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Statutory Interpretation in the EU: The Augustinian Approach

Lawrence M. Solan *

EU legislation is written in all of the EU's official languages. Each version is authoritative, and no version is privileged as 'the original,' at least not as an official matter. The practice derives from the very first Regulation of the Council of the European Economic Community in 1958, which declared Dutch, French, German and Italian as the official languages.¹ As countries enter the EU, the Regulation has been amended many times to expand the number of official languages to match the official languages of the member states. Moreover, as accession treaties are signed, the treaties themselves contain provisions that show respect for the linguistic diversity of the EU. For example, the 1997 Treaty of Amsterdam says:

This Treaty, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

Pursuant to the Accession Treaty of 1994, the Finnish and Swedish versions of this Treaty shall also be authentic.²

Since then, others have joined the EU, which now has twenty-seven members and twenty-two official languages.

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¹ EEC Regulation No. 1, 1958-04-15.

² Treaty of Amsterdam, Art. 53.

The existence of a regime of multilingual legislation appears to create a daunting task for a court that must resolve disputes over a statute's applicability in a particular situation. The opportunity for inconsistencies among the various language versions is so profound that it would not be surprising if the entire system collapsed under its own weight.

But that has not happened. Whatever problems face Europe and the EU, statutory interpretation is not high on the list. On the contrary, the European Court of Justice resolves disputes among member states in what appears to be a routine manner. In this article, I argue that the proliferation of languages actually *assists* the interpretation of statutes by the ECJ. To the extent that the goal of the court is to construe statutes to effectuate the intent of the legislature and to further the goals of the enacted directive or regulation, the existence of so many versions of the law makes this task easier. In other words, my argument is that the Babel of Europe facilitates communication.

Ideally, the linguistic practices of a supranational legal regime should meet three goals. The first, which is the value promoted most aggressively by the EU, is respect for the equality and sovereignty of the individual member states. By treating each version of an EU law as an authoritative original, EU members are treated equally. Although the EU has three working languages – English, French and German – the final forms of all laws are not limited to these three.

The second goal concerning statutory interpretation in a supranational regime is that the laws should be construed in a manner that is faithful, in some meaningful way, to the intent of the drafters. Although fidelity to the legislative purpose is not the only goal of statutory interpretation (see Eskridge 1989), it is the principal goal in any legal regime.

Yet it would appear to be more difficult to accomplish when laws are written in many languages, with each version, at least to some extent, reflecting the nuances of many legal cultures. If the laws mean very different things to the various members, whether because of legal, cultural or linguistic differences among them, the project cannot succeed, since there will be no rule of law for the members to follow.

The third goal is that of efficiency. If the burden of maintaining a supranational legal order exceeds its benefits, it will lose influence over time, and devolve into an obscure, costly burden on its members. A recent report discloses that Directorate-General for Translation of the European Commission employs some 2,200 people at an annual cost of EUR 541 million. Each time a new member joins the EU, tens of thousands of pages of documents must be translated into the language of the new member. To take a recent example, prior to their recent accession, teams of 16 Bulgarian and 20 Romanian translators arrived in Brussels to prepare for the addition of those languages to the group of official languages.³

These three goals -- equality, fidelity and efficiency -- are in tension with one another. It would surely be more efficient to legislate in a single language, or a small group of official languages, perhaps those that are now the working languages of the EU. Such a move, however, would reduce the degree to which the system respects the equality and sovereignty of the individual members, since those whose languages are not represented as official languages would play a somewhat diminished role in the legal process.

³ See Commission Memo, Translation in the Commission: Where Do We Stand Two Years After Enlargement? europa.eu.int/.../06/173&format=PDF&aged=0&language=EN&guiLanguage=en - May 2, 2006, Memo 06/173, Brussels, 27 April 2006.

The concern of this article is with the second goal: fidelity. The question explored is how faithful to the will of the legislative body can decision makers be in a system that produces legislation in many languages and gives equal status to each version. The question would seem difficult to answer in the abstract because there is no particular measure of fidelity. However, it is certainly possible to investigate the extent to which the proliferation of languages affects the ability to render decisions faithful to the legislature in comparison to other regimes, such as ones in which decision makers operate in a monolingual legal order. It is also possible to hypothesize an intermediate legal order limited to a few languages and compare the work of the European Court of Justice with what might happen in such a system. An ‘intermediate system’ might contain, for example, three official languages in which legislation is written. Disputes could be resolved with reference to:

- a. The three official versions; and
- b. The versions of the parties to the dispute if they differ from the official versions.

