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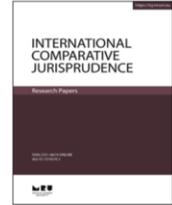
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METHODS OF LEGAL INTERPRETATION, LEGITIMACY OF JUDICIAL DISCRETION AND DECISION-MAKING IN THE FIELD OF THE POLITICAL: A THEORETICAL MODEL AND CASE STUDY¹

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Abstract. This article examines, on the one hand, the relationship between methods of legal interpretation used by judges, and on the other hand, the legitimacy of judicial discretion and the impact of judicial decisions upon structural social antagonisms (known as ‘the political’). The paper explores these matters by means of a case study, namely, the judicial activity of the European Court of Justice (‘Court’). The article posits a direct correlation between the method of interpretation chosen by the court, and the legitimacy of its discretion as well as the level of decision-making with regard to the political. Accordingly, if the Court chooses a linguistic method of interpretation, adhering to the objective will of the treaty-makers and legislators, the legitimacy of a decision has more weight, and the extent of judicial decision-making in the field of the political is correspondingly lower. However, this is not possible due to the general features of legal language, and especially specific features of the language used in European case law since the judge is unable to decide cases solely on the basis of the language of legal texts. This creates a need for the judge to arrive at a decision, which must be legitimised on the basis of the axiological choices made, and interests protected. To this end, a tentative normative theory of interpretation for the Court is proposed.

Keywords: legal interpretation, legitimacy, the political, social antagonisms, substantive justice, ECJ

Introduction

This article examines the relationship between three distinct, yet interconnected, problems: the methods of legal interpretation used by judge; the legitimacy of judicial discretion; and the impact of judicial decisions upon structural social antagonisms (i.e. the political). The paper will analyse these questions by applying the research framework of the critical theory of adjudication (Mańko, 2018a) to the judicial activity of the European Court of Justice (hereinafter: ‘the Court’ or ‘Court of Justice’), which is treated as a case study for the purposes of building a narrative of applied legal theory. I put forward the argument that a direct correlation exists between the method of interpretation chosen by the court, and the legitimacy of its discretion as well as the level of decision-making with regard to structural social antagonisms (‘the political’). Thus, if a judge chooses a linguistic method of interpretation, strictly adhering to the objective will of the treaty-makers and legislators, the legitimacy of a decision has more weight, and the extent of judicial decision-making in the field of the political is correspondingly lower. However, due to the general features of legal language (Gizbert-Studnicki, 1986), and specific features of the language of European law and its multilingualism (Kalisz, 2007, 153-154; Doczekalska, 2009; Beck, 2012, 236; Łachacz & Mańko, 2013, 81-82; Jedlecka, 2019, 142), this is not possible. Hence, the judge is unable to decide cases exclusively on the basis of the language of legal texts, but must resort to other

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methods of reasoning which increase their discretionary power, eg reasoning from principles, from precedent, or methods based on purposive-teleological criteria. Judges therefore need to make decisions that must be legitimised on the basis of other, non-textual criteria, and ultimately take ideological preferences into account when deciding the conflicting interests posed by structurally antagonistic social groups (section 3). In order to boost the Court's legitimacy (section 2) the paper presents a normative theory of interpretation for the Court (section 4), which in a situation where the Court cannot simply defer choices to the legislator, will, nonetheless, allow it to take decisions that enjoy a stronger degree of legitimacy

Thus, the paper's main argument is that the Court should remain faithful at all times, and to the extent possible, to the linguistic criteria of interpretation. Notwithstanding, given the fact that they cannot possibly be considered sufficient (Szot, 2019, 179), the Court should adopt a conscious axiological choice of defending weaker parties, which may include consumers in disputes with businesses, workers involved in industrial disputes with their employers, tenants in conflict with their landlords, and minorities in their assertion of rights vis-à-vis the majority. In other words, the paper invites the Court to take a consciously *ethical position on adjudication* (Mańko, 2018a, ch. 4), and not shy away from promoting substantive justice, especially social justice (cf. Douzinas and Gearey, 2005, 172-176).

