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TOWARDS TRANSPARENCY IN LAW (AND IN THE MEANWHILE, MORE MEDIATION)

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In this article, I address the problem that no matter how well a law or contract is drafted it cannot foresee and take into account all the possible contexts in which it will be utilised. Law is always relatively open-ended textual interpretation that by its nature is dependent on the perspective adopted by its interpreters, the courts, on both the legal and the factual context of a case. Thus, I see law as systemic discourse over societally acceptable behaviour defined by the perspective adopted by courts on legal and contextual input. Discourse over all the possible perspectives on this input is limited by the requirement of courts to finally solve each individual dispute. Within these limits, the perspective adopted by the courts depends on the courts' assessment of the value of the different kinds of input they perceive as affecting a particular case and, through that case, the system as a whole. This starting point leads to two conclusions that are discussed in more detail.

First, legal interpretation cannot by itself be a valid source of argumentation, but rather a means of identifying valid arguments. Any choice over different arguments must ultimately be made in some other way. For example, Latour's ethnographic research on the French Supreme Administrative Court indicates that the true motives behind individual judgments are extremely diverse and often concealed from the judgments themselves. Democracy requires that increased attention should be directed to how courts in fact motivate their decisions and how these actual motivations of courts could be made more overt from a textual perspective. This will require new legal methodologies and technologies for portraying judicial actions.

Second, in order to offset the justificatory deficiencies of interpretation in legal decision-making, authors such as Pöyhönen have proposed technologies for systematizing the effect that values might have on interpreting laws in their multiple possible contexts. However, it seems that existing law has been structurally designed to solve legal problems with little consideration of what would be the best solution in the greater context of a case, for example with regard to transaction costs, future relations, and reputation. Existing methods of creating, organizing, and systematizing law cannot take into account the wild multiplicity of these different contexts. This problem is especially emphasised in situations of interconnected networks of contracts. Towards this background, a more effective way of increasing context-sensitivity is afforded by mediation. Within the framework of binding law, mediation empowers parties to explore the possibilities afforded by the context of their specific dispute. While courts act to protect binding law, parties can override any other limits of law through the contextual freedom granted to them by mediation. Thus, mediation provides within the existing framework of binding law a second legal framework for increased context-sensitivity without requiring changes to existing legal paradigms.

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Keywords: textual theory, legal theory, legal meaning, civil law, contracts, mediation, conciliation

1 Introduction

Lawyers translate the concerns of their customers into a language that law is more responsive to. Judges evaluate contradicting claims and give a final interpretation of what law says on a certain matter at a particular point in time. Lawyers, judges and other actors engaged in law constantly interpret and give meaning to legislation passed by legislators. Law in action is a multiple process of interpretation and translation.

On the other hand, law is based on the ideal that a law is known to all concerned once it has been promulgated. Not knowing the law is considered as no excuse for breaking it. This is fine with simple enough laws such as speed limits and uncomplicated sales transactions at the supermarket. However, in more delicate cases the ideal has its practical limits. If two laws are in apparent contradiction of each other or if a contract motivates opposing courses of action, how should one act? What kind of a situation qualifies for leniency when breaking the speed limit? If a contract involving a long-term project has not taken into account a particular risk, who should bear that risk in light of the contract? Already the Ancient Greeks recognized that the generality of law results in a situation where law or contract cannot by itself account for all instances of societal transaction. There are situations in which two parties can have justified opposing expectations and law has to make a choice between them.

The key task of judges is to judge. A dispute taken before the courts must be resolved.[1] But how are judges supposed to interpret the legal system in hard cases such as those described above? When legislation is lacking, obscure or proposes contradictory values, how do judges find out which party's interests are more worthy of protection, and especially so if both parties are supported by excellent arguments prepared by capable jurists who take into account all intricacies of legal theory?[2]

1 Famously exemplified in Article 4 of the French Civil Code: *Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.*

2 For example, moot courts such as the Willem C. Vis International Commercial Arbitration Moot typically pit students against each other in arguing over legal stalemates.