If, say, a dispute arises between Finland and Sweden, the ECJ would look to the three official versions (likely, English, French and German), plus the Swedish and Finnish versions in rendering a decision. The three legal orders and their effects on the three goals discussed earlier are set out in Table 1:

Table 1 The legal orders and their effects on the three goals

| | <i>Official Languages</i> | <i>Official Languages +</i> | <i>All Languages</i> |
|------------|-------------------------------|---------------------------------|--------------------------|
| Equality | - | +/- | + |
| Fidelity | ? | ? | ? |
| Efficiency | + | +/- | - |

No doubt, the current legal order, reflected in the rightmost column, is both respectful of the sovereignty of the members, and quite costly, in terms of time and personnel. The open question is whether this multilingual legal order makes it easier or harder for a judicial body to remain faithful to the will of the enacting legislative body.

The rest of this article explores that issue. Part I briefly develops the notion of fidelity more generally. Part II introduces the concept of Augustinian Interpretation, the use of multiple versions of the same law as an advantage in discovering its intended meaning. The term reflects the similarity between this approach to interpreting statutes and the same method, developed by St. Augustine in the fourth century, for interpreting scripture. Part III explores the use of Augustinian Interpretation in the European Court of Justice, including some recurrent situations in which it falls short. Part IV is a brief conclusion.

I

Fidelity to Legislative Purpose in the EU

Almost as a mantra, the European Court of Justice looks to the legislative purpose in interpreting statutes. (See, e.g., McLeod 2004 for description). Sometimes called the *teleological approach* or *purposive approach* to statutory interpretation,⁴ the method is familiar to those engaged in statutory interpretation in individual states. The court investigates the motivation for the legislation, including founding documents that set forth overarching legal goals, and resolves disputes in a manner that will further those goals. Thus, the Court has said in a recent case, *Schulte v. Deutsche Bausparkasse Bardenia AG*, ‘Where it is difficult to interpret legislation from its wording alone, an interpretation based on purpose becomes fundamental. That is the case where the provision in dispute is ambiguous.’⁵ Such references to legislative purpose are easy to find.⁶ Barak (2005) has noted that purposive legislation typically ‘reflects, at various levels of abstraction, but particularly at the highest levels of abstraction, the intention of the text’s creator(s).’

Just as easy to find are references to legislative intent, which is similar to legislative purpose, but focuses on somewhat narrower goals. In fact, sometimes the ECJ uses both terms in the same case. For example, *Chacon Navas v. Eurest Colectividades SA*,⁷ dealt with whether the dismissal of an employee for reasons of illness violated the EC Framework Employment Directive 2000/78, which makes it illegal to dismiss an

⁴ See, e.g., Fennelly (1997) (observing the appropriateness of this kind of approach in a multilingual setting); Lord (1996) (observing that teleological method is used to bring about harmonization of local laws to comply with EU directives).

⁵ [2006] All ER 420 (2005) at ¶ 87.

⁶ See, e.g., , *Epikouriko Kefalaio v. Ipourgos Anaptixis*, [2006] All ER 112 (2004) at ¶ 22.

⁷ Case C-13/05, [2006] IRLR 706 (2006).

employee because of a disability. In holding that the Directive does not encompass ordinary illness, the Court held that in construing the Directive, account must be taken ‘of the context of the provision and the purpose of the legislation in question.’ (¶ 64). But it also gives credence to the argument that it is important to enforce the protection ‘intended by the legislature,’ by not giving employers carte blanche to ignore the disabling effects of certain illnesses. (Judgment, ¶ 23). Thus, whether by following a law’s language, purpose or intent, the Court’s obligation is to be faithful to, and to give primacy to, the legislative body that enacted the law.

Sometimes, these approaches are contrasted with the goal of ascertaining the intent of the legislature by reference to the language alone, as American textualists would prescribe. (See McLeod 2005). However, this distinction can be overstated. In its effort to be faithful to the will of the legislature, the European Court of Justice is perfectly comfortable relying on language as an important clue. Thus, in *Simutenkov v Ministerio de Educacion y Cultura*,⁸ decided in 2005, the Court noted: ‘The starting point for assessing art 23 of the Agreement in isolation must be its wording.’(¶ 14).

Because each EU directive is written in all twenty languages, this task is not a straightforward one, as the Court noted:

In so doing it must be borne in mind that Community legislation is drafted in various languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. (¶ 14).

Much of this article argues that this additional step adds value to the linguistic analysis that takes place in the interpretation of monolingual legislation. Here, my point is that the ECJ does not ignore language in favor of ascertaining the legislative purpose. Rather,

⁸ [2006] All ER (EC) 42 (2005).

language provides a somewhat unique kind of evidence of purpose, and the Court regards language differently for that reason.

