do things, the former person did not have this opportunity. For example, trained singers learn how to sing from people who already know how to do what we call singing. Some of the things they learn are how to use their voices, breathe, listen, articulate, intonate, and so on. However, this does not mean that they know how to sing exactly like their teachers because they still have to use their own voices, with their own sounds and qualities. The point is that by growing up and learning in a social environment trained singers (or trained language users) can come to *share* with other singers (or language users) a particular *technique* or *set of actions*.<sup>106</sup> I call this shared technique *agreement in actions*. This agreement forms the structure of a shared or socially constituted practice of rule following or language.

The understanding of trained singers (or language users) is controlled by such agreement in actions. Let me explain. When a trained singer makes a particular sound, this is

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<sup>106</sup> Cf. WILLIAMS, M. 1999, p. 177 – 183. Williams describes here how a child or language learner grows into a certain rule following practice, which becomes so-called “second nature.” This means that the child, once it has grown up, can only do things in the way it learned to do them. That is, as Williams would say the child is “alternative blind.”

*meaningful* to the extent that it is *in agreement* with the way other trained singers make sounds. Thus, the singer has to either follow or go against the shared practice of singing in order to be meaningful as a singer. The *actual correctness* of that singer's actions depends on whether he or she follows *or* goes against this shared singing practice. For example, the singer might go against the shared practice and sing out of tune, that is, "out of tune" in the way trained singers define it (i.e., agreement in singing actions). I will say more about this and two other challenges to the correctness of our understanding in a moment.

The advantage of this description of language is that it does not immediately undermine the effectiveness of our understanding. In other words, there is nothing in this description that directly entails multiple conflicting interpretations. I have suggested that our understanding is justified by agreement in actions, which includes agreement in the ways we deal with disagreement (e.g., competent jurists know how to argue for a particular position and to meaningfully disagree with each other). What competent language users can correctly understand is thus *exhibited* in actions that are in agreement. Why is this effective? It is effective because the understanding that is exhibited in actions is not something that entails interpretation. As I have mentioned, the understanding of actions (or the practice of rule following or language) is socially constituted, that is, controlled by agreement in actions over time.<sup>107</sup> For example, trained singers learned how to sing in the way trained singers before them learned how to sing, and so on. It is this agreement in actions that is possibly *manifested* in the actions of competent trained language users.<sup>108</sup> Therefore the understanding exhibited in the competent actions of language users *is* justified, that is, without a need for first-order interpretation (pace the first three accounts of language and law). However, this does not mean that competent language users always know what to do or are capable of acting in agreement in every situation. This occurs when they cannot rely on their competency and have to rely on interpretations. What is more, I do not mean to suggest that competent language users who in principle are capable of acting more or less in agreement cannot sometimes make mistakes. I will say more about this in a moment.

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<sup>107</sup> For a discussion of *practice* as a set of actions that is established *over time* as opposed to something that is constituted in a single action, see: WILLIAMS, M. 1999, p. 169 – 172.

<sup>108</sup> It is, as Williams says: "understanding is a disposition of the individual, namely, the ability to act in appropriate ways under the appropriate circumstances. And that ability, precisely because its content is normative, can only be exercised within a social context, where the social context is that de facto harmony in actions and utterances of a group of people" See: WILLIAMS, M. 1999, p. 177.



This brings me to a point where I can say something about the difference between the view of language I am arguing for here and a Kripkean “community check.” Recall that following Kripke’s theory of language the meaning of rules required a “community check.”<sup>109</sup> This check was supposed to function as a more effective connection (justification) between rules and our understanding (i.e., more effective than what rules can provide alone: see the first discussion of language). But following the view I am advancing here there is *no* gap between the practice of rule following and our justified understanding. That is, our justified understanding is (potentially) *exhibited* in this practice. Hence, there is no need for something like the Kripkean “community check” to mediate between our understanding and our rule-following actions or to justify our understanding. For trained language users there is nothing more to understanding than *acting in agreement with how they and others have learned how to act*. A competent individual can say, as Wittgenstein does, “I have been trained to react to this sign [rule] in a particular way, and now I do so react to it.”<sup>110</sup>

At this point I can also say something about the difference between my view of language and the views advanced by Baker and Hacker and Dworkin.<sup>111</sup> They argued for an individualistic view of the practice of rule following or law. For Baker and Hacker this followed from the fact that there is no good reason for individuals to follow the community. But, according to the view I am arguing for here, there is no need to explain why an individual should follow the community. The social element of our understanding is *inherent* to our individual actions: as trained language users we can only meaningfully exhibit an inherently social understanding. Thus, there is no need to add an external element (justification) to the practice of rule following (pace the Kripkean “community check”), nor is there a need to resort to an individualistic view of this practice (pace Baker and Hacker and Dworkin’s theories).<sup>112</sup>

Now I will finally answer the question raised above about the intelligible distinction between meaningful (rule-following) and meaningless (non-rule-following) behavior. Let me

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<sup>109</sup> Williams would say that the problem with Kripke’s theory of language is that it ignores the fact that language *users* are not like language *learners*. The latter need to be corrected by others (their teachers) in order to learn a particular rule-following practice but the former do not. See: WILLIAMS, M. 1999, p. 182.

<sup>110</sup> WITTGENSTEIN, L. 1953 (1986). Section 198. See also: WILLIAMS, M. 1999, p. 176.

<sup>111</sup> Williams would say that the problem with Baker and Hacker is that they focus too much on the position of the language user who is, unlike the language learner, capable of doing things competently without external justification. But, Williams continues, they forget that language users can rely on their competency *because* they have acquired different techniques *from others*. In her words: “they fail to see the significance of the community in the process of acculturation itself.” See: WILLIAMS, M. 1999, p. 182 – 183.

<sup>112</sup> Cf. WILLIAMS, M. 1999, p. 176.

return again to the singers and the man making weird sounds. What follows from the view of language I have been discussing is that trained singers have a shared background understanding of the practice of singing (i.e., agreement in actions). It is against this background understanding that they can intelligibly dismiss the weird sounds, that is, dismiss them as unintelligible in terms of everything they know about singing intelligibly. In other words, trained singers can argue, and even demonstrate, that the man's weird sounds are not in any way in agreement with the way competent singers know how to *do* things with their voices.<sup>113</sup>

But, it can be suggested that the man producing the weird sounds is convinced that he is doing the same thing the singers are doing (although he calls it zinging), and he starts an argument. He tells the singers that they are wrong to reject him because he is convinced that he is zinging. The outcome and intelligibility of this discussion turn on whether or not this man can produce arguments or examples that resonate with something the singers can recognize as singing. In other words, whether or not the man is following the rule for singing (or going against it) *or* is following no rule at all depends on whether his actions are accepted by competent singers whose actions are not in question (not contested). What this suggests is that in some situations or conversations the actions of a person will not be fully justified as intelligible but in other situations they will be. This leads to the following question, which is important in every conversation: "To what extent is there effective agreement in the actions of the communicating individuals?"

Before answering this question I should say something about how all relates to law and legal language. What follows accepts that the structure of law that allows for effective legal understanding is a socially constituted practice of legal language, that is, agreement in legal actions. We have seen in *Riggs* that Judge Earl managed to manifest his actions (his use of legal arguments) in agreement with the way the law is discussed by scholars and has been interpreted or applied in actual legal cases over time. In this sense the majority opinion is what I call effectively intelligible. By contrast, we saw that Judge Gray's behavior did not exhibit such an agreement in actions. Rather, his use of legal arguments seemed to go against the way competent jurists usually do things in law, or at least he did not show that there could be an agreement in *his* actions. In this sense his actions were not effectively intelligible but only meaningful in a weak or superficial sense.

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<sup>113</sup> Cf. WILLIAMS, M. 1999, p. 172 – 177.

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Let me return to the question “To what extent is there effective agreement in the actions of the communicating individuals?” This question entails three types of challenges to understanding. The first I have mentioned already, that is, the challenge to the *correctness* of effective understanding. For example, are our actions more *or* less in agreement with the way trained language users know who to do things? The second and third challenges are more fundamental in that they challenge the *effectiveness* of our understanding. But let me first say something about the challenge to the correctness of our effective understanding.

This challenge follows from the structure of our effective understanding: agreement in actions. This means that to say or do something meaningful (as a competent individual) requires an *actual manifestation* of agreement in actions. But there is no guarantee that agreement in actions occurs every time a competent language user says or does something. In fact competent language users can make mistakes. For example, a trained singer can make the mistake of singing out of tune. This is a mistake in light of the agreement in actions, that is, the shared ways in which competent singers usually sing. Usually competent singers sing in tune, that is, they do something that is called singing “in tune” as opposed to singing “out of tune.” Singing in tune constitutes their agreement in actions. Hence, we can say that the mistake of the lone singer follows from the fact that he or she *goes against* the agreement in actions by singing out of tune. It is in this sense that the singer’s actions are incorrect, although they are still meaningful and justified in terms of singing.

Thus the first challenge for every competent language user is to actually act in agreement and not go against it. In other words, the challenge is to not make mistakes. Further, if one happens to make a mistake, it needs to be corrected, which means in turn that the individual must try to act in agreement again. For example, we all know how to walk correctly and usually we do. But sometime we *stumble*, and then we have to correct ourselves, that is, we try to *place* our feet more carefully on the pavement, we *look* for obstacles, we try *keep* our balance, and then we continue *walking*.

But there is more. The two more fundamental challenges to our understanding challenge the effectiveness of understanding, not its correctness. From here on I shall focus only on these two challenges. We have seen that the effectiveness of understanding depends

on agreement in actions. This implies that the effective understanding of competent language users is found in *actual manifestations* of agreement in actions. The two challenges have to do with this. For example, in a conversation in which the participating language users *share* a socially constituted language practice, the challenge is for them to actually act in agreement. That is, *within* this shared practice of language, competent language users still have to show that they can do things more or less in agreement. This can be challenging, for the risk is that in particular situations the mutually competent participants *will not work well together*. Thus, in these situations their effective understanding is undermined. Their actions are only meaningful in a weak or superficial sense, entailing multiple conflicting interpretations. We saw this challenge illustrated in *Riggs*, where the opinion of Judge Gray is an example of a competent jurist who was not able to show that he could act in agreement with a socially constituted practice of law and the opinion of Judge Earl is an example of the opposite.<sup>114</sup>

Here is another example of this challenge. Imagine that a man is trying to *offer* another man a seat. Let us assume that these two people know what it means to offer something and be offered something, what it means to sit, and what kind of things one can sit on. In other words, let us assume that these two people *share* a practice of sitting and offering seats. Now in this situation suppose the person who wants to offer a seat *nods* his head in the direction of an empty chair but the other person does not *respond* to this gesture. Then the first person thinks that his gesture might not have been clear, so he tries again, perhaps by *pointing* at the chair while *looking* at the other person. Still nothing happens. The other person is not responding to the gestures the first person makes. This suggests that there is no manifestation of agreement in actions yet. Again the first person tries to offer the other person a seat. This time he *asks* the other person if he wants to take a seat (“Do you want to sit on this chair?”). Again there is no reaction. Maybe this other person is deaf or the first person’s voice is not loud enough. So again the first person *does* something. This time he *picks up* the empty chair and *brings* it to the other person. Now the other person *responds*. He *looks* at the first person

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<sup>114</sup> Another way to describe the challenge to the effectiveness of legal understanding is to say that the challenge is about managing the tensions in law. See: WHITE, J. B. 2012. Justice in Tension: An Expression of Law and the Legal Mind. *NoFo*, 9. In this article White describes different tensions that structure the practice of the law or legal language, for instance, the tension between ordinary and legal language, between formal and substantial legal reasoning, between different principles of justice, and between opposing lawyers. In White’s words: “[e]ach of these tensions is (...) inherently unstable, that is, not resolvable by reference to fixed rules, principles, or conventions; each is dynamic, not static, thus moving us in new directions that we cannot always anticipate; each is dialogic, not monologic, thus acting with the force of competing voices at work in the world or in the self. These tensions interact, to create fault lines that run through every act of full legal analysis. Their management is essential to the work of lawyer or judge.(p. 13-14)”

with a smile and *takes* a seat, that is, he *sits* on the chair that is offered to him. In this moment there *is* agreement in actions. What the first person initially wanted to do (offer a seat) seems to have been intelligibly communicated to the other person in the sense that his effective response *was* in agreement with the actions of the first person. Thus, agreement in actions has been *manifested*. What this agreement means to either party can only be known through their actions.

But we can also imagine that the first person is *unable* to intelligibly communicate his offer to the other person even though they are both mutually competent language users. For example, what if the first person *nods* at something that is not there (e.g., there is no chair)? How should the other person respond? Or what if the first person *points* at the chair (to signal his offer) but there is nobody there to respond (e.g., the other person is not there)? How can this be an offer? These are examples of situations in which the first person's actions do not allow for a manifestation of agreement in actions. The problem is this. With actions such as nodding and pointing in particular situations (ones in which there is no chair or other person present) the first person cannot immediately *indicate* that he is making an offer. Rather, his actions are subject to *multiple interpretations*. The *nod* could be interpreted as a simple twitch; maybe a fly is buzzing around the man's head. The *pointing* could mean nothing in particular or maybe the person was thinking about something and just moved his hand. This suggests that it is difficult to effectively *respond* to any actions that entail multiple interpretations. Hence, it is not likely that actual agreement in actions can be manifested for there is no way to know that an offer of a seat has been made. This means that the effectiveness of the actions is lost when there is no chair or a person to offer the chair to, and so the actions of the first person are only weakly or superficially meaningful.

The challenge to understanding relates to what White has said about meaningful communication: "to create meaning requires a cooperative art, that is to say an art in which two people are at work together in harmony or syncopation until they reach what Robert Frost called 'a momentary stay against confusion,' a momentary clarification of life."<sup>115</sup> I would call such a clarification of life an actual manifestation of agreement in actions, a moment of full and effective understanding as opposed to weak or superficial understanding.

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<sup>115</sup> Cf. WHITE, J. B. 1990, p. 21, 263

The third challenge to understanding is even more fundamental. It concerns the risk that the effectiveness of understanding will be completely *undermined*, that is, an entire conversation could lose its effectiveness not in a particular situation but in every situation. This risk arises when the communicating language users do *not share* a socially constituted language practice, that is, they are not mutually competent in language. In the next chapter I demonstrate that in certain conversations the participating language users are not able to act in agreement at all, that is, they *cannot* work well together not just in a particular situation but in any situation. My thesis is that in certain conversations in law the participating jurists cannot act in agreement *because* they do not share competency in language and hence the effectiveness of their conversation is undermined. This is the fundamental challenge to effective legal understanding. The risk is that what competent jurists say or do will entail multiple conflicting interpretations. Hence there is no shared sense of correctness (the paradox problem) and the meaning of their actions collapses into a regress of multiple conflicting interpretations (the regress problem).

## **6. Conclusion**

The goal in this chapter was to present an account of effective as opposed to superficial understanding. For this I described and discussed four different structures of language, complimented with different structures of law ranging from the simple to the complex. I argued that the first three descriptions of language and law allow for superficial but not for effective (legal) understanding. Superficial understanding entails two problems, the regress problem and the paradox of meaning. We have seen that these problems undermine the effectiveness of our understanding and its justification. Finally I argued that language as a socially constituted practice of rule following does not entail these problems and therefore allows effective understanding.

The crucial point is that the final description of effective understanding entails three *inherent* challenges to it. The first challenge is that competent language users should act in agreement and not against it, that is, they should avoid making personal mistakes. The second challenge is more fundamental: to actually manifest agreement in actions in all situations. I suggested that in particular situations the actions of competent language users do not allow

for the manifestation of agreement in actions. This means that the effectiveness of their understanding (actions) is lost in these situations (I will not discuss the reasons why competent language users sometimes fail to act in a way that allows for agreement). The most fundamental challenge is to be able to manifest agreement in actions at all. In the next chapter I demonstrate that competent language users or jurists who in principle know how to act in agreement with others are nevertheless in certain conversations *not able* to effectively communicate. The problem is that apparently the participants do *not share* a competency in language and this is what fundamentally undermines the effectiveness of their understanding. Hence the entire conversation becomes effectively unintelligible.





## Chapter Three – The Fundamental Loss of Effective Understanding in Legal Communication

*“What is left out of an expression if it is used ‘outside its ordinary language game’ is not necessarily what the words mean (they may mean what they always did, what a good dictionary says they mean), but what we mean in using them when and where we do. The point of saying them is lost.”*

Cavell, *The Claim of Reason*, p. 207

*“The term [word or rule] has meaning only in the context of a practice, which in itself is no more than a collection of general shared habits, which mesh with one another to produce various advantages, various ways of satisfying needs, the achievement of which is served in various ways, in the context of the practice, by various sorts of utterance, to which the ratio of the practice makes various kinds of response intelligible.”*

Hanna and Harrison, *Word and World*, p. 184 – 185

### 1. Introduction

This chapter demonstrates that in certain conversations the competent participants are not able to communicate with each other effectively. This is not like the situation in *Riggs* where Judge Gray undermined the effectiveness of the conversation only in a particular situation (the case of someone profiting from his wrong). Here I am talking about the loss of effectiveness in the entire conversation, that is, in every situation. This is the result of the communicating partners not sharing their competency in (legal) language. We will see that they are not able to actually manifest agreement in their actions. Hence their conversation is only superficially meaningful and the quality of understanding in this conversation is fundamentally undermined.

To illustrate this problem I discuss a non-legal example, a hypothetical legal example, and an actual legal example. In the first example I describe my own socially constituted practice of coffee language, that is, my coffee culture. This suggests how I can talk more or less effectively about and drink coffee. At the same time, it presents my idea of a rich and

particular *experience* of understanding something more or less effectively or, in other words, what it means to be *competent* in a particular socially constituted language practice. We shall then see that this experience, or competency, is fundamentally undermined in certain conversations.

In the second example I describe the effective understanding of competent jurists from the French civil law and English common law cultures. These descriptions I use to construct a hypothetical transnational conversation about the phenomenon of contractual interpretation. We will see that in this conversation the French and English jurists are not able to reach full and effective agreement in their actions. This means that the intelligibility of their conversation is undermined to such an extent that they can only communicate in the simplest terms, terms that are only superficially meaningful. This demonstrates my thesis that in certain conversations the quality of legal understanding is fundamentally undermined, which means that full and effective understanding of law is lost and only a weak or superficial kind of understanding remains or is available.

Finally I discuss an actual example of transnational communication in law. This conversation concerns a French translation of a decision of the European Court of Human Rights (“the Court” or “European Court”), *Pretty v the United Kingdom*.<sup>116</sup> We will see that most of the rich and particular experience embedded in the original decision is lost in the French translation. In fact, the translation seems to completely undermine the effective understanding of the original decision by changing and leaving out parts of the Court’s reasoning. This demonstrates that, although the translation may be effectively intelligible to the French legal community, it is not fully effective in the original “European” sense. This again demonstrates my thesis.

## **2. Talking About and Drinking Coffee**

I like coffee and I drink it every day. But what does this mean? What kind of experience do I have when I drink or talk about the coffee that I like so much? I first describe this experience by giving some details about my effective understanding of coffee. That is, I describe a portion of my socially constituted practice of coffee language. This allows me to demonstrate

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<sup>116</sup> *Pretty v The United Kingdom*. *ECHR 2346/02*. Hereafter: *Pretty*. See: Appendix 1.

the inherent and fundamental challenge to the effectiveness of my understanding in two different conversations. Finally I suggest how this challenge can be at least partially met.

The example begins with the story of how I learned to drink coffee from my parents. My parents initiated me in a particular practice of coffee language that now allows me to talk about and drink coffee more or less effectively, that is, I can *potentially* act in agreement with this socially constituted practice of language in different situations. However, in some situations, or even some conversations, it is challenging for me to *actually* act in agreement with this practice, I will turn to this in a moment.

## 2.1 My Socially Constituted Understanding of Coffee

I remember well the first time I drank coffee. I was about 7 years old. It was autumn in the Netherlands. It rained that day, and it was very windy and cold. My mom and I had been riding our bikes and when we finally arrived home we were soaking wet and freezing. After we changed into dry clothes, my mom made us something warm to drink. Usually in the afternoon she would have made tea, but this time she reheated some of the coffee that was left from earlier that day. She gave me a cup full of steamed milk and a tiny bit of coffee. I almost didn't notice the coffee because there was so much milk in my cup. My mother took something that we call "koffie verkeerd" in Dutch. Literally this translates as *wronged coffee* in English, and it resembles something the Americans call a "milk coffee" or "latte." I think we call it *wronged coffee* in the Netherlands because it has more milk than coffee.

Since my cup of coffee had *much* more milk than coffee, we invented the name "koffie mislukt." This translates literally as *failed coffee*. But this failure was only in the name; to me it tasted delicious! I think my mother even put some sugar in it. It was a real treat, soothingly sweet and warm and filling. We sat on the couch and drank our coffee, and it felt so relaxing and pleasant. This experience changed my life a little. I did not want to drink coffee every day, but the treat became something I longed for. I began to anticipate those moments when I could have coffee and experience the comfort of drinking a sweet warm drink together with my mom.

My family not only drank coffee on rainy afternoons but also on weekends. On weekends both my parents were usually at home. They would always drink coffee together,

and when we were young my brother and sister and I would join them with some lemonade or hot chocolate. But once I had tried coffee I wanted to have it too. My father told me at first that I was too young to drink coffee. I was allowed to help my mom prepare it instead. This gave me almost as much pleasure as drinking it had. I liked, for instance, to take the cups out of the cupboard. We each had a special one. Mine was a small stone cup with an ear and a picture of a rabbit, my parents had large stone mugs with boats on them, my younger sister had a blue plastic cup, and my older brother had a plain stone mug. I was asked to place the cups on a tray so that later they could be taken to the living room. Then I would help prepare a small plate with “koek,” a traditional Dutch cake made with cloves and cinnamon and ginger. We would each have one slice with butter on top. I put the plate on the tray as well.

The most important step in making coffee in our home was to heat and foam the milk. As I was only seven, this was the most difficult thing for me to do. I had to learn how to heat the milk carefully so that it would not boil. This would not only create a mess in the kitchen (as the milk would boil over on the stove) but if the milk became too hot it would not froth. This would ruin my parents’ coffee! I remember how I stared anxiously at the milk on the stove. First I tried to see if it was warm enough to start making the foam. This was a difficult task because I could not really see anything until the milk started boiling, which meant I was too late. That is, the milk had become too hot and therefore would not foam. I had to start whisking sometime before this boiling point but also not too early because milk that is still cold will not froth well either. I asked my mom when I should start frothing the milk. She could not tell me exactly. She knew no rule for the use of the whisk, for instance, or for how many minutes the milk should be on the stove. But she could *show* me when to start whisking. The technique for this she had learned from her mother, and she had become an expert. I tried to do what my mother did, over and over again, until I reached the point where I knew when to start frothing the milk on my own.

Heating the milk was not the only difficult thing about making coffee. Once I knew that the milk was warm enough to be frothed I had to be careful not to whisk too long. If I did that, the milk would become too hot, which would ruin the foam. Again I tried to imitate my mother’s technique. I saw how fast she frothed the milk, how she moved the whisk and controlled over the heat in the pan, and in response, I tried to do it myself.

Of course this went wrong many times. The milk would overcook and my parents’ coffee would be ruined. Their cups would not look as nice as they should: with thick frothed

milk on top. Instead they would have flat milk in their coffee, which would also be too hot to drink. But this was not a problem, and my mom always allowed me to try again the next time. This is how I eventually learned to heat and froth the milk on my own. And as I grew up, I learned how to do this well in different situations.

But there is more about coffee than heating and frothing the milk. At home my family always discussed the quality of the milk, the koek, or the coffee cups. At work there is usually no koek, so my mother takes a slice of koek with her in a small plastic bag. My sister and I have once made a list of cafés in Amsterdam that serve something sweet to go with the coffee. Unfortunately there are few cafés that do this. My father complains less about the lack of koek than about the coffee machine and cups where he works. The machine makes only black coffee, which comes in plastic cups. He finds both these things horrible. He misses the frothed milk and a proper mug. Also, he does not understand why his colleagues drink coffee so early in the morning. At home we are used to drinking coffee (koffie verkeerd) at around eleven o'clock, that is, between breakfast and lunch.

There is something about coffee that we do not talk about in my family, that is, the quality of the coffee itself. I know now that there are many ways to make coffee with different kinds of beans from all over the world. All these coffees taste different, and the quality differs too. But when I was growing up we always had the same coffee, which comes in a tin from I don't know where. My parents would use this to make coffee in an ordinary filter machine. The quality did not matter. My mother does not hesitate to heat up leftover coffee from earlier in the day, and when it is very hot outside she often puts a glass of old coffee in the fridge to have as a cold drink later. Many people find this habit disgusting, as they only like fresh coffee, but I am used to it. I especially like to drink refrigerated coffee on a warm day.

Besides all the things we do and do not talk about when it comes to drinking coffee, there is one thing that is most important for us; we always try to drink our coffee together. On weekends when I was young this meant that my parents would call my siblings and me from our rooms at about 10:30 in the morning. I would come immediately so I could help my mother prepare the coffee. I remember that one time we were sitting together with our koffie verkeerd and lemonade and the phone rang, but none of us went to answer the call. It seemed we all knew that this moment must not be interrupted.

Although I am no longer living with my parents or siblings, I still try to drink my coffee with someone. Often I call my mother around eleven, and usually she is just about to drink her coffee too. We drink our coffee together while we are on the phone.

## **2.2 In Conversation with My Dutch Friend's Family**

With my family I am able to talk about and drink coffee more or less effectively, in the way I have described. In other words, the description shows some of the ways in which my family and I can say or do things *more or less in agreement* when it comes to coffee. This does not mean that as mutually competent coffee drinkers we do not sometimes *disagree*. For instance, my sister I once have had a disagreement about the best way to froth the milk. She had bought a new tool (an electronic whisker) and she argued that the best way to froth the milk with it was to keep it at the surface level of the milk. To my mind, the best way to froth the milk was to whisk the entire body of it, not just the surface. This was our disagreement. But since we were both mutually competent in the practice of whisking milk, my sister could *show* me that her new way of whisking was indeed effective. That is, she could demonstrate that with the new tool she could produce more or less the same foam as could be done with the old tool (and with less effort). Thus, our actions turned out to be more or less in agreement despite our initial disagreement, that is, our disagreement was effectively *resolved* once we started arguing and showing each other how the tools are used. This meant that my sister and I were able to go on again, more or less in agreement, until our next disagreement arose.

Our disagreement did not completely undermine the effectiveness of my understanding of coffee. It only *momentarily* distorted the conversation between my sister and me. We were able to resolve it by finding a new way to work together, that is, a new way that *fits* the things we both know about making coffee. But, and here comes the problem, there are certain conversations in which the effectiveness of my understanding is not just undermined momentarily and the distortion of meaning cannot be overcome by finding a new *instance* of agreement in actions. The problem is that in some conversations there is *no* agreement in actions between the communicating partners to begin with. This I shall demonstrate in the following conversation between my Dutch friend (and his family) and me.

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Recently I was invited to a coffee party to celebrate a friend's birthday. My friend comes from a different part in the Netherlands. His family lives in the small village in Brabant in the south, and I grew up in Rotterdam, a big city in the west. When I arrived at the party on a Sunday around noon, most of my friend's family members were already there. The guests were sitting around a table drinking coffee, talking, and eating cake. This looked quite familiar to me. But when I was asked if I wanted coffee and I said "ja graag" in Dutch ("yes please" in English) the problems started, and these problems undermined to *some* extent my effective understanding of coffee. Let me tell you what happened.

The mother of my friend handed me a full cup of black coffee. Since I do not drink black coffee I took it hesitantly. In response she asked me if perhaps I would like sugar or milk with it? This made me happier, and I said I would like milk please ("melk alsjeblieft"). It seemed for the moment that I was going to have coffee with milk, but would it also be steamed and frothed milk? When the mother returned from the kitchen I realized that I was not going to be satisfied, for she handed me something that I would not even call milk. It was not warm and frothed. Moreover, it was not even real milk, the kind that is fresh and can be frothed. What the mother gave me was we call "koffiemelk," evaporated milk that comes in a small plastic container and is for individual use only.

The problem was that I did not know what to *do* with the koffiemelk in this particular conversation. I knew what it was and what it was for so this was not the problem. The problem was that there were several things I could do at the same time. On the one hand, I thought that this milk (in my opinion fake milk) would definitely ruin my coffee. I was sure the coffee would taste worse than it did without any milk at all. So I thought maybe I should leave it out. But, on the other hand, I also thought that this might be impolite since I had explicitly asked for milk (or something like it). So maybe I should pour it in. This was my paradox: there were two things I could do, but I did not know which of them was actually correct. The second option would *not* be in agreement with my effective understanding of coffee *at all* but it would be polite, while the first option would *not* be polite but also *not really* in agreement with my coffee culture since I usually did not drink black coffee.

Since I did not just want to be polite but also to drink coffee the way I like it, I decided to look around to see what the other guests were doing. I did not see anybody drinking coffee

with this evaporated type of milk. It seemed that my friend's family did not use milk (or something like it) in their coffee. So this did not help.

By this time I felt that the coffee I was holding in my hands was getting cold. Therefore I quickly decided to sit down at the table, open the plastic container of koffiemelk, pour it in my coffee, and drink it. There was no pleasure in this for me. There was nothing in this experience that resonated with my embedded understanding of coffee. Not only did the drink taste horrible, but I could not enjoy it together with my friend's family because in my stressed condition I was not really aware of their company. In other words, I did not act in agreement with the way I had learned to do things with coffee. What I did was only slightly effective because I thought that at least I was being polite, but the effectiveness of my understanding of coffee, and especially of what it means to drink *good* coffee (with warm frothed milk and so on), was *lost* in this conversation between my friend's family and me.

This example is not meant to suggest that I can only talk about and drink coffee in the exactly the same way my parents taught me to do it. The point is that in this conversation with my Dutch friend's family I was apparently unable to fully effectively talk about good coffee. We did not share a way of preparing and drinking coffee with warm frothed milk and so on. Hence what my friend and I could talk about was superficially meaningful only. We could, for instance, talk about different kinds of coffee. I could tell him that "I like coffee with milk," and he could tell me that he "does not like coffee with milk." (My friend likes only black coffee and it does not matter at what time of day or in what kind of cup as long as it is freshly brewed and served without milk.) But these statements would *not* communicate the full effectiveness of my own and my friend's coffee cultures.

What follows is that with my friend I cannot have a meaningful disagreement like the one that I had with my sister about the use of a tool that froths milk. He would not understand the importance of such a tool in the first place. What is more, I would have a hard time explaining that in my estimation the milk his mother gave me is not really milk at all. It is fake milk to me, but to my friend there is no real difference between evaporated and fresh milk when it comes to coffee; it all tastes bad to him. This suggests that it would also be difficult for him to understand the distinction that my mother and I made when I first learned to drink coffee, namely, the difference between koffie verkeerd ("wronged coffee") and koffie mislukt ("failed coffee"). To my friend all coffee with milk tastes bad, and so there is no meaningful distinction between a coffee with more or less milk.



This discussion suggests some of the inherent and fundamental challenges to the effectiveness of my understanding of coffee that arise in conversation with my friend's family. It shows that my ability to be more or less effective when it comes to talking about and drinking coffee is in some respects *limited*. With my Dutch friend's family I cannot fully act in agreement, not just in a particular situation but in general when we talk about what it means to drink a good cup of coffee, although we can have a conversation about different types of coffee or the fact that my friend and I have different preferences.

Over time my friend and I have become more effectively intelligible to each other. I have learned some of his coffee culture, and he has learned some of mine. This means that we both have *broadened* our socially constituted practice of coffee language. However, we have not learned to like coffee in the same way. I still do not like black coffee. But from my friend I have learned that coffee can be served in a plastic cup and it does matter when one drinks it or in what company. So when we arrive at a train station to catch an early train I can now appreciate it when my friend runs off to find a coffee machine. In turn, my friend has come to understand that in such a case I would like to wait and look for a different place where they also serve koffie verkeerd. This mutual understanding of coffee cultures *allows* my friend and I to reach what Frost calls "a momentary stay against confusion" and I call an *actual manifestation* of agreement in actions. In other words, by learning from each other's cultures my friend and I are now able to find new ways to go on together, ways that are more effectively intelligible than before.

### **2.3 In Conversation with the Italian Bartender**

There are some conversations in which it is much harder for me to act in agreement with my effective understanding of coffee. For example, four years ago I moved to Florence to begin working on my doctorate. Most people know that Italy is famous for its coffee. But when I first arrived in Italy I could not fully experience the richness and particularity of the Italian coffee culture. I could not act in agreement with this culture at all. And, more important, in conversation with Italians I could *no longer* effectively act in my normal way when it comes to coffee in general, that is, not just when it comes to *good* coffee, as was the case in the conversation with my friend. As we will see, in conversation with Italians I am not able to

effectively talk about or drink coffee at all, that is, not in the way I learned to do so from others over time.

I came to Florence together with my Dutch friend, and we were both eager to taste Italian coffee. So on the first day we went into a bar to see if they served coffee there. It was a *gelateria* that also served coffee. My friend asked the formal-looking bartender for a regular cup of coffee, which he thought was called a “caffè” in Italian, and I asked for something I hoped would be like a *koffie verkeerd*, a “caffè con latte.” We had learned these Italian words from our guidebook (we had read that “koffie” in Dutch is “caffè” in Italian). We had also used Google translate to find the Italian words for “mag ik alstublieft een koffie?” in Dutch (something like “may I please have a coffee?” in English). Google gave us this: “per favore, posso avere un caffè?” So that is what my friend said to the Italian bartender. In response, the bartender turned to his coffee machine and produced a small cup of coffee, which we in the Netherlands would call an “espresso.” This was the first thing that went wrong for us with regard to our shared Dutch coffee experience. We both *expected* my friend to be served what we call a “koffie” in Dutch, which is a full cup of black coffee that is not terribly strong. Instead he was served an espresso, which is smaller and much stronger.

Obviously something was wrong with our effective understanding of coffee. The problem was that my friend and I did not know *how* this had happened or *what* was wrong. For instance, was there something wrong with our order? Did we not use the correct words? Or was there something wrong with the hearing of the bartender? Did he not hear us correctly? Or was there something wrong with the coffee machine? Could it only produce espressos? Or was there something wrong with this particular bar in that it did not serve *koffie* but only espresso? These were just a few of the possible interpretations of our conversation with the Italian bartender. My friend and I could not decide which of these interpretations made sense the most because we did not know what the effective problem was. Hence, we also had no clue about how to resolve it and go on. How could we solve a problem when we did not know what it was, and thus how could we effectively continue interacting with the bartender?

There was also another problem. I was frustrated that I could not sit down while I was having my *koffie verkeerd*. I had ordered my drink by saying “per favore, posso avere un caffè con latte?” and indeed I had received something that resembled a Dutch *koffie verkeerd*.

The problem was that there were no tables in this *gelateria*. This made it impossible for me to enjoy my coffee comfortably. So I remained standing at the bar with my drink in front of me.

Then, as I was trying to talk to my friend, an Italian customer squeezed himself between us and ordered coffee. He loudly called to the bartender, saying, “mi fa un caffè, per favore.” In response to this order, what in my eyes was an espresso was placed on the bar. This exchange suggested two things. First, apparently my friend and I had *not* used the correct phrases when it came to ordering coffee. Obviously there was a difference between what the new customer said (“mi fa un caffè, per favore”) and our Google translation (“per favore, posso avere un ...”). This observation, however, did not tell us *what* was wrong with our Google translation. Second, it seemed that the Italian word “caffè” meant what we called “espresso” in Dutch, that is, the Italian customer had used *this* word and received the same drink that my friend was given in response to *his* order of “caffè.” Did this mean that the word “caffè” in Italian meant “espresso” in Dutch? What, then, was the Italian word for what we call “koffie”? I will come back to these questions in a moment.

In the meantime, my friend had finished his espresso, or “caffè,” in one sip, and so he tried to figure out where to pay for our drinks. He did not manage to contact the bartender. The bartender was busy talking to the Italian customer, who was still standing between us. (Did he ignore us because we were not his friends or had we done something wrong?) We began watching the other Italian customers. They all seemed to leave the bar as soon as they had finished their drinks. At first we thought that they did not pay at all, but this could not be so. Then we saw small paper receipts lying next to their empty cups. We learned that these came from a woman behind a counter near where we were standing. My friend went over to her and somehow managed to pay for our drinks. In return he received a similar receipt, which the woman tore a little before she handed it to him. Later we learned that this was to indicate that we had received the drinks we had paid for (normally the bartender would mark a receipt the customer gives him after he had prepared the drinks).

By this time I had become very uncomfortable. I felt completely out of place because I was standing at the bar, quiet and awkward, next to this loud Italian customer who was all the time talking with the bartender. I didn’t know how to behave properly in their company. So I quickly finished my caffè con latte. This experience did not resonate in any way with my effective understanding of talking about and drinking coffee. I missed having my own mug and the Dutch koek, but also I was annoyed that I could not enjoy my koffie verkeerd

comfortably in the company of my friend because the Italian customer was standing between us and that my friend could not have a regular Dutch cup of coffee because the bartender had given him an espresso. Thus, my first real encounter with the Italian coffee culture was uncomfortable, confusing and frustrating.

## **2.4 Learning about the Italian Coffee Culture**

My conversation with the Italian bartender demonstrates how difficult it was for me to effectively act in agreement with my Dutch coffee culture, even though in principle I am competent to act in agreement with this culture. For example, in this conversation I could not fully enjoy my koffie verkeerd the way I like it because there was no place to sit and for other reasons I could not comfortably talk with my friend. What is more, a lot of things were going on that were not clear to me, such as how we should have ordered our drinks, what the effective translation of Dutch coffee (koffie) is, where and when we should have paid, and so on. This means that to a great extent the effectiveness of my socially constituted Dutch coffee culture was lost in this conversation, not just my understanding of what it means to drink or talk about good coffee.