Finally, situations of conflicting interests become increasingly common as our society becomes more complex and intertwined. New social situations give rise to new expectations that must then be translated into the language of law.[3] Increasingly abstract and intertwined legal systems acknowledge more varied arguments as legitimate means for bringing a case before the courts. When the existing meanings attached to law cannot cope with a new social situation, these meanings need to be updated. This happens not only through new legislation but also through lawyers, courts and other jurists who try to transplant new expectations into existing laws and legal concepts. Despite the problems posed by this process to the Montesquieuean concept of separation of powers, this seems unavoidable.[4]

To sum up, how can one know what is right or wrong in a society where multiple parties engage in translating and interpreting their conflicting needs into the language of law? To explore this dilemma, Section 2 discusses the inherently changing nature of meanings attributed to textual objects in the field of law. Section 3 discusses why interpretation in itself cannot constitute the justification for legal reasoning but instead only a means for finding arguments. The choice over these arguments has to be made on the basis of systemic value objects that are not very explicit in law itself. Finally in Section 4, I propose a practical consequence entailed by the problems of attributing legal meaning. This practical consequence is increased reliance on mediation and conciliation. These procedures avoid many of the pitfalls of traditional legal argumentation by relegating that legal argumentation into the role of a means for setting the boundaries of dispute resolution instead of its substance. These procedures also provide dispute resolution a new layer of argumentation that is more sensitive to the situation at hand than traditional law.

2 Meaningful law – truism or fallacy?

In his essay, Criticism and the Experience of Interiority, *Georges Poulet* plays with the notion that when a book is being read it simultaneously exists both internally and externally to its reader.[5] The book exists in the reader's hands as a material object that can be handed over to another person. At the very same time, the book also exists in the reader's mind as ideas interpreted from the material object by the reader's very own code of meaningful references. In short, all kinds of texts – not only books but any kind of meaning conveying utterances whether oral, written or otherwise[6] – exist in two radically

3 For example, see the discussion on the effects of network expectations in *Amstutz* and *Teubner* 2009. A concrete example of change discussed in the next section is the relatively recent acknowledgment under common law that mediation agreements may after all be enforceable.

4 The expectations created by the European Convention on Human Rights and the fundamental freedoms of the European Union are typical examples. In the Finnish context, of note are the fundamental freedoms guaranteed by the Finnish Constitution; even in countries like Switzerland where similar fundamental freedoms do not have primacy in relation to federal laws, they can nevertheless be utilised to import new means of argumentation into the general legal system through interpretation. For new sources of arguments in the global context, see for example *Amstutz* and *Vaios* 2009.

5 *Poulet* 1970.

6 For the relativisation of all transfer of meaning see e.g. *Derrida* 1972.

different dimensions. The first is the physical world through which they are transmitted. The second is the ideational world into which the physical message is interpreted by its receiver. In interpreting a text into something meaningful to us we also create our idea of that text's subject – writer, author, creator, whatever one may call it – and what that subject intended to mean by creating the textual object we are interpreting. According to *Foucault*:[7]

> [i]f a proposition, a sentence, a group of signs can be called "statement", it is not therefore because, one day, someone happened to speak them or put them into some concrete form of writing: it is because the position of subject can be assigned. To describe a formulation qua statement does not consist in analysing the relations between the author and what he says (or wanted to say, or said without wanting to); but in determining what position can and must be occupied by any individual if he is to be the subject of it.

The duality of the textual object and its interpretation lies at the heart of *Textual Studies*, which has the practical goal of understanding how ideas are transferred from person to person as meaning bearing textual objects and how these ideas are necessarily transformed during this process.[8] Textual objects, such as contracts or codes of law, cannot have fixed and stable meanings throughout time. Different meanings can be tied to textual objects, and through the process of using, sharing and reinterpreting a textual object these meanings change over time.

The instability of textual objects has critical relevance for understanding law. It should come as no surprise to jurists that the meaning of law is a process of ongoing negotiation. To highlight this, I refer here to three different examples of changing legal meaning.