Articulating the goal of fidelity, however, is easier than determining exactly when a judicial body is faithful in any particular case. In monolingual settings, the following questions recur: What does the statute say (generally, the best evidence of legislative intent is the language used in the law itself)? Does applying the plain meaning of the statute appear to undermine the intent of the legislature? If the statute is vague or ambiguous, are procedures available for resolving the ambiguity in order to reach a decision? If so, should courts risk compromising the rule of law as reflected in applying the statute as written in order to further the legislative purpose?

These questions are not always easy to answer. To take an example from American law, the Food, Drug and Cosmetics Act permits the federal Food and Drug Administration (FDA) to regulate drugs and ‘devices’ used for the delivery of drugs. At the time the law was enacted, it was clear that the legislature did not intend to permit the FDA to regulate tobacco or tobacco products. Since then, various efforts have been made to amend the statute to include tobacco, but those efforts did not succeed. Nonetheless, during the Clinton administration, the FDA promulgated regulations that set limits on the distribution of tobacco products. One of the major tobacco companies, Brown & Williamson, sued, claiming that the federal agency had no right to do so.⁹ In response, the agency argued that cigarettes can reasonably be seen as devices for the delivery of nicotine, and therefore come within the scope of the FDA’s regulatory authority. A principle of American law requires courts to defer to the interpretation of an agency to

⁹ FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120 (2000).

whom regulatory authority has been delegated if any reasonable understanding of the statute would support the agency's interpretation.¹⁰

In a 5 – 4 decision, the United States Supreme Court agreed with the tobacco company, and held the regulation to be invalid. At stake was whether the purpose of the statute should prevail over language – the word ‘device’ – that seems to permit the agency to have taken the action it did. In this case, the Court held that the independent contextual evidence that the legislature did not intend to permit the regulation of tobacco should trump both the language of the statute and the principle calling for deference to administrative agencies.

On many other occasions, however, the Supreme Court has held that ‘the language of the statutes that Congress enacts provides “the most reliable evidence of its intent.”’¹¹ This creates a dilemma for courts that wish to be loyal to the instructions of the legislature, but sensible in drawing inferences about what the enacting legislature intended. To make matters more difficult, in many cases the legislature had no discernable intent at all with respect to situations that arise before courts. Strange things happen in this world, and legislatures cannot possibly predict each one of them. Dan Simon (2004) has argued that when faced with this problem, courts typically speak of purpose and intent, but really use arguments based on coherence to reach a conclusion about how the enacting legislature would have wanted the law to handle a particular situation.

European courts have traditionally been more comfortable than have American courts to put the purpose of a statute ahead of the language in the service of effectuating

¹⁰ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹¹ *Holloway v. United States*, 526 U.S. 1, 6 (1999)(quoting *United States v. Turkette*, 452 U.S. 576 593 (1981)).

the legislature's will. But evidence is evidence, whether it is put before an American court or a European court, and it is undeniable that the language of a statute provides privileged evidence of what the legislature intended. To take a classic example from the philosophical literature, when a law says 'no vehicles in the park,'¹² one can argue about the law's applicability to a child riding a tricycle, but no sane person would think the law sets a minimum age for buying tobacco products, or regulates the dumping of toxins in the sea. That is, language, while often not constraining the range of possible interpretations to one, surely is the principal vehicle through which legislative will is expressed, and that expression is largely successful.

When it comes to the multilingual legislation of the EU, the options for achieving fidelity are both broader and narrower than they are for the monolingual legislation of most individual states. Of course, individual states with legislation written in more than one language must make their own rules to deal with the status of the various legislative versions, as is the case in Belgium, Canada, and to some extent Spain.¹³ But in the typical situation in which a state's laws are written in a single, authoritative version, courts may use the statute's language as a fulcrum, deciding how much weight to give it in a particular dispute.

In contrast, when a dispute is over which of two fully authentic versions of a law should prevail, the status of the statutory language is itself contested. Courts may still endeavor to find the purpose of a law, but they must do so without the luxury of resort to

¹² The example is widely discussed in the literature. For discussion from a linguistic perspective, see Winter (2001).

