The unpredictable path of legal transplants: some analogy with language evolution

Silvia Ferreri[1]

Abstract: Historically, comparative lawyers have always paid great attention to the relation between law and language. Not only because it is very difficult to convey a legal message without using language (images may be ambiguous), but also because of some parallelisms between the evolution of languages and of legal institutions. In the present time, where "politically correctness" of language has become a priority, can we learn something from efforts to improve the way in which ordinary people speak or write? How far will directions to avoid discrimination in public discourse affect the general communication? Will the "rebellious nature" of spontaneous exchanges resist interferences to improve the condition of some social groups? A reflection on past experiences may help us in focusing on today's issues.

Keywords: Language evolution, borrowings, political correctness, legal transplants, interpretations.

Summary**:** 1. Language governance: efforts, difficulties. – 2. Top down or bottom up? – 3. Lections taught from linguistics sciences. – 4. Borrowings, legal transplants. – 5. Unidroit/Uncitral/World or Regional Organizations promoting legal models. – 6. WTO, International Monetary Fund, World Bank, financial institutions in general. – 7. Vehicles of imitation: more than one factor.

1. Language governance: efforts, difficulties

A distinct movement to moderate a certain chauvinism in language, especially toward the feminine component of society, has emerged since some years with particular momentum in the English-speaking world. James Boyd White, as a jurist having a background in languages, among others, has - for a number of years already - promoted the wider use of the pronoun "she" associated with the role of judges, lawyers, ministers, and other occupations that in the past were deemed proper for men rather than including women.

At first, the impression of the reader was somewhat mystified by the change from the so-called all-inclusive masculine to the specific feminine gender: reading that the judge "in *her* written opinion …" has underlined some aspects of the litigation, was initially disturbing, as it caused the reader to pause and ask herself whether the judge was indeed a woman, even in a hypothetical case, presented as a model to reflect on some legal feature. Gradually, people got used to the new trend and this stylistic choice has become quite accepted in the English-speaking world. The policy sought by this distinct movement is to train readers to consider quite natural that professional occupations may be held by women. If one objects that the practice seems artificial, or over-ambitious, the reply seems to be that language matters and it concurs to shape expectations, unconscious reactions. What sounds peculiar today, will tomorrow be common usage. Language can contribute to shaping society, to break barriers, to overturn unconscious assumptions.

[1] *University of Turin, Italy, (silvia.ferreri@unito).*

Similarly, in international conferences and organizations, the choice for neutral forms, such as "chairperson" rather than "chairman" has prevailed: after a period of confusion and puzzlement (that in some cases brought some organizers to speak of the "chair" presiding over the session)[2], a fair number of people agreed that the use was not, after all, so disturbing.

The issue is somewhat more complicated in the neo-Latin languages where the ending of the nouns changes according to the subject involved: in Italy some uncertainty still prevails as to whether a woman having the role of Cabinet member should be called "ministra" or "ministro". For some time, women having reached a directive position tended to prefer to be addressed with the masculine qualification ("direttore" – especially for orchestra directors -, "professore", "medico", "avvocato") to stress their equal status to male colleagues. Somehow a sort of mimetic strategy suggested to women in the past both to wear suites on the workplace, and to erase – as far as possible – their "irregularity", their entering in a different social theatre. Most of the times, the conforming to silent rules may be automatic, without specific choice, an answer to what is perceived as "proper", or well-suited to social expectations.

The situation becomes even more complex where the petitions for a "non-gender" language are taken in consideration: as well-known, a trend toward the use of plural pronouns even when referring to an individual is taking a foothold in some English-speaking countries, to avoid the binary classification between masculine and feminine (not all languages allow a neutral form as in German the word *Mädchen*, to designate a young woman). When only one person is acting it is somewhat complicated to interpret a sentence which is all structured in the plural.

As it can be expected, any forced, directed, use of language, conflicts with the rather unruly nature of verbal expression. The comic effort of the "cultural" branch of the fascist movement in Italy was to try and persuade Italians to use curious "Latin" expressions for objects that in the past were indicated with a foreign name (e.g. tram, phon, boiler)[3] reaching the absurd result of "Italinizing" even local names such as the villages in the Aosta Valley that had always been French (or in other areas on the border, either with France or Austria, where the frontier used to be moved one side or another at each conflict between competing States).

A complete disregard for the many and still alive dialects of Italy caused, in the last century, great distress in the population still reminiscent of belonging to different States in Italy until 1861.

The episode is well-known, and generally recalled with both disgust and laughable recollections. Proscribing the use of some familiar words, to comply with political designs, is perceived as especially invasive, hostile, disagreeable and fruitless.

An occurrence having some similarity with the fascist experience is recalled by Rodolfo Sacco in his first text-book on comparative law where he considers the language of the German ZGB, approved in Eastern Germany in 1976: the sterilization of the legal language originally used by the BGB brought about the substitution of the word "third person" with "another" (considered more transparent for the ordinary citizen)[4].

---

[2] In Scandinavia the *ombudsman* has become the *ombudperson* in some instances: R. CORMACAIN , *Legislative Drafting Software: Personal Experience of a UK Drafter*, Oslo University, 22 October 2015, power point presentation, retrievable by google search.

[3] *Le parole proibite dal fascismo raccontate da Valeria Della Valle*, 23.12.2014, available online: https://www.raiplayradio.it/audio/2014/12/Le-parole-proibite-dal-fascismo-raccontate-da--Valeria-Della-Valle-023bd5cb-e30f-423b-83ba-f96280ad1762.html.

