

The Dilemma of Law: An Examination of Controversial Judicial Decisions in Ethno-Culturally Based Legal Disputes

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1 Introduction

In October 1989, a 24 year old Iraqi immigrant was indicted before the Sandviken municipal court on a series of charges ranging from assault (misshandel) to unlawful coercion (olaga tvång) and unlawful threat (olaga hot). The plaintiff was his pregnant ex-girlfriend. Despite the fact that the court found the defendant beyond any shadow of doubt guilty of the above mentioned charges, he was freed with a suspended sentence and a penalty of 3000 Kr, even though a conviction on such a charge would ordinarily result in imprisonment. In the judicial decision the court motivated its ruling by claiming that it could neither dismiss the fact that the accused felt that his integrity was violated, at the time of assault, nor could it disregard the different culturally determined perceptions of the offense held by the parties involved. Consequently, the court maintained that the circumstances of the case warrant a mitigated sentence rather than incarceration.

The court decision received considerable publicity in the media and provoked critical remarks from all quarters. The most uncompromising objections were voiced within the legal system where

legal experts started once again to wonder "if *the law*, which was suppose to protect us from crises had itself become a part of it". Certain political forces – with well established anti-immigrant policies – also, recognizing the potentials of the situation, jumped at the opportunity trying to fish in the troubled waters. They turned the argument around, presenting it as a strategy intentionally engineered for undermining the rights of women. Ingrid Fredriksson, the chairman of Conservative Women's Association in Malmö commented the court's ruling in one of the morning newspapers' editorial pages¹ and stated that it is the woman who pays the price of such legal considerations² and asked if Swedish women married to foreigners were to receive a different legal treatment from those married to Swedes? The court's experiment in trying to strike a balance between two culturally divergent perceptions of reality was interpreted as an attempt to sabotage the whole idea of women's liberation movement. Finally, the indignant attorney general (chefsåklagare) appealed the ruling stating that an immigrant's cultural background cannot be used as an excuse for assault, even if it might provide an explanation for the action. The case was eventually reexamined by the court of appeal, the previous decision was over-ruled, and the accused sentenced to two months internment.

The above case, which exemplifies the dilemmas faced by the Swedish legal system in its attempt to function within a multi-cultural framework, is just one among many similar cases. These cases reveal the severity of the existing cultural conflicts in Swedish society and bring the legal system face to face with "new" categories of conflicts which demand a new, and perhaps even unconventional, approach to legal problem solving and legal argumentation. It should, at this juncture, be mentioned that the municipal courts do not always rule in favor of the ethno-cultural minorities in controversial cases of this kind. Their rulings can go either way. In another recent case a Kurd was sentenced, on the basis of shaky circumstantial evidence, to 12 years imprisonment for drug-trafficking. This case too created sensational headlines. The accused was depicted in the media as a PKK terrorist and a ruthless heroin dealer. However, the case was appealed to a higher court and the accused was, after sixteen months of imprisonment, finally released. His acquittal made no headlines!

This paper is intended as an examination of the effects of ethno-cultural variables on the outcome of legal conflicts. The center of

focus will be on the "communicative" aspect of the judicial decision making process in such cases, both regarding the courts of law, defined as social settings, and the process of legal argumentation, described as discourse dominated by instrumental rationality. Thus, the issue which I raise in the following paper addresses, above all, the communication problems which occur in courts of law.

The theoretical framework used for this purpose has received inspiration from three separate sources: the tradition of analytical legal positivism of John Austin as it was developed by Hans Kelsen and Herbert Hart, system thinking and cybernetics as used by Niklas Luhmann and Gunther Teubner, and finally Habermas' theory of communicative action.

Analytical positivism will provide us with means for evaluating the consequences of introducing into legal reasoning diverse socio-cultural norms alien to the foundation of the legal system. Cybernetics enhances our understanding of the legal system as an autonomous social sub-system, emphasizing the inadequacy of a purely "external" approach to legal problems. The Theory of Communicative Action highlights the problematic nature of the rational-instrumental approach, which constitutes the dominant technique of legal problem solving, and paves the way for a possible future method of legal argumentation.

1.1 The Issue of Proportional Representation

Contemporary Sweden is a multi-ethnic society. More than one million out of the total population of eight million are officially classified as immigrants, that is with their children counted too. More than one hundred diverse cultural groups live side by side, though often in ethnic enclaves, within the national boundaries of the state of Sweden. Nevertheless, the legal system appears to lack adequate preparation for dealing with the legal conflicts which have at least in part resulted from problems in cross-cultural communication in Sweden's relatively recent multi-culturalism. In certain legal quarters, where the universal validity of the Swedish culture is an undisputed fact, the questions of ethnicity are regarded as irrelevant side issues, which (ought to) have no bearing on the process of decision making in a Swedish court of law. For instance, in two separate and extensive investigations concerning the composition of lay assessor's corps³ in Swedish courts which were undertaken by the Law Court Authorities (*domstolsverket*), no attempt was made to ascertain the level of participation of different

ethnic groups in the corps of lay assessor's. The investigators are apparently enraged by the observation that the corps is male-dominated by a decisive factor of 7% but they somehow see it irrelevant to even mention the almost striking absence of ethno-cultural representation. Their assumption is that the cause of democracy and justice is best served by proportionate representation. But the decisive criteria for achieving this representational democracy and social justice is, in their mind, strictly limited to age, sex and professional characteristics. Ethno-cultural background is clearly excluded.