In his article Der Text des Gesetzes, *Amstutz* undertakes a textual analysis of the interpretation of legal code. He does this primarily in light of the different policies used to interpret Article 1 of the Swiss Civil Code which regulates how Swiss civil law should be interpreted and construed.[9] While the text of Article 1 of the Swiss Civil Code has remained unchanged since its inception in 1907, Amstutz identifies two major policy periods that are descriptive of how that article has been used for different kinds of legal justifications. This does not depend on the text of the article itself, but rather on the interpretations used to turn that text into practical legal output. In the end, Amstutz's outcome is that all texts, even legal code, share the same principle challenges attributed to communication. These texts rely on their interpreter to actually mean something and therefore turn into Derridean meaning producing machines, shells that have no fixed meaning apart from the interpretations attached to them.[10] That we, to an extent, can share these interpretations with one another is a fact that does not make particular interpretations any more stable in relation to other interpretations made as the same text is scrutinised by another pair of eyes. Amstutz then discusses the question of where these different interpretations come from. While not being able to provide an ultimate

7 *Foucault* 2009, p. 107.
8 See e.g. *Salminen* 2009.
9 *Amstutz* 2007.
10 *Amstutz* 2007, p. 242.

conclusion to the question of to what extent they come from "above" (the legislator) or from "below" (societal practises), he does contend that both are important and one cannot separate legislative impulses from the application of legal code into practice.

Votinius' monograph discusses the evolution of the meaning of the brocard *pacta sunt servanda*.[11] Votinius builds his thesis by arguing against the belief that the values embodied by *pacta sunt servanda* could be seen as representative of the free market society, even a symbol of it.[12] Instead, what is more representative is the contractual paradigm that free market societies have adopted in their interpretation of *pacta sunt servanda*. This contractual paradigm, Votinius argues, is radically different from contractual paradigms in earlier societies. He identifies different stages of Western society and studies their contract-related ideologies and practices, from the classical world through feudal and renaissance societies up to early modern, early capitalist and our present day society.[13] His conclusion is that the paradigms used to regulate contract law through the brocard *pacta sunt servanda* have undergone major changes, generally by alternating between ideologies where contracting parties have been obligated to help each other bear difficulties in upholding the contract on the one hand and ideologies where neither party does not need to move a thumb to help the other keep their promise on the other. These changes have been tied to the uses of contract in societal practise and on moral-philosophical ideas of what constitutes a good contract.[14] Thus, the textual object of *pacta sunt servanda* has a tightly knit relationship to how moral and practical aspects of what constitutes good contractual practice change over time.

A more concrete example of change is provided by the question of the enforceability of mediation and conciliation agreements.[15] Until recently, the binding nature of mediation agreements was cast in doubt. Under common law, conciliation agreements were seen as "agreements to agree" that could not be held valid under the certainty doctrine.[16] Most probably due to pressure from the willingness of businesses to use mediation, the interpretation of mediation agreements started to evolve towards a position that overcame the rift between the doctrine of certainty and business practice. For example the New South Wales Supreme Court transplanted mediation into the legal sphere in a string of cases starting with the statement in the 1992 Hooper Bailey Associated Ltd. V. Natcon Group Pty Ltd decision that "[w]hat is enforced [in mediation agreements] is not co-operation and consent [i.e. an agreement to agree] but participation in a process from which co-operation and consent might come". This radical shift in interpretation was then refined in a number of following judgments.[17] A similar progression is also visible in international regulation, institutional rules, and other case law.[18]

11 *Votinius* 2004.
12 E.g. *Votinius* 2004, p. 25.
13 *Votinius* 2004, pp. 205–9.
14 *E.g. Votinius* 2004, p. 117 ff. for the Renaissance context.
15 *Salminen* 2011.
16 While the example here is from Australian caselaw, the same arguments seem to be present also in Finnish discussion; see *Salminen* 2011, pp. 62–63.
17 See *Pryles* 2001 for mediation in particular and also *Chapman* 2010 for subsequent changes in conceptions of certainty with regard to processes that do not necessarily lead to the resolution of a dispute..
18 S*alminen* 2011.