[4] R. SACCO, *Introduzione al diritto comparato*, Turin, 1980, 173 (*Il Zivilgesetzbuch della DDR*), in SACCO, CRESPI REGHIZZI, DE NOVA, *Il Zivilgesetzbuch della RDT*, in *Riv. Dir. Civ*., 1978, I, 47-101 a whole dictionary of neologisms is submitted to the reader. Amusingly, some everyday expressions such as "agricultural workman" or "restaurant" went through a similar process of innovation creating complex descriptions that were rather difficult to understand at the beginning and certainly carried a bureaucratic flavour with them.

The balance between gently "nudging" people to improve their language and actually forcing them to do so is delicate, any strong encouragement may be counterproductive: language tends to be "rebellious" to external interference.

In recent times, the Oxford dictionary has undergone a scrutiny that has spotted the disagreeable association of the word "woman" with pejorative meanings, including "bitch" or "whore", while the word "man" did not seem to be similarly associated with negative meanings. Hence the appeal to an updated version of the expressions that may imply a discrimination[5].

At the legislative level, recommendations to adopt a gender-neutral language have reached Parliaments in many countries, and guidelines on legislative drafting nowadays do include instructions to avoid expressions that could imply a discrimination according to gender[6]: these prescriptions strongly influence the legal language. The efficacy of recommendations for drafters are still to be fully appreciated. Of course, one should take into account the increasing role of tools of Artificial Intelligence in drafting: some drafters refer that they are already using templates that direct the style of provisions, software tools that offer support by indicating alternative phraseology, recurring expressions, data bases that offer models of preambles and closing sentences. Some software tools also enable drafters to trace the amendments, verify the impact new rules have on pre-existing ones, identify possible conflicts and the need to abrogate previous legislation[7].

All these opportunities may facilitate the awareness of drafters to equality issues, but we should not forget the alarm raised by some observers who have pointed out how algorithms may themselves be means of discrimination[8]. Curiously words borrowed from other languages become masculine or feminine according to local experience: for instance, in Italy the word "nurse" is conceived as feminine as it is exclusively applied to persons taking care of very young children, while in Anglophone countries it may well apply to persons assisting ill people in hospitals ("infermieri") and including male employees[9].

These events, now briefly mentioned, prompt us to reflect on the parallelism drawn by distinguished comparative law scholars on the similarity between the evolution of language and the development of

---

C.J.JAMES, *Wie sagt man das*?, *Die Unterrichtspraxis / Teaching German* , Vol. 22, 1, 1989, 83-85, available on J*STOR*, www.jstor.org/stable/3530054. Accessed 27 July 2021.

[5] AA. WALAVALKAR, *Oxford Dictionaries amends 'sexist' definitions of the word Woman, The Guardian*, 7 November 2020, https://www.theguardian.com/books/2020/nov/07/oxford-university-press-updates-definitions-word-woman.

[6] In Switzerland for example it is easy to trace the neutral language instructions for drafting in English at the Federal Chancellery: *Style Guide – Bundeskanzlei*, available at https://www.bk.admin.ch *› english_style_guide*

[7] S. FERRERI, *Scrivere per il legislatore. I Manuali di redazione e i loro concorrenti,* in *Diritto Pubblico Comparato ed Europeo*, Bologna, Il Mulino, Saggi, n. 2-2017, 15-42.

[8] A whole series of reports have been published on the issue, especially in connection with criminal law: see, e.g., *AI and Bias* , The Brookings Institution (Washington D.C.), available at: https://www.brookings.edu/series/ai-and-bias/; also: G. SMITH, I. RUSTAGI, *When Good Algorithms Go Sexist: Why and How to Advance AI Gender Equity*, *SSIR (Stanford SocialInnovation Rev.),* March 21, 2021, available at: https://ssir.org/articles/entry/when_good_algorithms_go_sexist_why_and_how_to_advance_ai_gender_equity#; Y. LI, *Algorithmic Discrimination in the U.S. Justice System: A Quantitative Assessment of Racial and Gender Bias Encoded in the Data Analytics Model of the Correctional Offender Management Profiling for Alternative Sanctions* (COMPAS), Johns' Hopkins University, Paper for the Master in law, available at: http://jhir.library.jhu.edu/handle/1774.2/61818.

[9] On the opposite side: in Italian, "ostetrica" (meaning "midwife", "sage femme") seems to be used in Italian only for women, as the equivalent "ostetrico" tends to imply a medical degree in gynecology ("ginecologo e ostetrico"). An open question concerns how people address "midwives" belonging to the male gender in English.

law: both cultural expressions tend to resist strong political/economic interference.

The *system of law*, the *culture of law*, seems to have internal resources that partly insulate its structure from economic/social drastic changes. A certain amount of inertia prevents radical innovations in law, which tends naturally to be rather conservative, as the long-lasting influence of Roman law patently documents. The fact that Roman institutions could survive in medieval times and in XIX century codifications, in circumstances radically modified in comparison with the classical or Imperial era of the Roman rulers is often quoted to underline how much of older provisions is "re-cycled" in later administration of social behavior.

Imitation influences the evolution of law, but the choice of models to be replicated in another context is often unpredictable, not always dictated by rationality or communality of traditions. Theories that emphasize the role of ideology or economy in promoting legal change are only partly confirmed by facts: the variety of borrowings is greater than generally estimated. And they take place in various circumstances.

As Rodolfo Sacco once notoriously said[10]: "Unbiased analysis of the Marxist hypothesis leads to the conclusion that there is not always a correlation between class structure and the solution of a particular legal problem" and, selecting an example taken from road traffic, he provocatively argues: "Consider the rule whereby motor vehicles must drive on the right or on the left. There are no known cases in which the dissolution of class antagonism changes the side of the road on which motor vehicles have to drive. Consider the transfer of ownership in personal property. The line that distinguishes systems that require titulus and modus and those that require titulus crosses the line that distinguishes free market economies from socialist ones".

