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Contents

Volume 1 Number 1 February 2022

Editorial I - III

Les problèmes de traduction juridique 1 - 10
Rodolfo Sacco

Translating the idea of "prééminence du droit": divergent origins and homogeneous evolutions of État de droit, Rechtsstaatlichkeit, Stato di diritto and Rule of law? 11 - 33
Flavio Guella

Regulatory Linguistic Requirements for Product Labelling in the Internal Market of the European Union How the curious Case of the Irish Dog demonstrates the Need for a more coherent EU Language Policy 34 - 59
Stefaan van der Jeught

The unpredictable path of legal transplants: some analogy with language evolution 60 - 73
Silvia Ferreri

The legal recognition of sign languages in an intersectional perspective 74 - 87
Lucia Busatta

Events
Entangled relationship between law and language in globalized world. A report from the first edition of Winter School L.L.I.N.G.U.E, University of Trento (Italy), 13th-17th December 2021 88 - 92
Cezary Węgliński

Editorial

The relationship between law and language is, implicitly and explicitly, at the core of comparative law research. In its connotation of "intellectual activity with law as its object and comparison as its process"[1] comparison naturally implies language as one of its necessary research tools.

In the past century, comparative law science and language mainly met in the field of legal translation, as the general research approach comparatists complied with was to uncover the expected commonalities underneath different legal rules, to create a system of law reflecting the universal values of humanity.

This was the moment when legal translation emancipated from simply being an innominate, implicit activity of comparative law methodology, having no dignity of existence as a discipline. In the Italian circle, we owe the scientific definition of legal translation to the intuition of Rodolfo Sacco, who denominated it "traductology" ("traduttologia"), also in order to establish the autonomy of this discipline. Sacco's identification of problems and solutions to the difficult art of transferring legal concepts from one language to another[2] proved to be fundamental in making legal translation a relevant field of research of comparative law studies.

Thus, the publication in this first Issue of the CLL journal of the national report on legal translation presented by Rodolfo Sacco to the twelfth International Congress of Comparative Law (Sydney, 1986)[3] is a tribute to a leading scholar who gave scientific content to the apparently simple sentence "in order to know the law, it is necessary to know the language"[4], by also disclosing how deep its implications can run.

Since then, studies of "traductology" have regularly been on the comparatist's agenda. At the same time, comparative law has started to move in a very different environment too, in which the law changes and multiplies its characters: "mute law", "global law", "soft law", "multilingual law" are only some of the new contexts in which the legal phenomenon manifests itself. The law remains the core of comparative law studies, but it's the dynamic relationship between law and language that offers an ever-changing scenario, continuously creating new fields of research.

Notwithstanding all new challenges, comparative law has not however shifted its attention from continuing to uncover differences and similarities among legal systems, nor from relying on its original methodology. It is thanks to its familiar research methods, developed through the transposition of concepts from and to foreign legal systems, that the tools of comparative law remain of a crucial importance also to identify legal rules in new and complex environments. On the other hand, comparative law is becoming the legal science with the greatest potential when interpreting legal choices today, precisely because its methodology is flexible by nature, needing to adapt, today as in the past, to new and constantly changing situations[5].

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[1] K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, 3rd edition, translated by T. Weir, Oxford, 1998, p. 2 (original version *Einführung in die Rechtsvergleichung*, 3e éd, Tübingen, J.C.B. Mohr, 1996).

[2] R. Sacco, *Introduzione al diritto comparato*, Turin, 1980 (partially translation in R. Sacco, *Legal Formants: A dynamic Approach to comparative Law*, in *The American Journal of Comparative Law*, XXXIX (1991): 1 - 34 and 343 – 402).

[3] R. Sacco, *Rapport national italien au douzième Congrès International de droit compare/Italian national report to the twelfth International Congress of Comparative Law*, Italian Association of Comparative Law, Sidney 1986.

[4] Reminded by S. A. de Vries, Guest Speech at the Winter School *L.L.I.N.G.U.E, Legal Language in International, Global and Uniform Environments*, Trento Faculty of Law, Utrecht University , TSM (Trento Province), Sird (Società per la Ricerca nel Diritto Comparato, Turin), December 2021.

5 V. Grosswald-Curran, *Comparative Law and Language*, University of Pittsburgh School of Law Working Paper Series, 2005 (translated by Elena Ioriatti, "*Diritto Comparato e Lingua*" in *Annuario di Diritto Comparato e di Studi Legislativi*, 2016, later published in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, 2019).

One of the most evident example is the European Union, where EU law expressed in each national legal language is intrinsically destined to become more than the sums of their parts, namely the single linguistic version, and to develop a unique, supranational and authentic meaning of its legal concepts. Here comparative law can definitely be effective in decoding "the" European meaning, allowing for a deeper understanding of the ways in which EU law is expressed beyond the single language version. This is definitely relevant in order to avoid Eu legal language from becoming a barrier[6], rather than a means of interpretation, to the application of harmonized law at the national level.

Thus, both at the national, European and supranational level, uncovering "the legal rule" is one of the targets of comparative law research. However, because of comparative law's implicit connection to language, an indirect effect of this decoding process of the norm is also the attribution of significance to single concepts, which by nature are destined to acquire meanings that goes beyond national borders.

Within this context, to the extent that comparative law goes so far as to contribute – even if indirectly – to the meaning of legal concepts, how should this field of comparative law science be qualified? For certain, comparatists are not "legal translators", since a translator communicates what has already been defined, at least in part, in a descriptive manner. In his/her mission of decoding meanings, the comparatist identifies what does already exists, but is yet to be defined. If the aim is to describe, the process is to build up (meanings)[7].

This is the implicit message of Flavio Guella's contribution, *Translating the idea of "prééminence du droit": divergent origins and homogeneous evolutions of "État de droit, Rechtsstaatlichkeit, Stato di diritto and Rule of law"?* in which the Author analyses the different constitutional and national backgrounds of these concepts, all implying subjection of political power to the law.

Thus, when dealing with languages, attention in comparative law is paid to language meaning hindrances, which could also lead to limitations on the exercising of citizenship rights.

This is what Van der Jeught underlines in his article *Regulatory Linguistic Requirements for Product Labelling in the Internal Market of the European Union. How the curious Case of the Irish Dog demonstrates the Need for a more coherent EU Language Policy language.* The Author's focus is on the relationship between language policy and multilingualism, a phenomenon that shapes the effectiveness of EU law at the national level too. As the Member States develop their own language regulation, both in the private and public sectors, the EU's linguistic diversity can be an obstacle when specific regulatory linguistic requirements are imposed on the labelling of products on a national or even subnational level. By recommending an unifying approach, the contribution suggests a balance between two relevant principles, the "freedom of language" to market specific products in the EU Internal Market and the "territoriality principle" on the use of languages established nationally, in order to protect end-users and consumers.

As noted by Vivian Grosswald Curran, a relevant aspect of the parallelism between law and language is the innumerable similarities between the evolution of language and the development of law, which may originate in many non-linguistic and non-legal sources[8]. This field is explored by Silvia Ferreri in the essay *The unpredictable path of legal transplants: some analogy with language evolution*. In the current framework in which cultural expressions are mostly un-predictable, the Author investigates a traditional area of comparative law, the legal transplants, through some parallelisms between the evolution of languages and that of legal institutions.