The paper is structured as follows. Section 1 presents a discussion of the available methods of legal interpretation, drawing especially on the MST typology developed by MacCormick, Summers and Taruffo (MacCormick and Summers, 1996). I then demonstrate that the Court generally uses all methods of legal interpretation, but with an emphasis on teleological and purposeful *topoi*. Section 2 introduces the notion of legitimacy of adjudication and builds a link between the methods of legal interpretation used, on one hand, and the legitimacy of adjudication, on the other hand. Section 3 explores the concept of the political in adjudication, which can be understood as the relationship between the judicial decisions, and structural social antagonisms. I show that the choice of a method of interpretation influences the *level* at which decisions affecting antagonisms are made. The findings are detailed in Section 4. Finally, Section 5 addresses possibilities to boost legitimacy of the Court's case-law in connection with the findings in Sections 2 and 4, by proposing a normative theory of interpretation to guide the Court's decision making on social antagonisms, as identified in Section 3.

In terms of the methodology used, this paper is an exercise in *applied legal theory*. It assumes the theoretical foundations of critical legal theory, and especially the critical philosophy of adjudication (Mańko, 2018a), and applies them to the Court of Justice. As a result of the critical analysis of the Court's practice (sections 2-3), a normative theory of interpretation is developed (section 4) which is a response to the existing challenges and deficiencies.

1. Methods of Legal Interpretation and their Use by the Court

The concept of methods of legal interpretation refers to the ways in which the court approaches written legal materials (such as legislation or precedent) and also, but more generally, in which it builds its legal argumentation (also referring to concepts which cannot be described as 'legal materials', such as general legal principles (Tridimas, 2006; Hesselink, 2013) or canons of legal reasoning such as e.g. the maxim *exceptiones non sunt extendendae* (Mańko, 2016, 502; Case C-96/14 para. 31). Hence, the question of methods of legal interpretations is concerned, essentially, with the *type of arguments* used by a court. These arguments may be text-oriented (textual), i.e. take as their starting point some legal text (a treaty, a legislative act, a precedent), or non-textual, i.e. referring to some other concepts, such as interests, principles, or effects. Many non-textual arguments can be described as 'pragmatic' ones, especially if they focus on the economic or social effects of adopting one or another interpretive option.³ One of the most well-known and recognised typologies of legal

³ They could even be described as 'extra-legal' arguments (e.g. Mańko, 2015), emphasising that they do not refer to the *lex scripta*, although the fact that they are used in legal interpretation which, as such, is subject to certain rules of discourse, which some legal

arguments is the MST typology developed by MacCormic, Summers and Taruffo (Beck, 2012, 130). The MST typology divides arguments into 11 types, which are grouped into three groups – linguistic, systematic and teleological/evaluative, whilst one type – reasoning from the lawmaker’s intent – is considered transversal (Beck, 2012, 130-133). The full list of types is as follows (ibid.):

- A. *Linguistic arguments*: (A.1) arguments from standard ordinary meaning; and (A.2) from standard technical meaning;
- B. *Systematic arguments*: (B.1) contextual-harmonisation arguments; (B.2) arguments from precedent; (B.3) *analogia legis*; (B.4) logical-conceptual arguments; (B.5) arguments from legal principles; (B.6) historical arguments;
- C. *Teleological/evaluative arguments*; (C.1) teleological (purpose-oriented) arguments; (C.2) consequentialist arguments based on moral, political, economic or other social reasons;
- D. *Arguments from legislative intent*.

The MST typology can be considered exhaustive in the sense that any legal argument used by a court can be attributed to one of the categories provided for.

The Court of Justice is well known for its preference for extra-textual legal arguments over legalistic (formalist) ones (Marcisz, 2015, 115; Mańko, 2015, 7). As a rule, in the Court’s case-law linguistic arguments give way to systemic and teleological ones (Schilling, 2010, 60; Kalisz, 2014, 210), and legal arguments generally give way to policy considerations (Stawecki, 2005, 108; Arnall, 2006, 612; Paunio, 2007, 392; Paunio & Lindroos-Hovinheimo, 2010, 399; Łachacz & Mańko, 2013, 82-83).