¹³ For an excellent discussion of the bi-lingual and bi-jural regime in Canada, see Sullivan (2004).

a single, authoritative text.¹⁴ Thus, the option of being an American-style ‘textualist’ is simply not available to interpreters of EU law. Also unavailable, but potentially useful, is the translation history of a law. It would be perfectly sensible, for example, for a court to begin with, say, the French version, if that was the one with which the European Commission began during the drafting process. Then, the court could determine whether other versions reflect an error in translation. The ECJ, however, typically does not engage in this method, although there are some early cases reflecting it, shortly after the Treaty of Rome, when there were six countries and four languages involved in EU legislation.¹⁵

*Stauder v. City of Ulm*¹⁶ provides an important illustration of this early method. An EU regulation empowers members to subsidize the sale of butter to certain consumer groups in need of assistance as a means of assisting the dairy industry. A consumer from the city of Ulm complained when a retailer asked him to reveal his name and address in order to qualify for the benefit, asserting that it violated his constitutional right to dignity. The German and Dutch versions authorized the butter benefit to be given to consumers who had a coupon issued in their name. The French and Italian versions required only that the consumer present an individualized coupon. Who was right? The Court noted that the European Commission, which had to approve the measure, had agreed to a draft written in French. The Court thus concluded, ‘[t]he deviations in the German and Dutch versions must therefore be held to be merely translation errors, which must have arisen in

¹⁴ For my views on some of the shortcomings of reliance on the literal meaning of the text in monolingual environments, see Solan (2005).

¹⁵ Treaty Establishing the European Community, Rome, 25 March 1957

¹⁶ [1969] Case 29/69.

the preparation of the text for adoption by the Commission in the written proceedings.’
(p. 116).

More recently, however, that method has not been used for the same reason that the EU has not established an official language or given additional status to the three working languages. Reference to the translation history is the functional equivalent of selecting an official language. Doing so offends basic notions of sovereignty and equality among the members.

Yet translation is surely relevant to the interpretation of EU law. The American legal scholar, Lawrence Lessig (1993), proposed that a useful way of characterizing the quest for fidelity to legislative purpose is to liken the judicial role to that of a translator. As Lessig puts it: ‘The translator’s task is always to determine how to change one text into another text, while preserving the original text’s meaning. And by thinking of the problem faced by the originalist as a problem of translation, translation may teach something about what a practice of interpretive fidelity might be.’ (Lessig 1993:1173). Lessig, whose goal it was to explain statutory and especially constitutional analysis within the American legal system, spoke of translation as a way of expressing the thought that one can be faithful to a text without being entirely literal. Translators routinely must decide how to balance the target text’s choice of words against the likelihood that readers will understand the translation as conveying the same information as the original, which may require straying from a literal translation. (See, e.g., Nord 1997).

Translation cannot paint a complete picture of statutory interpretation in the monolingual context, however. As Levinson (1997) has pointed out, the analogy between translation and monolingual legal interpretation is imperfect. Whereas

translators bridge a knowledge gap between two groups of people separated by culture and language, the individual interpreting a monolingual statute is separated from the text only by time. How similar these gaps are is an empirical question.

When it comes to multilingual legal regimes like the EU, however, translation is more than a metaphor – it is a basic fact about the entire structure of the law. While translation history may not be used as extrinsic evidence of a law’s meaning or purpose, a comparison of the various versions of the law provides an important tool for the ECJ. It is of crucial importance to determine how effective this tool is, since it must replace both analysis of the plain language of a single statute and do the work of the translation history to which statutory interpreters may not refer. To the extent that reference to different language versions provides useful evidence of statutory purpose, it leads to a remarkable inference: The proliferation of languages in EU legislation actually aid interpreters in their quest for fidelity. In other words, Babel is not punishment, it is a gift.

Augustinian Interpretation in the EU

Among the methods of statutory interpretation that the ECJ employs is a comparison of various versions of the statute in question in different languages.¹⁷ The court looks not only at the versions written in the languages of the parties to the particular dispute before the court, but also at other versions. The goals of this inquiry are to determine consensus among the members as to the intended scope of the statute, and to discover whether a particular interpretation allowed (or not allowed) in the language of one of the members is a matter of linguistic happenstance rather than legislative

¹⁷ For a description and examples of cases using some of these comparative methods, see Van Calster (1998).

deliberation. I call this multi-lingual approach to statutory interpretation *the Augustinian approach*.

In *On Christian Doctrine*, begun in the year 396, Augustine concerned himself with the question of how we can be sure that we understand, and therefore obey, the scriptures. He hypothesized: ‘There are two reasons why things written are not understood: they are obscured either by unknown or by ambiguous signs.’ (Book 2, ch. X). The solution, Augustine opined, was to look at the scriptures in both the original Hebrew and Greek, and in the various Latin translations:

Against unknown literal signs the sovereign remedy is a knowledge of languages. And Latin-speaking men, whom we have here undertaken to instruct, need two others for a knowledge of the Divine Scriptures, Hebrew and Greek, so that they may turn back to earlier exemplars if the infinite variety of Latin translations gives rise to any doubts. (Book 2, ch. XI).