Even if law's most visible connection to language is given by the texts of the various legal systems being written in different languages, comparative law studies have their own intense focus on

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[6] On language as a barrier to the enjoyments of EU citizenship rights see S. de Vries, E. Ioriatti, P. Guarda, E. Pulice (eds.), *EU citizens' economic rights in action. Rethinking legal and factual barriers in the internal market,* Edward Elgar, 2018.

[7] On the relationship of comparative law and legal translation see J. Engberg, *Comparative Law for Legal Translation: Through Multiple Perspectives to Multidimensional Knowledge,* in *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique,* 2020, 33 (2), p. 263-282.

[8] Grosswald-Curran, *Comparative Law and Language,* cit., p. 37.

monolingual areas too. Comparison also takes place within single national legal systems and in one single legal language: Sacco's "legal formants" (originally "components") are the typical example of comparative law research as a way to identify the various elements composing a legal system (legislation, case law, scholarly writing) and contributing to shape its characters. Although the language is the same, comparative law is a tool to visualize the various elements at work within a specific national environment.

But the frontiers of law de-codification touch contexts of non-verbal legal communication too. Nowadays, research on traditional legal systems is among comparatists, legal anthropologist and ethnologist very productive. "Mute law"[9] is a very wide territory where traditional law and customs are only the tip of the iceberg of a world of "silent" legal rules, since they are not yet (and are not supposed to be) put into words: in this framework, the contribution *The legal recognition of sign languages in an intersectional perspective* by Lucia Busatta offers a very interesting overview of the regulations of sign languages and of their recent legislative acknowledgement in various European legal systems.

The content of the first Issue of the CLL journal is meant to offer an overview of the kaleidoscope of subjects that "Comparative Law and Language" implies. For this reason, given comparative law's mission – the acquisition of knowledge - and its intrinsic connection with language, this journal does not have a predefined area of analysis, if not that to focus on the relationship between language and law today "under the umbrella of comparative law".

This Issue was published also thanks to the collaboration of the Assistant Editorial Board and particularly of Mrs. Caterina Bergomi (AEB coordinator), Dr. Kerry H. Hellmuth, Mrs. Virginie O. S. Alnet, Mr. Cezary Węgliński and of advice of prof. Luca Pes (Global Jurist journal executive editor).

We would also like to express our gratitude to the Dean of Trento Faculty of Law prof. Fulvio Cortese for his invaluable support to the establishment of the journal.

Prof. Elena Ioriatti, Editor – in – Chief, on behalf of CLL Editorial Board

[9] R. SACCO, *Il diritto muto. Neuroscienze, conoscenza tacita, valori condivisi*, Bologna, 2015.

Les problèmes de traduction juridique

Rapports nationaux italiens au XIIe Congrès international de droit comparé, Sidney 1986

***Rodolfo Sacco*[1]**

Sommaire : 1. Le sujet et l'objet de la traduction. — 2. Les problèmes de la traduction : le droit. — 3. Les problèmes de la traduction : la langue. — 4. Au-delà de la définition. — 5. Les notions super-abstraites. — 6. Les catégories et les noms. — 7. La traduction et les données extralinguistiques. — 8. La traduction du savant, traduction par excellence.

1. La traduction juridique a lieu si un sujet exprime une proposition juridique en plusieurs langues, ou exprime dans une seconde langue une proposition juridique qui préexiste dans une première langue.

La traduction juridique est la traduction d'un texte qui parle de droit. Il s'agira quelquefois, d'un texte de loi, d'un jugement, d'un acte administratif. Il s'agira, normalement, d'un ouvrage de doctrine. Je mesure l'étendue des traductions présentes dans ma bibliothèque, qui est la bibliothèque d'un juriste : j'y trouve quelques codes, quelques rares jugements, pas un seul acte administratif. J'y trouve les quarante-trois volumes de l'ouvrage principal de Laurent, et puis l'ouvrage de Baudry-Lacantinerie en trente-trois volumes ; j'y trouve Savigny, puis Zachariae traduit en français par Aubry et Rau encore jeunes, Windscheid, traduit par Fadda et Bensa, René David et Venediktov, que j'ai traduits moi-même, et puis Czachórski, Esser, Jolowicz, Calabresi, et encore d'autres.

Je m'y retrouve, moi-même, traduit en tchèque[2] . Unique parmi les Italiens, je ne suis pas — hélas — traduit en espagnol. J'y trouve des articles à moi écrits en français : l'on pourrait discuter s'il faut les considérer comme des traductions de textes italiens non publiés, ou si le français vaut comme langue originaire du texte.

La traduction juridique qui compte est la traduction faite pour un grand public, destinée à rester, engagée dans la solution de problèmes difficiles, capable d'offrir des modèles de traduction à ceux qui viendront. Elle est la traduction d'un ouvrage de théorie ou, plus rarement, d'un code ou d'une loi; dans ce deuxième cas, il faut distinguer la traduction faite pour valoir comme loi en vigueur, et celle faite tout simplement pour faire connaître la loi étrangère.

Ma bibliothèque est la bibliothèque d'un italien, et bénéficie du fait que mes compatriotes ont traduit, au cours du XIXe siècle, les ouvrages français, et puis, au commencement de ce siècle, les pandectistes allemands[3]. L'Italie n'invente pas toujours les modèles juridiques qu'elle utilise ; elle utilise souvent des modèles que d'autres ont élaborés. Ces phénomènes de réception ont été accompagnés par d'importantes initiatives dans le domaine des traductions : traductions du français, de l'allemand, et, plus récemment, de l'anglais et (en dehors de toute réception) du russe ou du polonais.

Les Italiens, qui connaissent par expérience les effets de la réception, ont rendu leurs

[1] Professeur émérite de l'Université de Turin, Institut de France (Paris), Accademia Nazionale dei Lincei (Rome).

[2] Sacco, *O někerych otázkach základu občanského práva socialistickych womi (Sur certaines questions concernant l'essence du droit civil des pays socialistes)*, in *Právník,* Praha, 1971, 801. Cet article est la réduction de *Il sustrato romanistico del diritto civile dei Paesi socialisti,* in *Riv. dir. civ.,* 1969, I, 115.

[3] Sur le rôle des modèles français et allemands en Italie cf. Sacco, M*odèles français et modèles allemands dans le droit civil italien,* in *Rev. int. dr. comp.*, 1976, 225.

catégories juridiques homologues aux catégories élaborées par les juristes du pays dont ils imitaient les modèles. Le dictionnaire juridique italien s'est plié deux fois aux nécessités découlant de cette homologation : un même mot — *nullità* - a pu signifier une fois la qualité de l'acte invalide, conformément à la définition française de la nullité, et une fois la qualité de l'acte nul de plein droit, conformément à la définition allemande de la *Nichtigkeit*.

La langue italienne englobe dans son sein — de ce fait — deux diverses langues juridiques ; ce qui est remarquable, même si, à présent, un langage juridique francisant serait probablement considéré comme impropre, et qu'un traducteur d'un ouvrage aurait peut-être recours à un langage dont la précision soit mieux reconnue.

La coprésence de deux langages juridiques dans une seule langue n'est pas un fait rare. Le langage juridique du Québec n'est pas nécessairement le langage juridique des Français, surtout dans la mesure où le législateur peut choisir lui-même le lexique.

Dès que le législateur québécois appelle « fiducie » le *trust*[4], « fiducie » signifie — dans la langue juridique québécoise – *trust*. La question relève de la langue, et non du droit positif. « Possession », mot français, et *possesso*, mot italien, n'impliquent pas nécessairement *l'animus domini*, car le français et l'italien des juristes suisses attribuent aux mots « possession » et *possesso* la valeur de « pouvoir de fait en général ». Réciproquement, *Besitz*, mot allemand, n'implique pas nécessairement l'idée de pouvoir de fait en général, puisque dans l'allemand du juriste autrichien *Besitz* implique nécessairement *l'animus domini* [5].