Linguistic interpretation, even if overshadowed by teleological arguments, remains important for the Court of Justice (Beck, 2012, 188). As an example, one can refer to its judgment of 23 March 2000 (ECJ 2000b) in which it used a linguistic interpretation of the concept of ‘evidence’ in the Community Customs Code and its implementing provisions, using the ‘wording’ of the rule in question as the main argument (ECJ 2000b, paras. 28-31). Such cases are by no means isolated (Beck 2012, 188) and any interpretation of EU law must start from the linguistic layer (Szot, 2019, 178). In this context it should also be underlined that the Court of Justice uses a specific type of linguistic interpretation which, in effect, has a strongly creative element to it, namely the interpretative *topos* of ‘autonomous interpretation’ of EU legal concepts (see ECJ 2000a; Jedlecka, 2019, 151-152; Szot, 2019, 179). In this way the Court actually adds a third sub-type of linguistic arguments (A.3 – argument from autonomous Union meaning).

The Court readily uses systemic methods of interpretation, especially arguments from its own precedent (method B.3) and arguments from general principles of EU law (method B.5).⁴ However, more classical arguments, such as those based on the preamble are also used (Beck, 2012, 191; see e.g. ECJ 2002). Concerning precedent (method B.3), one must keep in mind that until now one can speak only of *de facto* precedent, as there is no official doctrine of *stare decisis* at the Court (McAuliffe, 2013, 483). However, it must be emphasised that the Court has ‘worked assiduously to develop what is now a robust and taken-for-granted set of practices associated with precedent’ (Stone Sweet, 2004, 97-98), and it cannot be denied that in the EU legal order ‘case law (in theory not formally binding) is often the most important source of law’ (Schermers & Waelbroeck, 2001, 133). However, in the absence of a doctrine of binding precedent there are no precise criteria applied by the Court with regard to the conditions for departing from its own precedent, which sometimes even occurs tacitly (Komarek, 2009, 400-401). As I have already implied, a special place in the Court’s reasoning belongs to teleological

theorists, like Artur Kozak, consider to be the *ius proper* (Kozak, 2010, 132; cf. Mańko, 2020a, 370-372) are a strong argument against treating them as ‘extra-judicial’, thereby underlining that they belong to the *ius* in the broad sense of the word.

⁴ The ECJ uses at least 11 different general principles of EU law, including the principles of: (1) equal treatment and non-discrimination; (2) proportionality; (3) uniform application of EU law; (4) effectiveness; (5) legal certainty; (6) loyal cooperation; (7) respect for fundamental rights; (8) supremacy of EU law; (9) vertical direct effect; (10) harmonious interpretation/indirect horizontal effect; (11) restrictive interpretation of exceptions, exemptions and derogations (Beck 2012, 195).

methods of interpretation, including both functional and consequentialist criteria (Beck, 2012, 207-215). This allows us to conclude that ‘purposive-functional interpretation, treated as a whole, is considered as the most characteristic method of interpretation’ of EU law (Kalisz, 2007, 170).

2. Methods of Interpretation and Legitimacy of Adjudication

The concept of legitimacy must be differentiated from that of legality (Schmitt, 2004). Legitimacy as a concept is broader than legality, although the latter can be one of the factors building legitimacy (ibid., 6, 9). However, given the indeterminacy of judicial decisions and the fact that traditional models of legal interpretation, putting an emphasis on subsumption and automatism are no longer acceptable, the legitimacy of adjudication cannot be based exclusively on strict adherence to the letter of the law, especially if the letter of the law is deliberately open-textured or if the situation at hand was not foreseen by the law-maker (Peretiatkowicz, 1938, 98-100; Gizbert-Studnicki, 1986, 107-108). Moreover, even if legal texts have been carefully drafted and the situation is *prima facie* typical, it is not possible to eliminate completely a certain component of judicial discretionary power because ‘a legal text cannot be directly applied to decisions of the law-enforcement bodies’, which gives rise to ‘the necessity to make choices, and consequently to take decisions’ (Bekrycht, 2015, 190). In effect, a judicial decision, especially of a body such as the Court of Justice is, in so-called ‘hard cases’ at the very least, a ‘sovereign decision [...] which is not deducible from a pre-existing norm or from a higher authority: it establishes the law *ex nihilo*, becoming in this sense absolute’ (Fusco, 2017, 134).