Ambiguity in text may remain unnoticed, especially if it results from bad translation. Even worse, incorrect translation can lead to mistake as to the actual content of the divine scripture, which can lead even the faithful to err. The surest way to discover such problems is to place competing versions (both in Latin and in predecessor languages, Hebrew and Greek) side by side and look for differences. Examining the translation history can root out obvious errors in the Latin versions. Residual ambiguity should be resolved in favor of promoting core religious values, such as charity.¹⁸

What about those who do not know Hebrew or Greek? A comparison of Latin translations can also be helpful:

For either a word or an idiom, of which the reader is ignorant, brings him to a stop. Now if these belong to foreign tongues, we must either make inquiry about them from men who speak those tongues, or if we have

¹⁸ I only touch on Augustine’s philosophy here. For a much fuller and richer discussion see Pelikan (1986).

leisure we must learn the tongues ourselves, *or we must consult and compare several translators.* (Book 2, ch. XXI).

Again, comparing the Latin to the originals in Hebrew or Greek, whether directly or with the help of others who are learned in those languages, is Augustine's first solution. As for comparing various Latin translations with each other, what at first appears to be a third-best method for those not able to consult the originals, has its own advantages. Studying the various translations can be an improvement over relying upon a single translation: 'And yet to those who read with knowledge, a great truth is to be found in each. For it is difficult for interpreters to differ so widely as not to touch at some point.' Furthermore, even when translation is straightforward, some of the Latin vocabulary may be unfamiliar, making it necessary to infer meaning from the surrounding linguistic context. Augustine noted, 'In this matter too, the great number of the translators proves a very great assistance, if they are examined and discussed with a careful comparison of their texts.' (Book 2, ch. XXI).

Augustine's reliance on a comparison of Latin translations was also a matter of necessity, we now know. While he embraced whatever learning could be gleaned from studying the translation history of biblical text, he himself was not fluent in Greek and had even less control of Hebrew, at least early in his life. Van Fleteren (2001:13) notes,

Unlike contemporary exegetes, Augustine exegizes the Latin text, not the original Greek or Hebrew text; perhaps Augustine was thinking of priest-students in Carthage or Milan, or even his parishioners in Hippo. However, knowledge of foreign languages is necessary for the interpretation of unknown or ambiguous signs – sadly Augustine was not an example of his own principles.

Others make similar observations.¹⁹

¹⁹ See Bastiansen (2001:33-34) ("His command of Greek was a limited one, not sufficient for an easy assimilation of the contents of theological treatises."); Evans (2001: 145-46) (comparing Augustine and

Of Augustine's two methods – comparing translations to the original and comparing translations to each other – only the latter is available to the European Court of Justice. The former method, as noted above, is disapproved as a violation of the principle of equality. Conceptually, it is easy to see how resort to an original text can yield insight into the intent of the drafter of that document. In the absence of being able to draw such an inference, however, it is worth exploring just what makes the comparison of translations a worthwhile activity at all. Augustine provides some insight into this question as well. Not all translations are created equal. Again, in *On Christian*, he complained: 'For in the early days of the faith every man who happened to get his hands upon a Greek manuscript, and who thought he had any knowledge, were it ever so little, of the two languages, ventured upon the work of translation.' (Book 2, ch. XVI). It is only by placing a bad translation next to a good one that brings forth the point, through a chain of inferences, that the essence of the passage becomes clear. Sometimes a particular translation has captured it, but at other times, reading the various translations suggests a common theme, expressed in different words by each translator.

Capturing this essence of a scriptural passage is the goal of the biblical scholar, (Book 2, ch. XVII), and capturing the essence of EU legislation is the goal of the ECJ. Like Augustine, the ECJ may rely upon consensus among the different versions to uncover outliers that probably have simply gotten the point wrong, or it may attempt to find various threads running through the different versions which, taken together, suggest an underlying purpose behind the legislation.

Jerome as textual critics, and referring to Augustine as an "amateur" in comparison because Jerome was conscious of the Hebrew and Greek, whereas Augustine "was dealing with an Old Latin text which was locally variable.").

Thus, both Augustine and the ECJ are essentialists. It is only if there exists in the first place some deeper, underlying understanding that one can justify an enterprise whose task it is to uncover such an essence. In both cases, language provides strong evidence of that essence, but the essence cannot be reduced to any single version of the text. As discussed below, there is an imperfect relationship between thought (conceptualization) and language (words). When evidence of thought becomes frozen in a single linguistic act, whatever imperfections exist become permanent. The ability to compare different versions and then to triangulate, however, brings out nuances that can help the investigator to gain additional insight into the thoughts of the original drafter. For this reason, one would predict that the proliferation of languages in the EU actually aids in the task of statutory interpretation, making it more likely that the court will come upon the intended goals of the legislation before issuing a ruling.