Au point de vue logique, rien n'empêche de conclure qu'il n'y a pas une langue juridique française, mais qu'il y en a plusieurs : une française pour la France, une pour la Suisse, une pour le Québec, une pour le Luxembourg, une pour le Val d'Aoste, en perspective une pour la Belgique, et puis encore d'autres pour le Congo, le Sénégal etc., et qu'il y a un italien du juriste francisant et un autre pour le juriste germanisant ; un allemand impérial-fédéral, et un allemand démocratique. Mais l'idée d'une telle multiplicité des langues se heurte au fait que pratiquement le juriste français consulte la loi québécoise sans la traduire ou faire traduire préalablement ; au point de vue empirique, la langue est une, même si elle englobe de multiples langages juridiques.

2. En 1974, Unidroit — l'institution internationale qui a comme but l'unification du droit privé , ayant vu le succès de son initiative dans le secteur de la vente internationale de la marchandise, se proposa de promouvoir la rédaction d'un code de commerce international. Les trois personnages qui acceptèrent la tâche de rédiger les premiers chapitres d'un avant-projet sont des comparatistes parmi les plus célèbres : René David, Tudor Popescu, Clive Schmitthofl; René David, notamment, venait de rédiger en français son célèbre ouvrage sur le contrat en droit anglais.

Le texte de l'avant-projet fut rédigé en deux langues : anglais et français.

Dès son deuxième article, l'avant-projet parle - tout naturellement — du contrat ; mieux, il parle du contrat dans son texte français, et du *contract* dans son texte anglais. Des savants de ce niveau se sont trouvés face, eux aussi, à des problèmes de traduction.

« Contrat » n'est pas *contract*, d'abord, car l'acte bilatéral conclu pour transférer la propriété d'un immeuble est un contrat (de vente) en langue juridique française, là où la *conveyance* n'est pas un *contract* en langue juridique anglaise. Dans la mesure où une convention de mandat, de gestion ou de prête-nom est efficace sur le continent, elle est sûrement un contrat, mais elle n'est pas un *contract* (le *trust* n'est sûrement pas un *contract*). Autrement dit, si je dois faire

[4] Art. 981a ss. du Code civil du Bas-Canada, 600 ss. du projet de Code civil du Québec.

[5] Art. 2228 ss. Code Nap., $ 309 ABGB, art. 1140 codice civile, $ 854 ss. BGB, art. 919 code civil suisse.

entrer un *trust* dans une catégorie française, cette catégorie est le contrat[6].

Cet avant-projet préparait des problèmes d'interprétation in solubles.

Qu'auraient dû faire les rédacteurs du projet ? Quelle était la situation sous-jacente, à laquelle ils devaient pourvoir ? Le problème ne naissait pas du fait que la règle de droit angloaméricaine et la règle de droit française diffèrent : le problème à régler naissait du fait que la langue anglaise ne comporte pas un mot pour indiquer le contrat, et que la langue française ne comporte pas un mot pour indiquer le *contract*. Je me rends compte que l'on pourrait être tenté par une autre conclusion : les mots *contract* et « contrat » pourraient signifier, l'un et l'autre, l'accord portant sur des relations juridiques ; le droit interviendrait pour fixer les règles, auxquelles ces accords sont soumis; ces règles pourraient être les mêmes pour tous les accords, ou pourraient être inapplicables à certains accords particuliers (*conveyance*, *trust*, *gift, bailments* — ou, en France, « don manuel », qui a besoin, pour son existence, de la remise de la chose).

Il s'agit de savoir si la proposition « la *conveyance* n'est pas un *contract* », qui implique une notion déterminée de *contract*, relève de la langue anglaise ou du droit positif anglais.

Il s'agit également de savoir qui est compétent pour modifier cette proposition. Si la proposition relève de la langue, la compétence est partagée, ici, entre plusieurs sujets: la doctrine est appelée à définir les expressions juridiques, puisque tout problème de lexique comporte un problème correspondant de concepts et de catégories; le législateur (y compris, en l'occurrence, le législateur uniforme) a le pouvoir nécessaire pour créer un néologisme juridique, ou pour attribuer à un vieux mot une signification nouvelle (le législateur québécois a pu établir l'équation *trust* = fiducie), les usagers de la langue peuvent modifier la signification des mots, car la langue dépend de ceux qui la parlent.

Si la différence entre « contrat » et *contract* a tout l'air d'être une différence entre concepts, il n'en est pas nécessairement ainsi, heureusement, chaque fois que les règles de droit diffèrent.

L'obligation de donner et l'obligation *to transfer a property* semblent être des expressions linguistiques interchangeables, même si les règles de droit diffèrent dans les divers pays. L'obligation *to transfer a property* entraîne la naissance d'un *equitable interest* en faveur du créancier, ce qui n'arrive pas avec l'obligation de donner. Celle-ci, par contre, entraîne un pouvoir d'action oblique chez le créancier, ou — si l'obligation est volontaire — produit le transfert de la propriété[7].

Aucune de ces conséquences ne se produit en droit allemand. Mais nous sommes, ici, face à des différences entre une règle de droit et l'autre, qui n'affectent pas le concept ni la signification des mots. La naissance du *equitable interest*, l'action oblique, le transfert de la propriété, s'ajoutent à l'obligation sans la dénaturer. Les différences relèvent du droit, mais non du langage. Si nous voulons, nous pouvons exprimer la règle française en allemand ou en anglais[8].

La traduction comporte sûrement la recherche de la signification d'une phrase juridique dans une première langue, et la recherche de la phrase qui est appropriée pour exprimer, dans une deuxième langue, cette signification. La première partie de l'opération est l'œuvre du juriste ; la deuxième partie de l'opération est l'œuvre du juriste ; l'œuvre tout entière appartient au

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[6] La donation et les contrats réels sont des contrats, là où le *gift* et le *bailments* ne sont pas des *contracts*. Mais cette constatation n'intéresse pas la matière que règle un code de commerce : la donation n'est pas un acte de commerce ; quant au *bailment*, s'il est onéreux, c'est un *bargain* et il peut être donc considéré comme un *contract* et, s'il n'est pas onéreux, ce n'est pas, en principe, un acte de commerce.

[7] Art. 1138 Code Nap.

[8] Il nous est plus difficile d'exprimer la règle anglaise en français, où nous ne trouvons pas le correspondant de *equitable interest*.

comparatiste, qui est seul compétent pour établir si deux idées, appartenant à deux systèmes juridiques différents, se correspondent ou non ; et si une différence des règles comporte une différence dans les catégories.

Le traducteur doit cependant tenir compte d'une série de circonstances, qui ne peuvent être réduites aux rapports entre mot et catégorie juridique.

3. Le droit préexiste à la langue qui nous décrit le droit. Les animaux supérieurs obéissent à des règles qui — s'ils étaient des humains — seraient des règles de droit. L'homme, qui parle des langues, peut bien décrire les règles de comportement des animaux ; il les verbalise.

L'ethnologie juridique se penche sur des règles auxquelles sont soumis des humains qui ne font aucun effort pour les verbaliser. La règle précède, la formulation verbale de la règle suit — si quelqu'un a soin de la libeller. Le droit coutumier est réduit en règles bien formulées dès qu'il forme l'objet des études d'une classe de juristes professionnels.