Since that day I have learned how to have a more pleasant experience at an Italian coffee bar and a more effectively intelligible conversation with Italians regarding coffee. In other words, I have learned about the Italian coffee culture, which broadened my understanding of coffee. This has allowed me to act (at least somewhat) in agreement with the Italian way of doing things with coffee and thus have a more intelligible conversation with Italians about coffee. But, as we will see, what I have learned about the Italian culture differs fundamentally from the culture in which I grew up. This means that I have had to let go of some of my most important desires and expectations when it comes to talking about and drinking coffee. Clearly, the way one drinks coffee at an Italian coffee bar does not allow for soothing afternoon coffees with milk.

For a couple of months I had an Italian teacher who taught me some things about Italian coffee language, such as which words to use for which cup of coffee. For example, she told me that there are three main types of coffee in Italy. These are called, respectively, “caffè,” “cappuccino” and “caffè con latte.” The third type resembles the Dutch koffie

verkeerd, that is, an espresso coffee with more than double the amount of warm, slightly frothed milk. The second type resembles something that in Dutch we also call “cappuccino.” This is an espresso coffee with a similar amount of warm milk and again a similar amount of milk foam on top.

The first type of coffee is a bit confusing. I learned that what the Italians call “caffè,” which is a literal translation of “koffie” in Dutch (or “coffee” in English), is not the same as what we in the Netherlands call “koffie.” This was apparent in my first encounter with the Italian coffee culture. But in that encounter it was not clear to me what had gone wrong with my friend’s order of koffie using the word “caffè.” My teacher explained to me that to the Italians the word “caffè” means something similar to what the Dutch call “espresso,” which is a small shot of strong coffee, not a large cup of regular coffee (in Dutch we call that “koffie”). This is in line with what I figured out by watching the Italian customer order “caffè.” This suggests, on the one hand, that my friend’s order of caffè was not completely unintelligible, for in response the Italian bartender served him a small shot of strong coffee. That is, this bartender acted effectively in agreement with the Italian use of the word “caffè.” But, on the other hand, the order was not really intelligible to us, for in our view the bartender had not responded correctly. In response to the order of “caffè,” he had served my friend what to us looked like an espresso, which is not the same thing as koffie. In other words, the bartender did not fully act in agreement with the way Dutch people would respond to an order of regular coffee because he served us something else (espresso). Thus, from the perspective of the Italian coffee culture there was nothing wrong with my friend’s order of coffee and the bartender’s response, but from the perspective of the Dutch coffee culture there was something obviously wrong with this response, although my friend and I could not identify it.

Now I have learned that the Italian word “caffè” means an espresso not koffie. This knowledge enables me to order coffee in Italy more effectively than before. When I use the word “caffè” I no longer expect to be served what the Dutch call “koffie.” But what is the Italian word for koffie? My Italian teacher also helped me with that. She told me that there are two different terms, the meanings of which resonate more or less effectively with koffie. The first is “caffè lungo,” which literally translates as “coffee that is long” or “stretched.” To make this, the Italians let the machine run a bit longer so extra hot water is added to the regular caffè. In Dutch this would be considered an espresso with extra hot water. This is indeed quite similar to a Dutch koffie because it is less strong and larger than what we call

espresso. Alternatively, the Italians use the term “caffè Americano” to indicate something resembling Dutch koffie. This drink is also less strong and larger than an espresso, but in this case the hot water is poured into the cup rather than the machine. “Americano” is less strong and larger than a “lungo.”

So these two names can be used in Italy to order koffie in the Dutch sense. This tells us something about what went wrong with my friend’s initial order of “caffè.” He used the wrong word. If he had ordered either “caffè lungo” or “caffè Americano,” he would have received a more intelligible response (in the Dutch sense). But our guidebook did not tell us this. Thus, with the help of my Italian teacher I learned that the literal translation of “koffie” into “caffè” is not really effective, that is, it does not fully capture the particular meaning of koffie in the Dutch sense. “Caffè lungo” or “caffè Americano” on the other hand, capture this more fully and hence are more intelligible translations of the Dutch word “koffie.”

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A more or less effective understanding of the Italian coffee culture requires more than learning the correct Italian words for different coffees, although we have seen that this knowledge can help us with some obvious translation problems. In the previous chapters I argued that the full effectiveness of our understanding is embedded within a socially constituted *practice* of language. This practice enables us (potentially) to say or do particular things in different situations. For example we can *open* a particular drawer and *count* five apples, not just say the words “five red apples.” This suggests that to learn about the Italian coffee culture requires learning a portion of the socially constituted practice of coffee language as well, for example the practice of *ordering* coffee at an Italian bar or *drinking* different types of coffee.

Recall that the first time my friend and I ordered coffee in Italy we used the Google translate phrase, “per favore, posso avere un caffè?” When I told this to my Italian teacher she laughed. She said it was not completely wrong to use this phrase for it was grammatically correct. Thus in a superficial sense the phrase was meaningful. But my teacher also told me that the phrase was not really intelligible in the Italian sense for it did not fully capture the particular way Italian customers address a bartender in a café (or a waiter in a restaurant). The phrase that my friend and I used captured a polite question, something like “please, could I

have a coffee?” But the Italians address the bartender differently: they give a polite command. For example, they say “mi fa un caffè, per favore” or “datemi un caffè, per favore.” In the first phrase the customer simply tells the bartender to *make* him or her a coffee, although the words “per favore” mean “please” and make the command polite. With the second phrase the bartender is told to *give* the customer a coffee (please).

It was quite challenging for me to learn this Italian practice of ordering. My teacher told me that for Italians there is no *question* as to whether or not a bartender (or waiter) wants to do something for you because that is what he is there for. So of course he wants to make you a coffee or something else. But I was taught that it is impolite to command anybody, not even in a restaurant or bar where you expect to be served. Service is not something that can be commanded. Therefore I was taught to say “mag ik alstublieft een koffie?” in Dutch, which means that I *asked* the bartender if I could please have a coffee. Of course, I did *expect* to be served coffee in response to my polite request. This suggests that, although I *phrased* my order as a polite question, I was still *commanding* the bartender to do something. But I would have felt extremely awkward if I had actually commanded him, as the Italians would. So what I had to overcome was my discomfort with the Italian practice of ordering coffee.

Although it was challenging to overcome my discomfort, doing so was crucial for the effectiveness of my order and the possibility of further conversation with the Italian bartender. For example, the bartender would immediately sense that something was wrong if I were to politely ask him for something instead of commanding him. This would be a sign that our actions were not fully in agreement. But it would not immediately tell him to what extent we could or could not effectively interact. Perhaps I was only using the wrong phrase and otherwise acting completely Italian. Or, as was more likely, I was completely incompetent with respect to the Italian coffee culture. In any case, the bartender would not know how to effectively *respond* to my phrase because this would require a manifestation of agreement in actions. My actions had not allowed for such agreement. In response the bartender might decide to ignore the foreign sound of my order and make me a coffee anyway. But it is also possible that I had asked for something else, in which case he would not make me a coffee. This suggests that my actions allowed for several interpretations, which undermined the effectiveness of the bartender’s actions (i.e., he did not really know how to effectively respond to my actions). Hence our entire conversation lost its intelligibility.

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Besides their way of ordering coffee, the Italians have a particular way of drinking different kinds. This also challenged my original understanding of coffee. Let me explain. I am told that Italians drink milk coffees, such as “cappuccino” or “caffè con latte,” only during breakfast. They seldom eat much for breakfast, perhaps a “cornetto” or “brioche,” which is a sweet pastry filled with honey or cream or chocolate. Milk coffees are considered heavy and filling and therefore pair well with a light breakfast. But after breakfast, or at the latest after eleven o’clock, the Italians start focusing on real food. That is, they start thinking about what to have for lunch. Lunch is usually their most important meal of the day, and ideally it has three courses. First there is soup or pasta or risotto; then, for the main course, there is fish or meat with vegetables; and finally, there is dessert. Such an extensive meal does not allow for heavy, filling coffees, or so the Italians think. They consider it appropriate to order after lunch or anytime after breakfast a “caffè,” which is much lighter and less filling than a milk coffee. At most, after lunch an Italian might order a “macchiato,” which is a caffè with a miniscule drop of milk. I have heard that an Italian chef would be offended if you were to order a “cappuccino” after dinner. It would imply that you did not have enough food and want to fill your stomach with milk coffee!

In the Netherlands there are no strict “rules” regarding when to drink milk coffee or regular coffee without milk. But when I am in Italy I do not order a “cappuccino” after lunch. It just does not feel right knowing that this is not what an Italian would do. And I think they have good reason for it. Once I was in a restaurant in Florence and I heard my American neighbors ordering four cappuccinos after dinner. This made me feel embarrassed, for they did not realize their mistake or how offensive this would be to the chef.

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There is another challenge to my Dutch coffee culture that I would like to discuss. I have mentioned that my family does not discuss or even care about the quality of their coffee, only about the quality of the milk and the koek and the cups, drinking coffee together, and so on. For the Italians the most important thing about coffee is its quality. This also explains why they drink their coffee the way they do, or at least the way they drink it at the bar, which is



while standing and in one shot. I prefer to sit down and take my time and comfortably enjoy my coffee in the company of others. But the purpose for the Italians is to fully enjoy the *taste* of the coffee, and they think this is best when the coffee is fresh and hot. Therefore Italians in a bar drink their coffee immediately after it is made. For them there is no *need* to sit down. I find this difficult to understand. I still do not enjoy standing at the bar, and I am uncomfortable crammed between loudly speaking Italians, who to my mind take no time to enjoy their coffee.

There are a few bars in Florence that have places where customers can sit down. The Italian bartender treats these customers differently. For example, they are served at their table, and for this service they are charged more. Before I knew about this practice I once tried to take my coffee to an empty table. The bartender almost jumped over the counter in his haste to serve me my coffee. When I left I had to pay almost double the price of a regular coffee. This would never have happened in the Netherlands.

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The last challenge to my Dutch coffee culture concerns the way one pays in an Italian coffee bar. I mentioned this challenge earlier. I have learned that there are certain bars in Italy where customers are expected to pay at the counter *before* they order their drink at the bar. These bars are often, though not always, located near train stations or other public areas. By contrast, most of the bars in Italy require customers to pay *after* they have ordered their drink, that is, after they have finished it. In the bars where you have to pay before ordering, you go to the person behind the counter, who is not the bartender (“barista” in Italian). You tell this person what you plan to order, for example, one brioche and one caffè. Then you pay and receive a small receipt, a “scontrino.” With this receipt you walk to the bar, where the barista is standing, and you either hand the receipt to him or tell him what to make (e.g., “mi fa un caffè, per favore”). The bartender will fill the order and mark your receipt. By contrast, in bars where you pay afterward, you just tell the bartender what you want and on your way out you go to the counter to pay.

The difference between these two ways of ordering and paying in an Italian bar is still difficult for me to understand. There are a few places where I go regularly, and so I have learned what to do there and in what order. But in every new bar I enter in Italy I have to

figure out what to do. This is sometimes frustrating. It always reminds me how *not* Italian I am because even the simple act of payment is difficult for me. As always, it helps to do as the Italians do. This is different from what I do in the Netherlands. There I do not even think about where and when to pay for my drinks and there is no need for me to observe the other customers. I just know the right thing to do, even in a bar I have never been in before. As Wittgenstein would say: “I have been trained to act in a particular way and now I do so react to this.”

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Let me summarize. This example began with a description of some elements of my socially embedded understanding of coffee, that is, my competency in coffee language. Then I demonstrated in two different conversations that some portion of this understanding or competency could be undermined. First we saw that I could not act fully in agreement with the way I had learned to do things with coffee in conversation with my friend’s family. Next in the conversation with the Italian bartender, we saw that it was almost impossible for me to act in agreement with my embedded understanding of coffee at all. With my Dutch friend’s family I was unable to effectively talk about or drink *good* coffee, that is, coffee with warm frothed milk and koek, but we could talk about different types of coffee. But in conversation with the Italian bartender I could not comfortably enjoy my *koffie verkeerd*, I was frustrated that my friend and I could not effectively order coffee in the Dutch sense, and I was confused about when and where to pay for our drinks. This suggests that my effective understanding of coffee was almost completely undermined in that conversation.

However, I have also demonstrated that by learning about both my friend’s and the Italian coffee culture I have *broadened* my effective understanding of coffee. This allows me to conduct a more intelligible conversation about coffee with both my friend and Italians. At the same time, I demonstrated that this *challenged* my original, socially constituted practice of coffee language. For example, whereas I would not drink black coffee from a machine, I have learned that this is what my friend likes to do, and, although I was taught to always politely ask for something in a bar, I have now learned that in Italy one should be commanding. It is of course easier for me to accommodate my friend’s habit of drinking black coffee from a plastic cup than to overcome my feelings of awkwardness regarding the Italian practice of

commanding the bartender. The latter poses a more fundamental challenge to my Dutch understanding. It is these more or less fundamental challenges that I need to overcome in certain conversations if I want those conversations to be effective rather than superficially meaningful. For example, if I were not to command the Italian bartender he would never fully accept me as an intelligible conversation partner, that is, he would probably always think that when it comes to coffee he and I will never really understand each other. In the next chapter I will say more about the fundamental challenges to our understanding in conversation with others.

### **3. Talking About Contractual Interpretation**

In this work, my thesis is that in certain legal conversations competent jurists are not able to effectively act in agreement with each other or disagree intelligibly. This means that they lose some of their effective understanding of law, and as result their conversation is superficially meaningful. This problem was discussed above in my coffee example. Now I will present an example of a conversation between two presumably competent jurists who know how to be more or less effectively meaningful in law but, as we shall see, in conversation with each other lose some of their effectiveness, rendering their conversation superficial. For this I borrow from comparative legal research conducted by Catherine Valcke, especially in her “Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric.”<sup>117</sup> I use this research to construct a hypothetical transnational conversation about contractual interpretation between a competent French civil law jurist and a competent English common law jurist. Since I am not a trained jurist myself, I also borrow from Barry Nicholas’ analysis of French contract law (civil law) from the perspective of English common law.<sup>118</sup>

These sources are not sufficient in themselves to present a full and effective understanding of French and English contract law, but they allow me to describe some of the richness and particularity of the French and English legal cultures, especially regarding the

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<sup>117</sup> VALCKE, C. 2009a. Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric. In: NEYERS, J. W., BRONOUGH, R. & PITEL, S. G. A. (eds.) *Exploring Contract Law*, Hart Publishing, p. 77 – 114. For reasons of convenience Valcke’s research focuses on material from France and Quebec for the civil law description and on material from the United Kingdom and Canada for the common law description (p. 79).

<sup>118</sup> NICHOLAS, B. 1992. *The French Law of Contract*. Clarendon Press.

complex ways in which they deal with the phenomenon of contractual interpretation. Thus from these sources I have not just learned about the different rules and doctrines used for contractual interpretation in French and English law. This would only allow for a relatively superficial understanding. Rather I have learned how these rules and doctrines are used more or less effectively in these legal cultures. As I suggested in the first chapter, this use or practice is more intelligible than a mere understanding of the rules. To describe this more intelligible understanding of law we have to look at the actual legal reasoning of competent jurists.

Valcke's research is in this sense particularly relevant because it does not describe and compare the rules or institutions of different legal systems per se but rather the actual legal *reasoning* of competent jurists supporting or not supporting the use of these rules or institutions. As she puts it: "the particular reasons offered (or not offered) in support of the choice of particular rules and institutions in each system are arguably far more significant than the rules and institutions themselves."<sup>119</sup> Her research, she says, is "an exercise in comparative legal rhetoric."<sup>120</sup> This is in line with the way Wittgenstein, for instance, examined the actions (i.e., the practice of language) of the shopkeeper in the first chapter in order to demonstrate that Augustine's simplistic description of language was not fully intelligible. Valcke says: "a meaningful comparative understanding (...) necessarily involve[s] comparing these rules and institutions *as they relate to one another and to the other elements of their respective systems through the values embodied in the attendant reasoning*."<sup>121</sup>

I will describe the understanding of the practice of contractual interpretation in French civil law following the writings of the *doctrine*, that is, French legal scholars. The scholars' use of language is considered to best represent the understanding of French civil law. What is more, competent French jurists (lawyers and judges) invoke the reasoning of French scholars in order to determine what is more or less meaningful. For example, the scholars' reasoning shows jurists how to effectively interpret a particular rule in different situations.<sup>122</sup> The effective understanding of English common law I will describe following the language of the

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<sup>119</sup> VALCKE, C. 2009a, p. 77.

<sup>120</sup> VALCKE, C. 2009a, p. 79.

<sup>121</sup> VALCKE, C. 2009a, p. 78.

<sup>122</sup> Cf. CURRAN, V. G. 2005. Re-membering Law in the Internationalizing World. *Hofstra Law Review*, 34, p. 93 – 136.

Courts or the respective judges.<sup>123</sup> Unlike French civil law, English common law does not follow from a system of rules that need to be interpreted by scholars. English law is created in actual situations, that is, it is so-called “case law.” Hence, since judges decide cases, it makes sense to look at the reasoning of the judges to determine what the law is.<sup>124</sup> Below I construct a transnational conversation about contractual interpretation based on these descriptions of the reasoning of French scholars and English judges following the work of Valcke and Nicholas. I will discuss two different examples of such contractual interpretations.

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The practice of contractual interpretation is a complex process of determining the normative legal content of a particular contract in a particular situation. In other words, this practice is about defining the more or less effective legal meaning of an agreement between two or more parties.<sup>125</sup> In the following I focus on contracts between two private parties, for instance between my neighbor and me.

Imagine that my neighbor has a car he wants to sell and I want to buy it. The combination of my neighbor’s intention to sell his car and my intention to buy it allows for a potentially meaningful conversation about both French and English contract law. In particular, it allows for a conversation about a particular sales contract. For a competent French scholar our combined intentions constitute a potential sales *agreement* between my neighbor and me. An English judge would talk about this agreement in terms of “offer” and “acceptance,” or he might use the phrase “meeting of the minds,” which would seem to be a completely

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<sup>123</sup> Cf. VALCKE, C. 2009a, p. 81; NICHOLAS, B. 1992, p. 13 – 19, 22. English common law is created in actual situations, that is, case law. It does not follow from a body of rules, as civil law does. Hence, it makes sense to look at the reasoning of the Court or the judges to find the meaning of common law.

<sup>124</sup> Cf. NICHOLAS, B. 1992, p. 9 – 10, 18, 47 – 48. The House of Lords in England has the task of developing the law in particular situations (cases). The law here is not a comprehensive body of rules but is tailored to the situation, that is, it combines the facts with the law (previous case law) to determine, for instance, the parties’ objective intention in a particular case. There is a constant process of facts hardening into law (p. 18). I shall say more about this later. By contrast, the Cour de Cassation in France is a “mouthpiece of the law.” Its task is to express the law in an uniform way, that is, to state the law as it is, a coherent and comprehensive system of rules. The facts of a particular case are not part of this system, which is one of the reasons why an agreement under French contract law is not reviewed as such by a court. There is in this sense a strict separation between law and fact (p. 18) but the facts as such can be controlled by law, for instance, under the doctrine of “defects of consent.” (p. 48)”

<sup>125</sup> Cf. VALCKE, C. 2009a, p. 79. This is not the same, for example, as determining the existence of a particular contract or discussing what to do when that contract is concededly breached.

subjective activity but is not, as we will see.<sup>126</sup> In the following I use the term “agreement” in my description of French and English law.

### 3.1 The French and English Understanding of Interpreting Facts

The first example of contractual interpretation involves a conflict between two parties about whether or not they have an agreement in the first place. For example, imagine that I say I want to buy my neighbor’s car, although in fact I do not, that is, I say this just for fun or to make my neighbor happy or I am only five years old and I just say things like this. In other words, I do not intend to actually create a sales agreement with my neighbor. On the other hand, my neighbor’s intention is to create a sales agreement, that is, he does not say things he does not mean. He is, for instance, already preparing his car for sale (not knowing that I am joking). Now for the purpose of this work the relevant question is “How would a competent French scholar and a competent English judge approach this kind of situation, one in which there is no clear agreement between the parties, where one party holds the view that there is no agreement (e.g., I was only joking) and the other party believes there is an agreement (e.g., my neighbor is serious about selling the car)?”<sup>127</sup>

I start with the French approach. It would seem that in this situation a competent French scholar will have nothing to say or do. He or she would consider such a conflict to be over *facts*, not law.<sup>128</sup> That is, the intentions of the parties are, in French law, just a matter of fact, and the treatment of facts *as facts* is not a matter of law. This means that there are no legal arguments that can resolve this conflict; there are only the arguments of the parties, which are not legally significant. I will say more about this later.

The French approach to the treatment of facts as facts can be explained with reference to the theory of the autonomy of the will.<sup>129</sup> This theory explained, at least in earlier times, why parties were bound to their contracts, namely, out of respect for their will. It was believed that individuals could only bind themselves by means of their will, not because some rule of law prescribed it. Hence, following this theory of autonomy a competent French

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<sup>126</sup> Cf. NICHOLAS, B. 1992, p. 35. For the last remark on subjectivity I am thankful to J. B. White.

<sup>127</sup> Cf. NICHOLAS, B. 1992, p. 47 – 49. About agreements that are “unclear.”

<sup>128</sup> Cf. NICHOLAS, B. 1992, p. 61 ff.

<sup>129</sup> Cf. VALCKE, C. 2009a, p. 88.

scholar could not directly interfere with the will or lack of will of the parties. This means that in principle in the above example I am free (not constrained by law) to introduce any argument I want to resolve the conflict between my neighbor and me. For example, I can claim that I was joking when I said I wanted to buy his car and so we do not have an agreement. In other words, the French treatment of facts as facts allows the parties to introduce anything, be it their implicit and explicit intentions or their so-called “hidden intentions.”<sup>130</sup> All this follows from the theory that parties are only bound by their will.

However, there are other situations in which the parties’ agreement is a matter of law, namely, where there presumably is an agreement between the parties or at least one of the parties thinks there is an agreement that is not contested. For example, if my neighbor does not know I was joking he could easily assume that he and I have a sales agreement. From this perspective he could argue that I have *failed* to buy his car because he thinks I am contractually bound to buy it under the terms of our agreement. In response to my presumed failure my neighbor could then lodge a complaint and demand *compensation* from me. In return I can argue that there is no reason to demand compensation because I never intended to buy the car. This conflict is no longer a factual matter only; it has become a *legal* matter as well. That is, my neighbor and I are no longer discussing a contested agreement but rather the meaning of a presumably uncontested agreement, one about whether or not I should pay my neighbor compensation. In such a situation there are legal arguments to be made. This means that legal rules apply, in this case, for example, the rules of “defects of consent.”<sup>131</sup> Following these rules a French scholar could argue that there is a problem with my intentions, that is, a defect in my consent. In other words, he or she could say that the fact that I was joking does not effectively support a valid sales agreement. As a result the presumed uncontested sales agreement is void, which means it has no legal effect. Thus, because there is no valid agreement obligating me to buy my neighbor’s car, he cannot demand compensation.

These two situations suggest that the French approach to contractual interpretation strictly distinguishes between facts and the law. On the one hand, there is the interpretation of the facts as facts, which follows the theory of the autonomy of the will. But on the other there is the interpretation of the facts as law, for example, in a situation in which one of the parties thinks there is an agreement but that agreement is (at least potentially) based on a defect in the

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<sup>130</sup> VALCKE, C. 2009a, p. 86.

<sup>131</sup> Cf. NICHOLAS, B. 1992, p. 48.

will of the other party. In the second example of contractual interpretation I will return to this distinction between facts and the law in the French legal culture.

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Let me now turn to the English approach to a situation in which the parties' agreement is essentially contested. The starting point for English contract law is the agreement between the parties. That is, at least one of the parties has to have a reasonable belief that there is an agreement based on the conduct or speech of the other party. This agreement is considered a matter of fact. But, contrary to French law, in English law the interpretation of facts as facts is not a strict matter of facts. In other words, the interpretation of the parties' contested agreement is not entirely left to the parties themselves; it also entails the use of legal arguments. What is more, it is especially so that in those situations in which the parties disagree about whether or not they have an agreement the judges will not just follow the parties' own interpretation of their will. Rather, the judges will try to determine the parties' so-called "objective intention."<sup>132</sup>

The notion of "objective intention" is the cornerstone of English contract law.<sup>133</sup> It means that the English start with "what the parties actually said," that is, their "external appearance of consent."<sup>134</sup> This immediately suggests that the parties are not entirely free to define their agreement on their own. Contrary to French law, English judges do not allow the parties to support an agreement with hidden intentions. For example, I would not be able to introduce that fact that I was only joking when I said that I wanted to buy the car. The English would look for my objective intention, which is presumably expressed in what I actually said rather than what I did not say. However, this does not imply that I am obligated to buy the car. I will come back to this point in a moment.

In English courts there is no strict separation between what the parties say is a fact and the legal significance of their saying it. In other words, as Valcke says, for the English there is no relevant difference between what the parties "ought to be taken to have intended" (what

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<sup>132</sup> The English would characterize the French approach to the interpretation of contested agreements as "subjective" because the French leave it to the parties themselves to resolve their conflict. By contrast, the English would characterize their approach as "objective" because they would not just rely on the parties' own interpretation of their agreement. See: NICHOLAS, B, p. 48.

<sup>133</sup> Cf. VALCKE, C. 2009a, p. 112.

<sup>134</sup> Cf. NICHOLAS, B. 1992, p. 48.



follows from the facts) and what the parties “ought to have intended” (what follows from the law).<sup>135</sup> However, not everything the parties say is legally significant. For example, it would not be reasonable to think that a five year old has a legally relevant intention to buy a car. Reasonableness, or what a reasonable man would think the words of the parties mean, forms the standard for the English notion of “objective intention,”<sup>136</sup> and this standard allows the competent English judges to more or less effectively resolve the conflict between the two parties about their agreement. For example, they could argue that my intention to buy a car as a five year old does not constitute a reasonable “objective intention,” for no reasonable man would think that a five year old has a legally relevant intention to buy a car. Hence there is no meaningful agreement between my neighbor and me.

The difference between English and French approaches is that the English can resolve the conflict between the parties in legal terms, namely, via the notion of objective intention and the standard of reasonableness, whereas to the French this conflict is strictly factual and there is no legal argument to be made.

In earlier times the English notion of objective intention and the standard of reasonableness was defined by combining the use of law and the notion of equity. This was during the time when the law of contracts was still separate from equity.<sup>137</sup> For example, if the parties agreed that the totality of their agreement was expressed in their written statements, the court would apply the rules of “parole evidence,” that is, the law. These rules mean that no oral statements were allowed in the process of interpreting the parties’ agreement. According to Valcke one of the reasons for this was to prevent the judges from interpreting the parties’ words too freely.<sup>138</sup> There was also the doctrine of “literalism,” which obliged the court to interpret only literally the written words of the parties. This was intended, Valcke says, to “curb the judges’ legislative leanings and to restore certainty.”<sup>139</sup> However, as we can imagine, too much reliance on the literal meaning of the parties’ written words could lead to unjust results. This is where equity came in. For example, imagine a strange case in which, although I am only five years old, I have expressed in writing my intention to buy my neighbor’s car (and he has put in writing his intention to sell it to me). My intentions would,

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<sup>135</sup> VALCKE, C. 2009a, p. 96.

<sup>136</sup> VALCKE, C. 2009a, p. 96: “it is because a particular intention reasonably can (factually) be attributed to the parties that the court will endorse that intention as that which reasonably can (legally) be attributed to them”

<sup>137</sup> Cf. VALCKE, C. 2009a, p. 95 ff.

<sup>138</sup> VALCKE, C. 2009a, p. 97.

<sup>139</sup> VALCKE, C. 2009a, p. 97.

for reasons of equity, be rectified by the court, that is, English judges would reformulate the meaning of my written statement in a more reasonable light considering my age.<sup>140</sup>

Today the distinction between law and equity distinction has disappeared, and this has some effect on the way English judges interpret parties' objective intention.<sup>141</sup> For example, the parole evidence rules are now substantive law. This means that following these rules the court can give direct legal effect to what the parties have written in their agreements. In other words, their factual (written) statements are law because of the parole evidence rules.<sup>142</sup> What is more, since the merger of law and equity the meaning of the parties' words are no longer taken literally. As Valcke describes this, now the words are given their "natural and ordinary meaning."<sup>143</sup> In practice this means, as Valcke says, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' ought now to be included."<sup>144</sup> In other words, the reasonable interpretation of the parties' objective intention goes beyond the literal meaning of the words. That is, the legal significance of the facts follows from what Valcke calls the natural and ordinary meaning of the parties' written statements.

The above example shows that the English approach to interpretation does *not* strictly distinguish between facts and the law. Especially in the later understanding of the parole evidence rule, only the facts (the parties' written words) have legal significance. By contrast, the French approach is to separate facts and the law and treat the facts as facts unless they entail a legal matter. Remember that following the theory of the autonomy of the will, the treatment of facts is in principle a factual matter, that is, the parties are free and only bound by their will, even in situations in which the combined will (agreement) is contested by the other party.<sup>145</sup> Parties can even introduce their hidden intentions, such as the fact that they were actually joking when they agreed to buy a car. Because of this the English would characterize the French approach as "subjective," that is, it all comes down to what the parties themselves want. The English approach in this respect is more "objective." This is visible in their use of legal rules, such as the rules of parole evidence, in cases of a contested agreement. This use of

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<sup>140</sup> Cf. VALCKE, C. 2009a, p. 97.

<sup>141</sup> Cf. VALCKE, C. 2009a, p. 98.

<sup>142</sup> Cf. VALCKE, C. 2009a, p. 98 – 99.

<sup>143</sup> VALCKE, C. 2009a, p. 99.

<sup>144</sup> VALCKE, C. 2009a, p. 99 and note 98 in article.

<sup>145</sup> Cf. VALCKE, C. 2009a, p. 87.

law runs counter to the French theory of the autonomy of the will.<sup>146</sup> But for the English the objective intention of the parties is the cornerstone of English law. For the same reason the English judges would, for instance, reformulate or rectify the parties' original intention in particular cases (to elicit the parties' objective intention). Again this would not be reconcilable with the French theory of autonomy. According to Valcke the French do not have anything resembling the English doctrine of rectification because in principle the parties are free to determine their agreement themselves, that is, without legal control.<sup>147</sup>

In sum, we have seen that whereas the French tend to separate the treatment of the facts as facts and the interpretation of the facts in legal terms, the English are inclined to combine facts and law in the process of interpreting the parties' objective agreement. To French scholars the facts become legally significant only when at least one party thinks there is an uncontested agreement, but to English judges the facts are legally significant from the start, even in situations in which the parties' agreement is inherently contested. In the next example of contractual interpretation we will see in more detail how the French separate the facts as facts from the working of the law and, at the same time, how the law effectively controls and diminishes the significance of the facts as facts. We will also see how the English continue to combine facts and law in the process of contractual interpretation.

### **3.2 The French and English Understanding of Interpreting Incomplete Agreements**

The second example of interpretation is a situation in which the presumed uncontested agreement between the parties is not completely defined. In other words, the problem is that the parties have failed to explicitly provide for all the relevant issues in a particular contract.<sup>148</sup> For example, let us presume that my neighbor and I have a sales agreement but we have failed to specify all the obligations of the seller (my neighbor in our earlier scenario). One of the primary obligations of a seller in a sales contract is to deliver the good (in this case the car) to the buyer (me). Imagine that a conflict arises between the seller and the buyer about when and where the good will be delivered. For example, my neighbor thinks that he should deliver the car after he has received payment whereas I think the car should have been

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<sup>146</sup> Cf. NICHOLAS, B. 1992, p. 48.

<sup>147</sup> VALCKE, C. 2009a, p. 91: "there is no need for some corrective measure to bring contractual interpretation in line with the party intention in a system where these are one and the same."

<sup>148</sup> Cf. NICHOLAS, B. 1992, p. 49.

delivered on the day we signed the contract. The relevant question here is “How would a French scholar and English judge approach a situation in which an agreement is not completely defined and because of this a conflict between the parties has arisen?”

Let me again start with the French approach. Presumably there is an uncontested agreement between the parties. The problem is that this agreement is not adequately defined, and as a result there is a conflict. To the French scholar this conflict is not a matter of fact, which can be left to the parties to decide following the theory of autonomy, but a matter of law. In other words, the French solution to such a problem is to interpret the agreement in legal terms, that is, for a French civil law jurist this means applying the law, which consists primarily of a body of rules (pace the English common law culture, which in principle is formed by case law).

In article 1108 of the French civil code we find four conditions that define a valid legal contract.<sup>149</sup> This article tells us that there has to be an *agreement* between the parties, which is the first condition of a valid legal contract. In the first example of contractual interpretation I explained that when an agreement is contested by the parties the conflict remains outside the law. Here we will see what it means if the *law* is used to interpret the parties’ uncontested agreement. The second condition defined in article 1108 is that the parties must have to have the *capacity* to contract, but I will not go into that here. The third condition is that there must be a defined *object* of the obligation entailed by the agreement. I will say more about this condition in a moment. Finally, the fourth condition is that the obligation of the parties must have a *legal cause*. This condition I will not discuss here.

There is no rule like article 1108 that defines the conditions of a valid legal contract under English common law. But it follows from case law that an English contract has to fulfill three conditions: there must be an agreement (“offer” and “acceptance”); there must be a consideration, which means that something of value is to be given or committed by the parties on each side; and, as already mentioned, the parties must have to have an objective intention, which is determined by the standard of reasonableness.

Let us return to the French conditions. These will guide the French scholars (and lawyers and judges) in interpreting the meaning of an incomplete agreement. Their first

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<sup>149</sup> Article 1108 CC: *Quatre conditions sont essentielles pour la validité d'une convention: Le consentement de la partie qui s'oblige; Sa capacité de contracter; Un objet certain qui forme la matière de l'engagement; Une cause licite dans l'obligation.*

question will be, as Nicholas puts it: “What type of contract did the parties enter into?”<sup>150</sup> The answer to this question is controlled by the third condition of article 1108 of the code, that is, the requirement that an agreement must have a defined *object* of obligation. Here the notion of object does not refer to the *factual* interpretation of the parties’ agreement but to the *legitimate* interpretation of their agreement, which in the case of French contract law has nothing to do with what the parties’ themselves want. Let me explain.

French contract law defines in the code different *types* of contract, which can be divided into two groups: so-called “nominate” or specific contracts and “innominate” or non-specific contracts. For example, a sales or marriage contract is a specific contract. For each of these specific contracts the French civil code has provided a set of rules that govern almost all the relevant issues that fall under a particular contract. It is these issues that form the legitimate *object*, the third condition of article 1108 of the code. For example, a sales agreement entails the obligation of the seller to convey the good to the buyer. This obligation of conveyance is a legitimate object of a sales agreement.<sup>151</sup> Hence, for a sales contract the code provides rules that govern the obligation of conveyance (and other rules governing other objects entailed by the agreement). The complete set of rules that govern a sales contract can be found in book III title VI articles 1582 – 1701 of the French civil code.

For non-specific contracts the code has less extensive rules, which grants the parties more freedom to determine the relevant issues. If a problem arises over the meaning of a non-specific contract, French scholars will interpret it in accordance with the rules of the code that govern the specific contract that most resembles the non-specific contract.<sup>152</sup>

So, if a conflict arises because of the incompleteness of an agreement, a competent French scholar will first want to know what type of contract it is. In the example of the car this is a sales contract. This immediately tells the French scholar a lot about the issues involved in this kind of contract. Namely, there is a set of rules governing sales contracts, including the object of delivery by the seller. So if the parties themselves have not defined the obligation of the seller, as was the case in our example, the French scholar can resolve this problem by applying the relevant rules in the code that define the obligation of a seller. These rules can tell the French scholar, for example, that the seller is not obliged to deliver the good if the buyer has not paid for it or cannot pay for it within a reasonable time. This suggests that

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<sup>150</sup> NICHOLAS, B. 1992, p. 50.

<sup>151</sup> Cf. NICHOLAS, B. 1992, p. 114.

<sup>152</sup> Cf. VALCKE, C. 2009a, p. 85; NICHOLAS, B. 1992, p. 49.

the seller is obliged to deliver the good not at the moment of signing the contract, as the buyer argues, but rather at the moment when the seller receives the money, as the seller argues.

In sum, with reference to legal rules, to a large extent a French scholar can interpret the meaning of specific contracts even when the parties' agreement is incomplete. What is more, the French can interpret contracts without actually examining the parties' own interpretation of the facts, that is, their subjective agreement. In other words, it is primarily the law, not the parties, that defines an uncontested agreement.<sup>153</sup>

But let me say more about the process of interpretation in French contract law. It is not true that the parties in a contract are immediately bound by all the rules that govern their agreement. Only in situations in which the agreement is incomplete and a conflict arises does the law control the meaning of the parties' agreement. In other situations the parties are free to depart from some of the rules, that is, some rules are waivable. These are the so-called "*lois supplétives*." This seems to appeal to the French theory of autonomy. Only certain rules cannot be waived, the so-called "*lois impératives*."<sup>154</sup>

The real process of interpretation for French scholars is the process in which they actually begin to interpret the parties' factual agreement, that is, their implicit (hidden) and explicit intentions. This kind of interpretation is needed to determine whether or not the parties intended to depart from the waivable rules, and if so to what extent? As I have said, it would appear that in principle the parties are free to determine their own agreement except when they fail to define all the relevant issues. But, as we will see, in reality the parties are not so free. To a large extent the law controls what their factual agreement means, even when they have chosen to depart from the waivable rules. Let me explain.

Remember that in the first example the French would not use the law (rules) to control the implicit or explicit intentions of the parties in situations in which they have a conflict over their agreement. The French scholars would consider this a matter of fact that should be left to the parties themselves. By contrast, English judges would use legal means, such as the parole evidence rules, to determine the parties' objective intention in such situations. But things are different for the French when the situations are different. If the agreement is not contested and more or less all the relevant issues of the contract are defined (the third condition of article 1108) then the French scholars will turn to interpreting the facts in legal terms. This is what

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<sup>153</sup> NICHOLAS, B. 1992, p. 49: "[t]he French starting-point is that the incidents of a contract are fixed by law, subject to the parties' power to vary them."