Interpretations of apparently stable textual objects, such as laws and legal principles, change. Following *Derrida*, the relationship of a textual object to societal practices that refer to that textual object must also be seen to apply with regard to all legal textual objects no matter whether their form is that of statute or more general principles.[19] A part of this relationship can be seen to stem from the very nature of legal textual objects as legal generalizations that are inadequate for taking into account all possible circumstances and contingencies as was noted already by Plato and Aristotle.[20] However, as seen above a part of this openness stems from the very nature of textual objects themselves. From a text theoretical perspective the relationship between texts and their use is not reliant on what is traditionally seen as the openness and generality of law.

The inherent openness of law does not prevent us from directing law by attaching new interpretations to legal textual objects.[21] The question is how this in practice happens. For example, what exactly led the New South Wales Supreme Court to change its clear, existing doctrine on mediation agreements? Who could have foreseen that change happening in that particular case? How do judges decide which interpretation of a textual object to use? What does it mean to interpret a legal text?

3 The death of the interpreter – a prerequisite for transparency?

In Switzerland there has been recent debate on the Swiss Federal Supreme Court's choice of interpretive methodology. In short, the Federal Supreme Court has stated that it analyses laws by first interpreting their wording and then by moving on to examine historical, teleological and systemic interpretations. However, at the same time it has declared that it refuses to fix an order of importance between the different methods of interpretation, calling this lack of a fixed interpretive method "pragmatic methodological pluralism" *(pluralisme methodologique pragmatique, pragmatischer Methodenpluralismus)*.[22] This has raised concerns in Swiss discussion about an absence of methodology that would leave too much manoeuvring room to the Federal Supreme Court in relation to the legislator, following which some advocates of stringent legalism have called for a rigid method of interpretation to be imposed in all situations.[23] Others have hailed the Federal Supreme Court's decision of not choosing a particular method in advance as an acknowledgment of the growth of contradicting normative expectations in society and of the practical difficulties of trying to bend these expectations to fit under a single form of interpretation in order to maintain an appearance of a coherent whole.[24]

It seems that in Swiss discussion the other side of the debate feels that interpretive paradigms can be used to justify results by an air of authority that results from the idea that fixed and rigid methods of interpretation could locate a true and constant meaning

19 The equivalence of all textual objects with regard to how their meaning is construed is proposed for example by *Derrida* 1972.
20 *Tubbs* 2000, p. 80.
21 *E.g. Votinius* 2004, p. 272.
22 *Steinauer* 2009, p. 109.
23 *Steinauer* 2009, p. 110.
24 *Amstutz* 2008, p. 31.

for legal textual objects. Unfortunately this is a fallacy as every act of interpreting a text may differ from another act of interpretation depending on how the interpreter sees the relevant context of the interpreted text.[25] There must be something more at play than just the use of an interpretive paradigm that is applied to a textual object. As seen in Section 2, the interpretation of textual objects can lead to different results even under an apparently stable interpretive paradigm. For example the change that overnight made conciliation agreements enforceable did not rely on choice of interpretive paradigms but rather on how conciliation agreements themselves were perceived and translated into the language of law. Even when law seems to come down to the question of how meaning is applied to legal textual objects upon the application of law, how this process actually works seems elusive. Even when different interpretive paradigms can be used to represent different approaches to applying meaning to legal textual objects, the results offered by these interpretive paradigms are hardly stable. How, then, is legal meaning actually created?

From an extralegal perspective, the process of how courts attribute and change legal meaning has been studied by *Bruno Latour*.[26] In his ethnography of how French administrative law is applied by the Conseil d'État, Latour uses behind-the-doors access to follow judges as they decide lawsuits. He then tries to identify what factors steer this decision-making process. Similarly to Section 2 above, the key feature of law for Latour is its duty to fix meanings.[27] Latour emphasises the obligation of courts to rule finally on whatever issue they face. While "scientific truth" is continuously remoulded and verified through scientific discourse with very particular rules of verity, "legal judgments" cannot similarly reflect such evolving truth but instead must necessarily be decisions made within limited contexts to solve individual disputes. There is no continuation of legal discourse in the very same context of a dispute after the matter has been finally judged:[28]

> [Law] has better things to do than mimic or approximate to the scientific truth: it has to produce justice, and declare the law, in accordance with the existing state of the texts, taking into account the precedent, with no arbiter other than the judges, who have no one to judge for them.