Le discours juridique a donc toujours un référent ; il se rapporte à une donnée qui précède l'expression parlée ou écrite. Dans la traduction, le traducteur se soucie, d'ailleurs, de la signification de l'expression à traduire. En principe, ce qui va au-delà de l'expression (le référent de l'expression originaire) semblerait ne pas l'intéresser.

Le problème de traduction est le problème de la correspondance entre deux expressions tirées de deux ou plusieurs langues différentes. La correspondance existe si les deux expressions se rapportent à un seul concept. Les expressions diffèrent, par définition : le traducteur doit savoir, et doit dire, si les significations sont identiques.

L'attitude du juriste de la langue à traduire face à des problèmes de définition peut être décisive pour rendre plus facile la traduction. La langue juridique allemande du XIXe siècle était objectivement facile à traduire. Les autres langues n'étaient pas équipées pour traduire les nombreux néologismes qu'utilisaient les juristes allemands ; mais il était possible de trouver la signification précise du néologisme, et de remplacer le mot allemand originaire par une expression complexe (une phrase, ou une série de mots) capable de représenter la même catégorie. Les difficultés de la traduction venaient de la pauvreté de la langue du traducteur.

Les vraies difficultés de traduction sont dues à un fait plus grave, à savoir au fait que le rapport entre mot et concept n'est pas le même dans toutes les langues juridiques.

Une doctrine de la traduction juridique doit se pencher sur les rapports existant, dans les diverses langues, entre mot et concept, et identifier des phénomènes linguistiques qui caractérisent ce rapport en telle ou telle langue.

Un exemple important, en la matière, nous est offert par la synecdoque, pratiquée par le juriste français[9].

La langue non juridique a recours à des figures rhétoriques bien connues, par exemple à la métonymie, à la synecdoque, etc.

Ces figures donnent lieu à des problèmes spéciaux de traduction. Si un Français peut bien dire « tourner les épaules » pour exprimer l'idée de « tourner sa personne », l'expression « tourner les épaules » peut être traduite en italien à la lettre, par les mots « girare le spalle », car l'italien admet (non seulement la synecdoque en géné ral, mais notamment) *cette* synecdoque. Mais pourrait-on rendre en italien toutes les synecdoques qu'admet le français ? Et pourrait-on rendre dans toutes les langues du monde l'idée de « sa personne » par le mot exprimant normalement l'idée de « les épaules » si le terme « épaules » se place après le verbe « tourner » ?

Le problème est fondamental pour le juriste car une langue juridique importante — le

[9] MONATERI, *Règles et techniques de la définition dans le droit des obligations et des contrats en France et en Allemagne; la synecdoque française,* in *Rev. int. dr. comp.*, 1984, 77; Iv., *La sineddoche,* Milano, 1984.

français — a tendance à définir l'ensemble coordonné de multiples circonstances de fait par le fait unique qui est le plus apte à évoquer immédiatement les conséquences de cette situation de fait complexe[10].

Les Français ne se rendent pas compte de cette spécificité de leur langue. Il paraît que de cette tendance proviennent leurs définitions : des actes juridiques (axées sur la seule volonté, plutôt que sur la situation complexe « volonté + déclaration »), du délit civil (axées sur la conduite fautive et le dommage, sans la mention de l'élément qualificatif de la lésion); du contrat (axées sur le consentement, avec un certain silence quant à la cause). Rien n'empêche que la surévaluation de la lettre de la définition permette à celle-ci de déteindre sur les règles de décision adoptées en pratique par les juges (ce qui finit par éliminer la synecdoque !). Le traducteur d'un texte français doit tenir compte de la possible présence de figures rhétoriques insidieuses et chercher, dans sa propre langue, des expressions capables d'exprimer une valeur indéterminée qui s'étend : a) à la signification littérale, et *b*) au sens impliqué par la présence d'une synecdoque.

La synecdoque est seulement un exemple d'un phénomène beaucoup plus vaste et général. Le discours juridique n'a d'autre but que celui de nous faire connaître la pensée du parlant, à savoir la représentation qu'il a de son droit. Mais la comparaison juridique nous apprend qu'un écart existe, dans tous les systèmes, entre la définition verbale (déclamation, énoncé qui reflète les connaissances de celui qui parle) et la règle appliquée en pratique[11]. La traduction ne se penche que sur le discours, sur ce qui parvient à être exprimé, verbalisé. Mais si le décalage se trouve entre la déclamation et les idées du parlant, et que ce décalage est dû à une figure rhétorique reconnaissable, le décalage ne devrait pas laisser insensible un traducteur doué d'ambition.

Le droit comparé - notamment le secteur du droit comparé qui étudie les caractères généraux de chaque système de droit positif - doit porter son attention sur la présence, la diffusion, les effets que produisent, dans chaque système, les figures rhétoriques affectant les énoncés juridiques du pays considéré. L'art du traducteur pourra tenir compte de ces phénomènes dès que la science du comparatiste lui en aura offert les instruments techniques.

4. La langue juridique, langue de la science, devrait être axée sur la correspondance entre un mot et une catégorie, définie par l'ensemble de ses caractères constitutifs (= par sa dénotation). En constatant que certaines expressions juridiques s'enrichissent de connotations diverses, favorables ou défavorables, impliquant sympathie ou phobie, ou que le choix du mot implique telle origine historique de la règle du droit, ou que l'apparentement des mots déteint sur l'apparentement des institutions.

C'est que la langue du droit (notamment public) est en même temps la langue des sciences politiques, où les jugements de valeur sont légitimes. Le mot « épargne » implique une évaluation favorable, qui fait défaut au mot « capitalisation ». Il serait impropre de traduire « épargne » par l'expression *capitalizzazione*, même si l'étendue des deux catégories ne diffère pas.

Choix du législateur dans le domaine de la terminologie et influence des émotions sur le choix du mot peuvent bien se cumuler.

Vers la fin du XIXe siècle, la « gauche juridique » allemande soumit à des critiques la terminologie que le législateur avait adoptée dans le projet du BGB.

Cette terminologie, élaborée par l'école des fameux « pandectistes » allemands avec un soin

[10] MONATERI, *oeuvres cit.*

[11] Sacco, *Introduzione al diritto comparato,* 2a ed., Torino, 1980, $ 5. La « dissociation des formants » est une technique qui commence à se diffuser chez les comparatistes italiens.

et une rigueur scientifique inimitables, était inculpée d'être abstraite, éloignée du langage populaire, et par conséquent incompréhensible pour les masses. À l'époque de la rédaction du *Zivilgesetzbuch* (1975), les juristes de la RDA ont remplacé un certain nombre de vocables juridiques allemands, appartenant à la tradition, par des néologismes. *Betrieb* a pris la place de *Unternehmen, Gemeinschaft* de *Gesellschaft*, *Andere* de *Dritte.* Le glorieux *Rechtsgeschäft* a été mis en ombre [12].

Le mot français « entreprise », le mot russe *predprijatie* traduisent, de tout temps, le mot *Unternehmen*. Sont-ils valables pour traduire *Betrieb* ?

Lorsqu'un modèle juridique forme l'objet d'une imitation, pour indiquer dans la nouvelle langue le modèle originaire, l'on recourt parfois à des emprunts, ou à des calques. La dénomination nous transmet, ici, des données concernant la circulation des modèles. Nous pouvons considérer quelle a été la diffusion — à partir de la langue juridique russe révolutionnaire — d'expressions telles que *hozrasčët, kolhoz presidium*.