<sup>154</sup> Cf. VALCKE, C. 2009a, p. 85.

the French would call the official interpretation phase.<sup>155</sup> It means that they will use the law to determine the parties' legally significant understanding of their agreement. This approach is actually quite similar to the English approach in the first example. Namely, like the English, the French have rules of evidence, such as the parole evidence rules, which constrain the way in which the parties may effectively present their intentions (articles 1315 – 1369 of the code). Following these rules the French scholars can effectively dismiss all the implicit or hidden intentions in favor of the parties' actual written statements. They can consider everything that goes beyond these statements to be extra-legal or only relevant in a moral sense (e.g., the fact that I was joking about buying the car is morally but not legally relevant).<sup>156</sup>

However, unlike the English rules, the French rules of evidence are not substantive law.<sup>157</sup> This means that the written words of the parties do not have an immediate legal effect. The rules are only used to control what the parties are legally allowed to intend; for example, the French exclude the parties' hidden intentions.<sup>158</sup> But other rules in French law define the substantive legal meaning of the facts. This means, as Valcke puts it, that the parties' agreement is "filtered, supplemented, or at the very least endorsed by the court."<sup>159</sup> For example, certain rules allow the French court to exclude any terms of an agreement that it considers "absurd." And, following article 1134 of the code, the court is required to exclude any terms of an agreement that it considers "onerous," that is, it may exclude these terms in "good faith."<sup>160</sup> What is more, other rules require the French to interpret an agreement in accordance with "the nature of the obligation under equity, usage, and the law."<sup>161</sup>

These examples all suggest that ultimately the law, not the parties, controls the legal meaning of the facts (in "good faith," because the terms of the agreement are "absurd," and so on). In other words, we can see that there are different ways in which the French court can exclude or ignore parts of the parties' factual agreement. That is, even though in principle the parties are free, the rules of evidence constrain the means with which they can express their intentions and other rules effectively define to what extent an agreement has legal effect (e.g., by excluding abusive terms). The result is that there is not much room left in which the parties

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<sup>155</sup> Cf. VALCKE, C. 2009a, p. 85; NICHOLAS, B. 1992, p. 49.

<sup>156</sup> Cf. VALCKE, C. 2009a, p. 86 – 88.

<sup>157</sup> Cf. VALCKE, C. 2009a, p. 89.

<sup>158</sup> Cf. VALCKE, C. 2009a, p. 89.

<sup>159</sup> Cf. VALCKE, C. 2009a, p. 93.

<sup>160</sup> Cf. VALCKE, C. 2009a, p. 92 – 93. For example see: article 1134 section 3 of the CC.

<sup>161</sup> VALCKE, C. 2009a, p. 92. For example see: article 1135 of the CC.

can construct their agreement. The space in which the parties can effectively depart from the waivable rules, for instance, is in fact first filtered by the rules of evidence and then further diminished by other legal rules. There is thus not much left of the parties' initial freedom.

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The English approach to the second example of interpretation is similar to the approach in the first example, so the following will be short. For the English judges the starting point is again the parties' objective intention, which should be interpreted following the standard of reasonableness. This means that where the agreement is not fully defined and therefore contested, the jurists will begin by looking at the terms the parties actually used.<sup>162</sup> While the French scholars would first want to know to what type of contract the parties have agreed, the English will interpret the agreement following the doctrine of "implied terms." This doctrine allows English judges to give legal significance not only to the actual terms the parties have used but also to the terms that are reasonably implied.<sup>163</sup>

Although this approach might suggest that it is the doctrine of implied terms (i.e., the law) that controls the meaning of an incomplete contract, that is not how English judges present it. The English will argue that the implied terms are the parties' *own* and do not follow from the law. For example, unlike the French, English judges would never explicitly exclude implied terms because they consider them abusive. Rather, they would try to explain these terms away by assuming that the *parties* could not reasonably have intended them.<sup>164</sup> This suggests that English judges are able to effectively control the legal significance of the parties' missing or implied terms, but it is presented as if it stems from the parties rather than the law. The English will do the same with regard to, for instance, the application of the rules of evidence. They will present this as the parties' own words, not the result of the application of the rules.

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<sup>162</sup> Cf. NICHOLAS, B. 1992, p. 50.

<sup>163</sup> Cf. VALCKE, C. 2009a, p. 108 – 109 and note 138 in article.

<sup>164</sup> Cf. VALCKE, C. 2009a, p. 107.



Let me summarize. In discussing these two examples of interpretation I have tried to present my understanding of the French and English approaches to contractual interpretation. Of course my understanding is not fully effective in the French or English sense (as I am not a competent jurist). But what I have shown is more than just a simplistic outline of the relevant rules or doctrines that govern the process of interpretation in these different legal systems. I have presented some details of two complex practices of legal language, in other words, some elements of two distinct cultures of law.

A remarkable thing about the French practice is the way it controls the meaning of the facts or the parties' subjective agreement. In the first example we saw that the treatment of facts was strictly separated from the law, but in the second example the facts were almost completely absorbed by the workings of the law. What is more, whereas in the first example the French would present the conflict as a problem between the parties, which has no legal significance, they would present the second conflict as a problem of the law, about which the parties have very little to say (e.g., the rules of the code govern almost all the relevant issues of a particular agreement regardless of what the parties do or do not say). Even in the official interpretation phase, French scholars would formulate an (filtered and diminished) agreement as if it followed from the law or legal principles (e.g., the principle of good faith).<sup>165</sup>

The English practice of legal language can be characterized by its combination of the use of law and reliance on the parties' own words (the facts). This is the result of the English approach to the notion of objective intention and the standard of reasonableness. What is more, it is remarkable that the significance of the facts seems to prevail over the significance of the law, although this does not mean that in some situations the facts are effectively controlled by the application of a particular legal doctrine (or in earlier times the notion of equity).

There is another way to describe the differences between the French and English legal cultures. Following Valcke, we could say that in all legal systems the law of contracts performs at least two "functions."<sup>166</sup> The first function can be described, as Valcke does, as determining what the parties want in legal terms, that is, *elevating* the facts into the legal domain. The second function can be described as *modifying* the parties' factual or subjective

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<sup>165</sup> Cf. VALCKE, C. 2009a, p. 93 note 66 in article: "[i]t therefore could not be better established that these [contractual] obligations [i.e., the legal effect of a particular agreement] draw their source, not from some professed will of the parties, but from the law."

<sup>166</sup> VALCKE, C. 2009a, p. 82 and note 12 in article.

agreement in terms of law. Valcke calls these functions “consecrating” and “disciplining,” respectively.<sup>167</sup>

We can find these functions in our descriptions of the French and English approaches. However, each approach has a different *constellation* of consecrating and disciplining functions. This is a crucial point. As follows from the first example, the French approach is characterized by the consecrating function. That is, it allows the parties to form their own agreement, without legal control. However, in the second example it becomes clear that the overall French approach is characterized by the disciplining function. Namely, to a large extent the significance of the facts is controlled by the law, which leaves little room for the facts of the parties’ agreement. Moreover, it seems that in the French legal culture these two functions are strictly separated. This means that the law does not interfere with purely consecrating matters (e.g., a contested agreement) and the parties have nothing to say about disciplining matters (e.g., what their legitimate agreement is). Hence, Valcke concludes: “the view that emerges from the French materials on contractual interpretation is that of an overall disciplining framework with a pocket of consecrating, which remains small and subject to the disciplining larger framework.”<sup>168</sup>

In the English approach the two functions seem to be combined. Namely, in the process of interpreting the parties’ objective intention English judges will begin with the parties’ own words, which resembles the consecrating function. But in this case it is done with reference to the law (e.g., the rules of evidence), which resembles the disciplining function. Ultimately the consecrating function seems to prevail, that is, the English tend to *present* the parties’ objective intention as following from the parties rather than the law. As Valcke puts this, “the view that emerges from the English material on contractual interpretation hence is that of a process in which the disciplining function tends to be folded into the consecrating function in an apparent attempt to downplay its relative significance.”<sup>169</sup>

### **3.3 A Hypothetical Transnational Conversation About Contractual Interpretation – Thesis Demonstration**

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<sup>167</sup> VALCKE, C. 2009a, p. 82.

<sup>168</sup> VALCKE, C. 2009a, p. 94.

<sup>169</sup> VALCKE, C. 2009a, p. 112.

As earlier stated, I will construct a hypothetical conversation between competent French and English jurists based on our understanding of the French legal scholar's and the English judge's of contractual interpretations. I do this to demonstrate my thesis that in such a conversation the effective understanding of these jurists is to a large extent *undermined*. This means that, in terms of the process of contractual interpretation, what each jurist says can only be superficially meaningful to the other.

Let us imagine that two jurists, one embedded in the French civil law culture and the other in the English common law culture, start a conversation about a situation in which there is a contested sales agreement between two parties (see the first example of contractual interpretation). What can we expect will happen? We can imagine that the English jurist will begin the conversation with a suggestion that they examine the facts, that is, look at the actual written terms used by the parties. For this the English jurist can make use of the law, such as the rules of parole evidence, to determine the parties' objective intention. This means that the English judge will exclude oral statements and only consider those written statements he thinks are legally relevant and meaningful as long as they are also reasonable.

This way of starting the conversation would sound very strange to the French jurist, who would think that a dispute like this one is a purely factual matter about which the law has nothing to say. Hence, she could conclude that the English jurist is making a mistake, perhaps referring to a different kind of situation, one in which one party is claiming compensation from another for failing to comply with the terms of a presumably uncontested agreement. This would explain why the English jurist turned to the law. Or she might conclude that the English jurist is not making a mistake but is simply incompetent since apparently he does not know how to effectively deal with a contested conflict. If he knew, the French jurist could reason, he would not have referred to the law because that runs counter to the French theory of the autonomy of the will. In any case, according to the French jurist, the Englishman should have left resolution of the conflict to the parties themselves.

This suggests that the French jurist, in response to the words of the Englishman, does not know how to effectively continue the conversation. If she thinks the English jurist is making a mistake, she can try to correct him. If she thinks he is simply incompetent, she could try to instruct him. Or they could have no meaningful conversation at all. The French jurist might have other interpretations, to which she could respond in different ways. The

problem is that, based on the way the English jurist began the conversation, the French jurist cannot know which of her responses will be the most effective.

From the perspective of the English jurist there is no problem. However, if the French jurist should tell him that he should *not* have turned to the rules of parole evidence, he would probably not find this very intelligible. Indeed, it would sound strange or stupid to him to hear that the conflict is purely a matter that should be left to the parties involved. What is more, it would sound problematic to the English jurist if the French jurist would allow the parties to introduce their hidden or implicit intentions. The Englishman would not be able to see how this could lead to a reasonable interpretation of the parties' objective intention. For the Englishman the problem in this conversation would be that he does not understand why the French jurist is criticizing or correcting him. What is more, he would not be able to effectively respond to any suggestions the French jurist makes, for instance, when she says that the conflict is purely a matter of fact. There is no such strict separation between the treatment of the facts and the law for the English jurist. Hence, French jurist's suggestions make no real sense to him.

Now, if the English jurist were to heed what the French jurist tells him, for example, that he should stop using legal means in a situation in which the parties' agreement is inherently contested, then he would begin to lose his effective understanding of contract law. Namely, this suggestion of the French jurist runs counter to what the English jurist considers the cornerstone of English contract law, that is, the notion of the parties' objective intention. This notion is meant to determine the parties' reasonable intentions and not to leave everything to the parties themselves. By contrast, if the French jurist were to go along with what the English jurist says, she would begin to lose most of her effective understanding of contract law. Namely, it would run counter to her theory of the autonomy of the parties. For instance, how would she be able to reconcile the use of the rules of parole evidence with this theory of autonomy?

We can thus see that competent French and English jurists cannot really work well together when it comes to talking about contractual interpretation. Most important, if they were to accept what the other jurist is saying, they would lose their own effectiveness. They would *no longer* be able to act more or less effectively in agreement with their own legal language practices. Because their understandings of contract law are fundamentally challenged, the entire conversation loses its intelligibility and is superficial. They can do little

more than exchange facts. And such an exchange does not capture the complex understanding of law embedded in each legal culture.

### **3.4 A Preliminary Conclusion after Talking about Coffee and Contractual Interpretation**

At the beginning of this work I suggested that we all know that our understanding comes in degrees, that is, we naturally expect that sometimes our conversations will be less than full and effective. A full and effective conversation usually provides the richest and most particular experience; see, for instance, my experience of talking about and drinking coffee with my family. By contrast, a less full and effective conversation does not allow for a rich and particular experience. For instance, in the first conversation about the structure of language in chapter 2 we saw that if the relation between language and meaning were defined only in terms of rules, our understanding would (or could) not be effective at all. This is because the meaning of rules collapses into an infinite regress of interpretations, that is, rules require interpretation, then the interpretation of rules also requires interpretation, and so on. For the same reason we saw that the justification of the meaning of rules breaks down into a paradoxical explanation of normativity. These two problems indicate what it means to have an ineffective, and in this sense unintelligible, conversation about language.

The effective kind of intelligibility is, as I have argued, embedded in a socially constituted practice of language. The central question of my work is to what extent the competent participants in a particular conversation can effectively use their socially constituted language practice in agreement. The quality of the conversation turns on the answer to this question.

In the first example in this chapter I suggested that my competency in coffee language allows me to have a very effective understanding of coffee (at least in terms of my family and me). This is the rich and particular experience I have when I drink a warm cup of koffie verkeerd in the right cup with fresh milk that is foamed in the right way and in the right company at the right moment. In the same sense, I suggested in the second example that a French scholar's and English judge's competency in contract law language allows them to have a full and effective experience in the process of contractual interpretation. For instance,

the particular way in which a competent French scholar approaches an inherently contested agreement *shows* the way factual matters are effectively separated from legal matters in the French legal culture. In other words, this particular experience of separating facts from law is manifested in the fact that a competent French scholar cannot intervene in situations in which the parties have a conflict over their agreement. The French jurist can intervene (through *legal* means) once *this* conflict is resolved, and hence there *is* an uncontested agreement that is disputed (though for different reasons).

However, I have suggested that there is no guarantee that our competency in language will always give us the richest and most particular experience. Competent language users usually do have such an experience, but there are always exceptions. For instance, it may be that I am sick, and *therefore* I cannot fully enjoy my coffee the way I like it (e.g., the milk in the coffee is too heavy for my stomach). My illness undermines for the moment my experience of coffee, and maybe I should avoid drinking it as long as I am sick. But my illness does not undermine my *competency* in coffee language. I am still potentially able to have a rich and particular conversation about coffee. For instance, once I recover I can return to drinking coffee in the way that is and has always been most effectively intelligible for my family and me.

A similar point can be made about French and English competency in contract law language. In a particular *situation* a competent French scholar may find that she has a disagreement with another French scholar about the legal significance of a particular agreement. Perhaps it concerns whether or not the terms of a contract are abusive and should be set aside. Their disagreement does not imply that these French scholars have lost some of their *competency* in contract law language. Exactly *because* they both know how to effectively separate factual from legal matters (and do other things), they are able to have this temporary disagreement about abusive terms. Thus, *within* the scope of their shared competency French jurists (and English jurists in the same way) can expect to have more or less effective conversations. To what extent depends on the particular situation in which they try to communicate.

This is not the main thrust of my thesis, however. We can expect that in certain *conversations*, not just certain situations, the quality of understanding will be undermined. This occurs when the participants (who are competent) do *not share* a competency in language. For example, in the conversation with my Dutch friend about good coffee we saw

that my competency in coffee language was to *some* extent undermined. I effectively lost some of my rich and particular experience of talking about and drinking coffee in this particular conversation, and so did my friend. But our respective experiences were not undermined because of the *situation* in which we spoke. I was not sick, and even if I were it would not have been the reason I could not be fully effective. The problem was that, even though my friend and I were both competent Dutch speakers and both grew up drinking Dutch coffee, we could apparently *not* reach a full and effective agreement on the particular ways in which we were able to talk about a good cup of coffee. We could talk about regular Dutch coffee all right, but not about what makes it *good* for the both of us. The latter would require a shared experience of, for instance, how to prepare milk foam. But we did not share this or other experiences. Hence, my friend and I lost some of our sense of effectiveness. This demonstrates that in our conversation we ran into the respective *limits* of our competency in coffee language, and in this sense our conversation *was not* (because it could not be) fully intelligible. It remained relatively superficial.

In the conversation with the Italian bartender my competency in coffee language seemed to be undermined to an even greater extent. This suggests that I lost not just some but almost *all* of my deeply embedded and effective understanding of coffee. For instance, we saw that my friend and I could not even begin to talk effectively about Dutch coffee with the Italian bartender. This had nothing to do with the *situation* (e.g., it was not that the bartender failed to hear us). It also had nothing to do with the fact that we did not know the correct Italian word for the kind of drink we call regular coffee in Dutch. The fundamental problem was that we and the Italian bartender apparently did not know how to *use* whatever words we knew *in effective agreement*. For example, whereas the bartender thought he had effectively served my friend a “caffè,” my friend and I had a completely different experience (we thought we had been served an “espresso,” which is not a “koffie” in the Dutch sense). This demonstrates that in this particular conversation my friend and I reached the limits of our socially embedded competency in Dutch coffee language, and hence we lost most of our effective Dutch understanding of coffee. The result was that our conversation was not (because it could not be) intelligible at all.

In a similar sense I demonstrated in the second example in this chapter that the competency of a French jurist is to a large extent undermined in conversation with a competent English jurist, and vice versa. The result of this is that most of the effective

understanding of both jurists is lost, that is, they lose most of their deeply embedded rich and particular experiences of contractual interpretation. Hence, the conversation between the French and the English jurists is superficial.

Even if the French and English jurists are able to speak the same language (e.g., French) this will not enable them to act in effective agreement. That is the fundamental problem. For example, if a competent English jurist were to start interpreting, in French, the words the parties to an agreement used in order to determine the meaning of those words, and, at the same time, to give the words legal effect following the substantive parole evidence rules, this would not be fully intelligible to a competent French jurist. Although the French jurist would understand the French the English jurist is using, she would not know how to effectively respond to what he is saying, at least not in a sense that is effective for the English jurist. This is not because they temporarily disagree about how the English jurist interpreted the facts of a particular agreement but because they do not seem to agree on a more fundamental level, that is, the level of competency in the practice of legal language.

For example, it would be effective for the French jurist to criticize the English jurist for intervening in a conflict that she considers strictly factual. The French jurist might also criticize him for combining the interpretation of facts with the workings of the law (by giving the facts, as facts, legal significance). But these responses or critique would not be at all intelligible to the English jurist. He would not understand why the French jurist is criticizing him for doing something that is completely intelligible to him. This means, in turn, that the English jurist would not know how to effectively (in the French sense) respond to what the French jurist is saying. Maybe he will think that the French jurist is crazy or incompetent. Whatever the French and the English jurists think about each other's responses, we can see that in this conversation both participants have reached the limits of their effective understanding. They cannot reach an effective agreement because of the different ways they know how to talk about contractual interpretation. In this sense their conversation is effectively *unintelligible* even though both participants are communicating in French.

In the coffee example we saw that once I learned how to use some of the Italian language practice, not just the words but the socially constituted practice of Italian coffee language, I became at least a little bit competent in the Italian sense. This means that with the Italian bartender (and probably some other Italians as well) I could talk somewhat effectively (in agreement) about coffee, that is, I could use the right words, in the right order, to the right



person, and so on. This could also be the solution to the problem the French and English jurists face in their conversation about contract law. If they learned something about each other's language practices, they could acquire a shared competency in legal language, at least to some extent. (It was the lack of shared competency that caused them to lose their sense of effective intelligibility, and this undermined the quality of the entire conversation.)

This solution, however, is only effective in that it allows the French jurist to be more intelligible in the English sense and vice versa. It does not allow the French and English jurists to be effectively intelligible in a third sense, one that is new and not particularly French or English but European. This is the challenge that the European legal community (as well as other transnational legal communities) faces. In the next example I discuss an actual transnational conversation between a European Court and a national legal community. We will see that the quality of a European decision can be fundamentally undermined by the fact that the French legal community does not understand the European Court's language practice.

#### **4. A Transnational Conversation About European Human Rights Law**

The fundamental difference between the French civil law culture and the English common law culture is visible not only in the process of contractual interpretation but also in the process of interpreting a new situation with the use of case law ("precedent"). Before I turn to an actual example of transnational communication I will say something about the different treatment of case law in the common law and civil law cultures.

Recall that in principle the English common law culture is based on case law, that is, the law follows from interpretations of the facts by competent judges. The previous example of contractual interpretation showed that English judges would interpret an inherently contested agreement between two parties by first interpreting the words that the parties actually used. These words were the facts that would gradually be given legal significance, that is, they would be molded into law in the process of interpreting the parties' objective intention.<sup>170</sup> This primary reliance on facts is also visible in the common law approach to case law. In the common law world the legal significance of the facts in a new case follows from factual analogous reasoning based on previous cases (and facts). In other words, common law

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<sup>170</sup> Cf. NICHOLAS, B. 1992, p. 50.

judges *induce* the law in a particular case from facts in previous cases that are *similar* to the facts in the new case.

It has been argued that the civil law countries of Europe have adopted this common law approach to case law. However, according to the comparative legal theorist Vivian Curran (and others), this is an illusion.<sup>171</sup> Nevertheless it is argued that in these civil law countries case law is accepted as the source of law next to legal rules. Recall that in civil law countries like France (though also, for instance, in the Netherlands, Germany and Italy) the primary source of law is a preexisting body of rules. These rules are usually defined in civil codes, such as that of France. As the previous example demonstrated, the French would use their civil code to give legal meaning to an incomplete factual agreement between two parties. In other words, in such situation the French would *deduce* the law from the rules of the code rather than from the facts (e.g., the rules governing sales agreements). By contrast, we have seen that the English would induce the law in such a situation from the facts (e.g., using the doctrine of implied terms).

It has been suggested that, due to the process of European legal integration, civil law countries now use case law to interpret the law in new situations. For example, Italy, as a civil law country, recognizes its Supreme Court decisions as the source of law in matters of private law.<sup>172</sup> But how does Italy (or another civil law country) actually use these decisions? Are they used by the Court in original common law fashion, which means that the facts of a new case “harden into law” by means of factual analogy?<sup>173</sup> Or are these decisions used in a civil law manner, which means that they are used as legal rules from which the law can be deduced in a new situation?

It seems that the latter approach is prevalent among the civil law countries of Europe. For instance in Italy, court decisions are relevant not because of the facts on which they are based but because of the *norms* they seem to prescribe.<sup>174</sup> In other words, the decisions are interpreted as prescribing legal rules that are more important than the original facts of the case. The result of this approach is that the decisions also can be used in factually *dissimilar*

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<sup>171</sup> CURRAN, V. G. 2005, p. 102: “Contrary to frequent claims, it is illusory that anything like a common law *stare decisis* [precedent] became a part of the EU civil law states when they recognized European court decisions as a source of law.”

<sup>172</sup> CURRAN, V. G. 2005, p. 103.

<sup>173</sup> NICHOLAS, B. 1992, p. 50.

<sup>174</sup> Cf. CURRAN, V. G. 2005, p. 103 and note 39 in the article.

situations. That is, as rules the decisions can be applied in different situations just as the rules of the civil code normally are.

With regard to the use of European case law, a decision by another civilian Supreme Court confirms this particular result. The German Constitutional Court has ruled that due to the process of European integration all Member States are bound to interpret the decisions of the Court of Justice of the European Union in factually dissimilar cases.<sup>175</sup> This suggests that in Europe today the civilian approach to case law is more accepted than the common law approach, which induces the law from factually similar cases only.<sup>176</sup>

We can now turn to an example of transnational communication. In this example we will see that, with regard to case law, it is possible for a European Court to combine the civilian and common law styles of legal reasoning in a decision. In this sense the Court seems to have been able to more or less effectively integrate the two main legal cultures that characterize the European legal community. However, we will also examine a translation of this decision by a French scholar that does not effectively resonate with the complex multicultural European practice of legal reasoning. What is more, the French scholar, whose writing is supposed to represent the effective understanding of French civil law, including European law,<sup>177</sup> does not seem to be capable of understanding the original reasoning of the Court. In other words, we will see that, with regard to the use of case law, the scholar's writing is not in agreement with the European Court's practice of legal reasoning.

#### **4.1 *Pretty v. The United Kingdom***

In *Pretty* the applicant, Mrs. *Pretty*, a national of the United Kingdom, was suffering from a degenerative and incurable disease.<sup>178</sup> This disease affected her muscles, including those used for breathing, which eventually lead to a very unpleasant death by suffocation. There was (and still is) no treatment for this ailment.<sup>179</sup> The applicant wished to be spared from the suffering and distress that would accompany the final stages of her disease. She wanted to be

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<sup>175</sup> Cf. CURRAN, V. G. 2005, p. 102.

<sup>176</sup> Cf. CURRAN, V. G. 2005, p. 102 and note 35 in the article. It is even suggested that the civilian approach goes beyond the common law approach because it also allows for the application of case law in future dissimilar situations (not just in future similar situations).

<sup>177</sup> Cf. CURRAN, V. G. 2005, p. 99.

<sup>178</sup> *Pretty*, par. 3. See: Appendix 1

<sup>179</sup> *Pretty*, par. 7.

able to choose how and when she would die.<sup>180</sup> The problem was that, because of her disease, when the time came she would be physically (though not mentally) incapable of committing suicide.

The applicant initially petitioned the Director of Public Prosecution (“DPP”) in the UK to grant her husband immunity from prosecution if he were to assist her in committing suicide. However, article 2.1 of the Suicide Act 1961 prohibited assisting in a suicide in the UK.<sup>181</sup> In response to the applicant’s request, the DPP refused to grant immunity “no matter how exceptional the circumstances.”<sup>182</sup>

The Divisional Court, which was asked to review this decision, came to the same conclusion. The applicant had asked this court to quash the DPP’s decision, to declare the decision unlawful, and to declare that the DPP would not be acting unlawfully in the case if he were to grant immunity or, ultimately, to declare that section 2 of the Suicide Act was incompatible with articles 2, 3, 8, 9 or 14 of the Convention of Human Rights (“the Convention”).<sup>183</sup> In response to this request the Divisional Court concluded (in short) that it did not consider the DPP to have the power to grant immunity from prosecution. Also it did not declare the Suicide Act incompatible with the rights granted by the Convention.<sup>184</sup>

Within the UK the final option for the applicant was to appeal to the House of Lords. But the House of Lords dismissed the appeal as well and upheld the judgment of the Divisional Court.<sup>185</sup>

This led the applicant to finally apply to the European Court of Human Rights (“the Court” or “the European Court”), arguing that the refusal of the DPP to grant her husband immunity from prosecution if he helped her to commit suicide, as well as the prohibition on assisted suicide as defined in the Suicide Act, was not compatible with articles 2, 3, 8, 9, and 14 of the Convention. The European Court had to decide whether or not these articles had been violated by the UK and, if so, whether or not this was with justification.

The Court’s decision eventually became a source of law to all the signatory parties of the Convention, that is, to the European civil law and common law countries.<sup>186</sup> The relevant

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<sup>180</sup> *Pretty*, par. 8.

<sup>181</sup> *Pretty*, par. 9.

<sup>182</sup> *Pretty*, par. 11.

<sup>183</sup> *Pretty*, par. 12.

<sup>184</sup> *Pretty*, par. 13.

<sup>185</sup> *Pretty*, par. 14.

<sup>186</sup> Cf. CURRAN, V. G. 2005, p. 99.

question is how this decision is interpreted in an actual instance of transnational communication, for example in the process of incorporating *Pretty* into the French legal community. In other words, is the French interpretation of *Pretty* in more or less agreement with the way in which the European Court interpreted the law in *Pretty*? This would make the transnational conversation more or less effectively intelligible. If the French interpretation is not in agreement with the European Court's language practice, however, the conversation will be superficial and not effectively intelligible. Before I discuss the effectiveness of the French interpretation of European law I will present and discuss the original reasoning of the Court.

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If we look at the decision (appendix 1), we can see that the Court stated the rules that govern the case in several places, for example, in paragraphs 33, 34, and 57. From these rules the Court seemingly was able to deduce the law in a typical civilian manner, namely, it interpreted the law in *Pretty* by discussing the meaning of the rules. This is similar to the French approach in the earlier example of the interpretation of an incomplete agreement. There I suggested that French scholars would apply the relevant articles of the code to determine the full and effective legal meaning of the parties' incomplete agreement (i.e., the facts). I will say more about this civil type of reasoning in a moment.

If we look at the case we can also see that to a large extent the Court incorporated the decision of the House of Lords.<sup>187</sup> The *Pretty* case originated in the United Kingdom, and so the Court stated, besides the relevant European rules (the Convention), the relevant local rules, such as the Suicide Act, and it also mentioned the local court decisions that had preceded the appeal to the European Court, primarily the opinion of the House of Lords.<sup>188</sup> In the following description of the House of Lords' proceedings we can see the typical common law style of reasoning, for instance, regarding the interpretation of article 2 of the Convention. Let me explain.

Lord Bingham began by reformulating in his own words the position of the applicant, Mrs. Pretty. He said that Mrs. Pretty argued that article 2 of the Convention acknowledges an individual's right to life, which also includes (or does not exclude) its antithesis, the right to

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<sup>187</sup> *Pretty*, par. 14 – 15.

<sup>188</sup> *Pretty*, par. 14 – 24, 63.

die. According to the applicant the state has a *positive* obligation to protect both these rights.<sup>189</sup> In this respect Mrs. Pretty argued that the state had violated her right to die when the DPP refused to grant her husband immunity if he assisted her suicide, and hence she would not be able to exercise her right to die.

In response to this argument Lord Bingham argued that it is *not* logical to draw the conclusion that the right to life includes the right to be killed at the hands of a third party and that by refusing to protect this right (to kill) the state would be in breach of the Convention.<sup>190</sup> To support this interpretation of article 2 Lord Bingham discussed several cases that deal with the same article and are based on more or less similar facts. It is in this discussion of case law that we best see the typical mode of common law reasoning.

First, Lord Bingham addressed the claim by the applicant that article 2 includes a right to die. He pointed out that even though some Convention rights allow for their opposite, article 2 is not one of them. For example, he mentioned article 11 of the Convention, which concerns the right to freedom of assembly association. He noted that it is accepted that this right also includes its antithesis, for instance, the right to *not* join an organization.<sup>191</sup> But, with respect to article 2 Lord Bingham argued that “whatever the benefits which, in the view of many, attach to voluntary euthanasia, suicide, physician-assisted suicide and suicide assisted without the intervention of a physician, these are not benefits which derive protection from an Article framed to protect the sanctity of life.”<sup>192</sup> With these words he suggested that, although article 2 concerns the right to protect the “sanctity of life,” it does not allow for its opposite, the right to die (in the form of euthanasia, suicide, and so on).

This interpretation of article 2 follows, according to Lord Bingham, from the “language of the article.”<sup>193</sup> The first part of this article reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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<sup>189</sup> *Pretty*, par. 14; *The Queen on the Application of Mrs Dianne Pretty (Appellant) v Director of Public Prosecutions (Respondent) House of Lords 61 (2001)*. Par. 4. Hereafter: House of Lords.

<sup>190</sup> *Pretty*, par. 14; House of Lords, par. 6.

<sup>191</sup> *Pretty*, par. 14; House of Lords, par. 6. For instance, see *Young, James and Webster v. United Kingdom*, EHRR 38, 4 (1981).

<sup>192</sup> *Pretty*, par. 14; House of Lords, par. 6.

<sup>193</sup> *Pretty*, par. 14; House of Lords, par. 5.

But how does it follow from these words that article 2 concerns the right to the “sanctity of life”? There are some who reject this line of reasoning, including Julen Etxabe in his article “It’s Not All About Pretty: Human Rights Adjudication in a Life and Death Situation.”<sup>194</sup> Nevertheless, Lord Bingham seemed to presume that his interpretation of the obligation entailed in article 2 follows from its language.

Second, Lord Bingham cited several cases in support of his conclusion that Mrs. Pretty was not entitled to the protection of a right to die because this right is not entailed in article 2 (which entails only the right to life). Hence, according to Bingham, the state did not violate the Convention when it denied Mrs. Pretty assistance in committing suicide. The first notable case discussed was *Osman v. United Kingdom*. In this case the applicant complained that the United Kingdom had not protected the right to life of her son and husband. Both were shot and wounded by a third person, and the husband eventually died of his injuries. The Court acknowledged in *Osman* that the state has a positive duty to secure the right to life (although it did not say anything about a right to be killed). In the opinion of the Court the state had a duty to take preventive measures against threats to the family posed by a particular individual. This meant putting in place protective rules to deter the commission of offenses, and it required the installment of effective law-enforcement machinery to prevent, suppress, and punish the breach of these protective rules.<sup>195</sup>

This interpretation of article 2 was considered relevant by Lord Bingham because it did not run counter to his own interpretation of article 2. In other words, the *Osman* ruling seemed to support Lord Bingham’s reasoning that article 2 protected the “sanctity of life” but not the support of killing (or the right to die).

The relevance of *Osman* to Lord Bingham’s conclusion finds further support in typical common law reasoning.<sup>196</sup> According to the facts in *Osman* the boy and his father did not want to die, but in *Pretty* the applicant did. This difference in *facts* supported a difference in law, that is, if the facts were similar to the facts in *Osman* Lord Bingham would be allowed to

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<sup>194</sup> Cf. ETXABE, J. 2013. It's Not All About Pretty: Human Rights Adjudication in a Life and Death Situation. In: ETXABE, J. & WATT, G. (eds.) *Living in a Law Transformed: Encounters with the Works of James Boyd White*. Ann Arbor, Michigan Publishing. According to J. Etxabe it is difficult to conclude that the “sanctity of life” follows from the wording of the article.

<sup>195</sup> *Pretty*, par. 14; House of Lords, par. 7.

<sup>196</sup> *Pretty*, par. 14; House of Lords, par. 7. Lord Bingham argued: “the context of that case [*Osman*] was very different [to *Pretty*].”

induce a positive obligation to protect life, but in *Pretty* the facts were different, and hence Bingham could not draw that conclusion let alone the conclusion that the state had a positive obligation to protect the right to die.<sup>197</sup> About the latter I will say more in a moment.

In line with this reasoning Lord Bingham continued to discuss other cases that seemed, factually speaking, closer to the *Pretty* case. For example, he discussed *X v. Germany*. In *X* the applicant was a prisoner who had gone on a hunger strike, which seemed to suggest that he wanted to die, just like Mrs. Pretty did. But in *X* the prison personnel started force-feeding the prisoner in order to prevent him from dying. According to the applicant, this constituted a violation of the rights protected by article 3 of the Convention. Article 3 contained the right to be protected from torture or inhuman or degrading treatment or punishment. In its ruling, however, the Court did not go into article 3 and the prisoner's complaint. Instead, and relevant for Lord Bingham, the Court argued that under article 2 of the Convention the state is obliged to secure a right to life, especially in a situation in which a person is in the custody of the state. This meant that in this case the state had the obligation to take effective measures that would *save* the prisoner's life, for example, by force-feeding him.<sup>198</sup>

The factual similarity between *Pretty* and *X* is of course that both the applicants seemed to wish to die. However, according to Lord Bingham, *X* did not support Mrs. Pretty's claim that article 2 includes protection of the right to die. Thus there was an important difference in facts between *X* and *Pretty* in that the applicant in *X* was in the custody of the state and Mrs. Pretty was not. The fact that the applicant in *X* was in custody entailed, according to the Court, the positive obligation of the state to protect the applicant's life. Now, following this fact, Lord Bingham could not induce the conclusion that in *Pretty* there is also such a positive obligation because in *Pretty* the facts are different. And even if the facts were similar, this would still not allow Lord Bingham to conclude that the state has a positive obligation to protect the right to die. That would simply be too far-fetched.

A similar conclusion follows from Lord Bingham's discussion of *Keenan v. United Kingdom*. In *Keenan* a young prisoner had committed suicide and his mother accused the state of having failed to protect his life. The Court argued that a person in custody required special protection by the state, just like in *X*. But in a sense the facts in *Keenan* (and *X*) are quite similar to those in *Pretty*, namely, in both cases there is someone who wants to die (by means

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<sup>197</sup> *Pretty*, par. 14; House of Lords, par. 7.

<sup>198</sup> *Pretty*, par. 14; House of Lords, par. 8.



of suicide or assisted suicide). However, just like in *X*, in *Keenan* the facts are different from those in *Pretty* in an important sense. That is, Mrs. Pretty was not in custody. Hence, based on this factual dissimilarity Lord Bingham could not be allowed to draw the conclusion that in *Pretty* the state has a similar positive obligation to protect the right to life.

Lord Bingham phrased his final conclusion as follows: “Both these cases [i.e., *Keenan* and *X*] can be distinguished [factually], since the conduct complained of took place when the victim was in custody of the State, which accordingly had a special responsibility for the victim’s welfare. It may readily be accepted that the obligation of the State to safeguard the life of a potential victim is enhanced when the latter is in the custody of the State. To that extent these two cases are different from the present [i.e., *Pretty*], since Mrs. Pretty is not in custody of the State. Thus the State’s positive obligation to protect the life of Mrs. Pretty is weaker than in such cases. It would however be a very large, and in my view quite impermissible, step to proceed from acceptance of that proposition [i.e., there is a positive obligation] to acceptance of the assertion that the State has a duty to recognize a right for Mrs. Pretty to be assisted to take her own life.”<sup>199</sup>

Thus Lord Bingham concludes that Mrs. Pretty was not entitled to state protection of her right to die because, first, the facts in *Pretty* were different from those in *Keenan* and *X*, which meant that Mrs. Pretty was not entitled to full and positive protection of her life by the state similar to the protection extended to persons in custody. Second, he argued that the first conclusion did not support the opposite conclusion that Mrs. Pretty was entitled to protection by the state of her right to die. That would be too far-fetched. Hence, the House of Lords’ conclusion, according to Lord Bingham, had to be that regarding the facts in *Pretty*, the state was not in violation of article 2 of the Convention.