The comparison with language drawn by the same Author runs as follows:

"If we wish to classify all facts about society as either economic (and therefore structural), or as noneconomic (and therefore superstructural) we must place law in the second subdivision along with language, fashion and so forth. Language provides a typical example of a cultural phenomenon in continuous evolution but the evolution of language is not connected to a class or an axiological or moral choice. The use of language in linguistic borrowings may be influenced by politics, ideology and economic interests, which may, of course, give rise to conspicuous abuses. Yet the content of a language and its changes by no means are the product of class interest. The plurality of cultural forms is not always the product of class struggle. On the contrary, it dates from an era that is far more remote than the beginning of class conflict as Marxists conceived it. Until the '50s such considerations seemed wholly incompatible with the doctrine of Marx and Engels. In that period, Stalin's famous four articles concerning language introduced into Marxist doctrine the idea that the contents of a language are autonomous with regard to the economic structure of various societies. … No one returned to the argument again. If it is admitted, then, that some cultural forms are conditioned by the material base of the society, what is the position of legal morphemes? There are, indeed, legal morphemes which immediately reflect class interest, or, in general, a political decision based on interests or values. An example would be the nationalization of the ownership of the industrial means of production. Other legal morphemes are neutral with regard to class interest. Nearly all the law with which we are familiar falls into that category. The neutrality of these morphemes explains the survival of Roman rules and institutions in feudal, free market and socialist law (for example, *obligatio*, *reivindicatio*, *emptio venditio*, and so forth). Conversely, the neutrality of legal morphemes explains why societies with a similar economic base can have rules and institutions that are irreducibly different in the way that certain

[10] R. SACCO, *Legal formants, A Dynamic Approach to Comparative Law* (Installment II of II), *The American Journal of Comparative Law*, Spring, 1991, Vol. 39, No. 2 (Spring, 1991), 343-401, 392.

common law institutions are irreducibly different"[11].

The question we are asking ourselves concerns the effects of policies implemented to govern the spontaneous evolution of language and what we may learn from the attempt to govern language development as far as the evolution of law is concerned.

In university classes meant to introduce young students to the structure of the law, often teachers distinguish between rules that are merely "positive", that is to say simply set by the governing power, with no ideological/philosophical implications, and rules that imply some specific ideological choices. In the passage just recalled, we can read, in the eyes of one of the most distinguished scholars, a statement in favor of the prevalence of rules that are independent from deep ideological options.

2. Top down or bottom up?

In Italy, Valeria Della Valle and Giuseppe Patota have published a book: "Le parole valgono" (Treccani Libri. 2020) in which the authors plead for a more careful use of words, against the casual reference to very negative expressions in the social media, without any attention to the implications that these injurious expressions may have on the receivers. At the same time, these scholars, involved in the updating of the famous Italian dictionary by the Istituto Treccani in Rome, profess some misgivings about a strict discipline of language: a pedantic weighing of all secondary meanings of words, to verify an exact correspondence between the feminine and masculine words to avoid any unbalance that could indicate some form of male chauvinism seems too burdensome and artificial in their eyes (e.g.: adding to the word "uomo" also "bruto", "femminicida", "mafioso" - as in "uomo d'onore"-, and similar pejorative nouns, is considered excessively artificial)[12].

Observations that women are more subject to definitions according to their appearance than men are, as in their case characterizations by reference to moral qualities (courageous, strong, steady, etc.) are more common in language analysis, encourage efforts to rebalance the difference between the genders. A certain level of caution and self-restraint seems however necessary when trying to shape the language use: any forceful intervention seems to be doomed to failure. The rhetorical question therefore is: how far can you influence language usages? Can the aspiration to help people to speak well ("parlare bene") be promoted with stronger means than just good books, helpful dictionaries? Will legislation passed to rule the communication between persons be effective or will it be rejected by the simple device of neglecting prescriptions perceived as too intrusive? Is there a difference when the aspiration to a change in verbal communication arises from a part of society rather than from grammarians, Academies, intellectual élites? The significant factor seems to be that, in later campaigns of "politically correctness", the insistence to improve past practices arises from people (or, at least, from groups) rather than from authority, it is *bottom up* rather than an imposition, top-down, within some political design.

The level of reciprocal contamination between deliberate introduction of a linguistic practice (as the "s/he" form, to avoid discrimination) and adoption by the public at large so that it becomes a custom, a

[11] *Ibidem*, 393; while originally: *Introduzione al diritto comparato*, I ed., 1980, Turin, 118 (n. 35: *Mutazioni dei modelli, e strutture materiali)*.

[12] In a broadcast by Italian RAI1, *RADIO1 IN CAMPO*, episode broadcasted on 22/07/2021 (directors: Anna Maria Caresta e Gianfranco Valenti: Valeria Della Valle, Michela Marzano, Federico Faloppa, Nino Cartabellotta, Paolo Truzzo, Daniele Massaro, Alessandro De Carlo and others). Podcast on Rai1, website (https://www.raiplayradio.it/audio/2021/07/RADIO1-IN-CAMPO-cbae2374-5680-42da-97c4-dbd53db71d0c.html).

common usage, is very difficult to measure. As an instance we may just mention the word "badante"[13] which was deliberately chosen to indicate people taking care of elderly or handicapped persons in their daily needs: a regulation of their rights and duties was considered necessary and a specific expression was chosen in legislation to indicate a profession which is distinct from baby-sitting, nursing, overseeing, a mixture of many tasks, and hopefully a word not having a pejorative implication.

2. Lections taught from linguistics sciences.

Comparative law scholars have found source of inspiration in linguistics, under several profiles. For instance, Rodolfo Sacco has, early on in his writings on comparative law, highlighted how the same language spoken in different countries may gradually diverge, and how often the more secluded geographic area may preserve an older form of expression which becomes obsolete in the mother country[14]. The phenomenon, studied sometimes under the label of "language parallelism", is rather conspicuous in Quebec where older French forms are preserved, also in the legal field while they have become old-fashioned or exceedingly sophisticated in France[15].