Des relations peuvent exister, ou être entrevues, entre plusieurs expressions dans une langue déterminée. En français, « autonomie contractuelle » et « liberté contractuelle » sont des synonymes; ce qui suggère l'idée d'un apparentement entre la liberté contractuelle et les droits de liberté. La suggestion est perdue si la langue du traducteur oblige celui-ci à parler d'autonomie sans évoquer la liberté. De façon analogue, la langue française apparente le droit d'auteur et le droit de l'inventeur à la propriété par l'intermédiaire des synonymes « propriété littéraire » et « propriété industrielle »[13].

5. Nous avons déjà parlé de l'instabilité de la dénotation des mots « possession », *Besitz, possesso*.

Chacun de ces trois vocables signifie, dans certains systèmes juridiques, pouvoir de fait sur la chose, avec ou sans *animus domini* et, dans certains autres systèmes, pouvoir de fait + *animus domini* du sujet et se trouve de ce fait opposé au vocable détention*, Inhabung, detenzione*, qui signifie pouvoir de fait immédiat, avec ou sans *animus domini*. L'opposition linguistique passe, ici, à l'intérieur du français, de l'allemand et de l'italien. La possession anglaise ne comporte pas d'*animus domini*, mais seule l'étude du droit écossais et sudafricain pourrait nous dire si « possession » ne s'oppose pas, dans certains contextes juridiques, à un deuxième vocable sur la base de l'*animus* du sujet.

Les Allemands et les Suisses ont décidé d'accorder une même protection à tout sujet exerçant un pouvoir de fait sur la chose (indépendamment de son *animus*). Ce choix porte d'abord sur une question de droit, cela dit, il faudrait leur demander pourquoi ils n'ont pas appelé ce sujet *Inhaber*, et *resp. Inhaber*, détenteur, *detentore* — ce qui aurait permis de sauvegarder, à l'intérieur de chaque langue, l'harmonie du système.

L'on peut essayer de trouver une réponse à la question que nous venons de poser. Le mot « possession » ou *Besitz*, fait penser à cette situation possessoire, qui est la plus forte à l'intérieur du système de droit considéré ; c'est-à-dire qui est protégée non seulement en cas de dépossession, mais également en cas de trouble.

Lorsque Jhering a proposé de relire les textes romains pour identifier la

possessio romaine avec le pouvoir de fait, avec ou sans *animus*, il n'a pas conclu que la *possessio* romaine était une *Inhabung*; la correspondance entre *possessio* et *Besitz* était supérieure à toute discussion car l'un et l'autre vocable évoquent la protection juridique du sujet,

[12] CRESPI REGHIZZI, DE Nova, Sacco, Il Zivilgesetzbuch della Repubblica Democratica Tedesca, in Riv. dir. civ., 1976, I, 47.

[13] L'art. 222 du traité de Rome, instituant la Communauté économique européenne, exclut toute incidente du même traité sur le régime de la « propriété ». En langue française, l'expression « propriété » pourrait comporter une interprétation étendue.

beaucoup plus que sa situation de fait.

Le mot « possesseur » et *Besitzer* se correspondent car l'un et l'autre disposent 1) d'un pouvoir de fait sur la chose et 2) de la protection juridique la plus étendue que le système juridique considéré puisse accorder à un pouvoir de fait. Le génotype (= notion super-abstraite) naît de l'idée de pouvoir et de protection, et chaque système produit un phénotype dont il fixe les détails (présence ou non présence de l'*animus*).

Dès que les Allemands et les Suisses ont rompu avec les règles romaines, et accordé la protection contre les troubles au sujet d'un pouvoir de fait dépourvu d'*animus*, leur pouvoir de fait est devenu *Besitz*.

La loi française de 1975 sur les actions possessoires semble remettre en discussion cette symétrie linguistique. Le détenteur est admis à intenter la complainte : Va-t-il, désormais, se faire appeler possesseur ? Ou verrons-nous le scandale d'un simple détenteur qui bénéficie de la protection juridique la plus étendue ?

Le détenteur français n'est pas protégé « contre celui de qui il tient ses droits » ; sa protection lui est ouverte dans des conditions « prévues par le Code de procédure civile », et ces conditions pourraient lui imposer des chicanes.

Le détenteur n'a pas encore « la protection juridique la plus étendue ».

L'évolution d'une langue peut être graduelle et imprévisible. La traduction peut avoir, en revanche, des besoins urgents. Si à présent nous devons traduire du français le mot « détenteur », pouvons-nous utiliser le mot *detentore*, comme nous l'avons fait jusqu'en 1975 ? Et l'opposition qui existe, à partir de l'année 1975, entre le droit français et belge, est-elle doublée d'une opposition linguistique ?

Des discours plus compliqués pourraient être fait à l'égard des expressions contrat, *contract, Vertrag*; propriété, *Ownership*; fait illicite, tort; elles semblent, toutes, cacher des rapports conceptuels complexes entre des génotypes (notion super-abstraite) et leur manifestations empiriques.

Le phénotype, manifestation empirique, forme l'objet de l'analyse juridique (dogmatique, dans le sens germano-italien du mot) interne de chaque pays ; à un niveau plus élevé, le génotype forme l'objet de l'analyse du comparatiste, qui le découvre sur le plan linguistique et qui l'utilise dans la traduction.

6. Jusqu'ici, nous avons considéré l'hypothèse de mots qui représentent des catégories abstraites : « contrat », « volonté », « dommage ».

Mais la traduction peut bien rencontrer des mots qui ont l'air de représenter une catégorie de grande étendue et qui acquièrent — juste dans les rapports interlinguistiques — une signification étroitement liée à l'ambiance d'origine, ou à d'autres circonstances, jusqu'à devenir l'équivalent d'un nom propre, réservé à un seul sujet. Des mots semblables sont intraduisibles. Pour indiquer le souverain britannique nous disons roi, *re*, *König*. Mais pour parler de l'ancien souverain russe, nous disons « tsar » quelle que soit notre langue, et cela vaut même si nous parlons de ces monarques qui adoptaient, officiellement, le titre d' « *imperator* ».

Dans le secteur du droit public qui se rapporte aux titres honorifiques, nous trouvons souvent des oppositions entre noms, qu'aucune opposition conceptuelle ne peut expliquer (comte, marquis ; chevalier, commandeur ; licencié, maître). L'équivalence avec des mots latins ou latins-médiévaux, ou la valeur historique de ces mots permet d'enraciner les mêmes oppositions dans un grand nombre de langues.[14]

Nous avons ici des exemples de nominalisme juridique ; la dénomination prime sur la

[14] Et, malgré cela, des problèmes de traduction peuvent se présenter. Les Français appellent « Grand-Duché » de Varsovie l'État polonais créé à l'époque de Napoléon. Mais les Polonais l'appellent « Księstwo » (c'est-à-dire Duché, ou Principauté) *Warszawskie*.

signification. Nous pourrions dire, par une phrase qui n'est ni rigoureuse ni scientifique mais qui se fait bien comprendre, que le nom indique ici, plutôt qu'une idée, un autre nom. Nous pouvons trouver d'autres exemples de ce phénomène : personne ne traduirait « *Soviet* » (dans le sens d'assemblée politique) par « Conseil », quoique la signification des deux expressions corresponde.

La règle de droit relève du pouvoir.

La définition des concepts qu'implique la règle du droit et leur classification sont l'œuvre, libre, de la doctrine.