Later on, the meaning of judgments is of course remoulded as new interpretations are attached to them, possibly even by the same judges that made the original judgment.[29] But

25 See for example *Foucault* 2009. Werner, writing from the perspective of textual criticism, notes that (1998 p. 256): ...the editor...is charged with the task of re-making Dickinson['s poems] in the image of the present critical and cultural age. Of particular interest here will be the ways in which [the edition] responds to recent readings of Dickinson – many feminist and poststructuralist in orientation – that challenge, among other things, the "hierarchies of traditional textual components (e.g., truth and error, reading and variant, center and margin)," and that are clearly antithetical to masterpiece theories of art. A similar process of re-evaluation (though probably on grounds different than those explicitly mentioned by Werner) of the object interpreted, i.e. mediation agreements in light of the doctrine of certainty, must have been undertaken by the New South Wales Supreme Court in the example mentioned above in Section 2.

26 *Latour* 2010.

27 *Latour* 2010, p. 274.

28 *Latour* 2010, p. 240–241.

29 For example, the judge of the above-mentioned Hooper Bailey case apparently modified his earlier reasoning to better suit a later case; see Salminen 2011, p. 43–47.

in any case the contexts in which the new meanings are attached to previous judgments are different than those in which the latter were originally made. In other words, once a judgment has been rendered, judges are free to create new meanings to the textual objects comprising that judgment.

Latour's perspective emphasises the process of enunciation through which meaning is finally assigned to legal textual objects by courts. Based on Latour's observation of the Conseil d'État, this process of assigning meaning is an interaction of "value objects" that guide individual cases through the transformation process from legal code and factual circumstances into a decision. The value objects named by Latour are:[30]

1. the *authority* of the agents participating in the judgment;
2. the *progress* of the claim as it moves through obstacles;
3. the o*rganization* of cases, which enables the logistics of claims to be respected;
4. the *interest* of cases, which is a measure of their difficulty;
5. the *weight* of texts, which makes for an increasingly contrasted landscape and history;
6. the process of *quality control* by means of which the conditions of felicity of the process as a whole are verified reflexively;
7. *hesitation*, which produces freedom of judgment by unlinking things before they are linked up again;
8. the *means* or *arguments* which compel the linking of cases together [translated from the French *moyen*, i.e. more precisely "legal ground" or "legal argument"];
9. the *coherence* of law itself as it modifies its internal structure and quality; and
10. the *limits* of law, which are defined by regulating the right to launch or suspend legal action.

All these value objects are interrelated in different ways. For example, quality control and hesitation are integral requirements for good law by attempting to distance the judges' individual attitudes from particular viewpoints and by stressing the adequate evaluation of a multitude of features and circumstances. This serves as a kind of opposing force to for example the value object of relative authority. Similarly, two of the more traditional value objects in Latour's list, the means and limits of law, act together to control the process of providing circumstances with legal meaning. Through different means, factual circumstances can be linked to previously attributed groups of legal meanings and therefore also used to require a particular kind of decision from a court. The limits of law define the right to launch legal action in particular circumstances. In Latour's example of raising a particular kind of claim against a French state company, this right is tied to shareholder status in that company; even a single share out of thousands suffices for this, but without the single share no claim is possible no matter how good substantial reasons there may exist for such a claim. Means and limits are thus opposites that are important catch phrases for attributing meaning to different textual objects. In order for something to catch the eye of the court that provides legal meaning, this something needs to be related to some means or other and be within the limits of law, thus making the means and the limits of law crucial for how and whether circumstances can be translated into legal discourse in any particular legal system. Yet, even means and limits are tied to

30 *Latour* 2010, p. 194–195.