But biblical studies have one big advantage over the project of discovering the purpose behind EU law. There really *is* an original. For our purposes, statutory interpretation in the EU is statutory interpretation without a single, authoritative text. (See Dollerup 2004). Moreover, biblical translation, at least in the time of Augustine, involved only one target language: Latin. Whether the European endeavor will succeed, in contrast must depend upon a variable not relevant to Augustine: How well Augustinian interpretation will succeed in the multilingual statutory context is a function of what it is that makes languages similar to each other and what it is that makes languages different from each other.

In some respects, it seems likely that the proliferation of languages will help the statutory interpreter. To the extent that one language contains a syntactic ambiguity that

allows multiple interpretations of a law, whereas other languages do not, the Augustinian approach will quickly unmask the outlier and make clear that the legislative body intended the meaning in common to the other language versions. Far more difficult are the problems that arise from subtle differences from language to language in the meanings of words. The more people are designed to form similar concepts given similar experiences, the less it should matter which language they speak and the better a multilingual legal order should work. Divergence from one language version to another might be expected to the extent that:

People in different cultures speaking different languages have different experiences reflected in words that appear to be translations of each other but really aren't (consideration/consideración, cause/causa).²⁰

Languages express concepts differently from each other in small ways; there is some truth to the Whorfian hypothesis, suggesting that the concepts one's language makes available influences thought; (Whorf 1956); and

People conceptualize idiosyncratically even when they share both experiences and cultural norms. For example, people vary as to whether they would say that a person who has deceived another person into believing something false has lied if the deception does not literally involve a false statement.²¹

If these sorts of conceptual issues did not arise, there would be no particular reason to engage in the Augustinian project because there would be no difference between one language and another. This is not to say that languages are internally crisp. But it does mean that looking at different languages to ascertain the purpose behind a law will only work if the different language versions are not exactly the same as one another, in both the intentional and extensional senses. Yet the languages must be close enough to each

²⁰ See Alcaraz (2002) for discussion of this classic problem in the translation between Spanish and English.

²¹ For discussion, see Solan and Tiersma (2005), especially chapter 11. For a more general discussion of variation in the conceptualization of non-paradigmatic cases, see Schroeder (2007).

other to permit only a small set of possible interpretations. Otherwise, the amount of discretion available to a court would be so broad as to challenge the very notion of a supranational order governed by the rule of law.

The solution to this problem lies in the nature of conceptualization. The concepts of people who speak different languages and live in different cultures will be most alike if people are designed to form the same or similar concepts from the same or similar experiences; and the experiences of people from the various member states of the EU are similar enough. Using somewhat different vocabulary, Engberg (2004) lays out this problem nicely. Thus, the likelihood of identical concepts has both an innate component (our cognitive design) and a cultural one (how culture structures experience and represents it in that culture's language).

As for the innate component, there has been a great deal of study of how people form concepts and categories during the past three decades, with considerable progress. Many now believe that our concepts are complex entities consisting in part of prototypes based on experience, and in part of definitional conditions, whether necessary or sufficient.²² Peter Tiersma and I (2005) have used the dictionary definition of the word *chair* to illustrate this point. *Webster's Third New International Dictionary*, one of the leading dictionaries of American English, defines the word as follows:

A usu[ally] movable seat that is designed to accommodate one person and typically has four legs and a back and often has arms.

The only necessary (i.e., definitional) component is that a thing must be a seat designed for one person. All of the other features are prototypical in nature, expressed in the definition with the words, *usually*, *typically* and *often*. Psychologists now believe that

²² For some contrasting views, see Fodor (1998) Murphy (2002).

we conceptualize by forming mental models that contain both kinds of information, and perhaps even more complex elements, such as theories of how a concept interacts causally with the world. No doubt people who speak different languages do not have precisely the same concepts. The fact that our concepts are in part comprised of experientially-based mental models would make such uniformity impossible. Moreover, work by the linguist Anna Wierzbicka (1992) shows that very few concepts are universally expressed in the languages of the world.

What is necessary for the success of the Augustinian method, then, is not the universality of concepts, but rather the universality of how our minds are designed. Similar experiences cause us to produce more or less the same concepts, whether considered individually or culturally. As the philosopher Jerry Fodor (1998) puts it, we conceptualize a *doorknob* as ‘the property that our kinds of minds lock to from experience with good examples of doorknobs,’ ‘by virtue of the properties that they have as typical doorknobs.’ If German and French doorknobs differ from each other, then we may find some differences in the mental models of doorknobs that French and German people form in their minds. But given exposure to the same types of doorknobs, including a sense of what a prototypical doorknob looks like, people of all cultures will make more or less the same thing of their experience. This suggests that not only must we be Whorfians to explain the success of Augustinian interpretation, but we must also be Chomskyans in the sense that an explanation of our innate endowment is a prerequisite to justifying the approach.