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Besides the discussion of article 2 the excerpt from the House of Lords in appendix 1 includes a discussion of other articles, but I will not go into that here.<sup>200</sup> For the purposes of this work it is more interesting to compare the common law reasoning of the House of Lords with the reasoning of the European Court. Although this Court came to the same conclusion as the

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<sup>199</sup> *Pretty*, par. 14; House of Lords, par. 8.

<sup>200</sup> *Pretty*, par. 14 – 15; House of Lords, par. 1 – 40, 100.

House of Lords regarding article 2, this conclusion followed from a completely different, civil type of reasoning. Let me explain.

The Court did not begin its interpretation of article 2 by interpreting the language of the article, as the House of Lords did. Rather it stated that the article itself has fundamental value, that it “safeguards the right to life, without which enjoyment of the other rights and freedoms in the Convention is rendered nugatory.”<sup>201</sup> This suggests that, just as it did for Lord Bingham, article 2 concerns protection of the right of life. However, unlike Lord Bingham, the Court concluded that this right follows not from the language of the article but from its significance to the rest of the Convention. For example, without life there would be no need for the protection of privacy or a private life, as defined in article 8 of the Convention. Hence, according to the Court, article 2 concerns a fundamental right to life.

In support of this conclusion the Court referred to a particular case, *McCann and Others v. The United Kingdom*. However, the Court did not discuss the facts of this case. Rather it seemed to use it as a rule that defined the fundamental significance of article 2. In other words, by mentioning this case the Court presumably was supporting its own statement that article 2 concerned the protection of the fundamental right to life.<sup>202</sup>

In similar civil fashion, the Court argued that article 2 also entailed a positive obligation by the state to protect the lives of those within its jurisdiction. According to the Court this positive duty went “beyond a primary duty to secure the right to life.”<sup>203</sup> For example, following *Osman* the Court argued, just like Lord Bingham, that this positive duty included taking appropriate measures to ensure protection, for example, by enacting legal provisions to prevent the commission of offenses or by implementing relevant law-enforcement mechanisms. However, unlike Lord Bingham, the Court never discussed the details of *Osman* case or any other case (e.g., it mentions also *L.C.B. v. the United Kingdom*). Again, the Court’s arguments were presumably supported by the rules expressed in these cases rather than by the facts. This is typical of the civil style of legal reasoning. The only relevant fact for the Court seems to have that there was “consistent emphasis in all the cases

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<sup>201</sup> *Pretty*, par. 37.

<sup>202</sup> *Pretty*, par. 37.

<sup>203</sup> *Pretty*, par. 38.

before the Court.”<sup>204</sup> Because there was no mention of the facts, this must mean that there was consistency in the norms of these cases.<sup>205</sup>

Having argued that the state has a positive duty to protect the right to life, the Court turned to a discussion of the meaning of this positive duty. Recall that the applicant in *Pretty* argued that this positive duty includes protection of the right to die. However, with reference to *Young, James and Webster v. the United Kingdom* the Court argued that article 2 does not include its antithesis. Its reasoning seems to have been that, as a fundamental right of the Convention, article 2 cannot allow for protection of the right to die. That would undermine the entire Convention. Just like Lord Bingham, the Court recognized that certain articles do allow for their antithesis, such as article 11. But this was not the case with article 2. According to Lord Bingham this was true because, following its language, article 2 protects the “sanctity of life” and not its opposite. According to the Court article 2 is concerned with life and the protection of life and is “unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life.”<sup>206</sup> Thus, according to the Court article 2 does not allow for protection of the right to die because this is presumably a matter of quality or choice, rather than life or living, in the first place.

Finally the Court concluded that there was no violation of article 2 in *Pretty*. Just like Lord Bingham, the Court referred to *Keenan* in order to argue that the positive obligation of the state included the obligation to take action in order to save someone’s life but not to kill or help someone die. However, and again unlike Lord Bingham, the Court did not mention any of the facts in *Keenan*. It again seemed to presume that this case represented a particular rule of law regardless of the facts.

Thus the conclusion of the Court was somehow *deduced* from case law that presumably represented particular legal norms rather than facts. That is, nowhere did the Court discuss the facts of the cases it mentioned. We can see that the Court reached the same conclusion as Lord Bingham did also with reference to more or less similar case law. However, the Court’s approach to case law was obviously very different from that of Lord Bingham. Whereas Lord Bingham discussed facts and their similarity or dissimilarity to facts presented in previous cases, the Court argued for the fundamental significance of article 2 because of its relevance to the entire Convention, and it interpreted the meaning of article 2

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<sup>204</sup> *Pretty*, par. 39.

<sup>205</sup> *Pretty*, par. 38.

<sup>206</sup> *Pretty*, par. 39.

with reference to the norms presumably represented in particular cases, not in the facts of those cases.

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Most of the Court's discussion continued in the civil manner, except for the discussion of one article. In the assessment of the possible violation of article 8 the Court at some point departed explicitly from its civil law reasoning. Let me explain. Article 8 concerns the right to a private and family life. Regarding this article the applicant, Mrs. Pretty, had argued that it concerned the right to self-determination. She claimed that in this article the right to self-determination "was most explicitly recognized and guaranteed."<sup>207</sup> According to her this right entailed the right to make decisions "about one's body and what happens to it."<sup>208</sup> What is more, she argued that it also included the right to choose when and how to die. Therefore she concluded that the refusal of the DPP to grant her husband immunity if he assisted in her suicide constituted a violation of article 8.

The European Court began its assessment of the possible violation of article 8 in typical civil fashion, namely, with reference to case law without a discussion of the facts. For example, without discussing of the facts the Court mentioned *X and Y v. the Netherlands*. This case was mentioned in relation to the Court's statement: "the concept of 'private life' is a broad term not susceptible to exhaustive definition."<sup>209</sup> The case presumably supported this statement (although how this followed we do not know). In a different example, with a mere reference to *Mikulić v. Croatia* the Court seemed to argue that article 8 concerns "aspects of an individual's physical and social identity."<sup>210</sup> The Court did not explain how or why the case was relevant to this statement. These are just two of examples of the Court's civil law style of reasoning (and some critical questions about it).

The relevant question for the Court was to assess whether or not article 8 includes the right to self-determination, as the applicant argued. Regarding this point the Court said: "no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, [but] the Court considers that the notion of personal autonomy is

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<sup>207</sup> *Pretty*, par. 58.

<sup>208</sup> *Pretty*, par. 58.

<sup>209</sup> *Pretty*, par. 61.

<sup>210</sup> *Pretty*, par. 61.

an important principle underlying the interpretation of its guarantees.”<sup>211</sup> This argument seems to depart from the previous civil law style of reasoning. Namely, the Court recognized that there was no case law to support the interpretation that article 8 includes the right to self-determination, but nevertheless it considered this right to be part of the article. What followed was that the Court had to look for a different type of support for this interpretation because it could not rely on its own case law.

It is relevant to mention here that Lord Bingham also discussed the right to self-determination in relation to article 8 of the Convention. He affirmed the inclusion of this right but argued that: “there is nothing to suggest that the Article [8] has reference to the choice to live no longer.”<sup>212</sup> In other words, according to Lord Bingham, the right to self-determination only concerns the lives of those who want to live. But if we look at the excerpt from the House of Lords’ proceedings we can read the opinion of a different judge, Lord Hope. This opinion is included within the European Court’s decision as well. In his opinion Lord Hope argued, contrary to Lord Bingham, that article 8 includes, besides the choice of how to live and not die, the choice of how and where to die. According to Lord Hope the latter is “part of the act of living.”<sup>213</sup>

In line with Lord Hope’s opinion, the European Court argued that article 8 includes the right to choose when and how to die. This affirmed the position of the applicant. But, as noted, the Court had to depart from its civil style of reasoning in order to support this argument, for there is no European case law that would allow for this particular interpretation of article 8. Now, in a particular *common* law use of language, the Court argued that there was a different case, a non-European one, that “concerned a *not dissimilar* situation to the present [case].”<sup>214</sup> Here the Court for the first time seemed to actually acknowledge the importance of the *facts* in its use of case law. What is more, the facts appeared to be more important than the existing (case) law. That is, the Court actually referred to a Canadian case that was not part of the European legal order. This Canadian case did not even stem from a civil law court. Hence, the only way this case could be relevant to the European Court would be because it concerned relevant *facts*.

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<sup>211</sup> *Pretty*, par. 61.

<sup>212</sup> *Pretty*, par. 14; House of Lords, par. 23.

<sup>213</sup> *Pretty*, par. 15.

<sup>214</sup> *Pretty*, par. 66. (emphasis mine)

The case the Court referred to was *Rodriguez v. the Attorney General of Canada*.<sup>215</sup> In this case the applicant, Mrs. Rodriguez, was suffering from a disease similar to Mrs. Pretty's. The Canadian Supreme Court argued that Mrs. Rodriguez would be deprived of her autonomy if she were not allowed to manage her own death. Hence, the Canadian Court concluded that this required justification. As the European Court put it: "In *Rodriguez v. the Attorney General of Canada* (...) the majority opinion of the Supreme Court [of Canada] considered that the prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice."<sup>216</sup> Because of the similarity in facts, the European Court followed the conclusion of the Canadian Court and concluded that it was "not prepared to exclude that this [the refusal of the DPP to grant immunity] constitutes an interference with her [Pretty's] right to respect for private life as guaranteed under article 8 paragraph 1 of the Convention."<sup>217</sup>

The result of this conclusion was that the Court had to further discuss whether or not the potential inference of article 8 could be justified in accordance with article 8 paragraph 2 of the Convention. The applicant, Mrs. Pretty, had argued that the state's general prohibition of assisted suicide was disproportionate and therefore *not* justified because it did not "take into account her situation as a mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision, and therefore cannot be regarded as vulnerable and requiring protection."<sup>218</sup>

In response to this the Court argued that the state is endowed with the task of safeguarding the lives of individuals. For this the state could prescribe "general rules of criminal law, which would apply to everybody equally."<sup>219</sup> For example, in the UK the Suicide Act is a general rule that prohibits assisted suicide in order to protect vulnerable people in society such as those who are dependent on others because they are not mentally competent. However, the Court recognized that this general rule also affected Mrs. Pretty, who was not vulnerable in the same sense. Although she was only physically dependent on others, she still fell under the general protection of the Suicide Act. This was justified, according to the Court,

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<sup>215</sup> *Rodriguez v Attorney General of Canada*. LRC 136, 2 (1994).

<sup>216</sup> *Pretty*, par. 66.

<sup>217</sup> *Pretty*, par. 67. (emphasis mine)

<sup>218</sup> *Pretty*, par. 72.

<sup>219</sup> *Pretty*, par. 74. (emphasis mine)

because “many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question.”<sup>220</sup>

There is another reason behind the Court’s justification of the general prohibition on assisted suicide, that is, the fact that its decision would constitute precedent and be applicable in future cases. This seems to have undermined the Court’s willingness to acknowledge Mrs. Pretty’s individual wishes for it appeared to be afraid that its decision would give rise to a general rule.<sup>221</sup> The only relief that can actually be found for Mrs. Pretty in her case is the Court’s suggestion that the DPP could decide to not prosecute her husband after all.<sup>222</sup> I will say more about this later.

The Court’s final conclusion was similar to the one reached by the UK courts. It found no violation of articles 2, 3, 8, 9 and 14 of the Convention, which meant that both the Suicide Act and the DPP’s refusal to grant Mrs. Pretty’s husband immunity if he were to help her commit suicide and the Suicide Act were not in violation of the law.

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In this discussion, I have tried to highlight some of the details of the Court’s effective understanding of the law in the *Pretty* case. Most important is that these details show *how* the Court came to its conclusion, especially with regard to articles 2 and 8 of the Convention. We can see that in its reasoning the Court combined both common law and civil law approaches in its use of case law. Now the final step is to see how this multi-cultural reasoning is translated into particular national legal cultures. For this I will continue to borrow from Vivian Curran’s article “Re-membering Law in the Internationalizing World.”<sup>223</sup> Based on all that I have discussed so far, I think we can expect that this instance of transnational communication is inherently challenging. The challenge for national authorities in the EU is to effectively translate the Court’s decision into their own legal cultures. This means that their translation should reflect at least some of the Court’s multi-cultural legal reasoning. Without this the translation will not be effective in the European sense and the transnational

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<sup>220</sup> *Pretty*, par. 74.

<sup>221</sup> Cf. ETXABE, J. 2014.

<sup>222</sup> *Pretty*, par. 76.

<sup>223</sup> CURRAN, V. G. 2005, p. 100.

conversation will be superficial. The question is to what extent the translations of competent national jurists will result in effective agreement in their actions, that is, in agreement with the Court's multi-cultural practice of law.

To answer this question I will discuss the French translation of the *Pretty* case (in appendix 2).

#### 4.2 The French Rendition of *Pretty*

In France the translations of European Court cases are published in *La Semaine Juridique*. The French national decisions are also published in this journal, and they are usually quite short (3 to 4 pages). French decisions only state the relevant legal rules and whether or not they have been violated. As noted earlier, the meaning of the law in the French legal culture is more effectively represented in the writings of French legal scholars (the *doctrine*). These writings form the guidelines judges and lawyers use to understand a case. As Curran puts it, “the cryptic style” of a French decision is rarely fully understandable on its own because it lacks “explanatory and evaluative commentary.”<sup>224</sup>

Since French decisions are short they are published in the journal in full, single spaced and in small type.<sup>225</sup> By contrast, the scholars' commentaries, which come *after* the decision, are much more legible, more wide spaced and in larger type.<sup>226</sup> This supports the idea that the scholars' analysis is more important than the decision itself and that serves as the final word.<sup>227</sup>

The *Pretty* case was originally a European Court decision, and hence it was not drafted in the traditional French style.<sup>228</sup> The Court's decision is much longer than an ordinary French decision. Nevertheless, it was translated into French and published in the French journal in the French format. In the process the original 43 pages were reduced to less than 4. This is the first visible disruption of the original Court decision that undermines its effectiveness. The reduction, however, is very effective in the French sense, having more or

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<sup>224</sup> CURRAN, V. G. 2005, p. 122.

<sup>225</sup> Cf. CURRAN, V. G. 2005, p. 118.

<sup>226</sup> Cf. CURRAN, V. G. 2005, p. 122 – 123.

<sup>227</sup> Cf. CURRAN, V. G. 2005, p. 118.

<sup>228</sup> La Cour EDH ne reconnaît pas l'existence d'un droit à la mort. *La Semaine Juridique Edition Générale*, 2003, 15, p. 676 – 679.



less the length of a French national decision. This allows a competent French jurist to read the European Court's decision as if it were a national decision.

The problem with this French-style reduction is that it has a strong civil law filter.<sup>229</sup> The French version leaves out the first 31 paragraphs of the original decision, the very paragraphs that contain the long excerpt from the decision of the House of Lords.<sup>230</sup> Thus, most of the common law understanding of the case has been deleted, and if a French lawyer were to read only the translation of *Pretty* he or she would not be able to understand its common law origins. This is not because the French lawyer is ignorant or refuses to look at common law aspects; rather, the common law understanding is simply not provided in the translation.

After reading the shortened and translated decision of the Court, a competent French jurist will expect to find the scholar's comment. This allows him or her to understand the decision more effectively. For the *Pretty* case Carole Girault wrote the comment (see appendix 2).<sup>231</sup> We will see that Girault's understanding of the Court's decision does more harm to its original effectiveness than the mere reduction in the number of pages. Even though Girault approves of the Court's conclusion, she is highly critical of its underlying common law reasoning and therefore rejects it.<sup>232</sup> Let me give some examples.

Girault writes that the Court's decision "[p]lus qu'une analyse réfléchie, il semble que ce soit un décision de la Cour suprême du Canada qui emporta ici la conviction des juges européens."<sup>233</sup> This can be translated as "rather than a considered analysis, the European Court has relied for its judgment on prior, non-European case law (Canadian case law)." In writing "rather than a considered analysis" Girault is referring to the Court's use of the Canadian *Rodriguez* case in its interpretation of article 8. As noted earlier, there was no European case law for the Court to rely on in support of the idea that article 8 includes the right to choose when and how one will die. Therefore the Court had to turn to a different kind of argumentation, and we saw that for this it made a typical common law move; it discussed the facts in the *Rodriguez* case in order to induce in the *Pretty* case, which has similar facts, the conclusion that the state's refusal to grant immunity interfered with the rights of the

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<sup>229</sup> Cf. CURRAN, V. G. 2005, p. 118.

<sup>230</sup> For example, in the Netherlands (also a civil law country) the first 31 paragraphs are also excluded. See: Verbod op hulp bij zelfdoding. *NJ 2004*, 543.

<sup>231</sup> GIRAULT, C. 2003. Note. *La Semaine Juridique Edition Générale*, 15, p. 679 – 682.

<sup>232</sup> Cf. CURRAN, V. G. 2005, p. 119.

<sup>233</sup> GIRAULT, C. 2003, p. 681.

applicant. Girault rejects this line of reasoning as unconsidered, that is, she disqualifies the line of common law reasoning in the Court's original decision.

Another example of Girault's rejection of the Court's common law reasoning concerns the way the Court justified the possible violation of article 8. Recall that the Court argued that it could not grant individuals like Mrs. Pretty the right to commit suicide with the assistance of a third person because the UK Suicide Act provided general protection for the lives of vulnerable people. This protection was justified because the state was allowed to provide such general protection. However, the Court's decision suggested that under certain circumstances the authorities could decide not to prosecute. This flexibility could bring some relief to Mrs. Pretty.

Recall that facts are more important than rules in the common law world. Therefore the suggestion that under certain circumstances the authorities can choose not to prosecute is more or less acceptable to common law jurists. But is certainly not acceptable to civil law jurists. Indeed, Girault finds the Court's suggestion unreasonable. Not to prosecute means not to apply the law, but in France and other civil law countries the whole meaning of the law depends on its application (i.e., the application of rules).<sup>234</sup> Girault writes: "En matière d'euthanasie, l'indulgence des juges se traduit le plus souvent par un acquittement prononcé en dépit des aveux de culpabilité de l'accusé. La Cour veut-elle alors signifier que la non-application de la loi peut être un réponse à sa trop grande sévérité?"<sup>235</sup>

To overcome this problematic common law suggestion by the Court, Girault writes: "Nous préférons croire qu'il n'est rien, pareille conclusion dépassant probablement la pensée des juges européens."<sup>236</sup> These words pave the way for a civil law understanding of the Court's suggestion. Namely, according to Girault, it is not possible for the Court to consider the common law solution (no prosecution). A more intelligible (civil law) suggestion would be to apply the law and then choose not to *punish* the convicted person.<sup>237</sup>

The result of Girault's comment, in combination with the greatly reduced and filtered translation of the *Pretty* case, is a more or less acceptable *civil law* understanding of the Court's original decision. This resonates well with French jurists' effective understanding of law. However, the problem with this understanding is that it does not reflect the Court's

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<sup>234</sup> Cf. CURRAN, V. G. 2005, p. 120 – 121 and note 140 in the article.

<sup>235</sup> GIRAULT, C. 2003, p. 682.

<sup>236</sup> GIRAULT, C. 2003, p. 682.

<sup>237</sup> Cf. CURRAN, V. G. 2005, p. 120.

multi-cultural understanding of the law. It leaves out all the original common law elements that partially constitute the full and effective European meaning of the *Pretty* case. As Curran puts it: “the peculiar integration of law that is occurring within the European tribunals reverses itself, as national legal cultures process and absorb European court decisions through the filter of national legal categories, with cognitive grids of civil or common law creation that do not assimilate information from the other system of legal thinking and reasoning.”<sup>238</sup> This implies that based on the French translation and the French scholar’s comment it is impossible for competent French jurists to effectively conduct a conversation at the complex multi-cultural or European level. In other words, the French rendition of the *Pretty* case will undermine the quality of a supposedly effective transnational conversation between the European Court and a national state. This supports my thesis. From the European perspective the French version of *Pretty* is superficial; it is not effectively intelligible because it does not capture the richness and particularity embedded in the Court’s complex legal reasoning.

Thus we see that the real challenge for Europe is to overcome the fundamental loss of effective legal understanding in transnational conversations. Curran’s suggestion is to enhance the cross-cultural legal understanding of the participants with the help of comparative analysis. This analysis would in her words, “elucidate the legal norms underlying the relevant differing legal mentalities that, in turn, give shape and meaning to legal concepts.”<sup>239</sup> In the concluding chapter I will say more about this.

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<sup>238</sup> CURRAN, V. G. 2005, p. 100.

<sup>239</sup> CURRAN, V. G. 2005, p. 123.



## Chapter Four – Effective Transnational Communication in Law

*“[Translation in law] necessarily involve[s] fundamental modifications, the development of new insights, the organization of both the whole and the parts along different lines – in fact a new concept of the law with all the changes necessary to conform to a different way of thinking, doing and speaking. Any other method of borrowing will lead to deplorable consequences.”*

Adjutor Rivard, *The Law of Languages in Canada; Studies of the Royal Commission on Bilingualism and Biculturalism*, p. 114

### 1. Translation of Legal Language Practices

Let us go back to an image discussed at the beginning of this work. This image spoke of *transporting* legal meaning into different national contexts. I used this image to describe the process of transnational communication in law. Now we know that this description rests on a false and simplistic view of legal understanding, namely, the belief that this understanding can be “picked up” in one context and transported into another. Imagine that I would try to bring my embedded Dutch understanding of talking about and drinking coffee to Italy. How could I do this? We have seen that the words “koffie verkeerd” do not fully capture my effective understanding of coffee (they do not capture the particular way in which I like to drink coffee in the company of my family or friends, etc.). Indeed I argued in chapter 1 and 2 that words or rules alone do not allow for full and effective understanding (remember the regress and paradox problems). Instead, our effective understanding of something is manifested in our capacity to act more or less in agreement with the way in which others, including ourselves, do things over time. I talked about this capacity for understanding in terms of a socially constituted practice of language.

This account of understanding suggests a new image of the process of communication. It is not the image of transporting language practices into different contexts. We have seen that it is impossible to transport a particular language practice into a context controlled by a different language practice without the loss of effective understanding. I demonstrated this in the previous chapter. For example, in conversation with the Italian bartender I was at loss as

to how to order a regular cup of coffee in the Dutch sense let alone share my experience of drinking koffie verkeerd with him. We also saw in the example of the two communicating jurists that they seemed to be incapable of fully appreciating each other's approach to contractual interpretation. From the perspective of the French jurist, for instance, it seemed that the English jurist was making a mistake when he tried to induce the legal meaning of a contested agreement from the terms the parties used. To the French jurist such a contested agreement was a matter to be left to the parties involved and thus not something with which the English jurist should have been concerned. To the English jurist the French approach made no sense, and so their transnational conversation was superficial. In the third and final example we saw that the French rendition of the *Pretty* case was formulated so that it would be more or less acceptable to the French civil law community. But rendered in this way the decision lost all the common law elements that formed a crucial part of its original European understanding. Hence, on the basis of the filtered and distorted French rendition of *Pretty*, a transnational conversation would always be superficial because the participants would not know how to act in agreement with the complex multi-cultural reasoning of the Court.

Thus it makes no sense to describe the process of communication in terms of the transportation of language practices. Rather, in line with the account of understanding that I have argued for, we can say that communication depends on whether or not a *shared* practice of language is available to the communicating participants. Such a shared, socially constituted language practice would allow the participants to act more or less in agreement with each other, which is a necessary condition for effective mutual understanding, and hence the intelligibility of their conversation. However, there are three inherent challenges to this practice of understanding and the quality of communication. In the second chapter I mentioned that even someone who is a competent language user can make a mistake. For example, a professional singer can sing out of tune even though he knows how to sing in tune. The second challenge is the risk that two or more competent language users will not act in agreement in a particular situation. I discussed the example of the two judges in *Riggs*, who disagreed about the interpretation of a particular case, and I also described the challenge of a person who wanted to offer someone a chair. We saw that it was difficult for the first person to reach agreement in actions with the other person.

The third and most fundamental challenge entailed by the nature of effective understanding is the risk that competent language users will not be able to act in agreement

with each other at all, that is, not only in a particular situation but in any situation. We have seen that this lack of a shared practice or competency will undermine the effectiveness of the entire conversation.

In the previous chapter I demonstrated that the last challenge appears in instances of transnational communication. This is the type of communication I have focused on in this work. While this does not mean that other types of communication in which the effective understanding of the participating parties is fundamentally undermined do not exist, I will not go into that here. The question here is how to overcome the loss of effective understanding in transnational communication in law. I will discuss this question with reference to the French rendition of the *Pretty* case. The question is thus: “How can the French rendition be more or less intelligible to the French civil law community and at the same time reflect some of the Court’s original understanding of the law?” In this discussion I hope to suggest how competent jurists might overcome the risk of losing effective legal understanding in transnational conversations. To do this I will discuss several approaches to *translation* and ultimately suggest ways to talk about the translation of different legal language practices.

### **1.1 More or Less Perfect Translation of Legal Understanding**

Although we know that our understanding of something cannot be transported effectively, there are quite a few approaches to translation that presume this is possible. These approaches commonly acknowledge that a perfect translation is impossible because some of our understanding is always lost in translation. But, regardless of the approach, the goal is always to transport as much of the original understanding into the new context as possible. Thus the presumption underlying these approaches is that our understanding can be “picked up” and, depending on how it is done, more or less completely transported into different contexts.

In the following I discuss three approaches to translation: one that attempts to translate legal meaning at the simplistic level of national languages as discussed in the first chapter (i.e., at the level of words and rules of grammar), one that attempts to translate legal meaning with the use of a specialized legal dictionary, and one that attempts to translate legal meaning at the complex level of what I call legal language practices. The first two approaches are problematic in the sense that they falsely presume that our understanding can be transported.

They fail to acknowledge the complexity of effective understanding. What is more, they falsely presume that there is already a shared legal language practice that allows for effective translation. This begs the question of the availability of such a shared language practice.

Recall that I demonstrated in the first chapter that a simplistic view of language as a system of words and rules of grammar alone is not fully intelligible. For this I followed Wittgenstein's analysis of the excerpt from Augustine on language learning. We saw that the underlying view of language in this excerpt did not account for the complex competency of language users who know how to *do* particular things with words and rules of grammar. For example, the shopkeeper knew how to *open* a particular drawer, *count* a particular number of apples, and so on. This is more than the mere words "five red apples" can tell us or him. For instance, if we were to check the definitions of these words in a good dictionary, this would not tell us what we or the shopkeeper can actually do with the three words in different situations. So we have seen that Augustine's excerpt and its underlying view of language are not really intelligible. Nevertheless, it is this view of language that underlies the first approach to translation that I will discuss, that is, the view that legal understanding can be transported into a different context merely by translating the words and grammar of different languages into each other, for instance, English into French and vice versa.

If we apply this approach to the *Pretty* case we can say that the French "understanding" of the Court's decision follows from the translation of the original English-language decision into French. The question is whether the French-language version is really intelligible in the sense that it allows the European and the French legal communities to conduct a more or less effective conversation about law. We will see that the French version cannot be fully intelligible because, just like Augustine's excerpt, it fails to account for a complex language practice, in this case the language practice of the French legal community. Hence, the French translation undermines the effectiveness of the understanding of the French legal community, just like the original English version did as I discussed in the previous chapter (see the French rendition of the *Pretty* case).

There is already an official French-language version of the *Pretty* case because French and English are both official languages of the European Court of Human Rights.<sup>240</sup> This means that there is an official French version that resembles the official English version. One

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<sup>240</sup> Appendix I reproduces the English version. For the French version see: *Affaire Pretty c. Royaume-Uni* [Online]. Available: [http://hudoc.echr.coe.int/eng#{"itemid":\["001-65003"\]}j](http://hudoc.echr.coe.int/eng#{) [Accessed 25 – 11 – 2015].



might think, then, that these versions are literally the same and have the same official legal significance. They are the same length, contain the same number of paragraphs, discuss the same articles with reference to the same cases, and so on. What is more, just like the official English version, the official French version includes a large excerpt from the House of Lords proceedings, which employed typical common law reasoning. Both versions also include a combination of common law and civil law reasoning, for instance, where the Court interpreted article 8 of the Convention. Remember that here the Court referred to a foreign case in order to induce the law in *Pretty* because of the similarity in the facts of the two cases. This is a typical common law move.

These official French- and English-language versions of *Pretty* are different from the French rendition of this case. Recall that the rendition published in *La Semaine Juridique* distorts the understanding of the Court's original decision, especially with regard to its use of common law reasoning. As we have seen, the French rendition of *Pretty* features a greatly shortened and filtered civil law account of the original Court decision. This suggests that the official French-language version, just like the official English version, is also not fully intelligible in the French sense. The problems that the French legal community had with the Court's multi-cultural reasoning (see the French rendition in *La Semaine*) are not overcome by merely translating this reasoning into French.

For example, in French, as well as in English, the Court's interpretation of article 8 is an explicit common law move. For instance, in paragraph 66, the English version reads: "In *Rodriguez v. the Attorney General of Canada* ([1994] 2 Law Reports of Canada 136), which concerned a not dissimilar situation to the present, the majority opinion of the Supreme Court considered that the prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice. Although the Canadian court was considering a provision of the Canadian Charter framed in different terms from those of Article 8 of the Convention, comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body."

This paragraph was literally translated into French as: "Dans l'affaire *Rodriguez c. Procureur général du Canada* (*Law Reports of Canada*, 1994, vol. 2, p. 136), qui concernait une situation comparable à celle de la présente espèce, l'opinion majoritaire de la Cour suprême du Canada considéra que l'interdiction de se faire aider pour se suicider imposée à la

demanderesse contribuait à la détresse de cette dernière et l'empêchait de gérer sa mort. Dès lors que cette mesure privait l'intéressée de son autonomie, elle requérait une justification au regard des principes de justice fondamentale. Si la Cour suprême du Canada avait à examiner la situation sous l'angle d'une disposition de la Charte canadienne non libellée de la même manière que l'article 8 de la Convention, la cause soulevait des problèmes analogues relativement au principe de l'autonomie personnelle, au sens du droit d'opérer des choix concernant son propre corps.”

The common law practice of language displayed in this paragraph (in French and English) is not compatible with the French civil law style of reasoning. As a result the French legal community will reject it regardless of whether it is in French or English. The rejection of the English version I discussed with reference to the French scholar's comment in the previous chapter. The reasons for this rejection are still valid in the literally translated French version. That is, the official French-language version still includes a combination of common law and civil law reasoning. The problem with this approach to translation is that it does not give enough weight to the complex legal language practice of the French civil law community. I conclude that the mere translation of national languages is not sufficient to allow for effective transnational communication in law.

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In the second approach to translation an attempt is made not just to translate legal meaning by translating the words and grammar of different national languages but also to address the legal concepts used within particular legal cultures. This approach thus acknowledges that it is not enough to translate law at the simplistic level of language, and in this sense it is more intelligible than the first. However, this approach continues to presume that by translating legal language into different national languages the understanding of the law can be transported more or less effectively. The result of this false presumption is that the translated understanding of law is not effective but superficial. Another problem is that the view of legal language underlying this approach to translation is too simplistic to allow for effective legal understanding. Moreover, this approach does not show how communication across different legal cultures is effectively possible. Let me explain.

For this and the following example of translation I borrow from the book *The Role of Legal Translation in Legal Harmonization*, edited by Jaap Baaij.<sup>241</sup> In it the authors present their view of translation in law and discuss the problems that accompany them, especially with respect to the harmonization of legal understanding in the European Union. Here I will discuss the view of translation presented by Martha Chromá in “A Dictionary for Legal Translation.”<sup>242</sup>

Translation to Chromá is “the transfer of information between different languages.”<sup>243</sup> This definition underwrites the presumption that our understanding of something (such as information) can be transported. To transport legal meaning she suggests translating particular legal concepts into different national languages.<sup>244</sup> To efficiently do this she has developed a bilingual legal dictionary. It is primarily a dictionary of law, containing legal concepts, that is, definitions of legal notions such as the notion of “good faith.” These concepts are presented in two different languages. Chromá’s is a Czech-English legal dictionary. Thus, for instance, the definition of good faith is translated into both Czech and English. What is more, she has further specialized these translations by providing separate entries on good faith as the concept is defined in both the civil law and common law worlds. See the following example.<sup>245</sup>

**Good faith** 1 *common law* the quality or state of mind of a person subsisting in honesty, sincerity, decency, fairness and reasonableness without intent to cheat or defraud or take unfair advantage of another (*BLD*) (subjektivní) dobrá víra subjektivní přesvědčení osoby, že jedná v souladu s právem a že svým jednáním nikomu nepůsobí újmy (*TOM*); **mutual duties of** ≈ vzájemná povinnost jednat v dobré víře; **to donate st. in** ≈ darovat v dobré víře; **to make a** ≈ **determination** učinit rozhodnutí v dobré víře; ....

2 *continental law* (A) an objective maxim of general moral values (*TOM*) dobrá víra generální pravidlo chování odkazující na obecné morální

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<sup>241</sup> BAAIJ, C. J. W. (ed.) 2012. *The Role of Legal Translation in Legal Harmonization*. Kluwer Law International.

<sup>242</sup> CHROMÁ, M. 2012. A Dictionary for Legal Translation. In: BAAIJ, C. J. W. (ed.) *The Role of Legal Translation in Legal Harmonization*. Kluwer Law International, p. 109 – 138.

<sup>243</sup> CHROMÁ, M. 2012, p. 111.

<sup>244</sup> CHROMÁ, M. 2012, p. 112.

<sup>245</sup> CHROMÁ, M. 2012, p. 136.

hodnoty v mezilidském styku (*TOM*); **principle of** ≈ zásada dobré víry; **to act in** ≈ jednat v dobré víře; **to acquire a right/title in** ≈ získat právo/titul v dobré víře; ....

(B) a subjective duty to take legitimate interests of others into account and the duty of mutual loyalty (*TOM*) přiměřenost, loajalita subjektivní přesvědčení osoby, že jedná v souladu s pravém a nepůsobí nikomu újmu (*TOM*); **assessment of** ≈ posuzování přiměřenosti; ...

The sources of the definitions in Czech and English are in parentheses (*TOM* and *BLD*). I will not discuss them here. Before I turn to the translation presented in this example, though, I wish to discuss the quality of legal meaning that is defined in the common and civil law definitions. For convenience let me focus on the first part of the civil law definition in English. This definition tells us that good faith is “an objective maxim of general moral values.” The question is whether or not this set of words is intelligible. The answer is no. We know that meaning cannot be defined in terms of words or rules alone. Effective understanding is manifested in a complex practice of language. This means that for words or rules to be effective they have to be embedded in a complex practice of language as well. But this complex embeddedness is not present in the simplistic definition, rule, or range of words presented in Chromá’s dictionary.

But we can imagine that a competent civil law jurist who is also competent in English will be able to *do* particular things with the English civil law definition of good faith.<sup>246</sup> That is because this definition is embedded within this jurist’s competency in civil law language and English. Hence, he or she will know, for instance, how to use a “maxim” within a civil law system and how to relate it to the facts of a particular situation. By contrast, laypersons or common law jurists with no competency in civil law will probably *not* know how to do these things regardless of whether or not they speak English. To them this definition of good faith will only entail further interpretations, which is not very effective. It does not help that Chromá has included several phrases in which “good faith” is used (the bold phrases with ≈). A layperson will still not know when or where to use these phrases without a more or less effective understanding of civil law. Recall the discussion of law as a system of rules. In a

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<sup>246</sup> In the same sense we can imagine that for a competent language user a dictionary can be useful whereas for a not competent language learner it is not.

similar way the use of legal definitions or phrases without an embedded socially constituted language practice collapses into a regress of meaning and breaks down into a paradox of meaning as well.

Thus, the civil law definition of good faith is only really intelligible to someone who is competent in both civil law language and English. To everyone else (including jurists) the definition will be *superficial* because the words “an objective maxim of general moral values” alone do not capture the effective understanding of law. As we know, such an understanding is manifested in a particular language practice. Thus Chromá’s dictionary would be more intelligible in a legal sense if this practice were included. But this is very difficult to achieve. For instance, imagine a dictionary that contains every aspect of a particular civil law culture, that is, every move that can be made, every argument or criticism that can be raised, and so on. Definitions in such a dictionary would probably not look as orderly as Chromá’s entry on good faith.

The next important question is how this superficial understanding of law can be translated effectively. In other words, how do we know that the English words “an objective maxim of general moral values” express more or less the same understanding of law as the Czech words “dobrá víra generální pravidlo chování odkazující na obecné morální hodnoty v mezilidském styku”?

Before I discuss these questions, note that Chromá’s dictionary does not translate *between* different legal cultures. It does not show how the common law definition of good faith (in English and/or Czech) relates to the civil (or continental) law definition (also in English and/or Czech) and vice versa. This means that the dictionary is not very helpful because I am looking for a resolution to the problem that in certain transnational conversations the participants do not share a legal culture. We have seen that this undermines the quality of the entire conversation. Hence, I am looking for a way to create a shared legal language practice that addresses different legal cultures more or less effectively. This would potentially improve the quality of transnational communication in law.

Let us return to the translation of the civil law understanding of “good faith” into the Czech and English languages. How do we know if the English definition even resembles the Czech definition? Again this is a question that not everyone can answer, for it requires complex competency in civil law language in both English and Czech language. Such competency would allow someone to conduct a conversation about “good faith” in English in

a legally meaningful sense, in a way that is more or less in agreement with how this person can also talk about or do things with “good faith” in legal Czech. We know that this capacity to act in agreement is a necessary condition for effective legal understanding. For example, with this capacity a person can comment in English on the definition of “good faith” in Czech and vice versa. However, this shared language capacity is not visible in Chromá’s dictionary. Hence, to those who do not have the required competency in legal language or, for instance, only know how to talk about “good faith” in English, which is not the same as being embedded within a civil or common law culture (I will say more about this later), the translation is superficially meaningful. For example, for someone who is a common law lawyer, is not competent in civil law, but is competent in English and Czech, it is impossible to go beyond the mere restatement of the words in which the civil law definition of “good faith” is formulated. Such a person cannot use these words to conduct a meaningful conversation that resonates with the civil law culture. The know-how required to do this is not present in the translation and therefore I conclude that Chromá’s dictionary is not fully intelligible.<sup>247</sup>

We could try to apply this approach to translation to the *Pretty* case. For instance, we could create a definition of the right to personal autonomy as it is protected by article 8 of the Convention in English and then translate it into French. In line with the Court decision, we could say that “personal autonomy” means the right to live life as one chooses, which includes the right to choose when and how to die. In French this is something like “l’autonomie personnelle” signifie le droit de vivre la vie que l’on choisit, y compris le droit de choisir quand et comment mourir.