The observation is relevant when people compare legal institutions: sometimes the same legal notion descending from a common source, such as the French Civil Code, or the German civil code, evolves in different directions in countries that share a common cultural background; different interpretations may arise in the case law and in the academic readings ("*dissociazione dei formanti*") even where legislation is identical, in extreme cases written in exactly the same language [16].

---

[13] Accademia della Crusca, https://accademiadellacrusca.it/it/parole-nuove/badante/873 (a word in use since 2002); see: Contratto collettivo nazionale per il lavoro degli assistenti alla persona, in force since 1.07. 2013; also: "legge di sanatoria per la regolarizzazione dei lavoratori stranieri" (legislative act 189/2002, and D.L 195/2002).

[14] An interesting episode, fairly recent, concerns an area of the ex-Jugoslavia: A. BLANTIK, *Porabje*, *So Near... So Far…*, in *Adria Airways In-Flight Magazine Revija Adria Airways In-Flight Magazine*, September 2010, 50 ff. (on line: i*ssuu.com/akersnic/docs/adria_inflight_4_2010w): "*The region of Porabje (or Raba Region), was secluded from the rest of the country during the communist period (being attached to Hungary). The Slovenian population living in that region went on speaking a local dialect which, little by little, was left behind by changes occurring in the larger area where the same language was spoken*. *The result is that once re-united, the Slovenian population belonging to the prekmurščina language (spoken mainly at Prekmurje) could not easily communicate any longer.*" similarly, The Javanese spoken in Suriname is more ancient and has preserved ways of saying that have disappeared in Java where a modernization of the language has been introduced: http://www.sil.org/americas/suriname/index.html.

[15] J. DARBELNET, *Niveaux et réalisations du discours juridique*, available online : http://www.cslf.gouv.qc.ca/bibliotheque-virtuelle/publication%20html/?tx_iggcpplus_pi4[file]=publications/pubf104/f104p1ch2.html#1 (e.g. « Dispendieux » per « coûteux » (Code civil : « objets dispendieux à conserver »); « Et de même *marchan*ds là où l'on attendrait *commerçants*. Il ne se dit plus guère en français moderne pour désigner la catégorie professionnelle de ceux qui tiennent magasin pour servir leur clientèle … »; « *habile* au sens d'ayant la capacité de, étant légalement autorisé à; « habile à tester ». La langue moderne préfère, dans ce sens, *habilité à*. Mais le parler québécois, qui sur certains points a évolué plus lentement, offre des exemples très proches de cet usage devenu archaïsant pour un Français de France».

[16] R. SACCO, *Sistemi giuridici comparati*, in Sacco (dir.), *Trattato di diritto comparato*, Turin, 1996, p. 4: the situation of the heir apparent in France and Belgium (facing similar rules, in both cases expressed in French, courts and academics reached different conclusions: as in France interpreters follow a solution more similar to Italy, where legislation explicitly rules the matter, while in Belgium the law in action reflects the legislator's silence in the issue).

Similarly, the theory of legal formants is indebted to observations in language developments, having in mind the variations occurring when Latin evolves into modern languages through adaptations that diverge in various contexts.

One should of course not ignore also the opposite process where the same language is artificially severed for political reasons: some process of the kind has taken place between Croatian and Slovenian according for instance to the analysis published by Andrea Marcolongo[17].

3. Borrowings, legal transplants

In comparative law investigations, a point of analysis, shared by both Watson and Sacco, concerns the elements causing legal transplants. The question on how the law evolves has been widely investigated. A highly quoted passage by Milsom[18] states that - except for constitutions which are sometimes original -, for the rest, States generally take their laws from others by way of imitation. The importance of legal transplants is not underestimated by comparatists. The question on where people (legislators, but also notaries, lawyers, even judges) seek their models has several answers even though none of them is final. According to Watson and Sacco imposition through violent means, such as military conquest is obviously the most conspicuous factor (as in Europe, by force of the French Army under Napoleon, or in the colonies submitted to European rulers), while chance may also play a significant role (as in the event of casual knowledge that some successful reform has been introduced somewhere, or in connection with the intellectual formation of a political leader in some foreign country, such as France). A shared language can of course be an important factor.

The difficulty of translating legal provisions is serious and it may hinder imitation: one of the reasons why China introduced a German like civil code in the Nationalist period of *Chiang Kai-shek***'s** ruling is connected with the translation into Chinese characters carried out by Japanese scholars before the adoption of the German BGB model in Japan in the civil code enacted there in 1898. Having at hand a European legislation already translated in a written form accessible also to Chinese readers was a determinant element for a rapid updating of private law in China.

As a more general explanation of the models' circulation, however, Sacco indicates the desire to

[17] A. MARCOLONGO, *Pulizia linguistica nella ex-Jugoslavia, Guerre nazionaliste al serbo -croato,* speech delivered in 2008 in Rovereto (Trento) at the event called *Festival delle lingue (available online at: https://www.corriere.it/cultura/17_marzo_08/andrea-marcolongo-intervento-festival-delle-lingue-rovereto-947f2252-0426-11e7-9858-d74470e8bbec.shtml* ("la Repubblica socialista federale di Jugoslavia (Sfrj), [Stato] … proclamato …nel 1943 e dissoltosi nel 1992 ... Ma prima e dopo la Jugoslavia … è esistita una lingua slava meridionale: il serbo-croato o il croato-serbo, che era parlato in Bosnia Erzegovina, Serbia, Montenegro, Croazia. Il serbo-croato è sempre stato la lingua ufficiale della Federazione, oltre alle lingue autonome di Slovenia e Macedonia. Oggi esistono una ex Jugoslavia e un ex serbo-croato. Ma se l'entità politica non esiste più, sostituita dalle nuove Repubbliche nate dopo la guerra, l'entità linguistica esiste ancora. Solo, non la si può più nominare. Dire che parla *serbo* a un cittadino di Sarajevo, che ha subìto un assedio .., è come dargli un pugno nello stomaco. Lo stesso vale per un croato, che oggi pretende di parlare solo croato e non serbo … il professor Ranko Bugarskilinguista internazionale … a Belgrado, … «il serbo, il croato, il bosniaco e il montenegrino sono una lingua unica, con oltre il 90 per cento di parole comuni». Tuttavia, 17 milioni di persone oggi credono di parlare lingue diverse …").