The legitimacy of adjudication can be built on a number of grounds. Firstly, as regards *institutional grounds*, such legitimacy can be built on the democratic mandate of the adjudicator, be it direct or indirect (Mańko, 2018a, 243-247). In the case of national courts such mandate can be stronger, especially if it comes directly from citizens (direct election of local judges) or from the parliament (direct election of constitutional court judges, appointment of judges by parliamentary committee), or weaker if it is based on a decision of a body which is itself indirectly legitimised, e.g. a minister of justice. As regards the Court of Justice, it is appointed by a special committee and then by a national government (Dumbrovsky et al, 2014).

If institutional grounds are unavailable or weak, legitimacy of a court can be built by deference to the choices made by the democratic legislator which entails the model of judicial restraint (Posner, 1983). However, even where such a stance is adopted, the judge will inevitably encounter this situation when textual and intentionalist arguments cannot provide an answer (Posner, 1983, 24). This prevails, particularly in cases entailing serious doubts as to legal interpretation; not that the great majority of cases before the Court of Justice belong to this category, so that deference to those choices may be very difficult to implement, even if the judge acts in a *bona fide* capacity. We should keep in mind that from the outset multilingual EU law has been drafted in a vague manner, expressing principles and objectives, rather than prescribing in detail concrete modes of action (Arnull, 2006, 612; Mańko & Łachacz, 2013, 81). It is also an established fact that legislative drafting is not only collective, but necessarily involves hundreds of actors from different institutions, from different cultural backgrounds, and showing more concern for reaching a compromise on the text rather than striving for clarity and precision (Kalisz, 2007, 152-153; Guggeis & Robinson, 2012, 51–81, 61–62). Judicial restraint faces additional challenges due to the ‘inevitable discrepancies between the various language versions, their deliberate vagueness and the impossibility of identifying a psychological “legislator’s” intent [that] obviously create challenges for traditional theories of legal interpretation’ (Mańko & Łachacz, 2013, 81), especially those typical of judicial restraint. In fact, the Court of Justice has not shown any greater interest in the actual intent of the law-maker as an argument of legal interpretation (Szot, 2019, 181). Accordingly, consistent with the postulates of the critical philosophy of adjudication, it becomes necessary to shift our focus from fidelity to the legislator towards fidelity to justice (Mańko, 2018a, 249-250; cf. Douzinas and Gearey, 2005, 172-176), i.e. to *output legitimacy* (Milej, 2014, 239) otherwise known as the pragmatic aspect of legitimacy (Mańko 2018a, 249). My understanding is that the latter means taking the side of weaker (oppressed, dominated) parties within the structural social antagonisms, which the Court decides upon (see sections 3 and 4 below).

To these one should also add *procedural grounds* (pragmatic aspect of legitimacy – Mańko, 2018a, 247-249), such as the involvement of *amici curiae* in the proceedings, or the involvement of social judges (Juchacz, 2016) in the very process of adjudication. As Piotr Juchacz underlines, the participation of social (lay) judges in adjudication is an important factor strengthening the legitimacy of the judicial power (Juchacz, 2016, 162).