The problem with such an entry in a bilingual legal dictionary is that it does not capture the particular way in which the Court interpreted the article, that is, the particular things it could actually *do* with this definition when, for instance, this right is violated. For example, recall that the Court suggested that in the end the state could decide not to prosecute the defendant. This means that, even though the state interfered with Mrs. Pretty’s right to choose when and how to die, this was justified because (among other reasons) her husband would not necessarily be prosecuted if he were to help her commit suicide. This reasoning made sense from a common law perspective, as I explained. But from the French civil law perspective it made no sense at all. To the French it would be much more intelligible to say

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<sup>247</sup> But it might be useful to someone who is already competent in the two legal cultures and languages.

that the Court did not consider the option of setting the law aside (and not prosecuting) so that in the end the offender would not be punished. See the discussion at the end of chapter three.

The relevant point is that a legal dictionary is too superficial to fully capture the effective understanding of law as it is manifested within a particular legal culture, and, what is more, it does not help to translate between different legal cultures. This brings me to the next approach to translation. This third approach attempts to address not just particular legal concepts or definitions but also the complex legal cultures that underlie these concepts or definitions. Here I borrow from the view of translation discussed in Jaakko Husa's "Understanding Legal Languages: Linguistic Concerns of the Comparative Lawyer."<sup>248</sup>

At the beginning of this article Husa formulates his view of translation with a question: "[H]ow can we translate from one language to another in such a manner that the precise legal content of legal text remains unaltered?"<sup>249</sup> We can see that underlying this question there is the presumption that legal understanding can somehow be transported into another context. Husa's question asks how this can best be done without undermining the law's original meaning. However, we know it is false to think that there *is* a meaning to be transported. Our understanding depends on the actual manifestation of a particular *practice* and no definable "original" meaning exists beyond this. Thus, we know that the question is not how to translate law without undermining its original meaning but how to enable the relevant participants to practice agreement in actions? Nevertheless, Husa's approach does tell us something important about translation, in particular about how to translate between different legal cultures. Let me explain.

Husa recognizes that beyond the legal concepts or definitions that Chromá talks about there is "deeper legal cultural knowledge."<sup>250</sup> This is what he calls the "epistemic level of legal language."<sup>251</sup> This means, as Husa puts it, that "it places concepts, doctrines and institutions in a legally conceivable order."<sup>252</sup> Thus, in my words, the epistemic level does not contain concepts, doctrines, or institutions *per se* but consists of a practice that orders these things in a particular way. This is compatible with what I said earlier about manifesting

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<sup>248</sup> HUSA, J. 2012. Understanding Legal Languages: Linguistic Concerns of the Comparative Lawyer. *In*: BAAIJ, C. J. W. (ed.) *The Role of Legal Translation in Legal Harmonization*. Kluwer Law International, p. 161 – 181.

<sup>249</sup> HUSA, J. 2012, p. 162. Husa thinks this question is of utmost importance to Europe.

<sup>250</sup> HUSA, J. 2012, p. 163.

<sup>251</sup> HUSA, J. 2012, p. 163.

<sup>252</sup> HUSA, J. 2012, p. 167.

understanding in a particular socially constituted language practice, not just in the language of rules or legal concepts.

According to Husa this epistemic level of law is more important than the mere definition of legal concepts. I agree with him in this respect and I would call the level of concepts or definitions the simplistic level of legal language as opposed to a more complex epistemic level that contains a particular ordering practice. What follows is that to Husa the process of translation should take place at this epistemic level of legal language rather than at the mere simplistic level of law. This means that the transfer of legal understanding cannot just be about translating legal concepts into different national languages. For example, “consideration” is a common law notion of English contract law (see the second example in chapter three). In short it means that something of value should be exchanged between the parties of a contract. However, in layman’s English the term “consideration” means something quite different. A good dictionary would define it as “a certain manner of viewing a thing, an aspect of observation.”<sup>253</sup> Now, if we were to translate the English word “consideration” into a different national language, for example, into the French word “considération,” this would not effectively capture the common law meaning of the term.<sup>254</sup> In French “considération” means respect or respect for others, which is similar to the non-legal English definition of “consideration” but not to the legal idea of the exchange of something valuable.

Husa suggests that when we translate we should look not just for the correct legal terms in different languages but for a *compatible* understanding of law at the epistemic level, which can then be formulated in the relevant languages. For example, following the research of others, Husa suggests that it is possible to translate the deep cultural knowledge of the civil law notion of “good faith” into the English common law term “contract law equity.”<sup>255</sup> Below we will see for the first time how to translate more or less effectively between different legal cultures.

Following a well-known example, Husa tells us that one of the general principles of civil law is called in German the principle of “Treu und Glauben.” In the German civil code this is defined in article 242 as “Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Trau und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.” Literally this can be

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<sup>253</sup> HUSA, J. 2012, p. 175.

<sup>254</sup> HUSA, J. 2012, p. 174 – 176.

<sup>255</sup> HUSA, J. 2012, p. 177.



translated into English as “An obligator has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”<sup>256</sup> This principle originated in Germany at least, from the Roman law principle of “bona fide.”<sup>257</sup> This Latin term can be literally translated into English as “good faith.” For this a good Latin-English dictionary can be used. However, this translation does not fully resonate with the English common law culture. As Husa puts it: “the idea of ‘good faith’ fits poorly to the English common law culture.”<sup>258</sup> And, he continues, the “English courts have remained strictly reluctant to accept such a rule which is regarded as ‘vague restraint on the behavior of a contracting party.’”<sup>259</sup> Recall that in the English common law approach to contract law there is a reluctance to let anything other than the facts control the meaning of the parties’ agreement. For example, even when the law intervenes in the parties’ intention (the facts) this is presented as if it follows from the parties themselves. In the same sense we can say that the English Courts are reluctant to apply a legal notion such as the principle of “good faith” as a way to control parties’ behavior.

But, and here comes the crucial point, he argues that from comparative research it follows that the civil law understanding of “good faith” or “Treu und Glauben” at the epistemic level is compatible with the common law understanding of the concept of “contract law equity.” I am not enough of a competent common law jurist to explain how this concept works within a common law culture, but presumably, and this is the point, it works in more or less the same way that the notion of “good faith” or “Treu und Glauben” works within a civil law culture.

What we learn from Husa’s approach is that effective translation between different legal cultures requires an effective understanding of the other culture, at least to some extent. Based on such understanding it is possible to effectively communicate across different legal cultures even when the national languages are different. However, Husa shows only that effective transnational communication is possible when there is some similarity between the cultures. For example, apparently the deep cultural understanding of “good faith” in civil law bears some similarity to the deep cultural understanding of “contract law equity” in common law. But this does not answer the crucial question, namely, how to communicate about

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<sup>256</sup> HUSA, J. 2012, p. 176.

<sup>257</sup> HUSA, J. 2012, p. 176.

<sup>258</sup> HUSA, J. 2012, p. 177.

<sup>259</sup> HUSA, J. 2012, p. 177.

cultural differences. We have seen that in the *Pretty* case the French civil law culture did not resonate with the multi-cultural European understanding of law. How can this transnational conversation, in which there is apparently no shared legal language practice, be made more intelligible? This is where the belief that we can transport meaning comes up short, that is, where there is *no* mutually effective understanding available on the basis of which different concepts can travel meaningfully across different legal cultures. Thus, the really important challenge is to find a way to enhance transnational communication when there is no mutual understanding.

## **2. The Work of a Draftsman**

In the first chapter I suggested that the first step in overcoming the risk of losing effective understanding is for the communicating parties to learn about each other's language practices. For example, the French legal scholar could learn about the common law practice of legal reasoning. This would help her understand why it made sense to the Court to refer to a foreign case in order to interpret the Convention. This resonates with what Husa, Valcke and Curran have suggested, for they all rely on comparative legal research, that is, on what Husa calls the epistemic level of legal language or reasoning, and from this all three scholars were able to learn something about different legal cultures. Husa used what he had learned to conclude that there is some similarity between the common law and civil law cultures, while Valcke and Curran used what they had learned to conclude that these cultures are incompatible.

But what is the next step? What enables competent jurists from different legal cultures to communicate with each other more or less effectively about the similarities *and* differences between their cultures? In other words, what would allow them not just to understand the complexities of the other culture (on the basis of comparative research) but also to *integrate* these complexities into their own understanding of law? Here I think it makes sense to consider again James Boyd White's approach to translation. In the first chapter I mentioned his complex view of translation as a form of integration. In my interpretation, this means that a translator works out a *new* constellation of effective understanding, that is, he or she combines different contesting language practices in such a way that together they form

something new, something that is meaningful in itself but allows the practices retain their identities as well.

White suggests that the work of a translator can be seen in a conversation between a lawyer and her client. This conversation illustrates the integration of at least two language practices: the understanding of the client (of his world and how he conceives his problem) and the practice of the lawyer (which allows her to effectively understand the law, discuss it with colleagues, and so on). According to White this is what happens:<sup>260</sup>

[i]n her [the lawyer's] conversations with her client, from the beginning, her task is to help him tell his story, both in his own language and in the language into which she will translate it. This conversation proceeds in large part by her questioning, trying to get it straight, suggesting complexities and difficulties, as she tries to help her client understand things more fully both in his terms and so far as possible in the language of the law, in which to a large degree the matter will be negotiated and argued. The client is thus led to learn something of the language of the law; at the same time, the lawyer must learn something of the language of the client; between them they create a series of texts that are necessarily imperfect translation of the client's story into legal terms, *and in doing so they also create something new, a discourse in which this story, and others, can have meaning and force of a different kind: the meaning and force of law.*

This passage describes the process of integrating a client's story into the law. We can see that his story is not literally transported but is *transformed*. The reason it is transformed is that otherwise in a literal sense it would not have been effectively intelligible to either the lawyer or other competent jurists such as a judge (because the legal language practice differs from ordinary language practice). However, in her work the translator-lawyer has to be responsive to the client's understanding of his problem as well, for otherwise he would not know what is going on. Hence the lawyer has to work together with her client to create something new, a new story that is at once faithful to the client's story and intelligible in a legal sense. When this happens in the manner White describes, the result is that the client and the lawyer are able

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<sup>260</sup> WHITE, J.B. 1990, p. 260 – 262. (emphasis mine)

to talk to each other about the client's problem more or less intelligibly. In other words, if all goes well the client and his lawyer have taught each other something and can now talk intelligibly about the client's story in legal terms. This does not mean that the client has become as competent in law as the lawyer is, but he does know enough to understand some of the legal ramifications of his problem or at least the legal questions it entails, which can then be further discussed by different lawyers or resolved by a judge.

White's approach to translation shows that it is not the *transportation* but the *transformation* of the client's story into a mutually understandable legal story that is required for intelligible communication to occur across different language practices. Following this insight let us see what this model of transformation might look like in conversations between persons who employ different legal language practices, such as occurred in the *Pretty* case. For this I borrow from a study by Claude-Armand Sheppard and focus on the problems of drafting and translating federal statutes into the two official legal languages of Canada, that is, French civil law (in Quebec) and English common law (in the rest of the country).<sup>261</sup>

Federal statutes in Canada are published in both French and English. This implies that a law is either drafted in both languages *or* first drafted in one language and then translated into the other. Canada does the latter. According to Sheppard's study there is no simultaneous drafting in both languages (at least not in 1971 when his book was published).<sup>262</sup> What happens is that the statutes are first drafted in English and then translated into French. However, the study notes, the process of translating the law into French is problematic. For example, the Canadian translators have to deal with two different languages, both of which have adopted words and concepts from languages used outside of Canada. Canadian French, for instance, has adopted not only French but also American terms, and a mixture of American and British English has inspired to some extent the vocabulary of Canadian English.<sup>263</sup> What is more, Canada has to deal with two different legal systems, civil law and common law, in which some technical terms found in one system are not present in the other. Moreover, sometimes terms that are present in both systems do not express the same legal meaning.<sup>264</sup> We know by now that more than differences in terms undermines the

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<sup>261</sup> SHEPPARD, C.-A. 1971. *The Law of Languages in Canada; Studies of the Royal Commission on Bilingualism and Biculturalism*. Ottawa, Information Canada.

<sup>262</sup> SHEPPARD, C.-A. 1971, p. 111.

<sup>263</sup> SHEPPARD, C.-A. 1971, p. 113.

<sup>264</sup> SHEPPARD, C.-A. 1971, p. 113.

intelligibility of a particular translation, for terms pose only a surface problem. The real problem is the lack of a shared legal language practice. Indeed, as Sheppard notes, in the words of Adjutor Rivard:<sup>265</sup>

The way an Englishman likes to develop an idea bears scarcely any resemblance to the way a Frenchman would do it. The mentality, turn of mind and method are different. One may thoroughly grasp the idea of a law as expressed in one language, and yet be unable to translate it properly into the other. Unless the two languages have common genius and the intellectual processes of both peoples are identical, any attempt at translation is in vain if it is not preceded by a complete assimilation of the legal idea to be “transplanted.” And that will necessarily involve *fundamental modifications, the development of new insights, the organization of both the whole and the parts along different lines – in fact a new concept of the law with all the changes necessary to conform to a different way of thinking, doing and speaking*. Any other method of borrowing will lead to deplorable consequences.

In the previous chapter we saw that the lack of a shared legal language practice results in the loss of effective legal understanding between the participants in a conversation and hence the quality of that conversation is fundamentally undermined. Recall that, from the French civil law perspective, the official French- or English-language version of the *Pretty* case was not effective and that, from the multi-cultural European perspective, the French rendition of this case was superficial as well. Exactly the same result is found in the translation of Canadian statutory law that is drafted in English and then translated into French. Sheppard writes: “Anyone who has examined the French text of any federal statute, even in the most perfunctory manner, has become painfully aware not so much of grammatical errors as of the totally non-Latin and non-idiomatic use of language. In fact, the French text is frequently almost incomprehensible to a French lawyer.”<sup>266</sup>

To improve the quality of translation, Rivard suggests (and I repeat): “fundamental modification, the development of new insights, the organization of both the whole and the

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<sup>265</sup> SHEPPARD, C.-A. 1971, p. 114. (emphasis mine)

<sup>266</sup> SHEPPARD, C.-A. 1971, p. 114.

parts along different lines – in fact a new concept of the law with all the changes necessary to conform to a different way of thinking, doing and speaking.” This suggestion is in line with the view that translation requires a particular *transformation*, rather than a *transportation*, of our understanding of something. Applied to the Canadian situation this means that a law that is originally drafted in English must be composed in a new way, one that reflects the English understanding of law but at the same time is compatible with the French. This transformation demands the skills of a draftsman.<sup>267</sup> Let me explain.

A draftsman is someone who creates something new, such as a new legal text, out of an initial idea, such as a policy idea. As we know, a policy cannot literally be copied into a text, and therefore it must be transformed so that it will be compatible with the existing understanding of the law and at the same time remain faithful to the policy idea. Sheppard’s study describes the work of a draftsman as follows:<sup>268</sup>

The draftsman of a statute must first of all understand the legislative policy which the statute is intended to express. He must examine critically, as a lawyer, the policy which he is to draft into a legislative enactment. He may have to round out that policy and supply a multitude of details since the legislative proposal he receives is in the form of a broad statement. Some of these details and refinements of policy appear only while the statute is actually being drafted. In drafting the statute, the draftsman must consider it in relation to other statutes and the law generally. Where it happens that more than one government department may be interested in a proposed piece of legislation, the draftsman brings together officials from these various departments, and the initial decisions as to the policy of the act may be altered as a result. Sometimes the legislative proposal has not been properly prepared by the departments concerned, and the draftsman must join with the departments in policy discussions. He sometimes has to elicit decisions on policy or to prepare alternative drafts. In order to understand the legislative proposal fully, he must familiarize himself with its subject-matter, with the legislative problems involved, and with the proposed

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<sup>267</sup> This idea is generally inspired by J. B. White’s book *Justice as Translation* (1990). Here in particular I follow White’s suggestion that the translator is doing work that is similar to the work of a draftsman. See: WHITE, J. B. 1990, p. 241 – 243.

<sup>268</sup> SHEPPARD, C.-A. 1971, p. 111 – 112.

solution. Further conferences with the sponsoring department may become necessary for this purpose. Once he truly understands what is expected, he must then plan the kinds of provisions the statute will have to include. This will entail further discussions with the sponsoring department, as a result of which further changes may be made. Finally he is ready to draft. Once he has completed his draft, it must be revised, examined for imperfections, commented upon, and considered and discussed with the sponsoring department until both the sponsors and the draftsman are satisfied with the statute's form and content. It is then submitted to the deputy minister or minister and further conferences take place, after which further change may also be required. In the process, the draftsman, having participated in all the deliberations culminating in the production of a statute, will have become somewhat imbued with the spirit in which the original policy and its subsequent modifications were conceived, and should therefore be more thoroughly acquainted with it than would someone who merely reads this finished product.

Recall that in the second chapter I described my lesson in the Italian coffee language (or culture), which both broadened my original understanding of coffee and challenged it, for instance, because I was confronted with a way of doing things with coffee that seemed incompatible with my original practice. The description of the work of a draftsman suggests a similar broadening of understanding between the draftsman and policymakers. For instance, the draftsman learns about the policy from the departments, and the people in the departments learn about the law from the draftsman. Moreover, the respective understandings of the draftsman and the policymakers are challenged in the process. We can see that choices have to be made because apparently the ways in which the policy is defined and the ways in which the law works are not in agreement. Let's say there are legislative problems that the policymakers did not anticipate. In this case the draftsman must transform the policymakers' proposal so that it is not incompatible with the law but still reflects the policy idea.

In this transformation process the draftsman creates a new language practice. For this he goes back and forth between the two different language practices. The result is a third practice of language that is socially constituted and different from the original two. This new practice allows for a mutually effective understanding of the new piece of legislation. That is,

those who participated in this transformation share a fuller and more effective understanding of the law than does someone who did not participate and only reads the final text.

This transformation process is the model for a potential resolution of the problems with legal understanding in transnational communication. In the above description, for instance, we could replace the draftsman with a competent jurist embedded within the French civil law community. And, to stay with *Pretty*, we could replace the policymakers or departments with jurists working for the Court. The task of the French jurist, as a draftsman, is to transform the Court's original understanding of law into a new understanding compatible with the French civil law community. This means that the jurist will have to broaden her understanding of law by learning how the Court practices common-law legal reasoning. However, even with such knowledge she cannot literally transport this understanding into her own legal culture. She must transform what she has learned into something new. By going back and forth between her own legal culture and that of the Court, and between the English and French languages, the jurist can, ideally speaking, create a new, socially constituted legal-language practice in French or English that differs from both the Court's and her own. This practice will allow her and the Court's participants to communicate with each other more or less effectively across their own legal cultures.

The actual result of the transformation process in this example I will not present here, mainly because I am not a competent jurist and so cannot fully participate myself. But it would be interesting to see what a competent French jurist endowed with the task of integrating the *Pretty* case into the French legal community would do, in other words, what the result would be if she were asked to transform the Court's decision, with the help of others, into a new type of understanding, one that is both faithful to the original and compatible with the French legal culture. This question I leave for future research. In this work I hope I have established a sense of the problems present in every multicultural legal conversation and an idea about how they might best be addressed.<sup>269</sup>

Sheppard notes that the drafting process is very demanding. It is time-consuming and expensive and requires intensive interaction between different parties. This is probably why in Canada laws are drafted in English and then translated into French. But, as in Canada, Europe, or in any other place where there is communication across legal languages, the quality of the communication depends on the collective undertaking of the transformation process. This

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<sup>269</sup> I am thankful to J. B. White for suggesting this final remark.



means that the participants must work as draftsmen, not just good lawyers, legal scholars, or translators. Otherwise their understanding of law will remain superficial, exactly what happened, as we have seen, in the French rendition of the *Pretty* case.<sup>270</sup>

### 3. Final Words

In this work I have discussed the nature of legal understanding, the quality of communication in law, and the difficulties of legal translation. All three subjects are important and could be dealt with on their own, as well as more extensively. I have brought them together to discuss their inherent connection. This connection lies in our ability to say or do things more or less in agreement with others, what I call competency in language. This competency forms the necessary (though not sufficient) condition for what I call effective understanding. I have argued that without this competency our understanding will remain superficial, collapse into a regress of interpretations, and further break down into a paradox of meaning. This is not effective.

The connection between effective legal understanding and the quality of communication in law is as follows. In certain conversations in law the participants' competency in legal language is undermined. This means that they cannot act in full agreement with each other (or in any agreement at all). This is not because they are incapable of doing or saying things in agreement with others. Rather, their legal conversations do not work well together because they lack a shared, socially constituted practice of legal language, that is, they do not share competency in law. This poses a fundamental threat to the quality of communication in law. The risk is that the effective legal understanding of the participants will be lost in certain conversations because they cannot work with each other; hence, their conversations remain superficial. I have demonstrated that this problem arises in instances of transnational communication in law.

The connection among effective legal understanding, the quality of communication in law, and the process of translation is as follows. We have seen that in certain conversations the effectiveness of legal understanding is undermined, which also undermines the quality of

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<sup>270</sup> Cf. WHITE, J. B. 2001. How Should We Talk About Religion? Inwardness, Particularity, and Translation. *Erasmus Institute*, p. 1 – 28. This is a fine example of the complex and time-consuming process of transformation as a form of translation.

the communication. According to a simplistic view of translation, the quality of communication can be improved by transporting legal understanding from one context to another. But we have seen that the requisite conditions for effective legal understanding cannot be transported effectively. In other words, the participants' competency in law cannot be transported without being fundamentally undermined. I discussed a more complex view of translation that does not necessarily undermine the participants' competency in law and hence can enhance the quality of transnational conversations. This is the view of translation as a process of transformation. In this process a new, shared competency in law is created by the participants.

This last point, about creating a shared competency in law or a socially constituted language practice, highlights one of the central themes of this work, the theme of legal language *learning*. At the beginning of this work I discussed an example of Augustine's view of language learning: the situation of a child learning a language from his parents or teachers. The language, or language practices, learned by the child is already more or less effectively understood by the parent or teacher. In other words, the child is initiated into the rich and particular experience of the grownup (much as I learned from my parents a particular way of talking about and drinking coffee). But the learning situation is different when the participants in a particular conversation are already competent in language. In this sense they are not like a child learning a language from scratch. What is more, the new language practice the participants are learning does not already exist. There are no parents or teachers in this respect. The participants have to be learners and teachers at the same time. They have to learn about other participants' language practices in order to broaden their own understanding. Or they have to teach other participants about their own language practices so that the latter can broaden theirs. A large part of this work presents examples of this learning and teaching process, that is, the process of broadening our understanding. For example, I discussed my full and effective coffee experience, the French and English approaches to contractual interpretation, and two different ways to understand the *Pretty* case. These examples were meant to increase our ability to effectively understand another culture or language practice, at least to some extent. Of course we cannot become fully competent on the basis of the described practices alone, but the examples provide for more than a superficial understanding (because I did more than just describe certain facts or rules). The most important point is that my effective understanding of coffee or the respective legal cultures I discussed were

challenged. We have seen that the French way of interpreting contracts does not fully resonate with the English way and vice versa. It could also be that my experience of coffee challenged my readers' experiences. Or they may have found the French rendition of the *Pretty* case problematic. This insight into the place where particular language practices meet, or where our respective competency in language runs out, is perhaps the most important aspect of this work. It is the only meaningful basis on which competent language users can begin to communicate without a loss of effectiveness. It is in the dynamic between competent participants who know about each other's understanding that a shared understanding can be created. It is in this sense that this work can be of assistance to competent jurists working within the European Union or any other transnational legal system.

What is more, this work tells us something about the understanding of a legal system regardless of the legal culture in which it is embedded. That is, effective understanding of law is manifested in a socially constituted practice of legal language. Every legal system depends for its intelligibility on such a practice, which is shared by its jurists. This insight is relevant not only to legal theory but also to legal education. It follows, for instance, that in civil law countries we cannot effectively teach students about rules if we do not also show the students how to use them. Without this, their understanding of law will be superficial.

This work also shows how comparative legal research should be done (i.e., how to understand a particular legal system in an effective way) and how such research can be used intelligibly (i.e., not by simply transporting legal understanding from one context to another). It also shows how translation of law should be done and that the problems with translation arise not just at the level of natural language or legal concepts but also at the deeper and more complex level of legal culture.



# Appendix 1 – Pretty v. The United Kingdom

## CASE OF PRETTY V. THE UNITED KINGDOM

*(Application no. 2346/02)*

JUDGMENT

STRASBOURG

29 April 2002

**FINAL**

*29/07/2002*

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

**In the case of Pretty v. the United Kingdom,**  
The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,

Sir Nicolas BRATZA,

Mrs E. PALM,

Mr J. MAKARCZYK,

Mr M. FISCHBACH,

Mr J. CASADEVALL,

Mr S. PAVLOVSKI, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 19 March and 25 April 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case originated in an application (no. 2346/02) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a United Kingdom national, Mrs Diane Pretty (“the applicant”), on 21 December 2001.

2. The applicant, who had been granted legal aid, was represented before the Court by Ms S. Chakrabarti, a lawyer practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Mr C. Whomersley of the Foreign and Commonwealth Office, London.

3. The applicant, who is paralysed and suffering from a degenerative and incurable illness, alleged that the refusal of the Director of Public Prosecutions to grant an immunity from prosecution to her husband if he assisted her in committing suicide and the prohibition in domestic law on assisting suicide infringed her rights under Articles 2, 3, 8, 9 and 14 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention), was constituted as provided in Rule 26 § 1.

5. The applicant and the Government each filed observations on the admissibility and merits (Rule 54 § 3 (b)). In addition, third-party comments were received from the Voluntary

Euthanasia Society and the Catholic Bishops' Conference of England and Wales which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3). The applicant replied to those comments (Rule 61 § 5).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 March 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr C. WHOMERSLEY, *Agent*,

Mr J. CROW,

Mr D. PERRY, *Counsel*,

Mr A. BACARESE,

Ms R. COX, *Advisers*;

(b) *for the applicant*

Mr P. HAVERS QC,

Ms F. MORRIS, *Counsel*,

Mr A. GASK, *Trainee solicitor*.

The applicant and her husband, Mr B. Pretty, were also present.

The Court heard addresses by Mr Havers and Mr Crow.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a 43-year-old woman. She resides with her husband of twenty-five years, their daughter and granddaughter. The applicant suffers from motor neurone disease (MND). This is a progressive neuro-degenerative disease of motor cells within the central nervous system. The disease is associated with progressive muscle weakness affecting the

voluntary muscles of the body. As a result of the progression of the disease, severe weakness of the arms and legs and the muscles involved in the control of breathing are affected. Death usually occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. No treatment can prevent the progression of the disease.

8. The applicant's condition has deteriorated rapidly since MND was diagnosed in November 1999. The disease is now at an advanced stage. She is essentially paralysed from the neck down, has virtually no decipherable speech and is fed through a tube. Her life expectancy is very poor, measurable only in weeks or months. However, her intellect and capacity to make decisions are unimpaired. The final stages of the disease are exceedingly distressing and undignified. As she is frightened and distressed at the suffering and indignity that she will endure if the disease runs its course, she very strongly wishes to be able to control how and when she dies and thereby be spared that suffering and indignity.

9. Although it is not a crime to commit suicide under English law, the applicant is prevented by her disease from taking such a step without assistance. It is however a crime to assist another to commit suicide (section 2(1) of the Suicide Act 1961).

10. Intending that she might commit suicide with the assistance of her husband, the applicant's solicitor asked the Director of Public Prosecutions (DPP), in a letter dated 27 July 2001 written on her behalf, to give an undertaking not to prosecute the applicant's husband should he assist her to commit suicide in accordance with her wishes.

11. In a letter dated 8 August 2001, the DPP refused to give the undertaking:

“Successive Directors – and Attorneys General – have explained that they will not grant immunities that condone, require, or purport to authorise or permit the future commission of any criminal offence, no matter how exceptional the circumstances. ...”

12. On 20 August 2001 the applicant applied for judicial review of the DPP's decision and the following relief:

- an order quashing the DPP's decision of 8 August 2001;
- a declaration that the decision was unlawful or that the DPP would not be acting unlawfully in giving the undertaking sought;



- a mandatory order requiring the DPP to give the undertaking sought; or alternatively
- a declaration that section 2 of the Suicide Act 1961 was incompatible with Articles 2, 3, 8, 9 and 14 of the Convention.

13. On 17 October 2001 the Divisional Court refused the application, holding that the DPP did not have the power to give the undertaking not to prosecute and that section 2(1) of the Suicide Act 1961 was not incompatible with the Convention.

14. The applicant appealed to the House of Lords. They dismissed her appeal on 29 November 2001 and upheld the judgment of the Divisional Court. In giving the leading judgment in *The Queen on the Application of Mrs Dianne Pretty (Appellant) v. Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)*, Lord Bingham of Cornhill held:

“1. No one of ordinary sensitivity could be unmoved by the frightening ordeal which faces Mrs Dianne Pretty, the appellant. She suffers from motor neurone disease, a progressive degenerative illness from which she has no hope of recovery. She has only a short time to live and faces the prospect of a humiliating and distressing death. She is mentally alert and would like to be able to take steps to bring her life to a peaceful end at a time of her choosing. But her physical incapacity is now such that she can no longer, without help, take her own life. With the support of her family, she wishes to enlist the help of her husband to that end. He himself is willing to give such help, but only if he can be sure that he will not be prosecuted under section 2(1) of the Suicide Act 1961 for aiding and abetting her suicide. Asked to undertake that he would not under section 2(4) of the Act consent to the prosecution of Mr Pretty under section 2(1) if Mr Pretty were to assist his wife to commit suicide, the Director of Public Prosecutions has refused to give such an undertaking. On Mrs Pretty's application for judicial review of that refusal, the Queen's Bench Divisional Court upheld the Director's decision and refused relief. Mrs Pretty claims that she has a right to her husband's assistance in committing suicide and that section 2 of the 1961 Act, if it prohibits his helping and prevents the Director undertaking not to prosecute if he does, is incompatible with the European Convention on Human Rights. It is on the Convention, brought into force in this country by the Human Rights Act 1998, that Mrs Pretty's claim to relief depends. It is accepted by her counsel on her behalf that under the common law of England she could not have hoped to succeed.

2. In discharging the judicial functions of the House, the appellate committee has the duty of resolving issues of law properly brought before it, as the issues in this case have been. The committee is not a legislative body. Nor is it entitled or fitted to act as a moral or ethical arbiter. It is important to emphasise the nature and limits of the committee's role, since the wider issues raised by this appeal are

the subject of profound and fully justified concern to very many people. The questions whether the terminally ill, or others, should be free to seek assistance in taking their own lives, and if so in what circumstances and subject to what safeguards, are of great social, ethical and religious significance and are questions on which widely differing beliefs and views are held, often strongly. Materials laid before the committee (with its leave) express some of those views; many others have been expressed in the news media, professional journals and elsewhere. The task of the committee in this appeal is not to weigh or evaluate or reflect those beliefs and views or give effect to its own but to ascertain and apply the law of the land as it is now understood to be.

*Article 2 of the Convention*

3. Article 2 of the Convention provides: ...

The Article is to be read in conjunction with Articles 1 and 2 of the Sixth Protocol, which are among the Convention rights protected by the 1998 Act (see section 1(1)(c)) and which abolished the death penalty in time of peace.

4. On behalf of Mrs Pretty it is submitted that Article 2 protects not life itself but the right to life. The purpose of the Article is to protect individuals from third parties (the State and public authorities). But the Article recognises that it is for the individual to choose whether or not to live and so protects the individual's right to self-determination in relation to issues of life and death. Thus a person may refuse life-saving or life-prolonging medical treatment, and may lawfully choose to commit suicide. The Article acknowledges that right of the individual. While most people want to live, some want to die, and the Article protects both rights. The right to die is not the antithesis of the right to life but the corollary of it, and the State has a positive obligation to protect both.

5. The Secretary of State has advanced a number of unanswerable objections to this argument which were rightly upheld by the Divisional Court. The starting point must be the language of the Article. The thrust of this is to reflect the sanctity which, particularly in western eyes, attaches to life. The Article protects the right to life and prevents the deliberate taking of life save in very narrowly defined circumstances. An Article with that effect cannot be interpreted as conferring a right to die or to enlist the aid of another in bringing about one's own death. In his argument for Mrs Pretty, Mr Havers QC was at pains to limit his argument to assisted suicide, accepting that the right claimed could not extend to cover an intentional consensual killing (usually described in this context as 'voluntary euthanasia', but regarded in English law as murder). The right claimed would be sufficient to cover Mrs Pretty's case and counsel's unwillingness to go further is understandable. But there is in logic no justification for drawing a line at this point. If Article 2 does confer a right to self-determination in relation to life and death, and if a person were so gravely disabled as to be unable to perform any act

whatever to cause his or her own death, it would necessarily follow in logic that such a person would have a right to be killed at the hands of a third party without giving any help to the third party and the State would be in breach of the Convention if it were to interfere with the exercise of that right. No such right can possibly be derived from an Article having the object already defined.

6. It is true that some of the guaranteed Convention rights have been interpreted as conferring rights not to do that which is the antithesis of what there is an express right to do. Article 11, for example, confers a right not to join an association (*Young, James and Webster v. United Kingdom* (1981) 4 EHRR 38), Article 9 embraces a right to freedom from any compulsion to express thoughts or change an opinion or divulge convictions (Clayton and Tomlinson, *The Law of Human Rights* (2000), p. 974, para. 14.49) and I would for my part be inclined to infer that Article 12 confers a right not to marry (but see Clayton and Tomlinson, *ibid.*, p. 913, para. 13.76). It cannot however be suggested (to take some obvious examples) that Articles 3, 4, 5 and 6 confer an implied right to do or experience the opposite of that which the Articles guarantee. Whatever the benefits which, in the view of many, attach to voluntary euthanasia, suicide, physician-assisted suicide and suicide assisted without the intervention of a physician, these are not benefits which derive protection from an Article framed to protect the sanctity of life.

7. There is no Convention authority to support Mrs Pretty's argument. To the extent that there is any relevant authority it is adverse to her. In *Osman v. United Kingdom* (1998) 29 EHRR 245 the applicants complained of a failure by the United Kingdom to protect the right to life of the second applicant and his deceased father. At p. 305 the court said:

'115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life

can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.’

The context of that case was very different. Neither the second applicant nor his father had had any wish to die. But the court's approach to Article 2 was entirely consistent with the interpretation I have put upon it.

8. *X v. Germany* (1984) 7 EHRR 152 and *Keenan v. United Kingdom* (App. No. 27229/95; 3 April 2001, unreported) were also decided in a factual context very different from the present. X, while in prison, had gone on hunger strike and had been forcibly fed by the prison authorities. His complaint was of maltreatment contrary to Article 3 of the Convention, considered below. The complaint was rejected and in the course of its reasoning the commission held (at pp. 153-154):

‘In the opinion of the Commission forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by Art. 3 of the Convention. Under the Convention the High Contracting Parties are, however, also obliged to secure to everyone the right to life as set out in Art. 2. Such an obligation should in certain circumstances call for positive action on the part of the Contracting Parties, in particular an active measure to save lives when the authorities have taken the person in question into their custody. When, as in the present case, a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's obligation under Art. 2 of the Convention – a conflict which is not solved by the Convention itself. The Commission recalls that under German law this conflict has been solved in that it is possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced feeding is even obligatory if an obvious danger for the individual's life exists. The assessment of the above-mentioned conditions is left for the doctor in charge but an eventual decision to force-feed may only be carried out after judicial permission has been obtained ... The Commission is satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respect for the applicant's will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant's human dignity.’

In *Keenan* a young prisoner had committed suicide and his mother complained of a failure by the prison authorities to protect his life. In the course of its judgment rejecting the complaint under this Article the court said (at p. 29, para. 90):

'In the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies ... It may be noted that this need for scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on prison authorities in respect of those detained in their custody.'

Both these cases can be distinguished, since the conduct complained of took place when the victim was in the custody of the State, which accordingly had a special responsibility for the victim's welfare. It may readily be accepted that the obligation of the State to safeguard the life of a potential victim is enhanced when the latter is in the custody of the State. To that extent these two cases are different from the present, since Mrs Pretty is not in the custody of the State. Thus the State's positive obligation to protect the life of Mrs Pretty is weaker than in such cases. It would however be a very large, and in my view quite impermissible, step to proceed from acceptance of that proposition to acceptance of the assertion that the State has a duty to recognise a right for Mrs Pretty to be assisted to take her own life.

9. In the Convention field the authority of domestic decisions is necessarily limited and, as already noted, Mrs Pretty bases her case on the Convention. But it is worthy of note that her argument is inconsistent with two principles deeply embedded in English law. The first is a distinction between the taking of one's own life by one's own act and the taking of life through the intervention or with the help of a third party. The former has been permissible since suicide ceased to be a crime in 1961. The latter has continued to be proscribed. The distinction was very clearly expressed by Hoffmann LJ in *Airedale NHS Trust v. Bland* [1993] AC 789 at 831:

'No one in this case is suggesting that Anthony Bland should be given a lethal injection. But there is concern about ceasing to supply food as against, for example, ceasing to treat an infection with antibiotics. Is there any real distinction? In order to come to terms with our intuitive feelings about whether there is a distinction, I must start by considering why most of us would be appalled if he was given a lethal injection. It is, I think, connected with our view that the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is. It follows that, even if we think Anthony Bland would have consented, we would not be entitled to end his life by a lethal injection.'