[18] *Historical foundations of the common law*, London, 1969, IX. See: A. WATSON, *Legal transplants*, Edinburgh, Scottish Law Press, 1974, 8 (footnote 4).

acquire the prestigious merits of the model, the hope of profiting from a highly regarded model[19]. This interpretation of the forces addressing reformers toward one model rather than another is confirmed in Sacco's eyes by the analysis of what happened after the decolonization of African countries: rather than abolishing previous legislation, especially in the private law field, reformers often extended rules that were previously reserved to the citizens of the ruling country (France, Germany, Portugal) to the general population. At least in the first period after independence: while, later on, often new States tried rather to turn over a new leaf and either reinstate Islamic traditions or absorb suggestions from the socialist model of the USSR. The complex of elements that can be collectively named as "prestige" is a significant factor to determine the choice of paradigm. In Italy itself the Napoleonic legal reforms were abrogated after his exile, but later they were re-implemented by the various kings and dukes and archdukes reigning over the several Italian states, as it is most evidently shown by the *codice Albertino* of the Kingdom of Sardinia (Regno di Sardegna, 1837) that reproduces, almost literally (although in Italian rather than French), the Code Napoléon.

In even more extreme terms, Watson underlines that new legislative provisions modelled on foreign precedents need not be especially harmonious or coherent with the previous legal framework. Imitation is not sparked so much by rational weighing of advantages, by careful consideration of drawbacks, but by a desire of advancement, by the impression of appropriating some additional quality. Only this argument, in Watson's opinion, helps us in understanding how Turkey could choose the Swiss civil code as prototype of the Turkish legislation in 1926, or in explaining the final option of Japan for the German civil code rather than the French code Napoleon in 1898. In neither case can we identify a shared background, a common language, a similar ideology between the model country and the imitating one. The cultural similarities, the shared economic conditions do not seem to be decisive if compared with the high reputation by which some codification is surrounded. In these terms, some analogy appears with the adaptation of languages. They evolve independently from economic growth, from political reversals, from segregation in social classes: in a way, according to Watson, one can affirm that both law and language are partly insulated from the political influences, the economic pressures. A paradox (often expressed by Sacco) compares fashion and law: as styles change in dressing, in decorating, in music, so does the law change, often taking inspiration from abroad, from apparently successful models.

A passage written by Watson epitomizes this point in an image which is rather suggestive[20]:

"what has emerged from these four books is my appreciation of the enormous power of the legal culture in determining the timing, the extent, and the nature of legal change. Social, economic, and political conditions that affect other groups within society are important, of course, but their impact on the legal rules must not be exaggerated.

Failure to appreciate the power and the autonomy of legal culture may lead scholars into interesting and illuminating errors. ... The claim that culture is fundamentally autonomous would be challenged, I think, by some Marxists. … No theory of economic materialism will explain why dog is not eaten in the United States; why the flesh of steers is highly favored when the eating of soya beans could produce the same material results; why men wear or wore ties around their necks; or why women wear or wore ribbons in their hair. If it be suggested in reply to the last point that in view of their economic

[19] R. SACCO, *Legal Formants, A Dynamic Approach to Comparative,* cit., " the French *Code Civil* spread throughout Europe, not because of comparative study, but because of the propagation of liberal ideas, the ideal of codification and the prestige of all that was French".

[20] *Legal Change: Sources of Law and Legal Culture*, 131 *Un. of Pennsylvania L. Rev*., (1983), 1121 ff. at 1154 ff., Available at: https://scholarship.law.upenn.edu/penn_law_review/vol131/iss5/2: (one of the examples most used by Sacco is the social convention by which a jacket has button wholes on the front rather than at the back, a rule that is independent from the "condizioni economiche e sociali di base").

dependence women had to appear "feminine" the particular choice of hair ribbons as opposed to neckties would still be without explanation".

Critics have often replied, to both Sacco and Watson's observations on some level of neutrality of the law, by pointing out how many superficial imitations have failed, precisely because they were suggested by appearance-driven considerations, rather than by careful dissection of all particulars. To this claim, both authors have, in the past, replied by pointing out that they were considering the mass of transplants, the general features of them rather than their destiny, whether faithful to the original or distorted and failing. In the long-run, imitation is to be taken into consideration when reflecting on the progress of legal institutions. Certainly, the time factor is relevant: often reforms may struggle, may be amended, suspended but by looking at longer periods of time, one has to admit that often innovation comes from abroad. Differences in appreciations may depend on the time factor, on the more or less extended period considered[21].

Pierre Legrand is the main sponsor of a movement, including a considerable number of scholars, who have strongly opposed the possibility of communication across different legal traditions[22]: even in Canada, where both civil law and common law live next to one another, it is argued that they have quite independent developments and a level of incompatibility which is underestimated by many comparatists. This rather polemic attitude has had a significant impact on a number of writers who agree with the proposal of reappraising the impact of transferring foreign solutions in law.

The battlefield is open: a strictly mathematical answer is unlikely. The exact influence exercised by imitation or innovation is probably impossible to quantify, to assess scientifically.