interpretations based on the weight of different texts, which on its turn is based on the relative authority of authors, etc. In sum, all the value objects mentioned by Latour create a system from which it is difficult to see, even in individual cases, which objects interact in what ways to different kinds of input in producing a particular kind of output.[31]

Latour admits that many of these value objects are not part of traditional legal systematization. For example, the traditional Finnish viewpoint on legal discourse is guided by a theory of sources of law that claims to rely primarily on what Latour coins the "weight of texts", whether these be legal code, *travaux préparatoires*, case law, or factual arguments.[32] In fact, a traditional positivist viewpoint on law would outright want to deny that for example the relative authority of agents participating in the judgment should have anything to do with law, while maintaining that the coherence of law with the legislator's demands is the sole objective in the interpretation of law.[33] Nevertheless, Latour claims that at least all the value objects mentioned by him interfere and interact in the process of assigning legal meaning at the top level of French administrative law. Not one can be separated from the whole without losing some important part of the explanation or reason behind a particular legal decision. This is due to the possibility of the judiciary to bend all the traditional elements of law through its judgments by reinterpreting the textual objects of which law and factual circumstances are composed. Due to the lack of intrinsic meaning of textual objects, courts have the power to reassign the meaning of already existing textual objects as they work their way through new cases. Also this takes place through the interaction of all the value objects.

Latour does not provide us with a detailed account of how exactly the different value objects interact and work together. Instead, he describes the process as a repeated discourse between the different value objects that is also to an extent guided by the very same value objects. For example, the value objects of hesitation and quality control require courts to question their own understanding of the situation and to distance themselves from their opinions while pondering other possibilities to solve the case. In the end, however, it seems that what Latour describes is a way for judges to translate their instinct or desire on how individual cases should be solved, i.e. their ideal of equity in individual cases, into reasoning acceptable to the system of law and within the slowly evolving limits of that system of law. This process allows courts also to change the law by gradually assigning new layers of meaning onto textual objects such as legislation and case law while keeping the overall system seemingly stable and predictable throughout the process.

Thus, it seems that law in a general sense, as opposed to statutes, is the process of transforming legal code via input from societal situations into output in the form of judgments. The process of transformation happens through value objects that direct the enunciation of meaning. A key end result of this understanding is that it becomes difficult to identify the actual reasoning of courts from underneath their "interpretation", or use, of textual objects. The plurality of value objects that according to Latour have affected a judgment are not clearly visible in the end result. This may have its benefits in that

31 For general systems theory in law, see for example the entry on *Luhmann* in *Braun* 2006.

32 *Tolonen* 2003, p. 103 ff.

33 Such viewpoints continue to exist; see for example the argument on legal interpretation in Steinauer 2009.

maintaining a level of vagueness makes it easier to keep on reassigning meaning within what has the appearance of a coherent system. On the other hand, it should also be argued that making the true reasoning behind legal judgments clearer should be an intrinsic goal of law. As one commissioner of law quoted by Latour puts it: [34]

> We are evaluated on the quality of our reasoning, but not on our solution: everyone agrees that *we could have decided otherwise*, this is not a surprise for anyone, but on the quality of the conclusions, yes, there is a strong peer pressure toward excellence.

While the commissioner of law seems to ditch the hot potato by talking about peer pressure, the principle mentioned by him or her of *the quality of reasoning* must be seen as a key requirement for law in a democratic society. The judgments of courts must be comprehensible in order for the rest of society, including the legislative elements, to plan their actions accordingly and, if necessary, work towards changing the state of law. It cannot be in the interest of society at large if a court's idea of what is reasonable is hidden behind not just the relative textual openness of its own judgment but also behind a vast system of textual objects alleged to comprise a coherent and unchanging whole from which the right answer can be found through interpretation. The next question is whether increased openness is possible at all, especially as the inner workings of the system of different value objects depicted by Latour is very unclear.