Issues related to the composition of the group of lay judges were even taken up on the editorial pages of the newspapers. As two judges, chefrådmän Ulla Ljunggren and Berith Söderberg wrote in *Dagens Nyheter*⁴: "Självfallet är det då nödvändigt att nämnden har en representativ sammansättning. Med åren har det emellertid, kanske främst i storstäderna, blivit en allt större snedfördelning av yrken, ålder och kön. I Stockholms tingsrätt tjänstgör 707 nämndemän, av vilka 132, eller 18% procent, är över 65 år...Vi anser alltså att det måste till förändringar för att få en allsidig sammansättning av nämndemannakåren."

From the point of view of DV's experts, ethnic background – defined in terms of differences in culture and religion, i.e., worldview, lifestyle, socio-cultural patterns of behavior, etc. – has no significant socio-legal bearing. However, recent controversies indicate a lack of consensus precisely in the outcome of legal cases which involve immigrants. It is furthermore, crystal clear that the lack of consensus is embedded in the legal system's inability to, in a satisfactory legal fashion, deal with the ethno-cultural component of these disputes.

Despite the legal system's apparent unwillingness, it is time to draw attention to the ethnic composition of the legal system's functionaries and analyze the possible negative social effects that a culturally homogeneous judicial corps might have on the social structure of a pluralistic society. Any such analyses must even consider the effects that a possible future ethnically proportionate judicial corps might have on society in general and on the legal system in particular. The majority is too often – and rightly so – accused of cherishing ethnocentric and prejudiced attitudes toward minorities (Westin, 1984, 1987). Thus, it is reasonable to assume that the total domination of the legal system by the majority will

only reinforce these prejudices. In the context of this general ignorance of the role of culture in legal questions, the fact that each minority group has its own peculiar set of prejudices is also frequently neglected. Nevertheless, it should be noted that minority groups do not confine themselves to making value judgments concerning the majority. Ethnic minority groups also tend to judge the life style and patterns of behavior of the other ethno-cultural groups from an ethnocentric viewpoint. It means that although a proportionate ethnic representation within the legal system is not only desirable but a *necessary* prerequisite for a democratic society, it would be misleading to insinuate that it would by its sheer fulfillment lead to the disappearance of controversies and disconsensus around the rulings on culturally grounded legal disputes. To overcome such disconsensus, it is required to make adjustments in the structure of legal argumentation so that it leaves space for conscious discussion and examination of the culturally relevant aspects of legal conflicts.

2 Cultural Relativism Versus the Legal System's Basic Norms

The above discussion brings us to another equally important issue which is raised in connection with the role of law in a pluralistic society, and which is clearly reflected in the recent controversies. This issue has to do with the extent to which the legal system is actually empowered to disregard or alter its "basic norms", from which, insist some legal scholars, stems the cohesion of the system of legal rules. "Basic norms" are often regarded to possess immutable substantive contents which compose the "universal" core of legal systems everywhere.

It is only too clear that, from a democratic point of view, a multi-cultural society requires particularized legal thinking. But how far can one extend the particularization of legal concepts without disintegrating the legal system and shattering the normative structure of the society? Can we, as Jürgen Habermas seems to believe, aided by reason invested in the rational communicative nature of the "better argument" and through "discourse" oriented to mutual understanding (*Verständigung*), transcend the normative limitations

of legal conflicts? Or do we have to draw a line beyond which normative flexibility is prohibited?

In order to provide an answer to the question posed above, we shall start, in the following section, by giving an "internal" description of the legal norms, as they are constructed, comprehended, presented and applied by the legal profession. Our main object will be, then, to discuss, and if possible to determine, the limits of tolerance of the "basic norm".

2.1 *The Concept of Legal Norm*

It is not unusual among legal scholars to search for concepts and relations that are common to law and legal systems *everywhere*. In fact, it is rather common among the students of law, to start their study with a basic assumption that there is *a universal valid core of substantive content in law*. Needless to say, if this assumption is true the ideal of a particularized legal thinking, which takes into consideration the diversity of socio-cultural norms of modern multi-ethnic societies, would become redundant. The substantive content of different legal systems' basic norms would not only be identical, but would also be fixed once and for ever.

The belief in the universality of some of the major characteristics of the legal system has historical roots. Although during different periods the notion of universality has manifested itself in different forms, its origins can be traced back to the ancient Greek Law. According to Homer, law was embodied in the *themistes* which the kings received from Zeus as the divine source of all earthly justice and which were based on custom and tradition. *Themis* means, according to Greek mythology, goodness and it can be translated into "law". "Themis is not a legal system in the technical sense of the word," writes Strömholm, "it is a network of norms, an impersonal and flexible 'order', the principle function of which is to draw up the lines of demarcation delimiting each man's proper sphere of action."⁵

In a relatively new doctoral thesis, *On Valid Law and Valid Moral Norms*, Mats Flodin, the author, describes his main goal as:

to argue that there is *a universal valid core of substantive content in law*, and make the argument so solid that it cannot be reasonably denied even by the extreme positivists or moral philo-

sophers seeking ultimately profound justification of a substantive content in law.⁶ (My italics)

In another place Flodin writes:

A civilized legal system expresses itself through official norms fit together into a coherent whole. Such a norm system is a unit when the validity of the norms rely on a postulated basic norm as a common source of validity and coherence. The function of the basic norm is first of all to provide validity for the highest norms of the system.⁷

Here I treat Mats Flodin's description of the legal system and its constituent norms as representing, a more or less, stereotypical trend of thought among many legal thinkers. This approach to the legal system has a legal-philosophical background which is misleadingly similar to legal theories pronounced by John Austin, Hans Kelsen, H.A.L. Hart and others. Yet, Flodin's standpoint differs fundamentally from both Kelsen's and Hart's in the sense that, unlike Flodin, they have never proposed that the law possesses a substantive universal core. I shall try to discuss this background in the following section.