3. Methods of Interpretation and the Political

The concept of ‘the political’ (German: *das Politische*, French: *le politique*, Polish: *polityczność*) is used here following Chantal Mouffe (2000; 2005; 2013) to denote structural social antagonisms. As such, the political is contrasted, on the one hand, to politics (German: *die Politik*, French: *la politique*, Polish: *polityka*), i.e. the sphere of social practices connected to the exercise of state power and struggle for it, and on the other hand, to policies (German: *die Politike*, French: *les politiques*, Polish: *polityki*), understood as spheres or areas in which state power operates, such as economic policy, agricultural policy, social policy, defence policy, and the like (Sulikowski, Mańko & Łakomy, 2018, 5-6). Mouffe’s agonistic theory of democracy is a vehement gesture of rejection of the post-political model of democracy in which conflict is replaced by the alleged possibility of rationally reaching consensus (Monteiro Crespo de Almeida, 2020, 466; cf. McNay, 2014, 67) as, in particular, *per* Rawls and Habermas (Menga, 2017, 540). In highlighting conflict rather than consensus, Mouffe nonetheless underlines the need to keep the former at bay by subjecting it to a set of rules – embedded in adequate institutional arrangements – preventing the dissolution of democracy itself (Mouffe, 2013, ch. 1 and 9; cf. Monteiro Crespo de Almeida, 2020, 467). Indeed, in line with Mouffe’s theory, the *agon* can and should be kept within the borders of one political community (Mouffe, 2005, 14), rather than locating it ‘outside the body politic’ (de Ville 2017, 184), as may be the case with antagonistic visions of the polity. For this to be possible enemies are transformed into adversaries, sovereignty becomes overshadowed by proceduralism, and the singularity of the event gives way to the cyclical nature of democratic processes (Smoleński, 2012, 67, 74-75, 78). This aspect of Mouffe’s thought allows to ‘tame’ (Mouffe, 2000, 107) and ‘sublimate’ (Mouffe, 2013, 9) the political, transforming the antagonism into an agonism, the latter being ‘compatible with pluralist democracy’ (Mouffe, 2005, 19). Agonistic adversaries, unlike antagonistic enemies, ‘see themselves as belonging to the same political association, as sharing a common symbolic space within which the conflict takes place’ (*Ibid*, 20).

According to traditional paradigms of interpretation the sphere of adjudication – the operative interpretation and judicial application of law – is insulated from the political, politics and policies, operating in the legal sphere as distinct from the political one. However, the critical philosophy of adjudication emphasises the structural links between adjudication and the political sphere (Łakomy, 2019, 55), especially with regards to the first aspect – the political understood as structural social antagonisms, opposing social groups or ‘subjectivities’ (Mańko, 2020, 7), such as employees vs. employers, consumers vs. traders, conservatives vs. liberals, ethnic majorities vs. ethnic minorities, and the like. Indeed, judges as legal interpreters do not exist in a void but rather they all ‘occupy a determined place in the structure of social conflicts which constitute the political’ (Łakomy, 2018, 26). It can therefore be said that: ‘Broader social antagonisms finding their place in specific court proceedings undertake the form of debates on the “proper” interpretation of legal texts that are to shape the basis for the decision in the proceedings’ (Łakomy, 2019, 51).

The link between the political (structural social antagonisms) and adjudication follows from the fact that the individual disputes decided by judges very often (perhaps almost always) affect such antagonisms and therefore, *nolens volens*, they encroach on the sphere of the political (Mańko, 2018b; cf. Sulikowski & Wojtanowski, 2019, 188-190). This occurs in two ways. Firstly, the decision of a judge affects the interests of individual parties (citizens, organisations) who belong to the groups (subjectivities) which are in a state of structural antagonism. For example, if a judge is deciding a civil-law dispute between a consumer and a bank (e.g. ECJ 2013a; ECJ 2019), the consumer (e.g. Mr Aziz in ECJ 2013a, or Mr and Mrs Dziubak in ECJ 2019) is in a position of structural antagonism with the other side of the litigation – the bank (e.g. CatalunyaCaixa in ECJ 2013a or Raiffeisen in ECJ 2019). Of course, Mr Aziz and the lawyers for CatalunyaCaixa are acting before the court to

defend their *individual* interests, but nonetheless it can be said that their judicial ‘battle’ is part of an on-going legal ‘positional war’ between banks and consumers more generally. Secondly and more importantly, if such a dispute is decided by a higher court (e.g. court of appeal or supreme court) or a supranational court whose case-law enjoys authority of *de facto* precedent (e.g. Court of Justice), the decision in an individual dispute (such as ECJ2019) affects not only the interests of Mr and Mrs Dziubak, on one hand, and Raiffeisen Bank, on the other hand, but *all consumers and all banks* which are in a similar position (*in casu* – have concluded a loan contract denominated in Swiss francs).