The second distinction is between the cessation of life-saving or life-prolonging treatment on the one hand and the taking of action lacking medical, therapeutic or palliative justification but intended solely to terminate life on the other. This distinction provided the rationale of the decisions in *Bland*. It

was very succinctly expressed in the Court of Appeal in *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, in which Lord Donaldson of Lynton MR said, at p. 46:

'What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which as a side effect will render death more or less likely. This is not a matter of semantics. It is fundamental. At the other end of the age spectrum, the use of drugs to reduce pain will often be fully justified, notwithstanding that this will hasten the moment of death. What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so.'

Similar observations were made by Balcombe LJ at p. 51 and Taylor LJ at p. 53. While these distinctions are in no way binding on the European Court of Human Rights there is nothing to suggest that they are inconsistent with the jurisprudence which has grown up around the Convention. It is not enough for Mrs Pretty to show that the United Kingdom would not be acting inconsistently with the Convention if it were to permit assisted suicide; she must go further and establish that the United Kingdom is in breach of the Convention by failing to permit it or would be in breach of the Convention if it did not permit it. Such a contention is in my opinion untenable, as the Divisional Court rightly held.

#### *Article 3 of the Convention*

10. Article 3 of the Convention provides: ...

This is one of the Articles from which a member State may not derogate even in time of war or other public emergency threatening the life of the nation: see Article 15. I shall for convenience use the expression 'proscribed treatment' to mean 'inhuman or degrading treatment' as that expression is used in the Convention.

11. In brief summary the argument for Mrs Pretty proceeded by these steps.

(1) Member States have an absolute and unqualified obligation not to inflict the proscribed treatment and also to take positive action to prevent the subjection of individuals to such treatment: *A. v. United Kingdom* (1998) 27 EHRR 611; *Z v. United Kingdom* [2001] 2 FLR 612 at 631, para. 73.

(2) Suffering attributable to the progression of a disease may amount to such treatment if the State can prevent or ameliorate such suffering and does not do so: *D. v. United Kingdom* (1997) 24 EHRR 423, at pp. 446-449, paras. 46-54.

(3) In denying Mrs Pretty the opportunity to bring her suffering to an end the United Kingdom (by the Director) will subject her to the proscribed treatment. The State can spare Mrs Pretty the suffering which she will otherwise endure since, if the Director undertakes not to give his consent to prosecution, Mr Pretty will assist his wife to commit suicide and so she will be spared much suffering.

(4) Since, as the Divisional Court held, it is open to the United Kingdom under the Convention to refrain from prohibiting assisted suicide, the Director can give the undertaking sought without breaking the United Kingdom's obligations under the Convention.

(5) If the Director may not give the undertaking, section 2 of the 1961 Act is incompatible with the Convention.

12. For the Secretary of State it was submitted that in the present case Article 3 of the Convention is not engaged at all but that if any of the rights protected by that Article are engaged they do not include a right to die. In support of the first of these submissions it was argued that there is in the present case no breach of the prohibition in the Article. The negative prohibition in the Article is absolute and unqualified but the positive obligations which flow from it are not absolute: see *Osman v. United Kingdom*, above; *Rees v. United Kingdom* (1986) 9 EHRR 56. While States may be obliged to protect the life and health of a person in custody (as in the case of *Keenan*, above), and to ensure that individuals are not subjected to proscribed treatment at the hands of private individuals other than State agents (as in *A. v. United Kingdom*, above), and the State may not take direct action in relation to an individual which would inevitably involve the inflicting of proscribed treatment upon him (*D. v. United Kingdom* (1997) 24 EHRR 423), none of these obligations can be invoked by Mrs Pretty in the present case. In support of the second submission it was argued that, far from suggesting that the State is under a duty to provide medical care to ease her condition and prolong her life, Mrs Pretty is arguing that the State is under a legal obligation to sanction a lawful means for terminating her life. There is nothing, either in the wording of the Convention or the Strasbourg jurisprudence, to suggest that any such duty exists by virtue of Article 3. The decision how far the State should go in discharge of its positive obligation to protect individuals from proscribed treatment is one for member States, taking account of all relevant interests and considerations; such a decision, while not immune from review, must be accorded respect. The United Kingdom has reviewed these issues in depth and resolved to maintain the present position.

13. Article 3 enshrines one of the fundamental values of democratic societies and its prohibition of the proscribed treatment is absolute: *D. v. United Kingdom* (1997) 24 EHRR 423 at p. 447, para. 47. Article 3 is, as I think, complementary to Article 2. As Article 2 requires States to respect and safeguard the lives of individuals within their jurisdiction, so Article 3 obliges them to respect the physical and

human integrity of such individuals. There is in my opinion nothing in Article 3 which bears on an individual's right to live or to choose not to live. That is not its sphere of application; indeed, as is clear from *X v. Germany* above, a State may on occasion be justified in inflicting treatment which would otherwise be in breach of Article 3 in order to serve the ends of Article 2. Moreover, the absolute and unqualified prohibition on a member State inflicting the proscribed treatment requires that 'treatment' should not be given an unrestricted or extravagant meaning. It cannot, in my opinion, be plausibly suggested that the Director or any other agent of the United Kingdom is inflicting the proscribed treatment on Mrs Pretty, whose suffering derives from her cruel disease.

14. The authority most helpful to Mrs Pretty is *D. v. United Kingdom* (1997) 24 EHRR 423, which concerned the removal to St Kitts of a man in the later stages of AIDS. The Convention challenge was to implementation of the removal decision having regard to the applicant's medical condition, the absence of facilities to provide adequate treatment, care or support in St Kitts and the disruption of a regime in the United Kingdom which had afforded him sophisticated treatment and medication in a compassionate environment. It was held that implementation of the decision to remove the applicant to St Kitts would amount in the circumstances to inhuman treatment by the United Kingdom in violation of Article 3. In that case the State was proposing to take direct action against the applicant, the inevitable effect of which would be a severe increase in his suffering and a shortening of his life. The proposed deportation could fairly be regarded as 'treatment'. An analogy might be found in the present case if a public official had forbidden the provision to Mrs Pretty of pain-killing or palliative drugs. But here the proscribed treatment is said to be the Director's refusal of proleptic immunity from prosecution to Mr Pretty if he commits a crime. By no legitimate process of interpretation can that refusal be held to fall within the negative prohibition of Article 3.

15. If it be assumed that Article 3 is capable of being applied at all to a case such as the present, and also that on the facts there is no arguable breach of the negative prohibition in the Article, the question arises whether the United Kingdom (by the Director) is in breach of its positive obligation to take action to prevent the subjection of individuals to proscribed treatment. In this context, the obligation of the State is not absolute and unqualified. So much appears from the passage quoted in paragraph 7 above from the judgment of the European Court of Human Rights in *Osman v. United Kingdom*. The same principle was acknowledged by the court in *Rees v. United Kingdom* (1986) 9 EHRR 56 where it said in para. 37 of its judgment at pp. 63-64:

'37. As the Court pointed out in its above-mentioned *Abdulaziz, Cabales and Balkandali* judgment the notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case.



These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not – or does not yet – exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention. In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to “interferences” with the right protected by the first paragraph – in other words is concerned with the negative obligations flowing therefrom.'

That was an Article 8 case, dealing with a very different subject matter from the present, but the court's observations were of more general import. It stands to reason that while States may be absolutely forbidden to inflict the proscribed treatment on individuals within their jurisdictions, the steps appropriate or necessary to discharge a positive obligation will be more judgmental, more prone to variation from State to State, more dependent on the opinions and beliefs of the people and less susceptible to any universal injunction. For reasons more fully given in paragraphs 27 and 28 below, it could not in my view be said that the United Kingdom is under a positive obligation to ensure that a competent, terminally ill, person who wishes but is unable to take his or her own life should be entitled to seek the assistance of another without that other being exposed to the risk of prosecution.

#### *Article 8 of the Convention*

16. Article 8 of the Convention provides: ...

17. Counsel for Mrs Pretty submitted that this Article conferred a right to self-determination: see *X and Y v. Netherlands* (1985) 8 EHRR 235; *Rodriguez v. Attorney General of Canada* [1994] 2 LRC 136; *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147. This right embraces a right to choose when and how to die so that suffering and indignity can be avoided. Section 2(1) of the 1961 Act interferes with this right of self-determination: it is therefore for the United Kingdom to show that the interference meets the Convention tests of legality, necessity, responsiveness to pressing social need and proportionality: see *R. v. A. (No. 2)* [2001] 2 WLR 1546; *Johansen v. Norway* (1996) 23 EHRR 33; *R. (P) v. Secretary of State for the Home Department* [2001] 1 WLR 2002. Where the

interference is with an intimate part of an individual's private life, there must be particularly serious reasons to justify the interference: *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493 at p. 530, para. 89. The court must in this case rule whether it could be other than disproportionate for the Director to refuse to give the undertaking sought and, in the case of the Secretary of State, whether the interference with Mrs Pretty's right to self-determination is proportionate to whatever legitimate aim the prohibition on assisted suicide pursues. Counsel placed particular reliance on certain features of Mrs Pretty's case: her mental competence, the frightening prospect which faces her, her willingness to commit suicide if she were able, the imminence of death, the absence of harm to anyone else, the absence of far-reaching implications if her application were granted. Counsel suggested that the blanket prohibition in section 2(1), applied without taking account of particular cases, is wholly disproportionate, and the materials relied on do not justify it. Reference was made to *R. v. United Kingdom* (1983) 33 DR 270 and *Sanles v. Spain* [2001] EHRLR 348.

18. The Secretary of State questioned whether Mrs Pretty's rights under Article 8 were engaged at all, and gave a negative answer. He submitted that the right to private life under Article 8 relates to the manner in which a person conducts his life, not the manner in which he departs from it. Any attempt to base a right to die on Article 8 founders on exactly the same objection as the attempt based on Article 2, namely, that the alleged right would extinguish the very benefit on which it is supposedly based. Article 8 protects the physical, moral and psychological integrity of the individual, including rights over the individual's own body, but there is nothing to suggest that it confers a right to decide when or how to die. The Secretary of State also submitted that, if it were necessary to do so, section 2(1) of the 1961 Act and the current application of it could be fully justified on the merits. He referred to the margin of judgment accorded to member States, the consideration which has been given to these questions in the United Kingdom and the broad consensus among Convention countries. Attention was drawn to *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39 in which the criminalisation of consensual acts of injury was held to be justified; it was suggested that the justification for criminalising acts of consensual killing or assisted suicide must be even stronger.

19. The most detailed and erudite discussion known to me of the issues in the present appeal is to be found in the judgments of the Supreme Court of Canada in *Rodriguez v. Attorney General of Canada* [1994] 2 LRC 136. The appellant in that case suffered from a disease legally indistinguishable from that which afflicts Mrs Pretty; she was similarly disabled; she sought an order which would allow a qualified medical practitioner to set up technological means by which she might, by her own hand but with that assistance from the practitioner, end her life at a time of her choosing. While suicide in Canada was not a crime, section 241(b) of the Criminal Code was in terms effectively identical to section 2(1) of the 1961 Act. The appellant based her claims on the Canadian Charter of Rights and Freedoms which, so far as relevant, included the following sections:

'(1) The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(7) Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(12) Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

(15) (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

The trial judge rejected Ms Rodriguez' claim, because (as his judgment was summarised at p. 144):

'It was the illness from which Ms Rodriguez suffers, not the State or the justice system, which has impeded her ability to act on her wishes with respect to the timing and manner of her death.'

He found no breach of section 12 and said:

'To interpret section 7 so as to include a constitutionally guaranteed right to take one's own life as an exercise in freedom of choice is inconsistent, in my opinion, with life, liberty and the security of the person.'

He also held that section 241 did not discriminate against the physically disabled.

20. The British Columbia Court of Appeal held by a majority (at p. 148) that whilst the operation of section 241 did deprive Ms Rodriguez of her section 7 right to the security of her person, it did not contravene the principles of fundamental justice. McEachern CJ, dissenting, held (at p. 146) that there was a prima facie violation of section 7 when the State imposed prohibitions that had the effect of prolonging the physical and psychological suffering of a person, and that any provision that imposed an indeterminate period of senseless physical and psychological suffering on someone who was shortly to die anyway could not conform with any principle of fundamental justice.

21. In the Supreme Court opinion was again divided. The judgment of the majority was given by Sopinka J, with La Forest, Gonthier, Iacobucci and Major JJ concurring. In the course of his judgment Sopinka J said (at p. 175):

'As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by governmental action. There is no doubt that the prohibition in section 241(b) will contribute to the appellant's distress if she is prevented from managing her death in the circumstances which she fears will occur.'

He continued (p. 175):

'I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person.'

He then continued (at pp. 177-178):

'There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these. The effect of the prohibition in section 241(b) is to prevent the appellant from having assistance to commit suicide when she is no longer able to do so on her own ... In my view, these considerations lead to the conclusion that the prohibition in section 241(b) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.'

He concluded (at p. 189) that:

'Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it can not be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society.'

With reference to section 1 of the Canadian Charter, Sopinka J said (at pp. 192-193):

'As I have sought to demonstrate in my discussion of section 7, this protection is grounded on a substantial consensus among western countries, medical organisations and our own Law Reform Commission that in order to effectively protect life and those who are vulnerable in society, a prohibition without exception on the giving of assistance to commit suicide is the best approach. Attempts to fine-tune this approach by creating exceptions have been unsatisfactory and have tended to support the theory of the "slippery slope". The formulation of safeguards to prevent excesses has been unsatisfactory and has failed to allay fears that a relaxation of the clear standard set by the law will undermine the protection of life and will lead to abuse of the exception.'

He rejected the appellant's claims under sections 12 and 15.

22. Lamer CJ dissented in favour of the appellant, but on grounds of discrimination under section 15 alone. McLachlin J (with whom L'Heureux-Dubé J concurred) found a violation not of section 15 but of section 7. She saw the case as one about the manner in which the State might limit the right of a person to make decisions about her body under section 7 of the charter (p. 194). At p. 195 she said:

'In the present case, Parliament has put into force a legislative scheme which does not bar suicide but criminalises the act of assisting suicide. The effect of this is to deny to some people the choice of ending their lives solely because they are physically unable to do so. This deprives Sue Rodriguez of her security of the person (the right to make decisions concerning her own body, which affect only her own body) in a way that offends the principles of fundamental justice, thereby violating section 7 of the Charter ... It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body.'

She held (p. 197) that

'it does not accord with the principles of fundamental justice that Sue Rodriguez be disallowed what is available to others merely because it is possible that other people, at some other time, may suffer, not what she seeks, but an act of killing without true consent.'

Cory J also dissented, agreeing with Lamer CJ and also McLachlin J.

23. It is evident that all save one of the judges of the Canadian Supreme Court were willing to recognise section 7 of the Canadian charter as conferring a right to personal autonomy extending even to decisions on life and death. Mrs Pretty understandably places reliance in particular on the judgment of McLachlin J, in which two other members of the court concurred. But a majority of the court regarded that right as outweighed on the facts by the principles of fundamental justice. The judgments were moreover directed to a provision with no close analogy in the European Convention. In the

European Convention the right to liberty and security of the person appears only in Article 5 § 1, on which no reliance is or could be placed in the present case. Article 8 contains no reference to personal liberty or security. It is directed to the protection of privacy, including the protection of physical and psychological integrity: *X and Y v. Netherlands*, above. But Article 8 is expressed in terms directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the Article has reference to the choice to live no longer.

24. There is no Strasbourg jurisprudence to support the contention of Mrs Pretty. In *R. v. United Kingdom* (1983) 33 DR 270 the applicant had been convicted and sentenced to imprisonment for aiding and abetting suicide and conspiring to do so. He complained that his conviction and sentence under section 2 of the 1961 Act constituted a violation of his right to respect for his private life under Article 8 and also his right to free expression under Article 10. In paragraph 13 of its decision the commission observed:

'The Commission does not consider that the activity for which the applicant was convicted, namely aiding and abetting suicide, can be described as falling into the sphere of his private life in the manner elaborated above. While it might be thought to touch directly on the private lives of those who sought to commit suicide, it does not follow that the applicant's rights to privacy are involved. On the contrary, the Commission is of the opinion that the acts of aiding, abetting, counselling or procuring suicide are excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life, as reflected in the criminal provisions of the 1961 Act.'

This somewhat tentative expression of view is of some assistance to Mrs Pretty, but with reference to the claim under Article 10 the commission continued (in para. 17 of its decision at p. 272):

'The Commission considers that, in the circumstances of the case, there has been an interference with the applicant's right to impart information. However, the Commission must take account of the State's legitimate interest in this area in taking measures to protect, against criminal behaviour, the life of its citizens particularly those who belong to especially vulnerable categories by reason of their age or infirmity. It recognises the right of the State under the Convention to guard against the inevitable criminal abuses that would occur, in the absence of legislation, against the aiding and abetting of suicide. The fact that in the present case the applicant and his associate appear to have been well intentioned does not, in the Commission's view, alter the justification for the general policy.'

That conclusion cannot be reconciled with the suggestion that the prohibition of assisted suicide is inconsistent with the Convention.

25. *Sanles v. Spain* [2001] EHRLR 348 arose from a factual situation similar to the present save that the victim of disabling disease had died and the case never culminated in a decision on the merits. The applicant was the sister-in-law of the deceased and was held not to be a victim and thus not to be directly affected by the alleged violations. It is of some interest that she based her claims on Articles 2, 3, 5, 9 and 14 of the Convention but not, it seems, on Article 8.

26. I would for my part accept the Secretary of State's submission that Mrs Pretty's rights under Article 8 are not engaged at all. If, however, that conclusion is wrong, and the prohibition of assisted suicide in section 2 of the 1961 Act infringes her Convention right under Article 8, it is necessary to consider whether the infringement is shown by the Secretary of State to be justifiable under the terms of Article 8 § 2. In considering that question I would adopt the test advocated by counsel for Mrs Pretty, which is clearly laid down in the authorities cited.

27. Since suicide ceased to be a crime in 1961, the question whether assisted suicide also should be decriminalised has been reviewed on more than one occasion. The Criminal Law Revision Committee in its Fourteenth Report (1980, Cmnd 7844) reported some divergence of opinion among its distinguished legal membership, and recognised a distinction between assisting a person who had formed a settled intention to kill himself and the more heinous case where one person persuaded another to commit suicide, but a majority was of the clear opinion that aiding and abetting suicide should remain an offence (pp. 60-61, para. 135).

28. Following the decision in *Airedale NHS Trust v. Bland* [1993] AC 789 a much more broadly constituted House of Lords Select Committee on Medical Ethics received extensive evidence and reported. The Committee in its report (HL 21-1, 1994, p. 11, para. 26) drew a distinction between assisted suicide and physician-assisted suicide but its conclusion was unambiguous (p. 54, para. 262):

'As far as assisted suicide is concerned, we see no reason to recommend any change in the law. We identify no circumstances in which assisted suicide should be permitted, nor do we see any reason to distinguish between the act of a doctor or of any other person in this connection.'

The government in its response (May 1994, Cm 2553) accepted this recommendation:

'We agree with this recommendation. As the Government stated in its evidence to the Committee, the decriminalisation of attempted suicide in 1961 was accompanied by an unequivocal restatement of the prohibition of acts calculated to end the life of another person. The Government can see no basis for permitting assisted suicide. Such a change would be open to abuse and put the lives of the weak and vulnerable at risk.'

A similar approach is to be found in the Council of Europe's Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and the dying. This included the following passage (at pp. 2-4):

'9. The Assembly therefore recommends that the Committee of Ministers encourage the member States of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects: ...

(c) by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while:

(i) recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the member States, in accordance with Article 2 of the European Convention on Human Rights which states that "no one shall be deprived of his life intentionally";

(ii) recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person;

(iii) recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.'

It would be by no means fatal to the legal validity of section 2(1) of the 1961 Act if the response of the United Kingdom to this problem of assisted suicide were shown to be unique, but it is shown to be in accordance with a very broad international consensus. Assisted suicide and consensual killing are unlawful in all Convention countries except the Netherlands, but even if the Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 and the Dutch Criminal Code were operative in this country it would not relieve Mr Pretty of liability under Article 294 of the Dutch Criminal Code if he were to assist Mrs Pretty to take her own life as he would wish to do.

29. On behalf of Mrs Pretty counsel disclaims any general attack on section 2(1) of the 1961 Act and seeks to restrict his claim to the particular facts of her case: that of a mentally competent adult who knows her own mind, is free from any pressure and has made a fully informed and voluntary decision. Whatever the need, he submits, to afford legal protection to the vulnerable, there is no justification for a blanket refusal to countenance an act of humanity in the case of someone who, like Mrs Pretty, is not vulnerable at all. Beguiling as that submission is, Dr Johnson gave two answers of enduring validity to it. First, 'Laws are not made for particular cases but for men in general.' Second, 'To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied' (Boswell, *Life of*



*Johnson*, Oxford Standard Authors, 3rd ed., 1970, at pp. 735, 496). It is for member States to assess the risk and likely incidence of abuse if the prohibition on assisted suicide were relaxed, as the commission recognised in its decision in *R. v. United Kingdom* quoted above in paragraph 24. But the risk is one which cannot be lightly discounted. The Criminal Law Revision Committee recognised how fine was the line between counselling and procuring on the one hand and aiding and abetting on the other (report, p. 61, para. 135). The House of Lords Select Committee recognised the undesirability of anything which could appear to encourage suicide (report, p. 49, para. 239):

'We are also concerned that vulnerable people – the elderly, lonely, sick or distressed – would feel pressure, whether real or imagined, to request early death. We accept that, for the most part, requests resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life.'

It is not hard to imagine that an elderly person, in the absence of any pressure, might opt for a premature end to life if that were available, not from a desire to die or a willingness to stop living, but from a desire to stop being a burden to others.

30. If section 2(1) infringes any Convention right of Mrs Pretty, and recognising the heavy burden which lies on a member State seeking to justify such an infringement, I conclude that the Secretary of State has shown ample grounds to justify the existing law and the current application of it. That is not to say that no other law or application would be consistent with the Convention; it is simply to say that the present legislative and practical regime do not offend the Convention.

#### *Article 9 of the Convention*

31. It is unnecessary to recite the terms of Article 9 of the Convention, to which very little argument was addressed. It is an Article which protects freedom of thought, conscience and religion and the manifestation of religion or belief in worship, teaching, practice or observance. One may accept that Mrs Pretty has a sincere belief in the virtue of assisted suicide. She is free to hold and express that belief. But her belief cannot found a requirement that her husband should be absolved from the consequences of conduct which, although it would be consistent with her belief, is proscribed by the criminal law. And if she were able to establish an infringement of her right, the justification shown by the State in relation to Article 8 would still defeat it.

#### *Article 14 of the Convention*

32. Article 14 of the Convention provides: ...

Mrs Pretty claims that section 2(1) of the 1961 Act discriminates against those who, like herself, cannot because of incapacity take their own lives without assistance. She relies on the judgment of the European Court of Human Rights in *Thlimmenos v. Greece* (2000) 31 EHRR 411 where the court said (at p. 424, para. 44):

'The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'

33. The European Court of Human Rights has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights. As it was put in *Van Raalte v. Netherlands* (1997) 24 EHRR 503 at p. 516, para. 33:

'As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.'

See also *Botta v. Italy* (1998) 26 EHRR 241 at p. 259, para. 39.

34. If, as I have concluded, none of the Articles on which Mrs Pretty relies gives her the right which she has claimed, it follows that Article 14 would not avail her even if she could establish that the operation of section 2(1) is discriminatory. A claim under this Article must fail on this ground.

35. If, contrary to my opinion, Mrs Pretty's rights under one or other of the Articles are engaged, it would be necessary to examine whether section 2(1) of the 1961 Act is discriminatory. She contends that the section is discriminatory because it prevents the disabled, but not the able-bodied, exercising their right to commit suicide. This argument is in my opinion based on a misconception. The law confers no right to commit suicide. Suicide was always, as a crime, anomalous, since it was the only crime with which no defendant could ever be charged. The main effect of the criminalisation of suicide

was to penalise those who attempted to take their own lives and failed, and secondary parties. Suicide itself (and with it attempted suicide) was decriminalised because recognition of the common law offence was not thought to act as a deterrent, because it cast an unwarranted stigma on innocent members of the suicide's family and because it led to the distasteful result that patients recovering in hospital from a failed suicide attempt were prosecuted, in effect, for their lack of success. But while the 1961 Act abrogated the rule of law whereby it was a crime for a person to commit (or attempt to commit) suicide, it conferred no right on anyone to do so. Had that been its object there would have been no justification for penalising by a potentially very long term of imprisonment one who aided, abetted, counselled or procured the exercise or attempted exercise by another of that right. The policy of the law remained firmly adverse to suicide, as section 2(1) makes clear.

36. The criminal law cannot in any event be criticised as objectionably discriminatory because it applies to all. Although in some instances criminal statutes recognise exceptions based on youth, the broad policy of the criminal law is to apply offence-creating provisions to all and to give weight to personal circumstances either at the stage of considering whether or not to prosecute or, in the event of conviction, when penalty is to be considered. The criminal law does not ordinarily distinguish between willing victims and others: *Laskey Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39. Provisions criminalising drunkenness or misuse of drugs or theft do not exempt those addicted to alcohol or drugs, or the poor and hungry. 'Mercy killing', as it is often called, is in law killing. If the criminal law sought to proscribe the conduct of those who assisted the suicide of the vulnerable, but exonerated those who assisted the suicide of the non-vulnerable, it could not be administered fairly and in a way which would command respect.

37. For these reasons, which are in all essentials those of the Divisional Court, and in agreement with my noble and learned friends Lord Steyn and Lord Hope of Craighead, I would hold that Mrs Pretty cannot establish any breach of any Convention right.

*The claim against the Director*

38. That conclusion makes it strictly unnecessary to review the main ground on which the Director resisted the claim made against him: that he had no power to grant the undertaking which Mrs Pretty sought.

39. I would for my part question whether, as suggested on his behalf, the Director might not if so advised make a public statement on his prosecuting policy other than in the Code for Crown Prosecutors which he is obliged to issue by section 10 of the Prosecution of Offences Act 1985. Plainly such a step would call for careful consultation and extreme circumspection, and could be taken only under the superintendence of the Attorney General (by virtue of section 3 of the 1985 Act). The Lord Advocate

has on occasion made such a statement in Scotland, and I am not persuaded that the Director has no such power. It is, however, unnecessary to explore or resolve that question, since whether or not the Director has the power to make such a statement he has no duty to do so, and in any event what was asked of the Director in this case was not a statement of prosecuting policy but a proleptic grant of immunity from prosecution. That, I am quite satisfied, the Director had no power to give. The power to dispense with and suspend laws and the execution of laws without the consent of Parliament was denied to the crown and its servants by the Bill of Rights 1688. Even if, contrary to my opinion, the Director had power to give the undertaking sought, he would have been very wrong to do so in this case. If he had no reason for doubting, equally he had no means of investigating, the assertions made on behalf of Mrs Pretty. He received no information at all concerning the means proposed for ending Mrs Pretty's life. No medical supervision was proposed. The obvious risk existed that her condition might worsen to the point where she could herself do nothing to bring about her death. It would have been a gross dereliction of the Director's duty and a gross abuse of his power had he ventured to undertake that a crime yet to be committed would not lead to prosecution. The claim against him must fail on this ground alone.

40. I would dismiss this appeal.”

15. The other judges concurred with his conclusions. Lord Hope stated as regarded Article 8 of the Convention:

“100. ... Respect for a person's 'private life', which is the only part of Article 8 which is in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs Pretty has the right of self-determination. In that sense, her private life is engaged even where in the face of terminal illness she seeks to choose death rather than life. But it is an entirely different thing to imply into these words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide. I think that to do so would be to stretch the meaning of the words too far.”

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Suicide, assisted suicide and consensual killing

16. Suicide ceased to be a crime in England and Wales by virtue of the Suicide Act 1961. However, section 2(1) of the Act provides:

“A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.”

Section 2(4) provides:

“No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.”

17. Case-law has established that an individual may refuse to accept life-prolonging or life-preserving treatment:

“First it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so ... To this extent, the principle of the sanctity of human life must yield to the principle of self-determination ...” (Lord Goff in *Airedale NHS Trust v. Bland* [1993] AC 789, at p. 864)

18. This principle has been most recently affirmed in *Ms B. v. an NHS Hospital*, Court of Appeal judgment of 22 March 2002. It has also been recognised that “dual effect” treatment can be lawfully administered, that is treatment calculated to ease a patient's pain and suffering which might also, as a side-effect, shorten their life expectancy (see, for example, *Re J* [1991] Fam 3).

## **B. Domestic review of the legislative position**

19. In March 1980 the Criminal Law Revision Committee issued its fourteenth report, “Offences against the Person” (Cmnd 7844), in which it reviewed, *inter alia*, the law relating to the various forms of homicide and the applicable penalties. In Section F, the situation known as mercy killing was discussed. The previous suggestion of a new offence applying to a person who from compassion unlawfully killed another person permanently subject, for example, to great bodily pain and suffering and for which a two-year maximum sentence was

applicable, was unanimously withdrawn. It was noted that the vast majority of the persons and bodies consulted were against the proposal on principle and on pragmatic grounds. Reference was made also to the difficulties of definition and the possibility that the “suggestion would not prevent suffering but would cause suffering, since the weak and handicapped would receive less effective protection from the law than the fit and well”.

20. It did however recommend that the penalty for assisting suicide be reduced to seven years, as being sufficiently substantial to protect helpless persons open to persuasion by the unscrupulous.

21. On 31 January 1994 the report of the House of Lords Select Committee on Medical Ethics (HL Paper 21-I) was published following its inquiry into the ethical, legal and clinical implications of a person's right to withhold consent to life-prolonging treatment, the position of persons unable to give or withhold consent and whether and in what circumstances the shortening of another person's life might be justified on the grounds that it accorded with that person's wishes or best interests. The Committee had heard oral evidence from a variety of government, medical, legal and non-governmental sources and received written submissions from numerous interested parties who addressed the ethical, philosophical, religious, moral, clinical, legal and public-policy aspects.

22. It concluded, as regards voluntary euthanasia:

“236. The right to refuse medical treatment is far removed from the right to request assistance in dying. We spent a long time considering the very strongly held and sincerely expressed views of those witnesses who advocated voluntary euthanasia. Many of us have had experience of relatives or friends whose dying days or weeks were less than peaceful or uplifting, or whose final stages of life were so disfigured that the loved one seemed already lost to us, or who were simply weary of life ... Our thinking must also be coloured by the wish of every individual for a peaceful and easy death, without prolonged suffering, and by a reluctance to contemplate the possibility of severe dementia or dependence. We gave much thought too to Professor Dworkin's opinion that, for those without religious belief, the individual is best able to decide what manner of death is fitting to the life that has been lived.

237. Ultimately, however, we do not believe that these arguments are sufficient reason to weaken society's prohibition of intentional killing. That prohibition is the cornerstone of law and of social relationships. It protects each one of us impartially, embodying the belief that all are equal. We do not wish that protection to be diminished and we therefore recommend that there should be no change in the law to permit euthanasia. We acknowledge that there are individual cases in which euthanasia may be seen by some to be appropriate. But individual cases cannot reasonably establish the

foundation of a policy which would have such serious and widespread repercussions. Moreover, dying is not only a personal or individual affair. The death of a person affects the lives of others, often in ways and to an extent which cannot be foreseen. We believe that the issue of euthanasia is one in which the interest of the individual cannot be separated from the interest of society as a whole.

238. One reason for this conclusion is that we do not think it possible to set secure limits on voluntary euthanasia ...

239. We are also concerned that vulnerable people – the elderly, sick or distressed – would feel pressure, whether real or imagined, to request early death. We accept that, for the most part, requests resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life ...”

23. In light of the above, the Select Committee on Medical Ethics also recommended no change to the legislation concerning assisted suicide (paragraph 262).

### III. RELEVANT INTERNATIONAL MATERIALS

24. Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe recommended, *inter alia*, as follows (paragraph 9):

“... that the Committee of Ministers encourage the member States of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects:

...

c. by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while:

i. recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the member States, in accordance with Article 2 of the European Convention on Human Rights which states that 'no one shall be deprived of his life intentionally';

ii. recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person;

iii. recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.”

## IV. THIRD-PARTY INTERVENTIONS

### A. Voluntary Euthanasia Society

25. The Voluntary Euthanasia Society, established in 1935 and being a leading research organisation in the United Kingdom on issues related to assisted dying, submitted that as a general proposition individuals should have the opportunity to die with dignity and that an inflexible legal regime that had the effect of forcing an individual, who was suffering unbearably from a terminal illness, to die a painful protracted death with indignity, contrary to his or her express wishes, was in breach of Article 3 of the Convention. They referred to the reasons why persons requested assisted deaths (for example unrelieved and severe pain, weariness of the dying process, loss of autonomy). Palliative care could not meet the needs of all patients and did not address concerns of loss of autonomy and loss of control of bodily functions.

26. They submitted that in comparison with other countries in Europe the regime in England and Wales, which prohibited assisted dying in absolute terms, was the most restrictive and inflexible in Europe. Only Ireland compared. Other countries (for example Belgium, Switzerland, Germany, France, Finland, Sweden and the Netherlands, where assistance must be sought from a medical practitioner) had abolished the specific offence of assisting suicide. In other countries, the penalties for such offences had been downgraded – in no country, save Spain, did the maximum penalty exceed five years' imprisonment – and criminal proceedings were rarely brought.

27. As regarded public-policy issues, they submitted that whatever the legal position, voluntary euthanasia and assisted dying took place. It was well known in England and Wales that patients asked for assistance to die and that members of the medical profession and relatives provided that assistance, notwithstanding that it might be against the criminal law and in the absence of any regulation. As recognised by the Netherlands government, therefore, the criminal law did not prevent voluntary euthanasia or assisted dying. The situation in the Netherlands indicated that in the absence of regulation slightly less than 1% of deaths were due to doctors having ended the life of a patient without the latter explicitly requesting this (non-voluntary euthanasia). Similar studies indicated a figure of 3.1% in Belgium and 3.5% in Australia. It might therefore be the case that less attention was given to the requirements of a



Careful end-of-life practice in a society with a restrictive legal approach than in one with an open approach that tolerated and regulated euthanasia. The data did not support the assertion that, in institutionalising voluntary euthanasia/physician-assisted suicide, society put the vulnerable at risk. At least with a regulated system, there was the possibility of far greater consultation and a reporting mechanism to prevent abuse, along with other safeguards, such as waiting periods.

## **B. Catholic Bishops' Conference of England and Wales**

28. This organisation put forward principles and arguments which it stated were consonant with those expressed by other Catholic bishops' conferences in other member States.

29. They emphasised that it was a fundamental tenet of the Catholic faith that human life was a gift from God received in trust. Actions with the purpose of killing oneself or another, even with consent, reflected a damaging misunderstanding of the human worth. Suicide and euthanasia were therefore outside the range of morally acceptable options in dealing with human suffering and dying. These fundamental truths were also recognised by other faiths and by modern pluralist and secular societies, as shown by Article 1 of the Universal Declaration of Human Rights (December 1948) and the provisions of the European Convention on Human Rights, in particular in Articles 2 and 3 thereof.

30. They pointed out that those who attempted suicide often suffered from depression or other psychiatric illness. The 1994 report of the New York State Task Force on Life and Law concluded on that basis that the legalising of any form of assisted suicide or any form of euthanasia would be a mistake of historic proportions, with catastrophic consequences for the vulnerable and an intolerable corruption of the medical profession. Other research indicated that many people who requested physician-assisted suicide withdrew that request if their depression and pain were treated. In their experience, palliative care could in virtually every case succeed in substantially relieving a patient of physical and psychosomatic suffering.

31. The House of Lords Select Committee on Medical Ethics (1993-94) had solid reasons for concluding, after consideration of the evidence (on a scale vastly exceeding that available in these proceedings), that any legal permission for assistance in suicide would result in massive erosion of the rights of the vulnerable, flowing from the pressure of legal

principle and consistency and the psychological and financial conditions of medical practice and health-care provision in general. There was compelling evidence to suggest that once a limited form of euthanasia was permitted under the law it was virtually impossible to confine its practice within the necessary limits to protect the vulnerable (see, for example, the Netherlands government's study of deaths in 1990, recording cases of euthanasia without the patients' explicit request).

## THE LAW

### I. ADMISSIBILITY OF THE APPLICATION

32. The applicant, who is suffering from an incurable, degenerative disease, argued that fundamental rights under the Convention had been violated in her case by the refusal of the Director of Public Prosecutions to give an undertaking not to prosecute her husband if he were to assist her to end her life and by the state of English law which rendered assisted suicide in her case a criminal offence. The Government submitted that the application should be dismissed as manifestly ill-founded on the grounds either that the applicant's complaints did not engage any of the rights relied on by her or that any interferences with those rights were justified in terms of the exceptions allowed by the Convention's provisions.

33. The Court considers that the application as a whole raises questions of law which are sufficiently serious that their determination should depend on an examination of the merits. No other ground for declaring it inadmissible has been established. The application must therefore be declared admissible. Pursuant to Article 29 § 3 of the Convention, the Court will now consider the merits of the applicant's complaints.

### II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

34. The relevant parts of Article 2 of the Convention provide:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

## **A. Submissions of the parties**

### 1. The applicant

35. The applicant submitted that permitting her to be assisted in committing suicide would not be in conflict with Article 2 of the Convention, otherwise those countries in which assisted suicide was not unlawful would be in breach of this provision. Furthermore, Article 2 protected not only the right to life but also the right to choose whether or not to go on living. It protected the right to life and not life itself, while the sentence concerning deprivation of life was directed towards protecting individuals from third parties, namely the State and public authorities, not from themselves. Article 2 therefore acknowledged that it was for the individual to choose whether or not to go on living and protected her right to die to avoid inevitable suffering and indignity as the corollary of the right to life. In so far as the *Keenan* case referred to by the Government indicated that an obligation could arise for prison authorities to protect a prisoner who tried to take his own life, the obligation only arose because he was a prisoner and lacked, due to his mental illness, the capacity to take a rational decision to end his life (see *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III).