An interesting observation by David Daube deserves however to be recalled here, concerning the amount of disagreement, of inefficiency, people are ready to put up with in order to be more highly considered, to enjoy better public reputation[23]: in some degree this may also apply to the adoption of foreign legal solutions that do not really improve one's legal system but that harmonize the State's rules with other States or organizations.

5. Unidroit/Uncitral/World or Regional Organizations promoting legal models

The above-mentioned considerations about borrowing from foreign legal models and legal transplants must, of course, be combined with the role played by institutions that professionally try to influence legal reforms: either with the goal of facilitating economic exchange and commercial transactions or to raise the level of respect of some freedoms that are considered universal (ILO, FAO, regional organizations for the protection of human rights).

In this field, one has to consider that the strategies have moved from hard tools such as conventions and treaties strictly binding signatories to them, to more subtle tools, the so-called soft law means. An increasing number of instruments that seek harmonization between the laws of various countries take the form rather of model laws, or guidelines to legislators.

Various reasons have influenced this change of strategy. On the one hand, formal agreements are difficult to amend, especially if unanimity of consent is required. Sometimes older conventions have been overtaken by new ones, not including all the original partners, because it was impossible to

[21] E. STEIN, *Un nuovo diritto per l'Europa. Uno sguardo d'oltre Oceano*, Milan, 1991.

[22] P. LEGRAND AND R. MUNDAY, *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003; P. LEGRAND, The *Impossibility* of "*Legal Transplants*", in *Maastricht Journal of European and Comparative* Law (1997) 111-124; P. LEGRAND, *How to compare*, *Legal Studies* , Volume 16 , 2, July 1996 , 232 – 242.

[23] The explanation referred to the Roman "patria potestas", rather stringent and in some cases too limitative of transactions is criticized by A. WATSON, *Legal Change: Sources of Law and Legal Culture*, 131 *Un. of Pennsylvania L. Rev.*, (1983), 1121 ff., at 1143

persuade everyone to accept modifications. The result is obviously confusing: a certain text binds a number of States but another one is in force between other States. No uniformity is reached by these proceedings.

On the other hand, a more flexible approach leaves room to improvements, to higher standards when one of the recipients of the model can afford a more demanding level of security or liability.

Suggestions by UNCITRAL, UNIDROIT, FAO and other international actors have significantly influenced the commercial field, often providing a level field to parties, including developing countries.

In this case as well, one could criticize the effectiveness of a limited harmonization, not enforceable by strong reactions, prone to different interpretations and varying readings. However, some results are striking and the lack of control by State's official long arms has become more accepted after the increase in a-national rules, in electronic exchanges often impossible to match to one specific place and one identified legal regime[24].

As often recalled, an ironic comment by John Honnold was: «realists have told us: 'Even if you get uniform laws, you won't get uniform results'. Those sad-faced realists were dead right -- as right as confirmed bachelors and spinsters who build their lives on the realistic view that there is no perfect spouse». The passage obviously replies to a nihilistic attitude of some commentators more focused on pointing out shortcomings of harmonization processes than on recording successes, or at least half-successes.

*6. WTO, International Monetary Fund, World Bank, financial institutions in general***.**

Pressure to amend previously existing rules often comes from economic institutions that have the strength to subordinate financial help to the adoption of some kind of innovation, including legal rules.

In recent years the case has been widely discussed in international congresses, meetings, seminars, in books and articles in relation to a study which has attracted perhaps more attention than originally expected: in a very contentious publication (*Doing Business 2004 Understanding regulations*, followed by *Doing Business in 2005: Removing Obstacles to Growth*) the World Bank put forward some propositions leading to represent that the common law tradition may be more favorable to efficient agreements and mechanisms of enforcement of commercial exchanges.

The fierce reaction of jurists belonging to the civil law tradition has mainly been led by French jurists, especially those connected with the Association H. Capitant[25], having a tradition of comparative legal studies and of some attention to the issues of the *Francophonie*, i.e. of relations between countries sharing a heritage of the French civil code. Emphatic denials, strong words have been written, a certain level of indignation exhibited: a number of clarifications have been added and arguments advanced to plead rather in the sense of a higher harmonization of rules as increasing the flow of exchanges.

Simplification is always treacherous and a square calculation of advantages and disadvantages of legal systems seems very complex and, probably, lying beyond the realm of comparatist lawyers who are more interested in learning from as wide and varied a horizon as possible rather than in certifying medals of superiority to some or other legal solution.

---

[24] G. TEUBNER, *Global Bukowina: Legal Pluralism in the World-Society*, in G. Teubner, ed., *Global Law without a State*, Dartsmouth, 1997, 3-28, 1996, Available at SSRN: https://ssrn.com/abstract=896478; G. TEUBNER, A. FISCHER-LESCANO, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law* , Michigan Journal of International Law, Vol. 25, No. 4, 2004, 999-1046, available at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=566891, last visited August 27, 2021.

[25] *Les droits de tradition civiliste en question*, v. 1, « Travaux de l'Association Henri Capitant », v. I, *A propos des Rapports '*Doing Business' *de la Banque Mondiale*, Paris, Société de législation comparée, 2006.

Perhaps an incidental backward look may help in contextualizing the more recent confrontation, the opposition between civil law and common law, having in mind the economic studies that tend to rather rigid modellings of historical facts.