What is clear is that interpretation itself cannot provide adequate foreseeability in the jungle of value objects that affect the choice over all the possible interpretations afforded by a system of law. Proposals have been put forth for a system of argumentation that would not rely on interpretation as a primary source of justification. Instead, justification would be measured by how well interpretations of law reflect the perceived reality of values in society. In the Finnish context an interesting example is provided by *Pöyhönen*, who proposes the use of the Finnish fundamental rights system and a systematization of contextuality as a basis for argumentation in tort, contract and property law.[35] I will not go into the details of Pöyhönen's argument here, but in short Pöyhönen claims that argumentation through fundamental rights in conjunction with increased context-sensitivity should be used for choosing which interpretation afforded by law is to be adopted in particular situations. Pöyhönen argues that this system would make law more adept at transforming societal concerns into the language of law. Society could avoid at least a part of the cumbersome process of having to translate societal expectations into traditional legal terminology that is ill-equipped for hearing them. More down-to-earth argumentation with the values depicted by the fundamental rights system could in general make it easier to argue perspectives on law. And if the legislator on the basis of the fundamental rights systematization would more precisely know on what grounds judgments have been made, societal discourse could better be guided towards perceived core issues.

34 *Latour* 2010, p. 213 fn.18.
35 *Pöyhönen* 2000.

Arguments similar to those of Pöyhönen have been put forth in international contexts.[36] I will not go into detailed criticism on these kinds of arguments here, save for two points I see as important. First, changing existing concepts and traditions is a difficult task due to the weight of all the history attached to interpretations of legal concepts throughout their use.[37] This use may well span centuries of different ideas and values, as shown by the example of *pacta sunt servanda* above. Even when Pöyhönen's attempt to change the system of argumentation within the Finnish legal system is based on values that are approved by the Finnish legal system and that are given primacy over other laws by the Finnish constitution, any attempt at replacing the existing system with its concepts and traditions with that proposed by Pöyhönen will be an onerous one.[38] Second, unless the relevant value objects themselves could somehow be directly used, every situation will always require some level of interpretation and translation into legal language. However, these are no reasons not to try. As the example of the Swiss Federal Supreme Court shows, interpretation as a means of justification has come to a stalemate; while it is useful for identifying different kinds of arguments on what law should be, it offers little power to justify why a particular kind of argument would be better than another. And if we get over the fallacious idea that texts can have a fixed, context-independent meaning, we can also start trying to describe judicial processes in more detail despite the fact that we will always on some level be engaged in a process of translation and interpretation.

In sum, it seems impossible to share every detail that has affected reasoning behind a particular judgment. But does this also mean that we should not try? For any situation regarding the interpretation of law, it is of integral importance to understand what such interpretation entails. How do courts give particular legal meanings to textual objects that in themselves may be devoid of legal meaning before application? Representing legal argument through overtly stable textual objects can confuse the meaning of such textual objects and the actual arguments that lead to the judgment, and therefore it is of intrinsic value to try better to understand the processes of judicial decision-making and the different values that affect those processes. A system such as that proposed by Pöyhönen could make argumentation clearer by shifting focus from more abstract processes of interpretation, which tend to hide value judgments, towards a more open understanding of different societal valuations in different contexts.

4 Conclusion – more mediation

It seems to be in the nature of law and contracts that it is impossible to make them perfectly transparent and predictable. The situation becomes increasingly complex as

36 E.g. *Amstutz and Vaios* 2009, p. 659: *Ein solches [Weltr]echt ist nicht mehr Normen-Sammlung als Kundgabe des gesollten Verhaltens an das Publikum, also nicht mehr Aufstellung von Bestimmungen, die unmittelbar Verhaltensbeeinflussung bezwecken. Die Zwölf Tafeln oder der Code Napoléon haben hier keinen Referenzwert mehr. Weltrecht* ist *vielmehr Vernetzungs-Recht, also ein Beziehungszusammenhang, der Normen aus unterschiedlichsten Kontexten und von verschiedenster Abstammung verknotet. Weltrecht ist ein Aktant... Oder nochmals anders (und im vorliegenden Sprachspiel wohl die passendeste Formel): Weltrecht ist Interlegalität...*