2.2 *The Notion of "Universality" and its Relation to Legal Theory*

Many legal theorists have depicted the legal system as a pyramid of legal norms. At the very top of this pyramid is situated the supreme authority from which all the subordinate levels of rules derive their validity. During the course of history this supreme authority – which is frequently supposed to be the “universal” core of the legal systems everywhere – has been given many names: God, reason or sovereign. The secularization of religion, on the one hand, and democratization of political life, on the other has, however, in modern times necessitated a new and impersonal make up for the “supreme authority”. This trend is reflected in both Hans Kelsen's notion of “Basic Norm” and H.L.A. Hart's concept of “Rule of Recognition.” Let us have brief look at Kelsen's and Hart's theories.

2.2.1 *Kelsen's Pure Theory of Law*

Austin thought of a legal system as the set of all the laws enacted, directly or indirectly, by one sovereign. Kelsen substitutes the *basic norm* for Austin's sovereign and left the rest of the definition unaltered. A legal system is then defined, according to Kelsen, as the set of all the laws enacted by the exercise of powers conferred, directly or indirectly, by one basic norm. In his own words: "All norms whose validity may be traced back to one and the same basic norm from a system of norms, or an order."

The concept of basic norm is one of two concepts on which Kelsen's criterion of identity is founded. The other is the concept of *chain* which is explained by the following passage:

To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal status. This statute, finally receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes. If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly... It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitutions have ordained. This is the basic norm of the legal order.⁸

2.2.2 *Hart's Concept of Law*

H.L.A. Hart develops his concept of law through numerous confrontations with both Austin and Kelsen. In fact the first three chapters of his famous work *The Concept of Law* is entirely devoted to refuting Austin's theory of law. In this book Hart offers an analysis of the concept of law and of legal system through a discussion of the way in which rules of human conduct are used as social standards of behavior, sometimes combined together into complex systematic wholes within which the concept of legal discourse make sense and become applicable in appropriate social contexts. The notion of "universality" is also present in Hart's work, though it aims at universality of application, being supposedly as

relevant to quite alien legal traditions as to the author's own. What follows here is a résumé of a few major topics, relevant to the subject of discussion in this paper, analyzed by Hart in *The Concept of Law*. Hart depicts the legal system as a system of social rules. These rules have, however, two major characteristics, which distinguishes them from other forms of rules, like those of morality, etiquette etc. They are concerned with "obligations" or "duties" – they make certain conducts "obligatory" or "binding" and they have a systematic quality depending on the interrelationship of two other kinds of rules, "primary rules" and "secondary rules".

The primary rules describe what is generally known as "crime" and "offenses" and define obligations and duties. The secondary rules are not, however, concerned with the binding standards of obligatory conduct. They are instead related in a systematic manner to the primary rules by determining how the primary rules can be changed or are confirmed. Hart distinguishes three types of secondary rules: *The rule of adjudication* do not impose duties but confer powers; *The rules of change* determine the procedure which must be followed for altering the primary rules; *The rule of recognition* settles the validity of the of the rules of a particular legal system. In Hart's own words:

...the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition...⁹

Rules of recognition outline the duties of the law administrators, particularly spelling out the limitations imposed on those who are given the power to adjudicate. No wonder Hart goes as far as regarding the rule of recognition as an *ultimate* rule and referring to one of its criteria as *supreme*. He writes:

The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense an ultimate rule: and where, as is usual, there are several criteria ranked in order of relative subordination and primacy one of them is *supreme*.¹⁰

2.2.3 *The "Universality" of the Supreme Authority*

Both Kelsen's and Hart's theories have been subjected to numerous critical appraisals and their shortcomings have been discussed many times over. Nevertheless, their outstanding contributions to the understanding of the legal system exceed their shortcomings and they – each in its own way – remain even today a source of inspiration. Let us now go back to our discussion regarding the notion of "universality" and its relation to Legal norms. According to both Kelsen and Hart certain characteristics of the legal system are "universal", this is especially reflected in Hart's "rule of recognition" and Kelsen's "basic norm". Yet, both Hart and Kelsen concentrate on the procedural aspects of law and not on its substantive qualities. Tore Strömberg describes the non-substantive character of Kelsen's basic norm in the following way:

Grundnormen är för Kelsen inte någon högsta rättsprincip, ur vilken innehållet i enskilda rättsnormer kan härledas på logisk väg. Den är i stället en grundregel för sättet att frambringa rättsordningens enskilda normer. Grundnormen ger giltighet åt en statsförfattning, en konstitution.¹¹

Hart's legal rules are, as already pointed out, a particular variety of social rules. They reflect the dominant social practices in society. Neil MacCormick describes Hart's legal norms in the following way:

They do not exist in some ideal order or extra-terrestrial universe independently of what men or women living together socially do, say and think. They are on the contrary an element in the doings, sayings and thinkings of the men and women who live together in human social groupings... Hart represents them as dependent on, or expressions of, the attitudes of human beings towards their own and other humans' conduct and their way of acting and interacting with each other as conscious agents.¹²

In regard to the content of legal norms Kelsen takes a more complicated approach. He agrees that the legal system is affected by moral norms, but he nevertheless argues that law creates its own criteria of "good" and "evil", independently of the existing divergent moral criteria. Kelsen even takes a relativistic standpoint and sustains that there are equally justified moral systems.¹³

Neither Hart's nor Kelsen's theories indicate any sign of the legal system not being able to cope with a particularized legal approach to ethno-culturally grounded legal disputes. Since they both take distance from what Mats Flodin calls "a universal valid core of substantive content in law" one could, using their theories, conclude that the demands of a multi-cultural society would neither overstrain the legal system's different mechanisms nor endanger its normative coherence.