Mais, ici et là, nous pouvons trouver des classifications voulues par le pouvoir, notamment par le législateur. La doctrine peut contester, mais elle ne peut ignorer, cette volonté. Le traducteur ne doit pas cacher à ses lecteurs la présence d'une volonté politique qui déborde du terrain des règles de décision pour envahir le terrain des instruments de la connaissance (aussi bien au niveau scientifique qu'au niveau de la vie quotidienne). Si une entreprise socialiste, en Union Soviétique, possède certains moyens de production, en dispose, en jouit, bien des juristes seront prêts à conclure que cette entreprise est — en langue française — propriétaire de ces moyens. La question de savoir si le propriétaire est, ici, l'entreprise d'État ou l'État lui-même a été étudiée par le fameux civiliste Venediktov qui, après des hésitations, a conclu, conformément aux vœux du pouvoir politique, en faveur de la propriété de l'État[15]. Après la parution de son ouvrage les *osnovy de l'URSS* en 1961, suivis par les divers codes civils républicains, est énoncé nettement que l'État est l'unique propriétaire des moyens de production industrielle[16]. Le traducteur ne doit pas, ici, introduire dans son texte un mot-signification ; il doit rendre *sobstvennost'* par « propriété » et renvoyer à une autre occasion toute contestation concernant la correspondance entre la *sobstvennost'* de l'État sur les moyens de production et les autres significations du mot *sobstvennost'*.

7. Une correspondance totale, sans réserve permanente, entre deux expressions appartenant à deux langues ne peut être due qu'à un élément artificiel ; pour négliger, ici, l'hypothèse d'une langue entièrement artificielle : la signification d'un mot est artificielle si une autorité supralinguistique s'est prononcée (soit sur la signification d'un mot, soit sur la correspondance des deux significations).

Nous pouvons penser à un législateur bilingue établissant que deux textes doivent avoir impérativement la même signification. Nous pouvons penser également à une autorité morale : la doctrine d'un pays peut décider d'utiliser tel mot comme correspondant à tel autre mot appartenant à une langue étrangère ; etc.

Nous pouvons examiner séparément un certain nombre d'hypothèses.

Une première hypothèse se présente si le législateur fait des textes multilingues ou fait œuvre de réception. Dès que le législateur québécois appelle « fiducie » le *trust*, « fiducie » signifie *trust* – du moins, en langue québécoise.

Une deuxième hypothèse, qui donne lieu à des problèmes spéciaux (et qui assure une solution spéciale, facilitée, de ces problèmes), se présente en cas de réception juridique. Un pays arabe adopte les règles du Code Napoléon ; l'Allemagne adopte le droit romain ; les Russes utilisent l'équipement conceptuel de la science pandectiste allemande.

La computérisation des données va permettre peut-être de rédiger un corpus de toutes les expressions arabes qui ont été utilisées pour exprimer des concepts juridiques venant

[15] VENEDIKTOV, *Gosudarstvennaja socialističeskaia sobstvennost',* Moskva, 1948 (tr. it., *La proprietà socialista dello Stato*, Torino, 1953).

[16] OGZ, art. 21 « L'État est le seul propriétaire du fonds unitaire objet de la propriété de l'État », cf. GK RSFSR, art. 94.

d'Europe[17] .

Savigny a pu recommander aux Allemands, il y a presque deux siècles, de retarder l'œuvre de codification tant que la langue juridique allemande ne fût mieux établie, etc.

Des circonstances rendent moins difficile la tâche du traducteur, en cas de réception juridique. La réception peut bien être l'occasion pour introduire, dans la langue du pays qui reçoit le droit étranger, les néologismes qui sont nécessaires pour mener à bien l'opération. Le néologisme nait juste pour exprimer une notion à laquelle sont familiers ceux qui connaissent le système juridique imité ; le sens du néologisme est alors déterminé de façon univoque ; le juriste du pays traducteur trouvera toujours quelqu'un qui pourra le renseigner à cet égard, et la traduction entre les deux langues est facile. Lorsque la doctrine italienne a commencé à parler de *negozio giuridico*, la définition de cette catégorie était claire dans la mesure où tous savaient que l'on voulait traduire, par ce mot, l'expression allemande *Rechtsgeschäft.*

Nous pouvons imaginer, maintenant, un cas légèrement plus complexe : les usagers de deux langues peuvent convenir (les uns indépendamment des autres) d'utiliser tel et tel vocables pour représenter l'idée qu'exprime un certain mot dans une langue tierce. Cela arrive avec les mots « louage » et *miet*, qui sont utilisés, tous les deux, comme correspondants du latin *locatio.*

8. La traduction-volonté impérative et la traduction-réception ne représentent pas — juste en vertu des circonstances qui les rendent plus faciles — la traduction « normale ».

La traduction normale a simplement le but de faire connaître, dans la langue de la traduction, et sans les modifier, une série de données qui sont exprimées dans la langue originaire ; ou de faire connaître en plusieurs langues des données qui doivent demeurer inaltérées dans les diverses formulations linguistiques.

Le problème de traduction à l'état pur est celui qui se présente au savant, au théoricien, qui ne peut pourvoir par un acte d'autorité à la non cohérence des dictionnaires juridiques nationaux. La langue nous intéresse, tout d'abord, comme instrument de la connaissance ; nous sommes intéressés à établir si la traduction est propre à nous faire connaître les données qui sont exprimées dans la langue d'origine.

Si l'on veut lier la fonction de l'interprétation à des « nécessités pratiques », il faut mettre bien au clair que l'on étend, ici, l'idée de « fonction pratique » à la création et à l'institutionnalisation des appareils qui nous permettent de nous comprendre mutuellement.

Le traducteur par excellence est le traducteur sans fonction publique, sans galon sur la manche, qui travaille (en pensée, ou par écrit) sans ajouter à son œuvre ni un timbre ni un serment, sans avoir été sollicité par n'importe qui.

Le problème de la traduction juridique ne peut être réduit au problème de la réglementation de la traduction dans les procédures législatives, judiciaires ou administratives.

Le problème de la traduction juridique n'attire pas l'attention du juriste appartenant à une nation qui se considère autosuffisante du point de vue culturel. Celui-ci estime ne pas avoir besoin de la pensée qui ne s'exprime pas dans sa langue. Sa langue lui suffit pour libeller une loi, pour rédiger un jugement, pour compiler un ouvrage doctrinal et surtout pour étudier et apprendre.

Le problème se fait, en revanche, plus aigu si le juriste d'une nation utilise de multiples modèles exprimés en des langues étrangères différentes.

La tâche du traducteur est plus délicate si celui-ci est un théoricien et que, dans son pays, la création de modèles est confiée plutôt à la doctrine qu'à la pratique (légale ou jurisprudentielle).

Le législateur – et, moins visiblement, la jurisprudence — ont le pouvoir d'imposer un mot

[17] Sur ce projet, cfr. ALUFFI BECK PECCOZ, *Verso il riordinamento del lessico giuridico arabo. Il progetto iura islamica informatica I,* in *Riv. dir. civ.,* 1985, I, 77.

nouveau, ou la nouvelle signification d'un mot. Qui plus est, ils peuvent avoir recours à un néologisme, et en même temps s'abstenir de lui trouver une définition soignée.