The National *Bureau of Economic Research* (*NBer*) had already in the past presented similar arguments, as scholars specializing in the study of the commercial world «such as La Porta, Lopez-de-Silanes, Shleifer et Vishny[26] s'efforcent de mettre en évidence les effets des règles du droit de l'entreprise sur les performances des systèmes financiers dans les pays de l'OCDE. Ces auteurs montrent que le système juridique (anglo-saxon, français, allemand ou Scandinave), le contenu des règles et leurs conditions d'application influencent non seulement le degré de protection accordée aux investisseurs, mais aussi le niveau de développement des marchés financiers. Ces études comparatives décrivent une situation dans laquelle les pays de *common law* offrent une meilleure protection aux investisseurs que les pays de droit civil. Cette particularité expliquerait pourquoi les pays appartenant au premier groupe ont des marchés financiers plus développés, une propriété du capital plus dispersée et des capitaux propres plus importants que ceux appartenant au second groupe » [27].

Previously, as is well known, studies by Anglo-American authors had announced a similar approach as the perspective of the Law and Economics school of thought had highlighted the efficiency requirement as better satisfied in commercial transactions by the case law of the common law area rather than by rules embodied in codified laws. The positions put forward by Posner (1997) and supported by Cooter[28] have had a high level of attention and large projects of investigation have followed this path. Especially before the 2008 financial crisis that has caused a reconsideration of market oriented legal rules.

According to other trends of interpretation, however, the influence exercised by some models is the result of much more complex factors[29], while a cultural movement has emerged that emphasizes less obvious qualities of rules for social regulation, such as the re-discovery of collective sharing of resources according to traditions pre-existing to the colonization of the Americas and summarized under the title of "buen vivir"[30].

7. Vehicles of imitation: more than one factor.

As considered in the last paragraphs, indirect pressure to change cultural paradigms may be coupled with economic influence.

In recent years we have learnt that Chinese Mandarin is highly sponsored in Africa and a growing

[26] R. LOPEZ-DE-SILANDES, A. SHLEIFER AND R. VISHNY, *Law and finance*, in *Journal of Political Economy*, 1998, 106, 1113-1155.

[27] B. DEFFAINS, JG. GUIGOU, *Droit, gouvernement d'entreprise et marchés de capitaux*, in *Revue d'économie politique,* 2002/6 (Vol. 112), pages 791-821, available at : https://www.cairn.info/revue-d-economie-politique-2002-6-page-791.htm.

[28] *The rule of state law versus the rule of law state: economic analysis of the legal foundations of development* , in *The law and economics of development*, E. BUSCAGLIA, W. RATLIFF & R. COOTER (eds), JAI Press, 1997, 101-148.

[29] Notably some observers have criticised the experiments to transplant commercial rules for instance in Russia in the post socialist period: D. BERKOWITZ, K. PISTOR AND J.F. RICHARD, *Economic development, legality and the transplant effect*, in *European Economic Review,* vol. 47(1), 2003, 165-195.

[30] E.g. S. BAGNI, *From the Andes to the EU: customary land law within the ecology of law,* in Revista General de Derecho Público Comparado, vol. 26, 2019, 1-33; S. BAGNI, *Dal Welfare State al Caring State*?, in S. BAGNI (ed.), *Dallo Stato del bienestar allo Stato del buen vivir. Innovazione e tradizione nel costituzionalismo latino-americano*, 19-59, Bologna, 2013; S. BALDIN, *Il «buen vivir» nel costituzionalismo andino. Profili comparativi*, Turin, 2019.

number of children are exposed to its learning in schools, for instance in areas close to Nairobi. The choice to get involved in the learning of such a complex and challenging language is difficult to separate from the increasing economic investment by large Chinese undertakings in costly building projects[31].

However, a final reflection may be reserved also to the spreading of cultural models by their own force of attraction.

In the past, Italian was greatly appreciated in music ("il bel canto"), especially in lyric opera, not because of any powerful economic blackmail on the recipients, but by the sheer seduction of the sound that seemed especially compatible with the kind of music of that period of time. Even Queen Victoria tried to utter some Italian words (we find passages in her letters that include some Italian expressions) and she expressed preference for this language over French in music[32].

Later on, in parallel with the different rhythms prevailing in recent musical compositions, especially with syncopate characteristics, English became the preferred idiom (even where singers belong to quite different cultures). One can obviously stress the powerful machinery of music-editing companies in the USA, the advertising industry contribution, the path-dependence effect once a certain fashion has prevailed, but one must still explain why a certain rhythm is preferred, why e.g. rap music is successful in younger generation's preferences. Of course, the complexity of factors playing in favor of one or another form of expression is huge. Analysts are still coping with the phenomenon of direct access to the public through social networks such as *Tik Tok* which have revolutionized previous strategies of commercial planning and marketing.

The most conspicuous effect of social media is obviously the "speed of contagion": expressions, fashions arise and fall in very short periods of time, attitudes change rapidly, the huge offer of new applications and tools immensely accelerates the spread of cultural responses, including words, acronyms, idiomatic sentences.

Many changes depend on corporate choices of electronic producers, but a great contribution is to be credited to the public at large as a widely spread group of authors that also cooperate in shaping games, tools, applications.

What may be finally relevant is not to underestimate the fact that not all cultural expressions are predictable, trends and fashions rise and fall, not always following a pre-detectable source.

Bibliography

ADEOYE A. & MUKHATAR I., *China's influence in Africa grows as more young people learn to*

[31] A. ADEOYE, I. MUKHTAR, *China's influence in Africa grows as more young people learn to speak Mandarin*, CNN, 11th April 2019, https://edition.cnn.com/travel/article/mandarin-language-courses-africa-intl/index.html. A world organization such as UNESCO has ratified the Chinese expansion of initiatives to increase education in Africa: see in 2019, the commitment to invest "US$ eight million China funds-in-trust (CFIT) to support the development of higher technical education in Africa over four years", *UNESCO and China sign agreement to support higher technical education in Africa* (https://en.unesco.org/news/unesco-and-china-sign-agreement-support-higher-technical-education-africa).