3 Is The Legal System an Autonomous Social Sub-System?

Traditionally social scientists have treated the legal system as either a reflexion of the dominating socio-economic structure of the society or as one of the offsprings of the increased social differentiation of common lives of human species. This traditional functionalistic perspective on the legal system misses one of the vital aspects of the modern legal system, namely, its *autonomy*. The notion of autonomy, as used here, is one of the controversial products of system thinking. With system thinking, it is meant, using a particular set of ideas, system ideas, in trying to understand the world's complexity. "System" defined in this context embodies a set of elements connected together which forms a whole. System thinking emphasizes the properties shown by this *whole* rather than the properties of the component parts.

From a functionally differentiated perspective society is divided into sub-systems, like that of politics, economy, culture, law and so on. Furthermore, each sub-system is distinguishable from other sub-systems due to its particular function. Thus, Niklas Luhmann postulates, "the one function/one system arrangement requires complete autonomy of the system because no other system can replace it with respect to its function. Hence, *autonomy is not a desired goal but a fateful necessity*. Given the functional differentiation of society no sub-system can avoid autonomy".¹⁴

The legal system, as depicted by Niklas Luhmann's system theory, is a *self-organizing* and *self-regulating* social sub-system. What is more, Luhmann argues that even if "there may be political control of legislation, *only* the law can change the law," and adds, "...the legal system reproduces itself by legal events and only by legal events."¹⁵

Now if there is any truth in Luhmann's statement and law produces itself, as also argued by Gunther Teubner, *only* intra-legally, then it will have vital implications for all arguments regarding the present state of, and possible future changes within, the legal system. Needless to say it has a bearing on the role of the legal system in a multi-cultural society, especially remembering the ethno-culturally homogeneous composition of the functionaries of the Swedish legal system.

According to the classical functionalistic view on the legal system, changes in the dominating socio-economic relations in society, as a rule, result in corresponding alterations within the legal system, which in turn can influence social relations and so on. Applying this classical perspective on the problem at hand, one would suggest that as long as the existing ethno-cultural problems in society at large are not dealt with in a "constructive" manner, i.e., with an eye to improve race-relations, we cannot but expect occasional outbursts of angry exchanges and debates within the legal system, which indicate fundamental disagreement on ethno-culturally embedded legal conflicts. In short, as long as ethno-cultural conflicts are not resolved at societal level, to expect consensus on those issues within the legal system would be unrealistic.

The relatively recent developments in cybernetics and system thinking show, however, that the classical sociological approach gives but an over-simplified picture of the legal system. It goes without saying that the legal system is in constant interaction with other systems like that of economics, politics, culture, and so on, and takes impression from outer-system developments. But it does not, necessarily, due to its own *internal logic*, mirror these changes. Cybernetics shows, for instance, that each system relates to its environment by re-arranging its degree of complexity. The system's complexity is always much greater than that of its environment. In order to deal with the constantly changing surrounding environment different systems "have to bring their own complexity into a relation of correspondence with that of their environments. Systems do this through establishing system structures that reduce the complexity of their environments and thereby *obviate point for point correlations between their own changes and changes in their environments.*"¹⁶ Thus, following the same trend of thought one can conclude that there occurs no point to point correlation between the developments in other socio-cultural and political sub-systems and the legal

system.¹⁷ Contrary to the traditional sociological view, an improved race-relation, within the cultural system, does not necessarily lead to disappearance of the above discussed legal controversies.

Therefore, when examining legal disputes with salient ethno-cultural features we must take into account the legal system's *autonomy* as a system, its logic and its basic norms. At the same time one must be careful not to fall a prey to various legal myths circulating in legal "academic" quarters and – as it is the general practice among students of law – exaggerate the role and alleged immutability of the legal system's basic norms, its system-logic, and the *mysterious* characteristics of legal argumentation. The legal system is in fact, despite its functionally autonomous status, but another socio-cultural construction in a sense that its logic, basic norms, formal rationality etc. are defined, and comprehensible, within the right cultural context only. *They do not reflect universal laws of human conduct.* Furthermore, as we shall see in the following section, it is *value-judgment* and not logic or rationality which provide the key to legal reasoning.

It is not surprising then if single-culturally constructed legal systems, like that of Sweden, cannot cope with multi-culturally based legal conflicts. Provisions for dealing with conflicts based on divergent cultural definitions of *reality* are simply lacking. How can, we must then ask, an arbitrator take into account the multi-cultural characteristics of a legal conflict and still *legally* justify its final decision?