Multilingual Interpretation in Practice

Augustinian interpretation does not always succeed – but it often does. Before we get to what can go wrong, let us look at a few examples of what may go right.

Sometimes, the absence of a linguistic issue is construed as evidence that the linguistic consensus has captured the essence of the legislation. Much of the time consensus among the various language versions is used as a means to confirm the Court’s sense of the law’s purpose, which had already been determined on other grounds. For example, *Pretura unificata di Torino v. X*²³ involved a regulation permitting local authorities to exceed concentrations of foreign particles in the water supply under certain emergency circumstances. Criminal proceedings had been brought against an official of Torino for violating Italian law by permitting excessive amounts of a contaminant to enter the water supply. He defended by relying upon the EU regulation. Looking at various versions of the regulation, the Court concluded that ‘it appears from the different language versions of Article 10(1) that the term “emergencies” must be construed as meaning urgent situations in which the competent authorities are required to cope suddenly with difficulties in the supply of water indented for human consumption.’ (¶ 14). Since that was not the case, the EU regulation would not provide a defense to the domestic environmental crime prosecution.

At other times, as Augustine noted, the various language versions can be used to find and discard outliers. Sometimes, the issue concerns simple errors in translation. Recall that the Court avoids referring to any particular translation history because of the principle of equality. A broad comparison among language versions, however, makes a historical account unnecessary, as long as there is relative consensus. Many of these

²³ [1988] ECR 5099.

cases involve word choice. Consider *Lubella v. Hauptzollamt Cottbus*.²⁴ A regulation adopted protective measures with respect to the import of certain cherries into the EU. Just about all of the versions of the regulation used the word for *sour cherries*. But the German version, for some reason, had used the word for sweet cherries (*Suesskirschen*). This fact made the scope of the challenged regulation entirely beyond controversy.

Lubella provides an excellent vehicle for comparing the Augustinian approach to discovering a statute's purpose with a textualist approach to statutory interpretation. The latter approach risks ossifying drafting errors that result from legislation written in clear, but erroneous language. The study and comparison of various versions, in contrast permits inferences to be drawn based upon consensus and outlying language. Most interestingly, this Augustinian approach does not require courts to stray from official textual material to extrinsic evidence that is subject to manipulation. To the contrary, the absence of a single text and the presence of many texts together provide a great deal of information within the official, authoritative documents that are absent from monolingual legislation. Thus, Augustinian interpretation gives maximum evidentiary weight to documents that actually have official status, reducing the likelihood that judges will substitute their values for those of the legislative body by straying too far from the legislative process in their analyses.

Other cases involve grammatical nuances. For example, in *Peterson v. Weddel & Co., Ltd.*,²⁵ the issue before the Court was a criminal prosecution within the UK for violation of a regulation setting certain limitations on the operations of trucks. An EU regulation, however, allows members to exempt from this regulation 'transport of animal

²⁴ [1996] ECR I-5105.

²⁵ [1984] ECR 1567.

carcasses or waste not intended for human consumption.’ (¶ 5). The UK had availed itself of this exemption, so if the shipper’s conduct was covered by the exemption, then no crime was committed.

While it is clear that the exemption applies to waste not intended for human consumption, the question was whether it applies only to those carcasses not intended for human consumption, or to all carcasses. The shipper being prosecuted was shipping, among other things, sides of beef intended for human consumption.

The Court looked at a number of versions of the regulation, finding most of them ambiguous. In the Dutch version, however, ‘the qualifying words ‘not intended for human consumption’ precede the term “carcasses” and consequently can apply only to both waste and carcasses.’ (¶ 11). The nonequivocal version was given a privileged status in this context, and was used to reinforce arguments based upon the purpose of the regulation.

To those versed in American law, the problem resembles cases that consider the proper application of the Last Antecedent Rule, which says that ‘a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.’²⁶ The problem with that rule, however, is that in situations like the one before the ECJ, it is not possible to determine in advance whether the last antecedent is the entire disjoined phrase, or the last of the disjuncts. Augustinian methodology provides evidence that may help in resolving that question in particular cases.

In contrast, the Augustinian method does not always bear fruit. Jan Engberg (2004) writes about *Commission of the EU v. United Kingdom of Great Britain and*

²⁶ See *United States v. Kerley*, 416 F. 3d 176, 180 (2nd Cir. 2005). I discuss this principle in Solan (1993).