[32] *The Letters* of *Queen Victoria, between the Years 1837 and 1861*, Volume 1, 1837-1843, edited by A. C. BENSON, R. BRETT, V. ESHER, Cambridge, 2014: August 1, 1837 (Princess Victoria to the King of the Belgians: "I admire the music of the Huguenots very much, but do not sing it, as I prefer Italian to French for singing greatly"; Princess Victoria to the King of the Belgians, 23 January 1837: "How I should delight in singing with you all our favourite things from *La Gazza*, *Otello*, *il Barbiere* etc. etc.").

speak Mandarin, CNN, 11th April 2019, https://edition.cnn.com/travel/article/mandarin-language-courses-africa-intl/index.html.

BAGNI S., *Dal Welfare State al Caring State?* In S. BAGNI (ed.), *Dallo Stato del bienestar allo Stato -americano*, 19-59, Bologna, 2013.

BAGNI S., *From the Andes to the EU: customary land law within the ecology of law*, in *Revista General de Derecho Público Comparado*, vol. 26, 2019, p. 1.

BALDIN S., *Il «buen vivir» nel costituzionalismo andino. Profili comparativi*, Turin, 2019.

BERKOWITZ D., PISTOR K. and RICHARD J.F., «Economic development, legality and the transplant effect», *European Economic Review*, vol. 47(1), 2003, p. 165.

BLATNIK A., *Porabje, So Near... So Far..*, in *Adria Airways In-Flight Magazine Revija Adria Airways In-Flight Magazine*, September 2010.

COOTER R.D., *The rule of state law versus the rule of law state: economic analysis of the legal foundations of development*, in *The law and economics of development*, E. BUSCAGLIA, W. RATLIFF & R. COOTER (eds), JAI Press, 1997, p. 101.

CORMACAIN R., *Legislative Drafting Software: Personal Experience of a UK Drafter*, Oslo University, 22 October 2015, power point presentation, retrievable by google search.

DARBELNET J., *Niveaux et réalisations du discours juridique*, http://www.cslf.gouv.qc.ca/bibliotheque-virtuelle/publication%20html/?tx_iggcpplus_pi4[file]=publications/pubf104/f104p1ch2.html#1.

DEFFAINS B. and GUIGOU J.D., *Droit, gouvernement d'entreprise et marchés de capitaux*, *Revue d'économie politique*, 2002/6 (Vol. 112), pages 791-821, https://www.cairn.info/revue-d-economie-politique-2002-6-page-791.htm.

FERRERI S., *Scrivere per il legislatore. I Manuali di redazione e i loro concorrenti*, in *Diritto Pubblico Comparato ed Europeo*, n. 2-2017, p. 15.

JAMES C.J. , *Wie sagt man das*?, *Die Unterrichtspraxis / Teaching German*, Vol. 22, 1, 1989, 83-85, available on J*STOR*, www.jstor.org/stable/3530054. Accessed 27 July 2021.

MARCOLONGO A., *Pulizia linguistica nella ex-Jugoslavia, Guerre nazionaliste al serbo -croato*, speech delivered in 2008 in Rovereto (Trento) at the event called *Festival delle lingue*, *https://www.corriere.it/cultura/17_marzo_08/andrea-marcolongo-intervento-festival-delle-lingue-rovereto-947f2252-0426-11e7-9858-d74470e8bbec.shtml*.

STEIN E., *Un nuovo diritto per l'Europa: Uno sguardo d'oltre Oceano*, Milan, 1991.

SMITH G. and RUSTAGI I., *When Good Algorithms Go Sexist: Why and How to Advance AI Gender Equity*, *SSIR (Stanford SocialInnovation Rev.)*, March 21, 2021, https://ssir.org/articles/entry/when_good_algorithms_go_sexist_why_and_how_to_advance_ai_gender_equity#.

TEUBNER G. and FISCHER-LESCANO A., *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, Michigan Journal of International Law, Vol. 25, No. 4, 2004, 999-1046, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=566891, last visited August 27, 2021.

LA PORTA R., LOPEZ-DE-SILANES F., SHLEIFER A. and VISHNY R., «*Law and finance*», in *Journal of Political Economy*, 1998, 106, 1113-1155.

LEGRAND P., "*How to compare*", *Legal Studies*, Volume 16, 2, July 1996, p. 232.

LEGRAND P., *The Impossibility of "Legal Transplants"*, 4, in *Maastricht Journal of European and Comparative Law*, 1997, p. 111.

LEGRAND P. and MUNDAY R., *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003.

SACCO R., CRESPI REGHIZZI G., DE NOVA G., *Il Zivilgesetzbuch della RDT*, in *Riv. Dir. Civ*., 1978, I, p. 47.

SACCO R., *Introduzione al diritto comparato*, I ed., Turin, 1980.

SACCO R., *Legal formants, A Dynamic Approach to Comparative Law* (Installment II of II), *The American Journal of Comparative Law*, Spring, 1991, Vol. 39, No. 2 (Spring, 1991), p. 343.

SACCO R. , *Sistemi giuridici comparati*, in Sacco (dir.), *Trattato di diritto comparato*, Turin, 1996.

TEUBNER G., *Global Bukowina: Legal Pluralism in the World-Society*, in G. TEUBNER, ed., *Global Law without a State*, Dartsmouth, 1997.

WALAVALKAR A., *Oxford Dictionaries amends 'sexist' definitions of the word Woman, The Guardian*, 7 November 2020, https://www.theguardian.com/books/2020/nov/07/oxford-university-press-updates-definitions-word-woman.

WATSON A., *Legal transplants*, Edinburgh, 1974,
http://www.sil.org/americas/suriname/index.html.

WATSON A., *Legal Change: Sources of Law and Legal Culture*, 131 *Un. of Pennsylvania L. Rev*., 1983, 1121 ff, https://scholarship.law.upenn.edu/penn_law_review/vol131/iss5/2.