4 Interpretation

The second aspect of the problem at hand which is worth considering is related to the theoretically and pragmatically problematic nature of what has to be the central classical dogma of legal "interpretation". The notion of "interpretation" is used here in at least three different senses: 1) Many immigrants use interpreters in their contacts with Swedish authorities, like during the process of trials at the court of law, i.e. a – supposedly neutral – *third party* is brought in to make the communication possible; 2) during the course of a trial the judges *interpret the actions and intentions* of the accused in order to identify their corresponding legal norms and

arrive at a decision. Judges, i.e., attach *meanings* to human actions ; 3) the process of legal decision making involves *interpretation of statutes*, in a sense that the judges must *read* legal texts and understand the legislatures' meaning in order to arrive at their decisions. Judges, i.e., attach *meanings* to legal texts. In this section I shall only touch upon the surface of these three features of interpretation process hoping only to identify a few of the problem areas which impede inter-cultural communication.

4.1. The "Neutral" Interpreter

The first interpretation situation, involving a "neutral" third party, was discussed by Birgitta Englund Dimitrova in *Invandrare & Minoriteter*, 4-5 October 1989. In her article, "Tolkning", she pointed out that the existence of the third party causes interaction problems and brings discontinuity in the process of exchange of ideas, transforming the whole enterprise into an unnatural communication situation. An interpreted conversation suffers from what Englund Dimitrova calls *feed-back* interaction problem, which refers to "de signaler en samtalspart använder för att visa hur han uppfattar den andra partens kommunikation. De hjälper talaren för att förstå om hans budskap uppfattas så som han har avsett, eller om han kanske måste klargöra eller förtydliga något, och har därför mycket stor betydelse för att få ett samtal att flyta samtidigt." For the feed-back mechanism to function properly, Englund Dimitrova argues, one must understand the message simultaneously as it is produced.

The deficiencies entailing an interpreted conversation are far more extensive and deeper than implied above. Englund Dimitrova confesses that "kontakt-tolkade samtal berör ofta ämnen där kulturskillnader är vanliga". Nevertheless she fails to see another closely connected problem, namely that related to divergent cultural codes and symbols. Therefore, she assumes that if the conversing parties could understand the messages simultaneously as they are produced, then the main bulk of our problem would be solved. However, notwithstanding Englund Dimitrova optimism, in cases where the differences of cultural background is considerable we are often dealing with two divergent "universes of meaning" which not only include different usage of language, and cultural codes, but even different association of symbolic meanings to physical

movements. To put it differently, our speakers – who belong to different divergent cultures – might well associate different meanings to the same physical movement or expression. Just to give a trivial example, to “nod” in most Westerns cultures is a sign of consent, while according to the Persian culture it signifies disapproval. A bowed head, to a native American, is a sign of respect, while precisely the same posture might by English speaking Caucasians be regarded as an attempt to avoid eye contact, which is a sign of either shyness, lying or guilt.

When we take into account the subtle differences in usage of cultural codes and symbols introduced into conversation by each speaker, then the issue of interpretation becomes much more complicated than suggested by Englund Dimitrova. An interpreter attributes beliefs to others and interprets their speech in terms of his own beliefs. An interpreter understands or interprets a sentence, an action or intention, by trying to grasp the thought it expresses. But a thought is defined by a system of beliefs. And as long as the interpreter is not competent in the background system of beliefs of what is being interpreted he/she only produces coherence between his/her own system of beliefs and the interpreted meanings. In other words, interpretations produced by an incompetent interpreter reflect, above all, the interpreter’s own system of beliefs.

The interpreters used in the court rooms are often far from being competent, in one of the two languages in question. It can even happen that the Swedish authorities use interpreters who are incompetent in both languages. The police authorities in Lund are, for instance, known to use Turkish-Swedish interpreters who have both Swedish and Turkish as their second language and cannot speak any of the languages in question fluently. In such situations, where there occurs only pseudo-communication, ethnocentric stereotypes and prejudices, in the last instance, determine the outcome of the interaction. Each interaction partner, in other words, would fall back on her/his preconceived socio-cultural categories in order to make sense of the situation.

4.2 *Interpretation of Actions and Intentions*

What is said above regarding the role of the “neutral” third party, applies also, to a large extent, to the interpretation of actions and intentions at the court of law. The judges when trying to determine

the meaning inherent in a disputed action, or the intention behind it, use their own cultural system of values, standards and norms of moral conduct. Subsequently, a legal case in which different culturally determined perceptions of "right" and "wrong" is involved, becomes a breeding ground for misunderstanding and misinterpretation of actions and intentions.

It is also important to note that the misinterpretation of actions and intentions are not restricted only to cases where the judges and the accused are from divergent cultures. Such misunderstandings can even arise within the framework of one and the same culture. An exaggerated example would be a "working class" person who is tried by upper class judges. The accused, in such a case, does technically speaking, use the same language as the judges and there is no need of an interpreter. Yet, due to their different social points of reference they might not only have different perceptions of the "right" and "wrong" conduct but even use more or less divergent cultural codes, which can easily be misinterpreted by the other party.

4.3.1 *Interpretation of Statutes*

Interpretation is, traditionally, defined in jurisprudence as the art or process of discovering and expounding the meaning of a statute, will, contract or other written document. "Interpretation" is a vital stage of legal application, in a sense that statute law must first be read and then "interpreted" before it can be applied. "Statute law does not", writes Jolowicz, "any more than law expressed in any other way, apply itself."¹⁸ "Interpretation" is then a necessary condition of legal application, it provides authoritative answers to practical questions risen in the process of legal decision making.