### 2. The Government

36. The Government submitted that the applicant's reliance on Article 2 was misconceived, being unsupported by direct authority and being inconsistent with existing authority and with the language of the provision. Article 2, guaranteeing one of the most

fundamental rights, imposed primarily a negative obligation. Although it had in some cases been found to impose positive obligations, this concerned steps appropriate to safeguard life. In previous cases the State's responsibility under Article 2 to protect a prisoner had not been affected by the fact that he committed suicide (see *Keenan*, cited above) and it had also been recognised that the State was entitled to force-feed a prisoner on hunger strike (see *X v. Germany*, no. 10565/83, Commission decision of 9 May 1984, unreported). The wording of Article 2 expressly provided that no one should be deprived of their life intentionally, save in strictly limited circumstances which did not apply in the present case. The right to die was not the corollary, but the antithesis of the right to life.

### **B. The Court's assessment**

37. The Court's case-law accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47). It safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory. It sets out the limited circumstances when deprivation of life may be justified and the Court has applied a strict scrutiny when those exceptions have been relied on by the respondent States (*ibid.*, p. 46, §§ 149-50).

38. The text of Article 2 expressly regulates the deliberate or intended use of lethal force by State agents. However, it has been interpreted as covering not only intentional killing but also the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life (*ibid.*, p. 46, § 148). Furthermore, the Court has held that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). This obligation extends beyond a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; it may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the

criminal acts of another individual (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115, and *Kılıç v. Turkey*, no. 22492/93, §§ 62 and 76, ECHR 2000-III). More recently, in *Keenan*, Article 2 was found to apply to the situation of a mentally ill prisoner who disclosed signs of being a suicide risk (see *Keenan*, cited above, § 91).

39. The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that “the right to life” guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise (see *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, pp. 21-22, § 52, and *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A no. 264, pp. 15-16, § 35). Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

40. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe (see paragraph 24 above).

41. The applicant has argued that a failure to acknowledge a right to die under the Convention would place those countries which do permit assisted suicide in breach of the Convention. It is not for the Court in this case to attempt to assess whether or not the state of law in any other country fails to protect the right to life. As it recognised in *Keenan*, the measures which may reasonably be taken to protect a prisoner from self-harm will be subject to the restraints imposed by other provisions of the Convention, such as Articles 5 and 8, as

well as more general principles of personal autonomy (see *Keenan*, cited above, § 92). Similarly, the extent to which a State permits, or seeks to regulate, the possibility for the infliction of harm on individuals at liberty, by their own or another's hand, may raise conflicting considerations of personal freedom and the public interest that can only be resolved on examination of the concrete circumstances of the case (see, *mutatis mutandis*, *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-I). However, even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition – that the United Kingdom would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established.

42. The Court finds that there has been no violation of Article 2 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

43. Article 3 of the Convention provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

#### **A. Submissions of the parties**

##### 1. The applicant

44. Before the Court, the applicant focused her complaints principally on Article 3 of the Convention. She submitted that the suffering which she faced qualified as degrading treatment under Article 3 of the Convention. She suffered from a terrible, irreversible disease in its final stages and she would die in an exceedingly distressing and undignified manner as the muscles which controlled her breathing and swallowing weakened to the extent that she would develop respiratory failure and pneumonia. While the Government were not directly responsible for that treatment, it was established under the Court's case-law that under Article 3 the State owed to its citizens not only a negative obligation to refrain from inflicting such

treatment but also a positive obligation to protect people from it. In this case, this obligation was to take steps to protect her from the suffering which she would otherwise have to endure.

45. The applicant argued that there was no room under Article 3 of the Convention for striking a balance between her right to be protected from degrading treatment and any competing interest of the community, as the right was an absolute one. In any event, the balance struck was disproportionate as English law imposed a blanket ban on assisting suicide regardless of the individual circumstances of the case. As a result of this blanket ban, the applicant had been denied the right to be assisted by her husband in avoiding the suffering awaiting her without any consideration having been given to the unique facts of her case, in particular that her intellect and capacity to make decisions were unimpaired by the disease, that she was neither vulnerable nor in need of protection, that her imminent death could not be avoided, that if the disease ran its course she would endure terrible suffering and indignity and that no one else was affected by her wish for her husband to assist her save for him and their family who were wholly supportive of her decision. Without such consideration of the facts of the case, the rights of the individual could not be protected.

46. The applicant also disputed that there was any scope for allowing any margin of appreciation under Article 3 of the Convention, although if there was, the Government could not be entitled to rely on such a margin in defence of a statutory scheme operated in such a way as to involve no consideration of her concrete circumstances. The applicant rejected as offensive the assertion of the Government that all those who were terminally ill or disabled and contemplating suicide were by definition vulnerable and that a blanket ban was necessary so as to protect them. Any concern as to protecting those who were vulnerable could be met by providing a scheme whereby assisted suicide was lawful provided that the individual in question could demonstrate that she had the capacity to come to such a decision and was not in need of protection.

## *2. The Government*

47. The Government submitted that Article 3 was not engaged in this case. The primary obligation imposed by this provision was negative: the State must not inflict torture or inhuman or degrading treatment or punishment. The applicant's case was based rather on alleged positive obligations. The Court's case-law indicated that where positive obligations

arose they were not absolute but must be interpreted in such a way as not to impose an impossible or disproportionate burden on the authorities. Positive obligations had hitherto been found to arise in three situations: where the State was under a duty to protect the health of a person deprived of liberty, where the State was required to take steps to ensure that persons within its jurisdiction were not subjected to torture or other prohibited treatment at the hands of private individuals and where the State proposed to take action in relation to an individual which would result in the infliction by another of inhuman or degrading treatment on him. None of these circumstances were relevant in the applicant's case, as she was not being mistreated by anyone, she was not complaining about the absence of medical treatment and no State action was being taken against her.

48. Even if Article 3 were engaged, it did not confer a legally enforceable right to die. In assessing the scope of any positive obligation, it was appropriate to have regard to the margin of appreciation properly afforded to the State in maintaining section 2 of the Suicide Act 1961. The Government submitted that the prohibition on assisted suicide struck a fair balance between the rights of the individual and the interests of the community, in particular as it properly respected the sanctity of life and pursued a legitimate objective, namely protecting the vulnerable; the matter had been carefully considered over the years by the Criminal Law Revision Committee and the House of Lords Select Committee on Medical Ethics; there were powerful arguments, and some evidence, to suggest that legalising voluntary euthanasia led inevitably to the practice of involuntary euthanasia; and the State had an interest in protecting the lives of the vulnerable, in which context they argued that anyone contemplating suicide would necessarily be psychologically and emotionally vulnerable, even if they were physically fit while those with disabilities might be in a more precarious position as being unable effectively to communicate their views. Furthermore, there was a general consensus in Council of Europe countries, where assisted suicide and consensual killing were unlawful in all countries except in the Netherlands. This consensus was also reflected in other jurisdictions outside Europe.

## **B. The Court's assessment**

49. Article 3 of the Convention, together with Article 2, must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the



democratic societies making up the Council of Europe (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 34, § 88). In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention.

50. An examination of the Court's case-law indicates that Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of State agents or public authorities (see, amongst other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25). It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise (see *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports* 1997-III, p. 792, § 49).

51. In particular, the Court has held that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals (see *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2699, § 22). A positive obligation on the State to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: see, for example, *A. v. the United Kingdom* (cited above) where the child applicant had been caned by his stepfather, and *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V), where four child applicants were severely abused and neglected by their parents. Article 3 also imposes requirements on State authorities to protect the health of persons deprived of liberty (see *Keenan*, cited above, concerning the lack of effective medical care of a mentally ill prisoner who committed suicide, and also *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI).

52. As regards the types of “treatment” which fall within the scope of Article 3 of the Convention, the Court's case-law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see *Ireland*

*v. the United Kingdom*, cited above, p. 66, § 167; *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX). Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see amongst recent authorities, *Price v. the United Kingdom*, no. 33394/96, §§ 24-30, ECHR 2001-VII, and *Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII). The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *D. v. the United Kingdom* and *Keenan*, both cited above, and *Bensaid v. the United Kingdom*, no. 44599/98, ECHR 2000-I).

53. In the present case, it is beyond dispute that the respondent State has not, itself, inflicted any ill-treatment on the applicant. Nor is there any complaint that the applicant is not receiving adequate care from the State medical authorities. The situation of the applicant is therefore not comparable with that in *D. v. the United Kingdom*, in which an AIDS sufferer was threatened with removal from the United Kingdom to the island of St Kitts where no effective medical or palliative treatment for his illness was available and he would have been exposed to the risk of dying under the most distressing circumstances. The responsibility of the State would have been engaged by its act (“treatment”) of removing him in those circumstances. There is no comparable act or “treatment” on the part of the United Kingdom in the present case.

54. The applicant has claimed rather that the refusal of the DPP to give an undertaking not to prosecute her husband if he assisted her to commit suicide and the criminal-law prohibition on assisted suicide disclose inhuman and degrading treatment for which the State is responsible as it will thereby be failing to protect her from the suffering which awaits her as her illness reaches its ultimate stages. This claim, however, places a new and extended construction on the concept of treatment, which, as found by the House of Lords, goes beyond the ordinary meaning of the word. While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. Article 3 must be construed in harmony

with Article 2, which hitherto has been associated with it as reflecting basic values respected by democratic societies. As found above, Article 2 of the Convention is first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and does not confer any right on an individual to require a State to permit or facilitate his or her death.

55. The Court cannot but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faces the prospect of a distressing death. It is true that she is unable to commit suicide herself due to physical incapacity and that the state of law is such that her husband faces the risk of prosecution if he renders her assistance. Nonetheless, the positive obligation on the part of the State which is relied on in the present case would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care. It would require that the State sanction actions intended to terminate life, an obligation that cannot be derived from Article 3 of the Convention.

56. The Court therefore concludes that no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking not to prosecute the applicant's husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide. There has, accordingly, been no violation of this provision.

#### IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. Article 8 of the Convention provides as relevant:

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

##### **A. Submissions of the parties**

### *1. The applicant*

58. The applicant argued that, while the right to self-determination ran like a thread through the Convention as a whole, it was Article 8 in which that right was most explicitly recognised and guaranteed. It was clear that the right to self-determination encompassed the right to make decisions about one's body and what happened to it. She submitted that this included the right to choose when and how to die and that nothing could be more intimately connected to the manner in which a person conducted her life than the manner and timing of her death. It followed that the DPP's refusal to give an undertaking and the State's blanket ban on assisted suicide interfered with her rights under Article 8 § 1.

59. The applicant argued that there must be particularly serious reasons for interfering with such an intimate part of her private life. However, the Government had failed to show that the interference was justified as no consideration had been given to her individual circumstances. She referred here to the arguments also raised in the context of Article 3 of the Convention (see paragraphs 45-46 above).

### *2. The Government*

60. The Government argued that the rights under Article 8 were not engaged as the right to private life did not include a right to die. It covered the manner in which a person conducted her life, not the manner in which she departed from it. Otherwise, the alleged right would extinguish the very benefit on which it was based. Even if they were wrong on this, any interference with rights under Article 8 would be fully justified. The State was entitled, within its margin of appreciation, to determine the extent to which individuals could consent to the infliction of injuries on themselves and so was even more clearly entitled to determine whether a person could consent to being killed.

## **B. The Court's assessment**

### *1. Applicability of Article 8 § 1 of the Convention*

61. As the Court has had previous occasion to remark, the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22). It can sometimes embrace aspects of an individual's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, for example, *B. v. France*, judgment of 25 March 1992, Series A no. 232-C, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; and *Laskey, Jaggard and Brown*, cited above, p. 131, § 36). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.

62. The Government have argued that the right to private life cannot encapsulate a right to die with assistance, such being a negation of the protection that the Convention was intended to provide. The Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8 § 1 and requiring justification in terms of the second paragraph (see, for example, concerning involvement in consensual sado-masochistic activities which amounted to assault and wounding, *Laskey, Jaggard and Brown*, cited above, and concerning refusal of medical

treatment, *Acmanne and Others v. Belgium*, no. 10435/83, Commission decision of 10 December 1984, Decisions and Reports (DR) 40, p. 251).

63. While it might be pointed out that death was not the intended consequence of the applicants' conduct in the above situations, the Court does not consider that this can be a decisive factor. In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention. As recognised in domestic case-law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life (see paragraphs 17-18 above).

64. In the present case, although medical treatment is not an issue, the applicant is suffering from the devastating effects of a degenerative disease which will cause her condition to deteriorate further and increase her physical and mental suffering. She wishes to mitigate that suffering by exercising a choice to end her life with the assistance of her husband. As stated by Lord Hope, the way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected (see paragraph 15 above).

65. The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.

66. In *Rodriguez v. the Attorney General of Canada* ([1994] 2 Law Reports of Canada 136), which concerned a not dissimilar situation to the present, the majority opinion of the Supreme Court considered that the prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice. Although the Canadian court was considering a provision of the Canadian Charter framed in different terms from those of Article 8 of the Convention, comparable concerns

arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body.

67. The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention. It considers below whether this interference conforms with the requirements of the second paragraph of Article 8.

## *2. Compliance with Article 8 § 2 of the Convention*

68. An interference with the exercise of an Article 8 right will not be compatible with Article 8 § 2 unless it is “in accordance with the law”, has an aim or aims that is or are legitimate under that paragraph and is “necessary in a democratic society” for the aforesaid aim or aims (see *Dudgeon*, cited above, p. 19, § 43).

69. The only issue arising from the arguments of the parties is the necessity of any interference, it being common ground that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others.

70. According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is “necessary in a democratic society”, the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake.

71. The Court recalls that the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual's sexual life (see *Dudgeon*, cited above, p. 21, § 52, and *A.D.T. v. the United Kingdom*, no. 35765/97, § 37, ECHR 2000-IX). Although the applicant has argued that there must therefore be particularly compelling reasons for the interference in her case, the Court does not find that the matter under

consideration in this case can be regarded as of the same nature, or as attracting the same reasoning.

72. The parties' arguments have focused on the proportionality of the interference as disclosed in the applicant's case. The applicant attacked in particular the blanket nature of the ban on assisted suicide as failing to take into account her situation as a mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision, and therefore cannot be regarded as vulnerable and requiring protection. This inflexibility means, in her submission, that she will be compelled to endure the consequences of her incurable and distressing illness, at a very high personal cost.

73. The Court would note that although the Government argued that the applicant, as a person who is both contemplating suicide and severely disabled, must be regarded as vulnerable, this assertion is not supported by the evidence before the domestic courts or by the judgments of the House of Lords which, while emphasising that the law in the United Kingdom was there to protect the vulnerable, did not find that the applicant was in that category.

74. Nonetheless, the Court finds, in agreement with the House of Lords and the majority of the Canadian Supreme Court in *Rodriguez*, that States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals (see also *Laskey, Jaggard and Brown*, cited above, pp. 132-33, § 43). The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue in this case, section 2 of the 1961 Act, was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.

75. The applicant's counsel attempted to persuade the Court that a finding of a violation in this case would not create a general precedent or any risk to others. It is true that it is not this Court's role under Article 34 of the Convention to issue opinions in the abstract but to apply the



Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.

76. The Court does not consider therefore that the blanket nature of the ban on assisted suicide is disproportionate. The Government have stated that flexibility is provided for in individual cases by the fact that consent is needed from the DPP to bring a prosecution and by the fact that a maximum sentence is provided, allowing lesser penalties to be imposed as appropriate. The Select Committee report indicated that between 1981 and 1992 in twenty-two cases in which “mercy killing” was an issue, there was only one conviction for murder, with a sentence of life imprisonment, while lesser offences were substituted in the others and most resulted in probation or suspended sentences (paragraph 128 of the report cited at paragraph 21 above). It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.

77. Nor in the circumstances is there anything disproportionate in the refusal of the DPP to give an advance undertaking that no prosecution would be brought against the applicant's husband. Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law. In any event, the seriousness of the act for which immunity was claimed was such that the decision of the DPP to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable.

78. The Court concludes that the interference in this case may be justified as “necessary in a democratic society” for the protection of the rights of others and, accordingly, that there has been no violation of Article 8 of the Convention.

## V. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

79. Article 9 of the Convention provides:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

## **A. Submissions of the parties**

### *1. The applicant*

80. The applicant submitted that Article 9 protected the right to freedom of thought, which has hitherto included beliefs such as veganism and pacifism. In seeking the assistance of her husband to commit suicide, the applicant believed in and supported the notion of assisted suicide for herself. In refusing to give the undertaking not to prosecute her husband, the DPP had interfered with this right as had the United Kingdom in imposing a blanket ban which allowed no consideration of the applicant's individual circumstances. For the same reasons as applied under Article 8 of the Convention, that interference had not been justified under Article 9 § 2.

### *2. The Government*

81. The Government disputed that any issue arose within the scope of this provision. Article 9 protected freedom of thought, conscience and religion and the manifestation of those beliefs and did not confer any general right on individuals to engage in any activities of their choosing in pursuance of whatever beliefs they may hold. Alternatively, even if there was any restriction in terms of Article 9 § 1 of the Convention, such was justifiable under the second paragraph for the same reasons as set out in relation to Articles 3 and 8 of the Convention.

## **B. The Court's assessment**

82. The Court does not doubt the firmness of the applicant's views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9 § 1 of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph. As found by the Commission, the term “practice” as employed in Article 9 § 1 does not cover each act which is motivated or influenced by a religion or belief (see *Arrowsmith v. the United Kingdom*, no. 7050/77, Commission's report of 12 October 1978, DR 19, p. 19, § 71). To the extent that the applicant's views reflect her commitment to the principle of personal autonomy, her claim is a restatement of the complaint raised under Article 8 of the Convention.

83. The Court concludes that there has been no violation of Article 9 of the Convention.

## VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

84. Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### **A. Submissions of the parties**

#### 1. The applicant

85. The applicant submitted that she suffered from discrimination as a result of being treated in the same way as those whose situations were significantly different. Although the blanket ban on assisted suicide applied equally to all individuals, the effect of its application to her when she was so disabled that she could not end her life without assistance was discriminatory. She was prevented from exercising a right enjoyed by others who could end

their lives without assistance because they were not prevented by any disability from doing so. She was therefore treated substantively differently and less favourably than those others. As the only justification offered by the Government for the blanket ban was the need to protect the vulnerable and as the applicant was not vulnerable or in need of protection, there was no reasonable or objective justification for this difference in treatment.

## 2. The Government

86. The Government argued that Article 14 of the Convention did not come into play as the applicant's complaints did not engage any of the substantive rights she relied on. Alternatively, there was no discrimination as the applicant could not be regarded as being in a relevantly similar situation to those who were able to take their own lives without assistance. Even assuming Article 14 was in issue, section 2(1) of the Suicide Act 1961 was not discriminatory as domestic law conferred no right to commit suicide and the policy of the law was firmly against suicide. The policy of the criminal law was to give weight to personal circumstances either at the stage of considering whether or not to prosecute or in the event of conviction, when penalty was to be considered. Furthermore, there was clear reasonable and objective justification for any alleged difference in treatment, reference being made to the arguments advanced under Articles 3 and 8 of the Convention.

### **B. The Court's assessment**

86. The Court has found above that the applicant's rights under Article 8 of the Convention were engaged (see paragraphs 61-67). It must therefore consider the applicant's complaints that she has been discriminated against in the enjoyment of the rights guaranteed under that provision in that domestic law permits able-bodied persons to commit suicide yet prevents an incapacitated person from receiving assistance in committing suicide.

87. For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing

whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 37, ECHR 2000-X). Discrimination may also arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV).

88. Even if the principle derived from *Thlimmenos* was applied to the applicant's situation however, there is, in the Court's view, objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide. Under Article 8 of the Convention, the Court has found that there are sound reasons for not introducing into the law exceptions to cater for those who are deemed not to be vulnerable (see paragraph 74 above). Similar cogent reasons exist under Article 14 for not seeking to distinguish between those who are able and those who are unable to commit suicide unaided. The borderline between the two categories will often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 Act was intended to safeguard and greatly increase the risk of abuse.

89. Consequently, there has been no violation of Article 14 of the Convention in the present case.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 2 of the Convention;
3. *Holds* that there has been no violation of Article 3 of the Convention;
4. *Holds* that there has been no violation of Article 8 of the Convention;
5. *Holds* that there has been no violation of Article 9 of the Convention;

6. *Holds* that there has been no violation of Article 14 of the Convention.

Done in English, and notified in writing on 29 April 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE	Matti PELLONPÄÄ
Registrar	President

## Appendix 2 – French Rendition of *Pretty*

*La Semaine Juridique Edition Générale*

9 Avril 2003

No. 15

<http://www.lexisnexis.com/fr/droit/auth/bridge.do?rand=0.19056862103560945> (May 2015)

### Droits de l'homme

#### 10 062 – La Cour EDH ne reconnaît pas l'existence d'un droit à la mort

Il n'est pas possible de déduire de l'article 2 de la Convention EDH un droit à mourir, que ce soit de la main d'un tiers ou avec l'assistance d'une autorité publique.

L'article 3 de la Convention EDH ne fait peser sur l'État défendeur aucune obligation positive de prendre l'engagement de ne pas poursuivre le mari de la requérante s'il venait à aider son épouse à se suicider ou de créer un cadre légal pour toute autre forme de suicide assisté.

La nature générale de l'interdiction du suicide assisté n'est pas disproportionnée. Il ne paraît pas arbitraire à la Cour que le droit reflète l'importance du droit à la vie en interdisant le suicide assisté tout en prévoyant un régime d'application et d'appréciation par la justice qui permet de prendre en compte dans chaque cas concret tant l'intérêt public à entamer des poursuites que les exigences justes et adéquates de la rétribution et de la dissuasion.

CEDH, 29 avr. 2002, req. n° 2346/02 ; aff. *Pretty c/ Royaume-Uni*.

Mots-clés : **Conventions internationales - Convention européenne des droits de l'homme - Maladie dégénérative incurable - Suicide assisté - Droit anglais - Infraction - Conv. EDH, art. 2, 3 et 8 - Violation (non)**

Juris-Classeur : Droit International, Fasc. 115-D, par Paul TAVENIER, Constance GREWE et Helene RUIZ-FABRI.

#### LA COUR - (...)

##### En droit :

##### I - Sur la recevabilité de la requête :

32. La requérante, qui souffre d'une maladie dégénérative incurable, allègue que des droits fondamentaux garantis par la Convention ont été violés à son égard par le refus du *Director of Public Prosecutions (DPP)* de prendre l'engagement de ne pas poursuivre son mari s'il l'aidait à mettre fin à ses jours et par l'état du droit anglais, qui ferait du suicide assisté une infraction dans son cas. Le Gouvernement soutient quant à lui que la requête doit être rejetée pour défaut manifeste de fondement aux motifs soit que les

griefs énoncés par la requérante ne mettent en cause aucun des droits invoqués par elle, soit qu'à admettre l'existence d'atteintes aux droits en question celles-ci sont couvertes par les exceptions prévues par les dispositions pertinentes de la Convention.

33. La Cour considère que la requête dans son ensemble soulève des questions de droit suffisamment sérieuses pour qu'une décision à leur égard ne puisse être adoptée qu'après un examen au fond des griefs. Aucun motif de la déclarer irrecevable n'ayant par ailleurs été établi, elle doit donc être retenue. Conformément à l'article 29, § 3 de la Convention, la Cour va maintenant se pencher sur le bien-fondé des griefs de la requérante.

## **II - Sur la violation alléguée de l'article 2 de la Convention :**

(...)

### **A - Thèses des parties :**

(...)

### **B - Appréciation de la Cour :**

37. Parmi les dispositions de la Convention qu'elle juge primordiales, la Cour, dans sa jurisprudence, accorde la prééminence à l'article 2 (V. 27 sept. 1995, *Mc Cann et a. c/ Royaume-Uni* : Série A, n° 324, § 146 et 147). L'article 2 protège le droit à la vie, sans lequel la jouissance de l'un quelconque des autres droits et libertés garantis par la Convention serait illusoire. Il définit les circonstances limitées dans lesquelles il est permis d'infliger intentionnellement la mort, et la Cour a appliqué un contrôle strict chaque fois que pareilles exceptions ont été invoquées par des gouvernements défendeurs (*Mc Cann et a. c/ Royaume-Uni, préc.*, § 149 et 150).

38. Le texte de l'article 2 régleme explicitement l'usage délibéré ou intentionnel de la

force meurtrière par des agents de l'État. Il a toutefois été interprété comme couvrant non seulement l'homicide volontaire, mais également les situations où il est permis d'avoir "recours à la force", pareil emploi de la force pouvant conduire à donner la mort de façon involontaire (*Mc Cann, préc.*, § 148). La Cour a par ailleurs jugé que la première phrase de l'article 2, § 1 astreint l'État non seulement à s'abstenir de donner la mort de manière intentionnelle et illégale, mais aussi à prendre les mesures nécessaires à la protection de la vie des personnes relevant de sa juridiction (V. 9 juin 1998, *L.C.B. c/ Royaume-Uni* : Rec. CEDH 1998-III, p. 1403, § 36). Cette obligation va au-delà du devoir primordial d'assurer le droit à la vie en mettant en place une législation pénale concrète, dissuadant de commettre des atteintes contre la personne et s'appuyant sur un mécanisme d'application conçu pour en prévenir, réprimer et sanctionner les violations. Elle peut également impliquer, dans certaines circonstances bien définies, une obligation positive pour les autorités de prendre préventivement des mesures d'ordre pratique pour protéger l'individu dont la vie est menacée par les agissements criminels d'autrui (28 oct. 1998, *Osman c/ Royaume-Uni* : Rec. CEDH 1998-VIII, § 115, et *KLC c/ Turquie, req. n° 22492/93, sect. 1* : Rec. CEDH 2000-III, § 62 et 76). Plus récemment, dans l'affaire *Keenan contre Royaume-Uni* [req. n° 27229/95, sect. 3 : Rec. CEDH 2001-III], l'article 2 a été jugé s'appliquer à la situation d'un détenu souffrant d'une maladie mentale qui donnait des signes indiquant qu'il pourrait attenter à ses jours (V. arrêt préc., § 91).

39. Dans toutes les affaires dont elle a eu à connaître, la Cour a mis l'accent sur l'obligation pour l'État de protéger la vie. Elle n'est pas persuadée que le "droit à la vie" garanti par



l'article 2 puisse s'interpréter comme comportant un aspect négatif. Par exemple, si dans le contexte de l'article 11 de la Convention la liberté d'association a été jugée impliquer non seulement un droit d'adhérer à une association, mais également le droit correspondant à ne pas être contraint de s'affilier à une association, la Cour observe qu'une certaine liberté de choix quant à l'exercice d'une liberté est inhérente à la notion de celle-ci (V. 13 août 1981, *Young, James et Webster c/ Royaume-Uni* : Série A, n° 44, § 52, et 30 juin 1993, *Sigurdur A. Sigurjonsson c/ Islande* : Série A, n° 264, § 35). L'article 2 de la Convention n'est pas libellé de la même manière. Il n'a aucun rapport avec les questions concernant la qualité de la vie ou ce qu'une personne choisit de faire de sa vie. Dans la mesure où ces aspects sont reconnus comme à ce point fondamentaux pour la condition humaine qu'ils requièrent une protection contre les ingérences de l'État, ils peuvent se refléter dans les droits consacrés par la Convention ou d'autres instruments internationaux en matière de droits de l'homme. L'article 2 ne saurait, sans distorsion de langage, être interprété comme conférant un droit diamétralement opposé, à savoir un droit à mourir ; il ne saurait davantage créer un droit à l'autodétermination en ce sens qu'il donnerait à tout individu le droit de choisir la mort plutôt que la vie.

40. La Cour estime donc qu'il n'est pas possible de déduire de l'article 2 de la Convention un droit à mourir, que ce soit de la main d'un tiers ou avec l'assistance d'une autorité publique. Elle se sent confortée dans son avis par la récente Recommandation 1418 (1999) de l'Assemblée parlementaire du Conseil de l'Europe (§ 24 *ci-dessus* [ndlr : non reproduit]).

(...)

42. La Cour conclut donc à l'absence de violation de l'article 2 de la Convention.

### **III - Sur la violation alléguée de l'article 3 de la Convention :**

(...)

#### **A - Thèses des parties :**

(...)

#### **B - Appréciation de la Cour :**

49. Tout comme l'article 2, l'article 3 de la Convention, doit être considéré comme l'une des clauses primordiales de la Convention et comme consacrant l'une des valeurs fondamentales des sociétés démocratiques qui forment le Conseil de l'Europe (V. 7 juill. 1989, *Soering c/ Royaume-Uni* : Série A, n° 161, p. 34, § 88). Contrastant avec les autres dispositions de la Convention, il est libellé en termes absolus, ne prévoyant ni exceptions ni conditions, et d'après l'article 15 de la Convention il ne souffre nulle dérogation.

(...)

52. En ce qui concerne les types de "traitements" relevant de l'article 3 de la Convention, la jurisprudence de la Cour parle de "mauvais traitements" atteignant un minimum de gravité et impliquant des lésions corporelles effectives ou une souffrance physique ou mentale intense (V. [18 janv. 1978], *Irlande c/ Royaume-Uni* [ : série A, n° 25], p. 66, § 167, et V. *c/ Royaume-Uni* [GC], req. n° 24888/94 : Rec. CEDH 1999-IX, § 71). Un traitement peut être qualifié de dégradant et tomber ainsi également sous le coup de l'interdiction de l'article 3 s'il humilie ou avilit un individu, s'il témoigne d'un manque de respect pour sa dignité humaine, voire la diminue, ou s'il suscite chez l'intéressé des sentiments de peur, d'angoisse ou d'infériorité propres à briser sa résistance morale et physique (V. *récemment*, *Price c/ Royaume-Uni*,

*req. n° 33394/96, sect. 3 : Rec. CEDH 2001-VIII, § 24 à 30, et Valaèinas c/ Lituanie, req. n° 44558/98, sect. 3 : Rec. CEDH 2001-VIII, § 117).* La souffrance due à une maladie survenant naturellement, qu'elle soit physique ou mentale, peut relever de l'article 3 si elle se trouve ou risque de se trouver exacerbée par un traitement - que celui-ci résulte de conditions de détention, d'une expulsion ou d'autres mesures - dont les autorités peuvent être tenues pour responsables (*V. [2 mai 1997], D. c/ Royaume-Uni [ : Rec. CEDH 1997-III, p. 792, § 49], Keenan c/ Royaume-Uni, préc., et Bensaid c/ Royaume-Uni req. n° 44599/98, sect. 3 : Rec. CEDH 2000-I).*

53. En l'espèce, chacun reconnaît que le Gouvernement défendeur n'a pas, lui-même, infligé le moindre mauvais traitement à la requérante (...).

54. La requérante soutient plutôt que le refus par le DPP de prendre l'engagement de ne pas poursuivre son mari si ce dernier l'aide à se suicider et la prohibition du suicide assisté édictée par le droit pénal s'analysent en un traitement inhumain et dégradant dont l'État est responsable, dans la mesure où il reste ainsi en défaut de la protéger des souffrances qu'elle endurera si sa maladie atteint son stade ultime. Ce grief recèle toutefois une interprétation nouvelle et élargie de la notion de traitement qui, comme l'a estimé la Chambre des Lords, va au-delà du sens ordinaire du mot. Si la Cour doit adopter une démarche souple et dynamique pour interpréter la Convention, qui est un instrument vivant, il lui faut aussi veiller à ce que toute interprétation qu'elle en donne cadre avec les objectifs fondamentaux poursuivis par le traité et préserve la cohérence que celui-ci doit avoir en tant que système de protection des droits de l'homme. L'article 3 doit être interprété en harmonie avec l'article 2, qui lui a toujours jusqu'ici été

associé comme reflétant des valeurs fondamentales respectées par les sociétés démocratiques. Ainsi qu'il a été souligné ci-dessus, l'article 2 de la Convention consacre d'abord et avant tout une prohibition du recours à la force ou de tout autre comportement susceptible de provoquer le décès d'un être humain, et il ne confère nullement à l'individu un droit à exiger de l'État qu'il permette ou facilite son décès.

55. La Cour ne peut qu'éprouver de la sympathie pour la crainte de la requérante de devoir affronter une mort pénible si on ne lui donne pas la possibilité de mettre fin à ses jours. Elle a conscience que l'intéressée se trouve dans l'incapacité de se suicider elle-même en raison de son handicap physique et que l'état du droit est tel que son mari risque d'être poursuivi s'il lui prête son assistance. Toutefois, l'accomplissement de l'obligation positive invoquée en l'espèce n'entraînerait pas la suppression ou l'atténuation du dommage encouru (effet que peut avoir une mesure consistant, par exemple, à empêcher des organes publics ou des particuliers d'infliger des mauvais traitements ou à améliorer une situation ou des soins). Exiger de l'État qu'il accueille la demande, c'est l'obliger à cautionner des actes visant à interrompre la vie. Or pareille obligation ne peut être déduite de l'article 3 de la Convention.

56. La Cour conclut dès lors que l'article 3 de la Convention ne fait peser sur l'État défendeur aucune obligation positive de prendre l'engagement de ne pas poursuivre le mari de la requérante s'il venait à aider son épouse à se suicider ou de créer un cadre légal pour toute autre forme de suicide assisté. Partant, il n'y a pas eu violation de l'article 3.

### **III - Sur la violation alléguée de l'article 8 de la Convention :**

(...)

**A - Thèses des parties :**

(...)

**B - Appréciation de la Cour :**

**1. Applicabilité de l'article 8, § 1 de la Convention :**

61. Comme la Cour a déjà eu l'occasion de l'observer, la notion de "vie privée" est une notion large, non susceptible d'une définition exhaustive. (...) Cette disposition protège (...) le droit au développement personnel et le droit d'établir et entretenir des rapports avec d'autres êtres humains et le monde extérieur (*V., par ex., [22 févr. 1994], Burghartz c/ Suisse [ : Série A, n° 280-B, § 24], in Rapp. Comm., op. cit., § 47, et Friedl c/ Autriche : Série A, n° 305-B, in Rapp. Comm., § 45*). Bien qu'il n'ait été établi dans aucune affaire antérieure que l'article 8 de la Convention comporte un droit à l'autodétermination en tant que tel, la Cour considère que la notion d'autonomie personnelle reflète un principe important qui sous-tend l'interprétation des garanties de l'article 8.

62. (...) La Cour observe que la faculté pour chacun de mener sa vie comme il l'entend peut également inclure la possibilité de s'adonner à des activités perçues comme étant d'une nature physiquement ou moralement dommageable ou dangereuse pour sa personne. La mesure dans laquelle un État peut recourir à la contrainte ou au droit pénal pour prémunir des personnes contre les conséquences du style de vie choisi par elle est depuis longtemps débattue, tant en morale qu'en jurisprudence, et le fait que l'ingérence est souvent perçue comme une intrusion dans la sphère privée et personnelle ne fait qu'ajouter à la vigueur du débat. Toutefois, même lorsque le comportement en cause représente un risque pour la santé ou lorsque l'on peut raisonnablement estimer qu'il revêt une

nature potentiellement mortelle, la jurisprudence des organes de la Convention considère l'imposition par l'État de mesures contraignantes ou à caractère pénal comme attentatoire à la vie privée, au sens de l'article 8, § 1, et comme nécessitant une justification conforme au second paragraphe dudit article (*V., par ex., en ce qui concerne la participation à des activités sadomasochistes consensuelles s'analysant en des coups et blessures, [19 févr. 1997], Laskey, Jaggard et Brown c/ Royaume-Uni [Rec. CEDH 1997-I, § 36] et, en ce qui concerne le refus d'un traitement médical, Comm. EDH, 10 déc. 1984, req. n° 10435/83 : D.R. 40, p. 251*).

63. On pourrait certes faire observer que la mort n'était pas la conséquence voulue du comportement des requérants dans les affaires ci-dessus. La Cour estime toutefois que cela ne peut constituer un élément décisif. En matière médicale, le refus d'accepter un traitement particulier pourrait, de façon inéluctable, conduire à une issue fatale, mais l'imposition d'un traitement médical sans le consentement du patient s'il est adulte et sain d'esprit s'analyserait en une atteinte à l'intégrité physique de l'intéressé pouvant mettre en cause les droits protégés par l'article 8, § 1 de la Convention. Comme l'a admis la jurisprudence interne, une personne peut revendiquer le droit d'exercer son choix de mourir en refusant de consentir à un traitement qui pourrait avoir pour effet de prolonger sa vie (*V. § 17 et 18 ci-dessus [ndlr : non reproduits]*).

64. S'il ne s'agit pas en l'espèce de soins médicaux, la requérante souffre des effets dévastateurs d'une maladie dégénérative qui va entraîner une détérioration graduelle de son état et une augmentation de sa souffrance physique et mentale. L'intéressée souhaite atténuer cette

souffrance en exerçant un choix consistant à mettre fin à ses jours avec l'assistance de son mari. Ainsi que l'a déclaré Lord Hope, la façon dont elle choisit de passer les derniers instants de son existence fait partie de l'acte de vivre, et elle a le droit de demander que cela aussi soit respecté (*V. § 15 ci-dessus [ndlr : non reproduit]*).

65. La dignité et la liberté de l'homme sont l'essence même de la Convention. Sans nier en aucune manière le principe du caractère sacré de la vie protégé par la Convention, la Cour considère que c'est sous l'angle de l'article 8 que la notion de qualité de la vie prend toute sa signification. À une époque où l'on assiste à une sophistication médicale croissante et à une augmentation de l'espérance de vie, de nombreuses personnes redoutent qu'on ne les force à se maintenir en vie jusqu'à un âge très avancé ou dans un état de grave délabrement physique ou mental aux antipodes de la perception aiguë qu'elles ont d'elles-mêmes et de leur identité personnelle.