Le théoricien a d'autant plus d'obligations qu'il a moins de pouvoirs. Il ne peut utiliser un mot sans s'interroger sur la signification de celui-ci. S'il ne peut renvoyer à la définition explicite ou implicite (où mettre au clair la définition implicite) que comporte ce mot dans un texte légal ou dans un jugement, il doit œuvrer avec ses seules forces. C'est-à-dire qu'il doit garantir à son lecteur la correspondance entre le mot imité et l'expression imitatrice[18].

[18] Et si cette expression fait défaut ? Il vaut mieux avoir recours à une explication plutôt qu'à une mauvaise traduction. Le futur appartient aux dictionnaires qui expliquent (dans la langue du lecteur) les mots étrangers, plutôt que de les traduire. C'est ce qu'a fait De François avec son dictionnaire juridique anglo-italien, qui a eu un très bon accueil en Italie.

Translating the idea of "*prééminence du droit*": divergent origins and homogeneous evolutions of *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto* and *Rule of law*?

Flavio Guella[1]

Abstract: The article analyses the different constitutional and national background of the ideas of *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto* and Rule of law, to verify how much such concepts can be reciprocally translated. Such ideas are indeed linked by a common purpose: the subjection of political power to law. However, a certain homogeneity in linguistic definitions stay together with a deep heterogeneity in the rules of application, especially looked in an historical perspective. Nevertheless, the European and international integration of the legal systems seems to realize a progressive standardization also in the field of the more general concepts of legal theory, like the rule of law, taking the legislators and the courts toward a "global legality".

Keywords: Rule of law; *État de droit*; Constitutionalism; European Union; Globalization

Summary: 1. The idea of the subjection of political power to law: homogeneity in linguistic definitions and heterogeneity in the rules of application; 2. From the nineteenth-century rule of law to the constitutional rule of law in the post-liberal tradition; 2.1. Plurality of technical institutes of regulation/limitation of politics that contribute to delineating a unitary concept of "rule of law"; 2.2. The development of the technical instruments of liberal derivation in the following evolutions towards the "constitutional" State of right; 3. The standardization of institutions (and terminology) in the internationalization of the concept of rule of law, towards a "global legality"; 4. Concluding remarks: does a common and "translatable" notion run the risk of being less strong than a historically connoted legal concept?

1. The idea of the subjection of political power to law: homogeneity in linguistic definitions and heterogeneity in the rules of application

The law of the European Union has always had to deal with translating the idea of "political order subject to law". In the English version of the Treaties the term defining this concept is *rule of law* whilein the French version the expression is*État de droit,* after the former expression "*préééminence du droit*", considered less strong culturally, has been abandoned[2]. Together with the Germans term *Rechtsstaatlichkeit* and the Italian expression *Stato di diritto* all these words refer to different historical legal experiences, and to constitutional mechanisms and rules that, although are not perfectly overlapping, share a common enlightenment and liberal culture.

Despite this unitary cultural matrix, it is still difficult to reconcile the continental notions of *État de droit* or *Rechtsstaat* with the rule of law of Anglo-Saxon legal tradition. By its very nature, however, and similarly to many other areas with autonomous notions inside the EU law, the European legal order requires a single, "translatable" notion, which the Court of Justice has developed over time in the form of a European approach to the rule of law.

However, because of the specificity of this principle one might well wonder whether the European rule of law can be qualified a special and autonomous concept. In this regard, the truth is that the principle of the rule of law has relatively recently become part of the "applicative" juridical tools of the European Union, given that its qualification as one of the founding values of the European Union was

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[2] This expression was still present in primary law until the Maastricht Treaty and it is still present at Council of Europe level.

definitely established only with the Treaty of Lisbon, by virtue of Article 2 of the TEU. The codification of the principle of the rule of law amongst the values of the Union has favoured some innovatively concrete applications. Examples are the Communication "A new EU framework to strengthen the rule of law" by the European Commission, and the case-law of the Court of Justice, in some sensitive issues such as asylum, the European arrest warrant or Article 7 TEU.

In particular, the case law of the Court of Justice, and particularly the recent decisions concerning the independence of the judiciary in Hungary and Poland, have has define some practical and operational applications of this principle .

As new will see in this contribution, the practical consequences are relevant, as in the EU case law a new notion of rule of law is emerging, having both substantive and procedural implications, that is at the basis of anextension of the competencies of the EU. This is the result of a grooving attention to comparative law studies, that implies an awareness of the different historical/legal origins of the various national terms, linked to individual legal cultures. Thus, in order to understand what the possible Europeanization, or more radically, "globalization" of a new and homogeneous idea of rule of law consists of, it is necessary to be aware of the historical reasons that different national cultures have outlined in the "pre-eminence of law over politics".

In the traditional Western legal systems the subjection of limits to political power fixed by law has developed over time with different conceptual nuances, reflecting the diversity of state experiences and corresponding inhomogeneous terminologies[3].

This is the background of the well known different taxonomies: the *Rule of Law*[4], of the Anglo – Saxon legal systems, the French *État de droit*[5], the Italian *Stato di diritt,* and the German *Rechtsstaatlichkeit*. Allerms that are largely superimposable regarding their fundamental nucleus, and which respond to a common need to bring back to a single concept the multiple institutions in which the subjection of public power to the law is manifested. pt. However, this partial overlapping clashes with a content having significantly different details, due to the legal traditions to which it belongs[6].

The translation of the terms mentioned, and first elaborated by the French and German scientific circles, has also led other legal systems to employ terminology which, although seemingly homogeneous, conceals a significant lack of congruity in detail. Thus, in Italy, *Stato di diritto* and of the Spanish *Estado de Derecho* are concepts that still express the general idea – literally taken from the French model - of the subjection of political power to the law[7].

The interchangeability of the terms *État de droit*, *Rechtsstaatlichkeit*, *Estado de Derecho,* and *Stato di diritto*, and, a fortiori, the fungibility of these expressions with the term *Rule of Law*, can therefore

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[3] For a reconstruction of the idea of the rule of law in comparative perspective, see P. Costa, D. Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica,* Milan, 2003, and the more extensive references cited therein ("bibliographical essay" on pp. 815 ff.). For general references see also P. Kunig, *Das Rechtsstaatsprinzip*, Tübingen, 1986; M. Troper, *Le concept d'État de droit*, in *Droits*, 1992, pp. 51 ff.; K. Sobota, *Das Prinzip Rechtsstaat*, Tübingen, 1997; O. Jouanjan (ed.), *Figures de l'état de droit: Rechtsstaat dans l'histoire intellectuelle et constitutionnelle de l'Allemagne*, Strasbourg, 2001; J. Chevallier, *L'État de droit*, Paris, 2010; R. Bin, *Stato di diritto*, in *Enciclopedia del diritto*, Annali IV, Milan, 2011, pp. 1149 ff.

[4] English-language literature refers to the rule of law as the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced, i.e. the so-called principle of government by law.

[5] French-language literature intend for *État de Droit* a state in which all individuals or groups have their activities determined and sanctioned by law, i.e. an institutional system in which public power is subject to law, based on the essential principle of respect for the law ("*primauté du droit*").