The majority of cases to be decided at the bar are the so called *simple cases* posing no apparent difficulty for the judge. The facts of the case, which are – to lesser or greater extent – identifiable allow themselves to be, without any greater difficulty, subsumed under a particular legal rule. The whole process of judgment looks then like a simple syllogism, the facts of the case are subsumed, and the appropriate sentence is meted out.

There is, however, a small category of cases, the so called *hard cases*, whose facts cannot easily and without raising critical questions be subsumed under general rules. Nevertheless, to be able to successfully handle *hard cases* is of great importance to the legal

system's creditability as the official apparatus of social and economic control. This fact necessitates working out techniques for handling such cases.

The legal rules have a general character and are formulated with an eye to the most typical characteristics of the phenomenon under legislation. The "odd" categories of the phenomenon are usually ignored by the legislature. This concentration on the typical categories takes two main forms. Either the legislature explicitly describes a few outstanding *concrete situations* (kasuistisk lagstiftningsteknik) or formulates the statute in *abstract general terms* (abstrakt eller syntetisk lagstiftning). Both these legislative techniques have their specific problems. If the legislation is particularly "casuistic" the legal rules' domain of application become specially narrow and the judge seldom manages to carry out a straight forward, i.e. legally unproblematic and non-controversial, mechanical subsumption. On the other hand, if the legal rules are formulated too *abstractly and in general terms*, there can arise doubts about a special case, which although linguistically might fit the legal rule, in other important practical respects does not allow itself to be placed under that rule. It is for these quantitatively small – but nevertheless important – cases that legal application and interpretation has to develop special methods.

It is important to keep in mind that the ambiguous character of either the legislation or the facts of the case do not provide the judge with satisfactory legal excuse for refusing to issue the legal decision. Over and above having to decide about the case at the bar, the judge has to fulfill certain fundamental juridical criteria. The legal decisions pronounced by the court must be in harmony with the totality of the legal system, they must satisfy the legislatures' intentions and they must comply to the generally accepted notion of fairness in society at large. Furthermore the judge must "treat like cases alike and different cases differently". There must be uniformity (likformighetsprincipen) in the decisions made so that the results can be predicted (förutsägbarhetsprincipen). It goes without saying that no judge can simultaneously satisfy all the juridical ideals of decision making. Therefore, different judges usually put the emphasis on different aspect of the decision, some stress the notion of "predictability" while others underline the importance of fulfilling the legislatures' "intention" etc. This problematic character of legal interpretation has led to creation of an arsenal of interpretation

techniques, methods, procedures and even maxims, which due to lack of space, we shall leave undiscussed here. However, just to get an idea of the extent of this arsenal we can say that an interpretation method can be “subjective” or “objective”, it can be “logical”, “grammatical” or “systematic”, it can be “analogic”, “extensive” or “restrictive”.

The judge, as stressed above, does not only *have to* arrive at a decision, in regard to the case before him/her, but is also obliged to *motivate* the decision. The judge must explain why and how he/she reached that particular decision. The judge does not, of course, always openly give – or even is conscious of – *all* the reasons behind his/her judgment. The judge might conceal his/her real motives – and his/her dubious deliberations – by minutely following a subsumption model. The main reason for such a strategy is as Strömholm writes:

Parterna i målet är sannolikt beredda att acceptera *lagens* auktoritet, men det är svårare för dem att finna sig i ett avgörande som bygger och öppet anges bygga på *domarens* värderingar. Det kan ligga nära till hands att domaren söker undgå kritik genom att redogöra för sin väg fram till avgörandet som om han i själva verket hela tiden följt en snitslad bana.¹⁹

What was said above should not, however, be interpreted as implying that legal judgments are as *a rule* “partial”, and the whole legal theater is solely arranged to legitimize the arbitrary wishes of a handful of people. It is rather to point out that the judges have a tremendous discretion at their disposal in a sense that they can dress the court decisions in a water-tight legal costume. To put it differently, a judge can first make up his mind about the outcome a case and then follow an interpretation procedure which legally legitimizes this decision.

4.3.2 Value-Judgment in Legal Argumentation

Robert Alexy in his dissertation *A Theory of Legal Argumentation*, has argued that “it can no longer be seriously maintained that the application of laws involve *no more* than a logical subsumption under abstractedly formulated major premises.” This statement underlines one of the common points of agreement in recent

discussions on legal methodology. "In many cases," writes Alexy following the same train of thought, "the singular normative statement which expresses a judgment resolving a legal dispute is not a logical conclusion derived from formulation of legal norms presupposed valid taken together with statements of fact which are assumed or proven to be true". This gives rise to questions concerning the issues of justification of such judicial decisions. How then, can such a judgment, we have to ask, be justified? This question illustrates one of the fundamental problems of legal methodology.

Alexy's major thesis is that neither the canons of interpretation nor the process of subsumption can guarantee an application of law consistent to the existing legal norms. It is in fact value-judgment which is, according to Alexy (and other legal theorist such as Larenz, Müller, Esser, Kriele and Engisch), constitutes the central core of any such issue related to the process of application of laws.

Without going too far into the complicated discussions on legal methodology, we can, following Alexy, argue that value-judgments are an essential part of legal argumentation. Since value-judgments are culturally determined, they would – within the present framework of legal argumentation – affect the out-come of the culturally based legal conflicts at a level out of reach for rational consideration.