66. Dans l'affaire *Rodriguez contre Procureur général du Canada* ([1994] 2 LRC 136), qui concernait une situation comparable à celle de la présente espèce, l'opinion majoritaire de la Cour suprême du Canada considéra que l'interdiction de se faire aider pour se suicider imposée à la demanderesse contribuait à la détresse de cette dernière et l'empêchait de gérer sa mort. Dès lors que cette mesure privait l'intéressée de son autonomie, elle requérait une justification au regard des principes de justice fondamentale. Si la Cour suprême du Canada avait à examiner la situation sous l'angle d'une disposition de la Charte canadienne non libellée de la même manière que l'article 8 de la Convention, la cause soulevait des problèmes analogues relativement au principe de

l'autonomie personnelle, au sens du droit d'opérer des choix concernant son propre corps.

67. La requérante en l'espèce est empêchée par la loi d'exercer son choix d'éviter ce qui, à ses yeux, constituera une fin de vie indigne et pénible. La Cour ne peut exclure que cela représente une atteinte au droit de l'intéressée au respect de sa vie privée, au sens de l'article 8, § 1 de la Convention. Elle examinera ci-dessous la question de savoir si cette atteinte est conforme aux exigences du second paragraphe de l'article 8.

#### **2. Observation de l'article 8, § 2 de la Convention :**

68. Pour se concilier avec le paragraphe 2 de l'article 8, une ingérence dans l'exercice d'un droit garanti par celui-ci doit être "prévues par la loi", inspirée par un ou des buts légitimes d'après ce paragraphe et "nécessaire, dans une société démocratique", à la poursuite de ce ou ces buts (22 oct. 1981, *Dudgeon c/ Royaume-Uni* : Série A, n° 45, p. 19, § 43).

(...)

72. Les parties axent leur argumentation sur la question de la proportionnalité de l'ingérence révélée par les faits de l'espèce. La requérante s'en prend en particulier à la nature générale de l'interdiction du suicide assisté, en tant que celle-ci omet de prendre en compte sa situation d'adulte saine d'esprit, qui sait ce qu'elle veut, qui n'est soumise à aucune pression, qui a pris sa décision de façon délibérée et en parfaite connaissance de cause, et qui ne peut donc être considérée comme vulnérable et comme nécessitant une protection. Cette inflexibilité signifie selon l'intéressée qu'elle va être forcée d'endurer les conséquences de sa maladie pénible et incurable, ce qui pour elle représente un coût personnel très élevé.

73. La Cour note que si le Gouvernement soutient que la requérante, personne à la fois désireuse de se suicider et sévèrement handicapée, doit être considérée comme vulnérable, cette assertion n'est pas étayée par les preuves produites devant les juridictions internes ni par les décisions de la Chambre des Lords, qui, tout en soulignant que le droit au Royaume-Uni est là pour protéger les personnes vulnérables, ont conclu que la requérante ne relevait pas de cette catégorie.

74. La Cour considère néanmoins, avec la Chambre des Lords et la majorité de la Cour suprême du Canada dans l'affaire *Rodriguez*, que les États ont le droit de contrôler, au travers de l'application du droit pénal général, les activités préjudiciables à la vie et à la sécurité d'autrui (*V. également Laskey, Jaggard et Brown préc.*, § 43). Plus grave est le dommage encouru et plus grand est le poids dont pèseront dans la balance les considérations de santé et de sécurité publiques face au principe concurrent de l'autonomie personnelle. La disposition légale incriminée en l'espèce, à savoir l'article 2 de la loi de 1961, a été conçue pour préserver la vie en protégeant les personnes faibles et vulnérables - spécialement celles qui ne sont pas en mesure de prendre des décisions en connaissance de cause - contre les actes visant à mettre fin à la vie ou à aider à mettre fin à la vie. Sans doute l'état des personnes souffrant d'une maladie en phase terminale varie-t-il d'un cas à l'autre. Mais beaucoup de ces personnes sont vulnérables, et c'est la vulnérabilité de la catégorie qu'elles forment qui fournit la *ratio legis* de la disposition en cause. Il incombe au premier chef aux États d'apprécier le risque d'abus et les conséquences probables des abus éventuellement commis qu'impliquerait un assouplissement de l'interdiction générale du suicide assisté ou la création d'exceptions au

principe. Il existe des risques manifestes d'abus, nonobstant les arguments développés quant à la possibilité de prévoir des garde-fous et des procédures protectrices.

(...)

76. Aussi la Cour considère-t-elle que la nature générale de l'interdiction du suicide assisté n'est pas disproportionnée. Le Gouvernement souligne qu'une certaine souplesse est rendue possible dans des cas particuliers : d'abord, des poursuites ne pourraient être engagées qu'avec l'accord du *DPP* ; ensuite, il ne serait prévu qu'une peine maximale, ce qui permettrait au juge d'infliger des peines moins sévères là où il l'estime approprié. Le rapport du comité restreint de la Chambre des Lords précisait qu'entre 1981 et 1992, dans vingt-deux affaires où était soulevé le problème de l'"homicide par compassion", les juges n'avaient prononcé qu'une seule condamnation pour meurtre, qu'ils avaient assortie d'une peine d'emprisonnement à vie, des qualifications moins graves ayant été retenues dans les autres affaires, qui s'étaient soldées par des peines avec mise à l'épreuve ou avec sursis (§ 128 du rapport cité au § 21 ci-dessus [*non reproduit*]). Il ne paraît pas arbitraire à la Cour que le droit reflète l'importance du droit à la vie en interdisant le suicide assisté tout en prévoyant un régime d'application et d'appréciation par la justice qui permet de prendre en compte dans chaque cas concret tant l'intérêt public à entamer des poursuites que les exigences justes et adéquates de la rétribution et de la dissuasion.

77. Eu égard aux circonstances de l'espèce, la Cour ne voit rien de disproportionné non plus dans le refus du *DPP* de prendre par avance l'engagement d'exonérer de toute poursuite le mari de la requérante. Des arguments puissants fondés

sur l'état de droit pourraient être opposés à toute prétention par l'exécutif de soustraire des individus ou des catégories d'individus à l'application de la loi. Quoi qu'il en soit, vu la gravité de l'acte pour lequel une immunité était réclamée, on ne peut juger arbitraire ou déraisonnable la décision prise par le *DPP* en l'espèce de refuser de prendre l'engagement sollicité.

78. La Cour conclut que l'ingérence incriminée peut passer pour justifiée comme "nécessaire, dans une société démocratique", à la protection des droits d'autrui. Partant, il n'y a pas eu violation de l'article 8 de la Convention.

#### **IV - Sur la violation alléguée de l'article 9 de la Convention :**

(...)

##### **A - Thèse des parties :**

(...)

##### **B - Appréciation de la Cour :**

82. La Cour ne doute pas de la fermeté des convictions de la requérante concernant le suicide assisté, mais observe que tous les avis ou convictions n'entrent pas dans le champ d'application de l'article 9, § 1 de la Convention. Les griefs de l'intéressée ne se rapportent pas à une forme de manifestation d'une religion ou d'une conviction par le culte, l'enseignement, les pratiques ou l'accomplissement des rites, au sens de la deuxième phrase du paragraphe 1 de l'article 9. Comme l'a dit la Commission, le terme "pratiques" employé à l'article 9, § 1 ne recouvre pas tout acte motivé ou influencé par une religion ou une conviction (*Arrowsmith c/ Royaume-Uni, req. n° 7050/77, in Rapp. Comm. 12 oct. 1978 : D.R. 19, p. 19, § 71*). Pour autant que les arguments de la requérante reflètent son adhésion au principe de l'autonomie personnelle, ils ne sont que la

reformulation du grief formulé sur le terrain de l'article 8 de la Convention.

83. La Cour conclut donc que l'article 9 de la Convention n'a pas été violé.

#### **V - Sur la violation alléguée de l'article 14 de la Convention :**

(...)

##### **A - Thèse des parties :**

(...)

##### **B - Appréciation de la Cour :**

87. La Cour a jugé ci-dessus que les droits garantis à la requérante par l'article 8 de la Convention se trouvaient en jeu (§ 61 à 67 *supra*). Il lui faut donc examiner le grief de l'intéressée consistant à dire qu'elle est victime d'une discrimination dans la jouissance desdits droits dans la mesure où le droit interne permet aux personnes valides de se suicider mais empêche celles qui sont handicapées de se faire aider pour accomplir cet acte.

88. Aux fins de l'article 14, une différence de traitement entre des personnes placées dans des situations analogues ou comparables est discriminatoire si elle ne repose pas sur une justification objective et raisonnable, c'est-à-dire si elle ne poursuit pas un but légitime ou s'il n'y a pas un rapport raisonnable de proportionnalité entre les moyens employés et le but visé. Par ailleurs, les États contractants jouissent d'une certaine marge d'appréciation pour déterminer si, et dans quelle mesure, des différences entre des situations à d'autres égards analogues justifient des distinctions de traitement (*V. Camp et Bourimi c/ Pays-Bas, req. n° 28369/95, § 37 : Rec. CEDH 2000-X, § 37*). Il peut également y avoir discrimination lorsqu'un État, sans justification objective et raisonnable, ne traite pas différemment des personnes se trouvant

dans des situations substantiellement différentes (*V. Thlimmenos c/ Grèce [GC], req. n° 34369/97 : Rec. CEDH 2000-IV, § 44*).

89. Toutefois, même si l'on applique le principe se dégageant de l'arrêt *Thlimmenos* à la situation de la requérante en l'espèce, il y a, pour la Cour, une justification objective et raisonnable à l'absence de distinction juridique entre les personnes qui sont physiquement capables de se suicider et celles qui ne le sont pas. Sur le terrain de l'article 8 de la Convention, la Cour a conclu à l'existence de bonnes raisons de ne pas introduire dans la loi des exceptions censées permettre de prendre en compte la situation des personnes réputées non vulnérables (§ 74 *ci-dessus*). Il existe sous l'angle de l'article 14 des raisons tout aussi convaincantes de ne pas chercher à distinguer entre les personnes qui sont en mesure de se suicider sans aide et celles qui en sont incapables. La frontière entre les deux catégories est souvent très étroite, et tenter d'inscrire dans la loi une exception pour les personnes jugées ne pas être à même de se suicider ébranlerait sérieusement la protection de la vie que la loi de 1961 a entendu consacrer et augmenterait de manière significative le risque d'abus.

90. Partant, il n'y a pas eu violation de l'article 14 en l'espèce.

**Par ces motifs, la Cour, à l'unanimité :**

1. Déclare la requête recevable ;
2. Dit qu'il n'y a pas eu violation de l'article 2 de la Convention ;
3. Dit qu'il n'y a pas eu violation de l'article 3 de la Convention ;
4. Dit qu'il n'y a pas eu violation de l'article 8 de la Convention ;
5. Dit qu'il n'y a pas eu violation de l'article 9 de la Convention ;

6. Dit qu'il n'y a pas eu violation de l'article 14 de la Convention.

(...)

M. Pellonpää, prés., Sir Bratza, Mme Palm, MM. Makarczyk, Fischbach, Casadevall, Pavlovschi, juges.

**Note :** L'arrêt *Pretty contre Royaume-Uni* renvoie l'homme à l'une de ses angoisses les plus intimes (1). Ce n'est pas tant la mort - la mort est ici perçue comme libératrice - qui est redoutée mais plutôt l'épreuve d'une agonie longue et douloureuse.

Atteinte de sclérose latérale amyotrophique, Diane Pretty souhaite, alors qu'elle était encore consciente, se prémunir contre une épreuve aussi pénible. Elle eut le courage d'interpeller directement les autorités publiques sur son sort. Incapable de mettre seule fin à ses jours, elle demanda au *Director of Public Prosecutions (DPP)* d'accorder à son mari une immunité de poursuites dans l'hypothèse où il serait amené à l'aider à se suicider. En d'autres termes, elle demandait au *Crown Prosecution Service* d'anticiper sa décision - l'infraction n'ayant pas encore été commise - sur l'opportunité des poursuites et de renoncer ainsi à faire application de la loi (2). Obtenir pareil blanc-seing était impensable comme le

rappela le *Director of Public Prosecutions* dans sa décision de refus : "*Les DPP successifs ont toujours expliqué qu'ils n'accorderaient pas, quelque exceptionnelles que pussent être les circonstances, d'immunité absolvant, requérant ou affirmant autoriser ou permettre la commission future d'une quelconque infraction pénale*".

Diane Pretty saisit alors la *Queen's Bench Divisional Court* afin d'obtenir l'annulation du refus d'engagement exprimé par le *DPP*, ainsi qu'une ordonnance lui enjoignant de prendre ledit engagement ou, à défaut, une déclaration aux termes de laquelle l'article 2 du *Suicide Act* de 1961, sanctionnant l'assistance au suicide d'autrui d'une peine de quatorze ans d'emprisonnement, était incompatible avec les articles 2, 3, 8, 9 et 14 de la Convention EDH.

Déboutée par la *Divisional Court*, puis par la Chambre des Lords, Diane Pretty put présenter sa revendication aux autorités judiciaires européennes. Le 22 janvier 2002, la Cour de Strasbourg décida de traiter par priorité sa requête et la communiqua en urgence au Gouvernement britannique.

Très attendue (3), la décision des juges européens, qui se prononcèrent unanimement en faveur de l'absence de

violation des articles précités, n'est guère surprenante. La jurisprudence de l'ancienne Commission (4) ainsi que les recommandations de l'Assemblée parlementaire du Conseil de l'Europe (5) permettaient déjà de présager l'hostilité de la Cour à l'encontre de toute revendication tendant à la reconnaissance d'un droit à la mort. Il eut été de surcroît bien étrange de déduire un tel droit du droit à la vie protégé par l'article 2. Le recours à l'article 3 ne pouvait davantage prospérer si l'on voulait respecter la cohérence de la protection offerte par la Convention.

Dès lors, le droit à la vie privée, droit aux contours élastiques (6), offrait peut-être une chance de succès plus raisonnable, espoir entretenu par la Cour avant d'être aussitôt remis en cause. Respectueuse du droit à la vie et ne violant pas l'interdiction des traitements inhumains et dégradants (1), l'incrimination de l'assistance au suicide constitue en effet une restriction justifiée du droit à la vie privée (2).

## **1 - L'incrimination de l'assistance au suicide au regard du droit à la vie et de la prohibition des traitements inhumains et dégradants**



Ne permettant pas de fonder un droit à la mort (A), l'article 2 de la Convention EDH détermine également l'interprétation de l'article 3 du même texte (B).

#### **A. - A - La négation du droit à la mort**

La Convention EDH relative à la dignité de l'être humain à l'égard de l'application de la biologie et de la médecine ne contient aucune stipulation explicite sur l'euthanasie ou l'assistance au suicide. Ce silence peut se comprendre au regard du paragraphe premier de l'article 2 de la Convention EDH qui interdit précisément de mettre intentionnellement fin à la vie d'autrui. Le second paragraphe de cet article prévoit trois restrictions au droit à la vie pour le cas où la mort *"résulterait d'un recours à la force rendu absolument nécessaire"*. Or, l'assistance au suicide dans un but altruiste ne figure pas parmi les hypothèses énumérées. Rien dans l'article 2 de la Convention EDH ne permet ainsi de légitimer un acte d'euthanasie homicide.

Pour relativiser la protection offerte, le conseil de la requérante développa une argumentation résolument libérale (7). L'objet de l'article 2 ne serait pas de protéger la vie en elle-même et pour elle-même, mais de garantir les individus

contre toute ingérence des tiers ou de l'État dans l'exercice de leur droit. Perçu essentiellement comme une liberté, le droit à la vie comprendrait une dimension négative et positive se traduisant par une protection du sujet contre les atteintes extérieures et par la faculté de disposer de sa propre vie. Le droit à la vie aurait pour corollaire le droit à la mort et il appartiendrait dès lors aux États membres de tout mettre en oeuvre pour aider une personne à mourir au moment jugé par elle opportun.

Si l'article 2 permet d'imposer une obligation positive à la charge des États (8), la Cour rappelle toutefois qu'une telle obligation a toujours été dictée par le souci de préserver la vie humaine. Sous peine de vider l'article 2 de sa substance, l'argumentation développée ne pouvait être approuvée. Ainsi que le résuma la Cour, *"l'article 2 ne saurait sans distorsion de langage être interprété comme fondant un droit diamétralement opposé, à savoir un droit à mourir"*.

À l'inverse de la rhétorique suggérée par la requérante, le Conseil de l'Europe estime qu'au droit de mourir dans la dignité revendiqué par les partisans de l'euthanasie correspond un droit à une vie dans la dignité (9). L'agonie faisant encore partie de la vie, il incombe aux États de

développer les infrastructures propres à accueillir les mourants et à mettre en place les moyens propres à prendre en charge la douleur (10). La dignité du mourant, selon les instances européennes, ne doit pas être invoquée pour qu'il soit mis fin à leur vie mais, au contraire, pour accroître les efforts en matière de soins palliatifs.

Il convient alors de distinguer soigneusement les pratiques interdites au nom du respect de la vie humaine de celles qui doivent être mises en oeuvre pour apaiser les malades en phase terminale (11). La cessation des soins inutiles, tout comme la prise en charge de la douleur, ne sont pas des actes homicides. L'acharnement prétendument "thérapeutique", qui déshumanise le patient pour en faire un objet aux mains du pouvoir médical, est depuis quelques années fortement dénoncé (12). Les médecins ont aujourd'hui le devoir d'interrompre les traitements disproportionnés, inefficaces ou inutiles (13). Enfin, lorsque le personnel médical décide d'atténuer l'intensité des souffrances endurées par une personne malade, ses prescriptions respectent une posologie calculée pour éviter l'irréparable. La mort, certes, est un risque potentiel. Cependant tout est fait pour éviter sa survenance. L'administration d'un cocktail lytique, breuvage mortel en raison de sa

composition, établit en revanche une intention de tuer et doit donc être condamnée au regard de l'article 2.

Les juridictions anglaises ont bien perçu cette ligne de démarcation entre ce qui peut être médicalement tenté et ce qui doit demeurer interdit. Les affaires *Cox* (14) et *Bland* (15) permirent à la Chambre des Lords de dissocier nettement l'acte médical du geste criminel. Une commission d'enquête nationale approuva la démarche des juridictions et se prononça en faveur de la permanence de l'interdiction de l'assistance au suicide (16), conclusion aussitôt approuvée par le Gouvernement britannique (17). Pour subtile qu'elle soit, la distinction entre les actions réprouvées et celles qui doivent être encouragées semble depuis avoir fait son chemin (18).

Dans ce contexte, il était peu réaliste de croire qu'un plus grand libéralisme médical allait permettre de justifier des pratiques homicides. Une telle vision repose sur une analyse erronée de l'humanisme médical (19).

Protégeant la vie humaine et non un droit à l'autodétermination quant à sa propre vie, l'article 2 de la Convention EDH doit éclairer la lecture de l'article 3.

## **B. - B - Le rayonnement du droit à la vie**

Sur le fondement de l'article 3 de la Convention, la requérante soutenait qu'en refusant de garantir à son mari une immunité de poursuites, le Royaume-Uni, par le truchement du *DPP*, lui imposait de subir un traitement inhumain et dégradant. À supposer que l'article 3 - qui protège l'intégrité physique et morale - soit applicable, l'argumentation présentée par Diane Pretty soulevait le problème de son articulation avec l'article 2 relatif à la protection de la vie humaine.

La Cour reconnut dans un premier temps qu'elle s'était réservé une certaine souplesse dans l'interprétation de l'article 3. L'arrêt *Selmouni* illustre bien à cet égard un désir d'accroître le niveau de protection (20). Auparavant, la Cour EDH avait déjà jugé que les États membres étaient contraints de protéger les personnes relevant de leur juridiction non seulement contre leurs propres agents mais aussi contre des particuliers (21) ou encore qu'il pesait sur eux un devoir de prévention afin de protéger toute personne contre une situation de danger (22).

À la lumière de cette interprétation extensive, la requérante prétendait que l'État anglais n'avait pas respecté son obligation positive d'agir pour la préserver contre les souffrances qu'elle serait amenée à subir. La seule mesure apte à la protéger

aurait été l'engagement de ne pas poursuivre son mari en cas d'assistance de sa part.

Bien que séduisante, cette prétention malmène la cohérence des principes qui assurent la protection de la personne humaine. En effet, il n'était pas demandé à l'État défendeur d'intensifier ses efforts en matière de prise en charge de la douleur, mais de délivrer un permis de tuer. Pour préserver l'intégrité physique et morale d'une personne en grand état de souffrance, il aurait fallu admettre une atteinte à sa vie. Ce paradoxe bouleverse les règles propres à l'état de nécessité et vide aussi de sa substance l'article 2 de la Convention. Or, comme elle l'indique, la Cour EDH doit veiller à ce que "*son interprétation soit conforme aux objectifs fondamentaux poursuivis par le Traité et préserve la cohérence que celui-ci doit avoir en tant que système de protection des droits de l'homme*". Il en résulte que "*l'article 3 doit être interprété en harmonie avec l'article 2*".

Le souci de cohérence justifierait ainsi qu'un État puisse légitimement infliger, afin d'assurer le respect de l'article 2, des traitements normalement constitutifs d'une violation de l'article 3 (23). En revanche, il ne permet pas de commettre une atteinte à la vie pour préserver le sujet

d'une atteinte, aussi douloureuse soit-elle, à son intégrité physique et morale.

Ne pouvant être défendue sur le fondement du droit à la vie et de la prohibition des traitements inhumains et dégradants, la thèse des partisans du "droit de mourir dans la dignité" peut-elle prendre appui sur le droit au respect de la vie privée ?

## **2 - L'incrimination de l'assistance au suicide et le droit à la vie privée**

Le droit à la vie privée, en ce qu'il postule la reconnaissance d'un droit à l'autodétermination (24), est fréquemment invoqué dans le domaine de la fin de vie. C'est la raison pour laquelle il faut désormais se demander si "*le droit à la mort ne pourrait pas faire son entrée par l'article 8 de la Convention EDH*" (25).

Les partisans de l'euthanasie prétendent que la décision de mourir comme ils l'entendent intéresse exclusivement leur conscience ; une sphère d'intimité - le fameux *right of privacy* du droit anglo-saxon - les protégerait contre toute intrusion de l'État dans l'exercice de leur droit d'option. Or, c'est précisément lors d'une affaire mettant en cause le *Suicide Act* de 1961 que la Commission EDH eut l'occasion de rejeter cette dernière conception (26). Rejetant également le

grief tiré de la violation de l'article 8, l'arrêt *Pretty* laisse néanmoins entrevoir une certaine ouverture par rapport à la jurisprudence de la Commission. La Cour reconnaît en effet timidement que le fait d'être empêché de choisir sa mort est susceptible de porter atteinte au droit au respect de la vie privée (A). Pour autant, l'ingérence du Royaume-Uni est jugée nécessaire dans une société démocratique (B).

### **A. - A - L'extension de la sphère d'intimité**

Les faits à l'origine de la décision d'irrecevabilité rendue par la Commission européenne lors de l'affaire *R. contre Royaume-Uni* diffèrent de ceux qui donnèrent lieu à l'arrêt commenté. À la fin des années 1970, un membre de l'association Exit fut arrêté pour avoir mis en contact des personnes souhaitant mourir avec un individu qui avait accepté de les assister dans leur projet en mettant à leur disposition les moyens appropriés. Condamné pour complot en vue d'aider et d'encourager le suicide, il décida de saisir la Cour EDH mais sa requête fut filtrée par la Commission. Devant celle-ci, il soutenait que sa condamnation sur le fondement de l'article 2 du *Suicide Act* violait son droit au respect de la vie privée.

La Commission remarqua que, "*si une éventuelle violation de ce droit devait être constatée, seul le candidat au suicide pourrait s'en prévaloir*". Puis elle prit soin de dissiper le doute qu'elle laissait ainsi subsister sur la recevabilité d'une requête présentée directement par une personne sollicitant l'assistance d'un tiers. Elle précisa en effet que les actes d'aide au suicide étaient de toute façon "*exclus de la notion de vie privée car ils portent atteinte à l'intérêt général de la protection de la vie*".

La Cour de Strasbourg fut moins catégorique lorsqu'elle se prononça sur le bien-fondé de la requête émanant de Diane Pretty. Les distorsions du raisonnement suivi révèlent d'ailleurs un certain embarras quant à la détermination de l'étendue du droit à la vie privée. Après avoir laconiquement affirmé que la notion de "*qualité de la vie*" prenait toute sa signification sous l'angle de l'article 8, la Cour *n'exclut pas* une atteinte au paragraphe premier de cet article. La faculté de choisir sa mort, au nom d'une qualité de vie jugée défaillante, participerait ainsi au déroulement et au développement de la personnalité...

Plus qu'une analyse réfléchie, il semble que ce soit une décision de la Cour suprême du Canada qui emporta ici la

conviction des juges européens (27). Sue Rodriguez, ressortissante canadienne, était également atteinte d'une sclérose latérale amyotrophique lorsqu'elle saisit les juridictions internes afin que l'article 241 b) du Code criminel, punissant de quatorze ans d'emprisonnement l'aide au suicide, soit déclaré contraire aux droits et libertés garantis par la Charte canadienne (28). La plupart des magistrats de la Cour suprême du Canada jugèrent que l'incrimination de l'assistance au suicide portait atteinte aux droits individuels de la requérante, mais que la restriction à ses droits fondamentaux se justifiait au regard des exigences d'une société démocratique. L'opinion majoritaire souligna plus particulièrement l'effet discriminatoire résultant de la prohibition de l'assistance au suicide. Ainsi, les personnes malades incapables de mettre fin à leur vie sans l'aide d'un tiers se trouveraient privées de la possibilité de choisir le suicide alors que cette option resterait ouverte au reste de la population.

Cette inégalité de traitement fut également mise en avant par Diane Pretty qui invoqua une violation de l'article 14 de la Convention EDH. L'interdiction des discriminations devant être rattachée aux droits garantis par la Convention (29), la Cour EDH se demanda si l'intéressée n'avait pas été victime d'une discrimination

dans la jouissance de son droit à la vie privée avant de conclure qu'il existait une raison objective et raisonnable aux éventuelles discriminations résultant de l'application du *Suicide Act*. L'incrimination de l'assistance au suicide lui parut en effet proportionnée à l'objectif poursuivi, à savoir la protection de la vie humaine.

### **B. - B - L'affirmation d'une ingérence justifiée**

L'ingérence que constitue la prohibition de l'assistance au suicide dans la jouissance du droit à la vie privée étant prévue par la loi, et cette loi poursuivant un objectif légitime, il convenait, conformément au paragraphe second de l'article 8, de contrôler la proportionnalité de l'ingérence par rapport au but poursuivi.

La requérante plaidait en faveur d'une prohibition plus nuancée, voire personnalisée, de l'assistance au suicide. Suivant son argumentation, les personnes lucides et non vulnérables ne devraient pas être protégées contre elles-mêmes.

Le Gouvernement maintenait à l'inverse que seule une interdiction de nature générale était à même de contenir le risque de dérives et de satisfaire ainsi au principe du respect de la vie humaine.

La mise en oeuvre d'un contrôle de proportionnalité ainsi que la reconnaissance d'une marge d'appréciation au profit des États offrent aux juges européens une certaine souplesse d'interprétation. En l'espèce, la Cour reprit la thèse de l'État défendeur en rappelant la nécessité de protéger les personnes malades contre les risques de pressions directes ou indirectes (30). Les principes d'opportunité des poursuites et de l'individualisation judiciaire lui semblèrent de surcroît propres à tempérer la rigueur de l'interdit pénal et à assurer une répression adaptée à chaque situation. Bien que réaliste, le raisonnement surprend ici par son aspect peu orthodoxe. En matière d'euthanasie, l'indulgence des juges se traduit le plus souvent par un acquittement prononcé en dépit des aveux de culpabilité de l'accusé. La Cour veut-elle alors signifier que la non-application de la loi peut être une réponse à sa trop grande sévérité ? Nous préférons croire qu'il n'en est rien, pareille conclusion dépassant probablement la pensée des juges européens.

Alors que certains États membres n'ont pas hésité à autoriser l'assistance médicale (31) au suicide et que la notion même de société démocratique se caractérise par le pluralisme, la tolérance et

l'esprit d'ouverture, la Cour EDH rappelle que la limitation de l'autodétermination se révèle parfois nécessaire pour préserver les droits d'autrui. Partant, elle marque les limites d'un libéralisme toujours plus agressif et d'une subjectivisation frénétique (32). Son arrêt fut sans aucun doute extrêmement cruel à entendre pour Diane Pretty et ses proches, comme la décision de la Cour suprême du Canada le fut autrefois pour Sue Rodriguez. Admettre la revendication de ces femmes conduisait toutefois à les conforter dans le sentiment qu'elles auraient pu perdre leur dignité dans les souffrances de l'agonie. Or, toute personne malade ou mourante, quelles que soient l'atrocité de ses douleurs ou l'intensité de son handicap, demeure un être humain digne de respect.

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1. V. notamment J. Hauser, *Euthanasie : le droit au néant et l'Europe* : RTD civ. 2002, p. 482 ; N. Deffains, obs. ss. CEDH, 4e sect., 29 avr. 2002, *Pretty c/ Royaume-Uni*, req. n° 2346/02 : Europe 2002, comm. 305 ; A. Garay, *Le droit au suicide assisté et la Cour européenne des droits de l'homme : le "précédent" de la dramatique affaire Pretty* : Gaz. pal. 2002, 2, doct. p. 1244.

2. La décision de déclencher les poursuites appartient initialement à la police. Le DPP jouit d'un pouvoir discrétionnaire pour réexaminer la décision de la police et pour décider de continuer ou d'interrompre les poursuites. Deux critères issus du Code for Crown Prosecutors doivent le guider : la pertinence des preuves recueillies par la police ainsi que l'intérêt public. Cf. M. Delmas-Marty, *Procédures pénales d'Europe*, PUF, 1995, p. 125 et s.

3. La Cour européenne ne s'était jamais prononcée en matière d'euthanasie, les requêtes introduites à ce sujet ayant été déclarées irrecevables. Cf. CEDH, 17 mai 1995, *Ramon Sampedro c/ Espagne*, req. n° 25949/94 ; - 4 juill. 1983, *R. c/ Royaume-Uni*, req. n° 10083/82 ; - 26 oct. 2000, *Sanles c/ Espagne*, req. n° 48335/99.

4. V. la décision d'irrecevabilité rejetant : CEDH, 4 juill. 1983, *R. c/ Royaume-Uni*, req. n° 10083/82 préc. [note 3].

5. Conseil de l'Europe, Assemblée parlementaire, *Recomm. 779*, 29 janv. 1976, relative aux droits des malades et des mourants ; - *Recomm. 1418*, 26 juin 1999, relative à la protection des droits de l'homme et de la dignité des malades incurables et des mourants,.

6. Cf. J. Velu et R. Ergéc, *La Convention européenne des droits de l'homme*, Bruylant, Bruxelles, 1990, p. 536 : "La vie privée "se sent" plus qu'elle ne se définit".

7. Suivant en cela les observations écrites déposées lors de la procédure par la Voluntary Euthanasia Society.

8. En 1989, un détenu condamné à la prison à vie avait exercé un recours au motif que les autorités pénitentiaires refusaient de mettre à sa disposition les moyens de se suicider. La Commission européenne estima que ce refus n'était pas contraire à la Convention, les États membres devant "prendre des mesures pour protéger la vie", Comm. EDH, 4 oct. 1989, req. n° 13371/88 ; - en 1993, la Commission réaffirma sa position à l'occasion d'une affaire visant des faits d'euthanasie dite passive, cf. 10 févr. 1993, J.-P. René Walter Widmer c/ Suisse, req. n° 20527/92.

9. Affirmant que "mourir est une phase de la vie", un rapport du Conseil de l'Europe conclut que "le droit de mourir dans la dignité correspond au droit à une vie dans la dignité", Assemblée parlementaire, Commission des questions sociales, de la santé et de la famille, Rapport sur le développement des soins et de l'assistance aux malades incurables et aux mourants dans le respect de leur volonté et de leurs droits, 7 sept. 1998 : Doc. 8421, § 53.

10. Selon le nouvel [article L. 1110-5 du Code de la santé publique](#), "les professionnels de santé mettent en oeuvre tous les moyens à leur disposition pour assurer à chacun une vie digne jusqu'à la mort". Les soins palliatifs tels que définis par la [loi du 9 juin 1999](#) sont précisément destinés à "sauvegarder la dignité de la personne malade".

11. Sur la distinction entre les pratiques euthanasiques à finalité médicale et les pratiques euthanasiques à finalité homicide, cf. C. Girault, Le droit à l'épreuve des pratiques euthanasiques, PUAM, 2001.

12. Cf. N. Lenoir, Aux frontières de la vie : une éthique biomédicale à la française, La documentation Française, 1991, p. 131.

13. D. 6 sept. 1995, art. 37, portant Code de déontologie médicale.

14. Le Dr Nigel Cox fut condamné à douze mois d'emprisonnement avec sursis pour tentative d'homicide après avoir injecté une dose mortelle de chlorure de potassium à une patiente de soixante-dix ans. Cf. J. Keown, The euthanasia debate in Britain : JIB 1997, n° 1-2, p. 55.

15. Airedale NHS Trust v. Bland [1993] : AC 789, p. 864, où la Chambre des Lords autorisa un médecin à interrompre l'alimentation et l'hydratation artificielles d'un patient en état végétatif.

16. Report of the Select Committee on Medical Ethics, House of Lords : Paper 21-1 of 1993-1994.

17. "Le Gouvernement a fait sien le refus de la légalisation de l'euthanasie ainsi que la reconnaissance du droit du patient conscient à refuser des soins sauf dans les cas où la loi rend le traitement obligatoire" in JIB 1995, n° 2, p. 172.

18. Cf. CCNE, avis n° 36, 27 janv. 2000, Fin de vie, arrêt de vie et euthanasie.

19. Cf. Conseil de l'Europe, Commission des questions sociales, Rapp. préc.



[note 9] : "Interrompre la vie d'un malade n'est pas une option thérapeutique, notamment si cet acte vise moins à mettre fin à ses souffrances qu'à ses jours", § 58.

20. CEDH, 28 juill. 1999, Selmouni c/ France : [JCP G 1999, II, 10193](#), note F. Sudre : "(...) compte tenu de ce que la Convention est un "instrument visant à interpréter à la lumière des conditions de vie actuelles" (...), certains actes qualifiés autrefois de "traitements inhumains et dégradants" et non de "torture", pourraient recevoir une qualification différente à l'avenir. (...) le niveau d'exigence croissant en matière de protection des droits de l'homme et des libertés fondamentales implique, parallèlement et inéluctablement, une plus grande fermeté dans l'appréciation des atteintes aux valeurs fondamentales des sociétés démocratiques".

21. CEDH, 23 sept. 1998, A. c/ Royaume-Uni.

22. CEDH, 7 juill. 1989, Soering c/ Royaume-Uni.

23. 9 mai 1984, X c/ Allemagne, req. n° 10565/83 : "La Commission estime que le fait de nourrir de force une personne comporte des aspects dégradants qui, dans certaines circonstances, peuvent être considérés comme interdits par l'article 3 de la Convention. D'après celle-ci, les Hautes parties contractantes sont toutefois tenues d'assurer à chacun le droit à la vie tel que le consacre l'article 2. Pareille obligation appelle dans certaines circonstances des mesures positives de la part des parties contractantes, et

notamment des actes concrets pour sauver la vie d'une personne en danger de mort lorsque celle-ci se trouve sous la garde des autorités".

24. En ce sens, V. A. Lepage, *Le secret de la vie privée sous influences : Dr. et patrimoine* n° 102, 2002, p. 63 ; D. Gutmann, *Les droits de l'homme sont-ils l'avenir du droit ?*, in *L'avenir du droit, Mélanges en hommage à F. Terré*, Dalloz, PUF, Éditions du Juris-Classeur, 1999, p. 339.

25. B. Maurer, *Le principe du respect de la dignité humaine et la Convention européenne des droits de l'homme*, La documentation française, CERIC, 1999, p. 398.

26. CEDH, 4 juill. 1983, R. c/ Royaume-Uni, préc. [note 3], req. n° 10083/82.

27. Rodriguez c/ Colombie-Britannique, [1993] 3 RCS 519.

28. Il existe un véritable parallèle entre la Charte canadienne et la Convention EDH, tant au niveau des valeurs protégées (vie, dignité, liberté ...) que des restrictions autorisées. Aussi bien dans la Charte que dans la Convention, les restrictions aux droits fondamentaux se justifient au regard de ce qui est nécessaire dans une société démocratique. Cf. J. Pradel, *Droit pénal comparé*, Dalloz, 1995, p. 191, n° 132.

29. V. toutefois CEDH, 26 févr. 2002, Fretté c/ France : [JCP G 2002, II, 10074](#), note A. Gouttenoire-Cornut et F. Sudre, où la Cour semble avoir "autonomisé" l'article 14.

30. Percevant un risque de pressions, la Commission des questions sociales du Conseil de l'Europe estime que l'interdiction de

tuer ne doit connaître aucune dérogation et que cette règle "vaut pour les personnes âgées, les malades et les handicapés, et incontestablement aussi pour les malades incurables et les mourants. Porter atteinte à cette interdiction dans le cas de ces derniers entraînerait des conséquences incalculables pour le système juridique. Ce fléchissement ne pourrait qu'accentuer les pressions individuelles ou sociales sur les malades incurables ou les mourants qui auraient le sentiment d'être un fardeau pour une société qui, de son côté, leur fournit la possibilité de mettre fin à leurs jours", Rapp. préc. [note 9], § 55.

31. Cf. L'euthanasie aux Pays-Bas et en Belgique, Sénat, Service des affaires européennes, juill. 2002. Ces deux pays ont mis en place une procédure de contrôle a posteriori afin de vérifier que le médecin a respecté des critères de minutie avant de pratiquer une euthanasie.

32. Cf. F. Terré, Sur la notion de libertés et droits fondamentaux, in R. Cabrillac, M.-A. Frison-Roche et T. Revet, Libertés et droits fondamentaux, Dalloz, 2001, p. 6 ; D. Cohen, Le droit à..., in L'avenir du droit, Mélanges en hommage à F. Terré, Dalloz, PUF, Éd. du Juris-Classeur, 1999, p. 393.





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## Case Law

- PRETTY v THE UNITED KINGDOM. *ECHR 2346/02*. (Appendix 1)
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