It follows from the above that the court, especially enjoying such great juridical authority as the Court of Justice, cannot look at its activity only as interpreting the objective law and protecting subjective rights, but must perceive itself as an *arbitrator in the field of the political*, because its decisions directly affect existing structural social antagonisms, such as those between labour and capital, consumers and banks, conservatives and liberals, or majorities and minorities. This brings us to the question of the extent to which the Court of Justice *qua* arbitrator of social antagonisms, acts on its own authority, or only gives effect to decisions taken elsewhere (*scil.* by the legislators). In that regard it can be argued that if the Court remains fully faithful to the letter of the law, understood as far as possible according to its original intent (i.e. applying methods A.1, A.2 and D, described in section 1 above), it is rather deferring the decision on the antagonism onto the legislator, and limiting itself – to the extent possible – to only applying those decisions in individual cases. In contrast, if the court engages into more open-ended methods of legal interpretation, such as arguments from legal principles (method B.5), purpose oriented-arguments (method C.1) or consequentialist arguments based on social interests (method C.2), it immediately enters into an area of greater discretionary power. This is especially true of balancing as a method of reasoning (Kennedy, 2015; Kotowski, 2017, 47). If the court is asked to balance conflicting interests, or conflicting legal principles, or conflicting fundamental rights, the outcome cannot be predicted, but depends on the Court’s decision. Finally, as concerns systemic arguments from precedent (method B.2), especially if they are based on the Court’s *own* precedent, and are not based on a rigorous *stare decisis* doctrine (with its focus on *ratio decidendi* and analogy of facts) – which is not the case at the Court (Beck, 2012, 242-250) – also give it a great deal of discretionary power.

4. Towards a Normative Theory of Interpretation

The critical philosophy of adjudication, which is the theoretical basis of this paper, has both a descriptive and a normative element. The descriptive element consists in the analysis of the limits of judicial discretion (Mańko, 2018a, 95-146) and the involvement of the judge within the political (structural social antagonisms), conceptualised in the form of a ‘juridico-political decision’ (Mańko, 2018b). The normative element consists in the ethical aspects of adjudication (Kennedy, 1997; Mańko, 2018a, 171-220) and a theory of legitimacy of judicial decisions (Mańko, 2018a, 237-253). The critical philosophy of adjudication is a general theory which by design can be applied to any kind of court or tribunal (Mańko, 2018, 93). However, the specificity of the Court of Justice as a supranational court must be taken into account when formulating such a theory. The need for such a theory can be justified by pointing to the fact that a widely acceptable normative theory of interpretation for the Court would be an essential element strengthening the legitimacy of the court’s decisions, especially in ‘hard cases’ i.e. those, where it takes politico-judicial decisions.

The contours of such a method of interpretation could be as follows. Firstly, in the interpretation of the Treaties, the Court should follow the principles enshrined in the Vienna Convention on the Law of Treaties, which in its Article 31(1) requires that treaties be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ In line with Article 32 of the Vienna Convention, which provides for supplementary means of interpretation: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.’ The provisions of Articles 31-32 of the Vienna

Convention reflect pre-existing customary international law (Dörr, 2012, 523) and universal custom (ibid., 254), and therefore enjoy a high degree of authoritativeness. They apply to all kinds of treaties, including those constituent of international organisations, where the ‘object and purpose’ is, of course, focused on the effective functioning of the organisation (ibid., 537).