5 The Legal System's Intrinsic Paradox

The court of justice is a social setting and one of the legal system's strategically vital points, where law as a system comes into direct interaction with its surrounding social environment. Within this setting, and inside the cultural framework of the law, decisions are made which affect both the fate of individuals and the features of the normative structure of the society. The court is a ritualistic and dramatic place, but also an institutional milieu where the attempt is made to bring to realization the ideological intentions lying behind codified law in the practical and more chaotic sphere of human society. Paradoxically, and notwithstanding the significant place of the court in modern societies, they are often depicted in literature as surreal and absurd. Josef K., Kafka's hero in *The Trial* is a good representative of the absurdity perspective on courts. According to

some scholars, this depiction reflects the phenomenological properties inherent in human interaction which are socially transcended by an institutionalized technology of semiotic and verbal coercion which serves to maintain existing forms of superordination". As Pat Caren has pointed out, the phenomenological dream of ontological pluralism and egalitarianism is, socially transcended in modern society, by the material reality of social inequality and coercion.

The courtroom is a place where legally recognized conflicts are re-enacted by means of a systematic attempt to communicate. Inherent in this process of communication, which is for the most part carried out through the medium of spoken language, is a formal quest for *truth* and *rightness*. It is assumed that this mode of communication is simultaneously *comprehensible* and conducted with *sincerity* (sannfärdighet). The criteria of truth, rightness, comprehensibility and sincerity constitute the *ideals* inherent in the courtroom communication, which are often taken for granted, even though not realized.

It is not surprising that in most societies communication is chosen as the instrument for resolving conflicts. This choice is based on the fact that the very essence of reason is embedded in communication in general and in language in particular. Habermas defines "communicative action" as the process by which subjects attempt to arrive at intersubjective understanding by posing "validity claims" (defined below) that are clarified in dialogue culminating in a linguistically shared definition of the situation which then becomes the basis of action. Here language becomes the medium by which understanding is mutually established. Habermas has stated that the focus of investigation thereby shifts from cognitive instrumental rationality to communicative rationality.

The idea of communicative action and rational organization of society already exists – no matter how distorted they may be in their form – "in the democratic institutions, the legitimacy principles and the self interpretations of modern industrial societies". However, it appears that no matter how hard modern men and women try, they are still not able to attain the Habermasian ideal of communication and consensus in the courts of law, where it is most needed. The probability of failure in this enterprise appears today as great as ever. The struggle to establish the truth regarding a particular issue in order to achieve understanding and consensus is often confronted by

seemingly insurmountable obstacles. These barriers are not just philosophical, like the difficulties connected with providing a rational basis for the intrinsic truth-value of a statement. They are also caused by the unequal division of power in the courtroom arena, which gives rise to what Habermas calls “systematically distorted communication”. System imperatives, such as efficiency and correctness, penetrate into the symbolic reproduction of the lifeworld supplanting the media of communication used in everyday life, i.e. truth and appropriateness. It is in its place to elucidate at this juncture that both system and lifeworld have central places in Habermas’ theory of communicative action. Lifeworld refers to the everyday world which is taken for granted and which contributes to the maintenance of individual and social identity by organizing actions around shared values, so as to reach agreement over criticizable *validity claims* which are raised whenever we speak. Lifeworld and system are viewed as belonging to absolutely separate realms of society, households and spheres of public access – culture, social and political – to the lifeworld, business and state agencies to the system. The important thing to keep in mind is that the system is generated within the lifeworld as the unintended consequence of action and remains anchored to it in a normative sense.

According to Habermas, human language assumes a number of “validity claims”. In everyday usage of language these validity claims are implicitly expressed, but they can be made explicit by the speaker. When we speak, writes McCarthy in the introduction to the English translation of Habermas’ *Theory of Communicative Action*, we constantly make “claims about the *truth* of what we say in relation to the objective world; or claims concerning *rightness*, *appropriateness*, or legitimacy of our speech acts in relation to the shared values and norms of our special lifeworld, or claims to *sincerity* or authenticity in regard to the manifest expressions of our intentions and feelings. Naturally claims of this sort can be contested and criticized, defended and revised”.

In the courtroom the complexity of the lifeworld is reduced to legally relevant concepts and interpretations. The Weberian notion of formal legal rationality, held sacred by so many, becomes an obstacle in the process of reconstruction of *validity-claims* intrinsic in the structure of a definite world-view. In such cases lack of *discourse* becomes the characteristic feature of legal proceedings. There seems to be no need to achieve a consensus by means of sound

argument or reason. This failure to resuscitate validity claims can, in turn, lead to disintegration of the lifeworld.

The idea of analyzing court room interactions according to the criteria of communicative action seems to call into question the normal, accepted rational justifications of the notion of universal normative standards which is applied in the dominant school of contemporary legal thought. But is this not exactly what the recent legal-cultural cases have already done? Let me make the argument more explicit by means of a concrete example. A 39 year old Lebanese ex-army captain, murdered his wife – who had, allegedly, been unfaithful to him – in Karlstad and was convicted. Subsequently, when the case came up for appeal, the defendant argued against the lower court's ruling claiming that "If this had happened in Lebanon I would have been imprisoned for one day only" and would not have received the 10 years sentence meted out by the Swedish municipal court. The defense attorney sought to support this line of argument emphasizing that an individual with very particular cultural background was being tried. The defense argued that the court should give consideration to the fact that the defendant was an individual brought up in a mountainous village, ridden with war and violence. In addition it was maintained that one cannot evaluate the crime committed without taking into account the socio-historical background of the offender. It is understandable if defense arguments of this kind provoke strong reactions from the juridical corps. For the defense's line of argument in such cases calls into question and even threatens the legal system's fundamental core, *viz.* its formal rationality. Suddenly, the validity of the "universal norms" presupposed by the legal system is being questioned.