37 E.g. *Legrande and Samuel* 2008 on what they perceive as key differences between common and civil law.

38 Though see e.g. *Husa* 2006 for a somewhat contrary viewpoint.

society becomes more complex and transnational.[39] However, this is no reason not to try to improve the quality of law. One way we can strive for increased transparency is by better motivating legal decisions and by not utilising motivations that lack justificatory power. Instead of basing decisions on general notions of interpretation, the reasoning used to choose between different interpretive possibilities afforded by any continuum of legal textual objects should be brought into light. Towards this ideal, research on the actual values motivating decisions, such as that of Latour's, and proposals for creating more realistic argumentation systems, such as Pöyhönen's framework, offer good bases for discussion.

However, a perhaps more outright useful implication of the inherent complexity of law and legal reasoning is the possibility that, by using mediation, we can to a considerable extent skip the translation of parties' interests into legal language that is normally required by litigation. The increased context-sensitivity called for by Pöyhönen finds a practical legal expression in mediation. Within the traditional framework provided by law, mediation provides a second framework that is more sensitive to the contextual expectations and requirements of the parties than law can ever be.[40] While mediation probably cannot provide increased foreseeability to unforeseeable disputes (what can?), it helps alleviate the problems posed by such disputes, such as potentially overwhelming transaction costs and solutions that, while crafted from a strictly legal perspective, fail to take into account the creative possibilities afforded by the greater context of a dispute. This is especially relevant in networks of interconnected contracts.[41]

Parties to a contractual dispute cannot outmanoeuvre the limits of binding law but due to the principle of party autonomy they can take into account much more than what law provides for. Mediation as a communication technology serves to facilitate the process of dispute resolution from this perspective. First, mediation lets parties concentrate on their actual interests, such as image, reputation and future relationships, instead of only those claims allowed by the law. Second, even those interests that would be allowed by the law may benefit from the clarity that these interests receive from not having to be translated into the language of law. Instead of arguing why the law should admit particular kinds of claims in particular kinds of cases, parties can concentrate on their interest in arguing over what they see as a fair compensation (money, reputation, services etc.). Third, utilising rigid legal argumentation that does not match actual interests or otherwise hides such interests from view may serve to distract parties from their interests. Fourth, in hard cases where there is little guarantee on which way judges will decide, why waste money on slugging it out in court for an uncertain decision with all the included transaction costs, in particular time, money and reputation? If both parties are equally possibly right or wrong on the interpretation of unclear law, wouldn't it instead be better for them to try and

39 *Amstutz and Vaios* 2009.

40 *Hill* 1998.

41 See for example *Teubner* 2004. Towards this background, networked contractual situations have been increasing with the tendency towards smaller units (from the perspective of hierarchically organized contractual structures see for example *Ben-Shahar and White* 2006). Smaller units and even individuals are increasingly empowered to operate on a global scale (see for example How to Make Stuff in *Wired* 19 (2011) 4 p. 90–113). Such scenarios are reliant on their operational environments, and these consist of increasing numbers of multilayered contracts for example in the case of computing clouds and smart grids.

seek an amicable solution that takes both sides' interests into account as well as possible? Fifth, even if mediation fails, it is probable that a number of translation problems can be avoided as the parties better understand each other's underlying situations, which might otherwise be belied by abstract legal claims. Even in a situation where a legal precedent is needed, better understanding the actual interests involved could also help foster a better solution to a dispute.

In any case, mediation would not do away with lawyers who would be needed to set the boundaries and binding legal frames around the discussions between parties. However, within these boundaries the parties themselves can communicate more freely about their context-specific interests whether or not these are overtly supported by law. Parties would rely on legal assistance only to keep them on track about the relative legal strengths and limits of their positions and to ensure that the proceedings are undertaken in an acceptable manner. To sum up, we have enough difficulties trying to figure out for ourselves what our actual concerns are in complicated situations, let alone trying to convey them to other parties. Why, then, should we also engage in a complex process of translation and interpretation in order to find out whether our concerns are worthy of legal protection? From this standing point mediation would seem to offer the best possible current alternative to legal opacity.

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