The Vienna Convention therefore supports the classical triade of interpretive methods: linguistic (‘terms’), systemic (‘context’) and teleological (‘object and purpose’). Supplementary means (Article 32) may be used either in a confirmatory fashion, or to specify the meaning (if it is ‘ambiguous or obscure’) or finally to overcome an interpretive result which is unacceptable as being ‘manifestly absurd or unreasonable’. The Vienna Convention clearly adopts ‘the textual approach, ie (...) the view that the text must be presumed to be the authentic expression of the intentions of the parties. Consequently, the starting point of every interpretation is the elucidation of the meaning of the text, rather than of any external will of the parties’ (Dörr, 2012, 541). However, concerning the mutual interrelationship between linguistic, systemic and teleological interpretation, there is no ‘hierarchical or chronological order in which those principles are to be applied’ (ibid.), but rather they should be applied as ‘a single combined operation taking account of all named elements simultaneously’ (ibid.). The component of teleological interpretation in the case of treaties establishing international organisations presupposes the element of effectiveness which justifies attributing implied powers to the bodies of the organisation (ibid., 547). Nonetheless, ‘[t]he consideration of object and purpose finds its limits in the ordinary meaning of the text of the treaty’ (ibid.) In contrast to the interpretation of domestic legislation (cf. Tobor 2013) or private-law contracts (see e.g. Article 65 § 2 of the Polish Civil Code), the common will of the parties is less important than its objective expression in the text of the treaty, read in its context and with regard to its *telos*. However, if that text remains ambiguous, the Court is entitled to make appropriate use of *travaux préparatoires*.

The normative principles of interpretation for secondary legislation (directives, regulations) differ in that they are not international treaties, and their interpretation is not necessarily guided by the Vienna Convention. Rather, the principles of legislative interpretation, developed in European legal culture, should prevail. Here, the intent of the legislator (Tobor 2013) comes to the fore as an important element to be taken into account but which has been, hitherto, by and large absent (Szot, 2019, 181).

Given the need for legal security, a formal doctrine of precedent as part and parcel of a normative theory of interpretation would certainly contribute to the legitimacy of the Court’s case law. Specifically, such a theory should provide for clear-cut criteria as to the binding force of the Court’s judgments rendered in different compositions (full court, grand chamber, five-judge panel, three-judge panel), and in different types of proceedings (preliminary references, action for failure to fulfil Union obligations, opinions). The model of the Polish Supreme Court could be followed, where a decision of the Court sitting in a seven-judge panel is binding on the Court itself only if expressly provided for, and a resolution of a chamber, joined chambers or the full court is *ex officio* binding (Supreme Court Act 2017, Art. 87). A resolution adopted by a seven-judge panel can be overruled by a chamber; a resolution adopted by a chamber – by that chamber or by joined chambers; by joined chambers – by the same joined chambers or by the entire Court; by the entire Court – only by itself (Supreme Court Act 2017, Art. 88).⁵ Applying this *mutatis mutandis* to the Court of Justice, one could provide that if a panel of the Court considers that its decision should become binding precedent, it may adopt an explicit resolution to that effect. A resolution by a three-judge panel could be overruled by the resolution of a five-judge panel (in a subsequent case), a resolution of a five-judge panel – by a resolution of a 15-judge panel (‘grand chamber’), and a resolution of the grand chamber – by the full court. This would certainly clarify which specific interpretations of law, adopted by the Court of Justice, are actually binding, from what moment, and until when,

⁵ The principle according to which the Supreme Court cannot overrule its own precedent is to be avoided, as it is inherently inflexible. It was in force in the UK with regard to the House of Lords between 1898 and 1966, having been introduced the judgment of *London Tramways Co. v London County Council* [1898] AC 375, and abolished by Lorda Gardiner’s Practice Statement of 26 July 1966 (Practice Statement [1966] 3 All ER 77).

greatly improving legal certainty. Given the position and role of the Court, its resolutions should be binding also on national courts.