The judicial corps was not of course unanimous on rejecting the defense's line of argument. Ulla Jacobsson professor in legal-procedure (processrätt) at Lund University supported the defense's claim as valid argument. She declared her support in the following way:

Vid utdömandet av straffet kan sociala och psykologiska hänsyn tas. Där kan domstolen väga in till exempel kulturell bakgrund... Debatten om kulturella olikheter som förmildrande omständigheter har blivit vulgariserad. Det är ju inte så att man skulle få allmän immunitet och kunna göra vad man vill bara för att man kommer från en annan kultur. Men jag menar att i varje enskilt fall kan sådana omständigheter prövas.

General prosecutor, however, saw the question in a different light. He stressed the fact that the act committed by the Lebanese was murder and meant that:

Vi måste skapa praxis så att folk vet vad som händer om de gör sig skyldiga till brott. Vi måste vara försiktiga med att göra avsteg. Det skapar villrådighet och osäkerhet och i förlängningen risken att människor förlorar tron till rättsväsendet.

Here we can observe again the same lack of consensus regarding what is and what is not permissible with respect to the basic norms and logic of the legal system. We can also see that both defense and the prosecutor are acting “instrumentally” instead of trying to expose the “validity claims” raised by the accused to critical rational argumentation.

It is tempting to postulate here that in order to overcome the above illustrated type of disagreement all legal argumentation must take the form of *rational practical discourse*, according to which the validity claim of each argument can be evaluated. The traditional structure of courts of law, legal argumentation and legal-procedure, however, systematically distort all communication efforts in the legal system. The legal system promotes, instead of communicative action, instrumental rationality. It is important to keep in mind that the legal system, as an institution external to the domain of everyday human interaction, can only with great difficulty stimulate communication in conflict situations. This difficulty is particularly striking in regard to criminal cases. Not only the prosecutor, but even the defense counsel, not only the accused but even the plaintiff, act instrumentally when entering the court of law. The quest for truth, rightness and sincerity in argumentation are all forgotten before law.

Despite the dominating “instrumental” praxis in the courts of law, as long as the spoken language is used as the medium of communication, a movement – no matter how small it might be – takes place from cognitive-instrumental rationality towards communicative rationality. This movement towards communicative rationality is inherent in the very nature of spoken language. The inherent rationality of language is not, however, enough for establishing communicative action in the legal system. As long as the parties involved in a dispute do not consciously and sincerely strive to reach agreement, no settlement will be reached and no mutual under-

standing will be achieved. This is apparently the legal system's intrinsic paradox.

Can we, then, as Habermas believes, go beyond the constraints of rational-purposive knowledge and establish communicative action in the courtroom arena? Here I am talking about an ideal communicative action which can transcend even the peculiar communicative hindrances that mark cross cultural confrontations. Or is it all that difficult to even imagine a courtroom where validity of actions, as Habermas would say, are evaluated according to whether or not individuals are able to truthfully and sincerely express their intentions to others and this, remember, even in a multi-cultural setting? This still remains to be seen.

Notes

- 1 SDS, 19th. Jan. 1990
- 2 "Rättens hänsyn drabbar kvinnan"
- 3 *Underrätternas sammansättning, rätten till offentlig försvarare*, DV rapport, 1986:4 , och *Nämndemannakårens sammansättning*, Dv rapport, 1989:2.
- 4 5 Juli 1989
- 5 Strömholm 1985:26.
- 6 Flodin 1986, *On Valid Law and Valid Moral Norms*, Norstedts, Stockholm, pp.12.
- 7 Ibid (pp.43)
- 8 Ibid (pp.115)
- 9 H.L.A. Hart, 1961:100
- 10 Ibid (pp.102)
- 11 Strömholm 1989:62-63
- 12 MacCormick 1981:29
- 13 See Alexander Peczenik's résumé of Kelsen's theory, 1988:183.
- 14 Luhmann 1986:112
- 15 Ibid (pp.113)
- 16 Quoted from John Bednarz' introduction to Luhmann's *Ecological Communication*, pp. IX.
- 17 The picture of the legal system as an autonomous subsystem has recently received some empirical support in Sweden. Following charges brought against 6 of Sweden's chiefs of police for illegal bugging of telephones and private residents of a number of Kurdish and Palestinian refugees the government proposed a bill especially designed to limit litigation rights and thereby disqualifying the Kurds and Palestinians as plaintiffs. The Swedish government's argument was that the legal process against the police chiefs necessitated disclosure of state secrets to the plaintiffs, who were foreign nationals, and this could in turn endanger the security of the country. Government proposal was, however, met with a strong reaction in the jurist circles. The proposal was first heavily criticized by the Association of Lawyers, who called it, among other things, a retroactive bill which is against the European

Convention and eliminates the guarantees that the police and the public prosecutors conduct their duties according to the book. Then the bill was categorically disapproved by the Legal Council. (The government had conveniently omitted the law faculties from the list of instances ordinarily consulted on such issues!) The reaction from within the legal system was, however, so strong that the government finally withdrew its proposal. Thus, the developments in the political system failed to bring about corresponding changes in the legal system.

18 Jolowicz 1963:280

19 Strömholm 1987:75

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