Northern Ireland,²⁷ a case involving how we conceptualize fishing. British trawlers were engaged in joint fishing expeditions in the Baltic Sea with Polish trawlers. The British vessels would cast the nets; the Polish vessels would then trawl for fish; the Polish vessels would then turn the nets over to British vessels, which would bring the fish on board. If these fish were deemed to have been caught by the Poles, then a tariff would be due. If caught by the British, there would be no tax.

The English version of the regulation in question says first that ‘goods wholly obtained or produced in one country shall be considered as originating in that country;’ and second that

the expression ‘goods wholly obtained or produced in one country’ means:
... products of sea-fishing and other products taken from the sea by
vessels registered or recorded in that country and flying its flag. (¶ 7)

The Commission claimed that the Poles had ‘obtained’ the fish since they were the ones that separated the fish from their natural habitat. The British claimed that ‘taken from the sea’ should be construed literally, and that the fish did not leave the sea until the British trawler lifted the nets containing the fish that were caught by the Poles.

To resolve the dispute, the Court looked at a number of different language versions, but learned nothing from them. The French ‘*extraits de la mer*’ was subject to both interpretations: taken out of the sea and separated from the sea. Other versions, including the Greek, Italian and Dutch were just as ambiguous. The German word, *gefangen*, meaning caught, was more helpful to the Commission’s position. The Court conceded: ‘Accordingly, a comparative examination of the various language versions of the Regulation does not enable a conclusion to be reached in favour of any of the arguments put forward and so no legal consequences can be based on the terminology

²⁷ [1985] ECR 1169.

used.’ (¶¶ 15-16). Anthony Arnall (1999) observed that this is the typical approach of the court in such situations. In this case, the Court determined, without the assistance of a comparative analysis of the various language versions, that holding the British vessel liable for the tariff was more consistent with the purpose of the regulation. The opposite result would have permitted members to ‘game’ the regulation by doing with impunity just what the regulation sought to prohibit: importing fish caught by non-members into the EU without the imposition of a market penalty. Thus, the Court relied on arguments based on coherence as a surrogate for legislative purpose.

What went wrong? Recall that multilingual statutory interpretation is essentialist in nature. Since there is no single text, there must be some message that the array of texts, taken as a body, has attempted to convey. The significant overlap in meaning implies that to a large extent, the communication is likely to have been successful. When I, as a native speaker of English refer to fishing, however, I really do not know whether the essential element is pulling the fish out of the water, or catching the fish on the line. It has never really mattered much to me. Perhaps they are both part of the essence, or perhaps they are alternatively part of the essence. If what is true for me is true for many people in my culture and for many people in very similar cultures where Germanic and Romance languages are spoken, then it should not be surprising to find confusion across the board, with only a few languages taking a position on the matter, perhaps as a matter of happenstance, perhaps for more interesting cultural and historical reasons.

What we can conclude from this case is that Augustinian reasoning does not work to clarify a concept when the dispute requires us to take a position on a subtle aspect of the concept that has been neither culturally nor individually resolved. If the essence of

fishing is not a universal, and if our common experience permits us to focus on both aspects of the activity with more or less equal attention, then the comparison of different language versions will have taught us only that a particular version's clear statement in one direction or the other is likely to be accidental, and should be ignored. Thus, Augustinian methodology, even when it does not work to give us a single answer, may warn us to be wary of drawing strong conclusions from the clarity of any particular version.

Conclusion

Let us return to the three values discussed at the beginning of this paper: sovereignty, fidelity and efficiency. In Table 1, the question of fidelity was an open issue. At this point, we can fill in some of the question marks as follows in Table 2:

Table 2 The legal orders and their effects on the three goals

| | <i>Official Languages</i> | <i>Official Languages +</i> | <i>All Languages</i> |
|------------|-------------------------------|---------------------------------|--------------------------|
| Equality | - | +/- | + |
| Fidelity | - | ? | + |
| Efficiency | + | +/- | - |

That is, the proliferation of language versions appears to add to the likelihood that the court will get a case right, where getting it right means issuing a judgment that is more likely to further the purpose behind the law, and which is consistent with the intent of the enacting legislature. This is true when the method appears to succeed, and it is even true

when the method appears to fail, in that the knowledge that the members' versions lack consensus gives the court due warning that it should not pay too much attention to any particular version that appears clear on its face.

The conclusion that Babel actually serves to clarify communication is a surprising one, especially for an American academic who is accustomed both to an environment in which at most two languages are spoken, and who comes from a culture in which textual analysis reigns, both in statutory interpretation and the law of contracts. Nonetheless, my happy conclusion is precisely that: Augustine had it right when he concluded that the careful study of different translations of the same text is likely to lead to a deeper understanding of the text's essential meaning.

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