The methods of interpretation and binding force of precedent would constitute the *formal* side of the normative theory of interpretation. However, the critical philosophy of adjudication places great emphasis on the scope of actual judicial discretion which escapes any formal formulae and exists even when the court performs linguistic or systemic interpretation, not to mention teleological reasoning (Mańko, 2018a, 113-114). Indeed, ‘whenever a legal interpreter undertakes the activity of “reading the law,” they inevitably enter into the space of the political, and each and every intellectual move they make is (...) inherently political’ (Łakomy, 2019b, 136). As Duncan Kennedy underlines, the question of limits of judicial discretionary power is not absolute, but rather one of the extent of interpretive work that needs to be performed by a judge to achieve a result which diverges from the *prima facie* result following from a cursory reading of legal texts and precedents (Kennedy, 1997, 160, 162, 166, 181; Kennedy 2008, 158, 160-162, 168). The key question that arises is the ideology⁶ (or ‘axiology’) adopted by the Court, i.e. the decision whose interests should be given preference: those of consumers or those of traders, those of employers or those of employees, those of business or those of environment protection, to name but a few antagonisms which the Court decides upon (Mańko, 2020b, 10-13). Here, in the emancipatory spirit of critical legal theory (Skuczyński, 2014, 133-134; Sulikowski, 2015, 19, 23; Mańko, 2018a, 136), the *substantive guiding principle* for the Court should be the protection of so-called weaker parties (workers, consumers, tenants, members of minorities) and vulnerable common interests (environment, animal welfare, cultural diversity). Adopting such an openly axiological (value-driven) stance, in line with the postulates of critical philosophy of adjudication, would contribute to the substantive legitimacy of the Court’s case law and to a progressive social transformation. Until now, the Court has indeed followed the proposed axiology in consumer cases (e.g. ECJ 2013a, ECJ 2019) and in environmental cases (e.g. ECJ 2018), but this has not been the case with regard to collective workers’ rights (e.g. ECJ 2007; ECJ 2013b) nor with regard to social housing (Braga and Palvarini, 2013, 40; see e.g. ECJ 2013c; GC 2018), treating the free movement of capital more important than a broad housing policy (Korthals Altes, 2015, 209). The normative theory of interpretation, put forward here, would require the Court to take the side of weaker parties whenever, following the ordinary methods of interpretation, the Court is faced with a dilemma as to the proper legal interpretation. Such a decision should be preceded by an analysis of the structural conflicts that are at stake in a given case (Mańko, 2020b).

Conclusions

This paper demonstrates the strict connection between the methods of interpretation adopted by the Court, on the one hand, and the legitimacy of its decisions regarding structural social antagonisms, on the other hand. Assuming that all adjudication takes place within the field of the political, defined along the lines of Chantal Mouffe, as a response to the challenges revealed, the paper puts forward a normative theory of interpretation for the Court. Its application presupposes the identification of the nature of conflicts which are the object of adjudication, and siding with weaker parties in an effort to promote social justice as a vehicle of legitimacy. If implemented this method would not only lead to an increase of the Court’s legitimacy, pending the implementation of more democratic methods of judicial appointments, but also lead to ethically superior outcomes in cases decided by the Court. As it has been underlined, although the Court has a significant track-record in protecting some weaker parties (consumers), this cannot be said about workers and tenants. Applying the substantive part of the normative methodology of interpretation put forward in this paper would lead to an improvement in this respect, making the Court of *Justice* truly worthy of this name, understood not merely as technical and formal ‘*Justiz*’ but also, and above all, as substantive ‘*Gerechtigkeit*.’⁷ Obviously, the limits to the

⁶ Understood here as a ‘universalization project of an ideological intelligentsia that sees itself as acting “for” a group with interests in conflict with those of other groups’ (Kennedy 1997, 39).

⁷ The English term ‘justice’ corresponds to two terms in German – *Justiz* in the sense of judiciary (administration of justice) and *Gerechtigkeit* in the sense of substantive justice (Hesselink, 2007, 338).

task of promoting social justice lies in the scope of jurisdiction of the Court which is, for instance, much more likely to decide on consumer cases rather than within the area of labour law.

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