[6] See section 2.1 *below.*

[7] For the translation of the term from German into Italian, see S. Panunzio, *Lo Stato di diritto* (Parte I, Libri I, II), Città di Castello, 1921, in particular p. 15 and A. Salandra, *La giustizia amministrativa nei governi liberi,* Turin, 1904, in particular p. 14 on the reasons for the choice of translation of the German term. Again for the translation of the term in Italian, see V.E. Orlando, *Introduzione al diritto amministrativo*, in *Primo Trattato completo di diritto amministrativo italiano*, Milan, 1897, pp. 33 f. where he translated *Rechtsstaat* as *Stato giuridico* (legal state) and maintained the close connection of the concept with that of *Stato costituzionale* (constitutional state). On the matrices of the Spanish idea of *Estado de Derecho*, see J.A. Santamaria Pastor, *Fundamentos de derecho administrativo*, Madrid, 1988, pp. 192 ff.

be founded on a basic homogeneity that characterizes the state experiences of the Western legal tradition. However, uncritical translation risks emerge when this interchangeability ignores the persisting differences that are present, despite a strong process of homogenization[8]

Examining the evolution of the rule of law in the Western legal history is therefore essential for a conscious translation of the concept in the various experiences. At the same time, reflections on the best possible translation, and on the linguistic interchangeability among the various national experiences, constitutes a precious opportunity to verify the "historical" nature of the Rule of law itself. The concept is historically contextualized, having represented an evolutionary idea of the social order at the basis of numerous profiles of modern state organization[9]; and the dynamics of this idea continue to determine new manifestations of juridical and political relations, and will do so into the future and "beyond" the State (with the affirmation of European and global concepts of legality)[10].

The Rule of law can be "historically" identified in the form of a state which has asserted itself as an anti-thesis to the absolute state, distinguishing itself by the presence of technical-normative instruments suitable for subjecting executive political power to the rules of law; a form of state which safeguards human rights and freedoms, together with the guarantees of the social state, limiting legislative political power (constitutional state of law)[11] in the form of rigid constitutions

The idea of a "statehood subject to law" has derived from a German-speaking scientific environment, where the term *Rechtsstaatlichkeit* appeared in the 19th century[12], even if this concept, albeit in a less organic and structured way, can be found in some previous scientific discourses ,. It has persisted with the same terminology in the state forms of the 20th century as well and continues to condition the analysis paradigms of the growing supranational and "global" juridical/political dimension.

The affirmation of the "rule of law" coincided with the end of absolutism andthe affirmation of the bourgeoisie between the 18th and 19th centuries. In this political and social environment, it claimed economic power and political power, leading to a radical transformation in the structure of society and in the concept of the State[13].

As the holder of political power in the absolute state was free from any external limit, then the rule of law is a juridical-organizational response to the historical parenthesis of absolutism, aimed at neutralizing the negative effects on social dynamism by introducing guarantees in favour of the freedom of individuals (producers). During the previous period of the Middle Ages, the relativization of power passed through the political plurality of the different bodies like -corporations, sovereign, feudal systems -)[14]. The response of the rule of law was based on the fact that the power of the State was the result of the political plurality of the subjects. A response consisting in the combination of the already achieved unity of the nation-state (and the loss of legal particularism) with a limitation of the relative political power of the state through its juridical regulation.

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[8] Persisting differences which derive from the diversity of national traditions in the historical emergence of the various forms of state. See paragraph 3 *below.*

[9] On the historicity of the basic conceptions of the rule of law see P. GROSSI, *L'Europa del diritto*, Roma-Bari, 2007 (also for a critique of modern generality and abstractness as a means of hiding the diversity of social reality).

[10] See B. KINGSBURY, N. KRISCH, R.B. STEWART, *The emergence of global administrative law*, in *Law and contemporary problems*, 2005, pp. 15 ff.

[11] See point 2.2 *below.*

[12] The paternity of the explication of the category of the *Rechtsstaat* must be attributed to R. VON MOHL, *Die Geschichte und Literatur der Staatswissenschaften,* I, Graz, 1855 (and See I. JENNINGS, *The Law and the Constitution*, London 1959, p. 48), although the use of analogous categories - in a more or less explicit way - is certainly previous, and identifiable for example in the constitution adopted by the revolutionary Constituent Assembly of 1789 (see R. CARRÉ DE MALBERG, *Contribution à la Théorie générale de l'État,* I, Paris, 1920, p. 489) or to broader and much earlier theories, such as that on Bodin's sovereignty (See B. KRIEGEL, *Etat de droit ou Empire?*, Paris, 2002, pp. 82 ff.).

[13] See M. FIORAVANTI, *Lo Stato di diritto come forma di Stato. Notazioni preliminari sulla tradizione europeocontinentale*, in R. GHERARDI, G. GOZZI (eds.), *Saperi della borghesia e storia dei concetti fra Otto e Novecento*, Bologna, 1995.

[14] On legal particularism, surpassed by the rule of law and the age of codification, see P. GROSSI, *L'ordine giuridico medievale*, Roma-Bari, 2002, in particular pp. 223 ff.

Therefore, the basic idea is to legally regulate state public power. In this sense, the English experience is particularly emblematic of the passage (and continuity) from medieval schemes of (pluralist) limitations of power to modern schemes of (normative) regulation of the same[15]. In the English constitutionalism of the 17th Century, the so-called "glorious English revolution", that fought against the absolutism of the Stuart dynasty, led to guarantee pluralism not by re-fragmenting national power, but by continuing to recognize the unity of the Crown and its sovereignty. Such Crown sovereignty was limited by its necessary expression through Parliament (King in Parliament)[16]; in this sense, the limitation of the sovereign power passes through a series of normative documents (Bill of rights, Habeas Corpus, Act of Settlement) that basically sanctioned the inviolability of the fundamental rights of citizens (bourgeois included), and the subordination of the King to Parliament as a representative political body. [17].

Although historically the basic structures of the idea of the rule of law emerged spontaneously from the limitation of absolutism in England (in the absence of a full theoretical reflection on the same), the conscious proclamation of the normative paradigm of the rule of law instead came about (in conceptually planned forms) through the two great eighteenth-century revolutions, the American and the French. It was the latter that imported the principles of the liberal state into the Old Continent. Indeed, the English customary system had been translated into the American Declaration of Independence and the subsequent Constitution which, as written documents, were more easily conveyed[18].

The rule of law as an ideology, thus, goes hand in hand with the origin of constitutionalism, marking the development of nation-states between the late eighteenth and early nineteenth centuries[19]. The concept of the rule of law presupposed, as a datum common to all national experiences of constitutionalisation, that the actions of the state (understood as state-apparatus, and therefore as executive power) should always be bound by, and conform to, the laws in force: thus the state subjects itself to compliance with the rules produced inside the same state-system, self-limiting its non-legislative public powers. The more mature constitutionalism, therefore, consists in the transition from the rule of law to a "constitutional" rule of law, even the sovereignty of parliament having been subjected to legal rules.

The reason for the existence of an arrangement of normative limitation of political power was clearly identifiable in the intention to regulate - on the basis of rational (legal) rules, and not mere (political) force - the clashes of interests emerging within the state borders. This was already stated in the rule of law developed in the liberal era with the limitation of executive (and judicial) powers, even if it lakes of a clear limitation of legislative power.

There are in fact different approaches to the organization of the plurality of interests, that emerge

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[15] On the more mature conceptualisation of the category in English law the author of reference is A.V. Dicey. See in particular A.V. DICEY, *Introduction to the study of the law of the Constitution*, and ID. *Lectures on the relation between Law and Public opinion in England during the Nineteenth Century*, London, 1914. For more details on the preceding evolution - of which Dicey takes the lead - see A. BABINGTON, *The Rule of Law in Britain from the Roman Occupation to the present day*, Chichester, 1978.

[16] On the process of institutionalisation of sovereignty in representative bodies, and its contribution to the construction of the category of rule of law, for the English experience see J.D. GOLDSWORTHY, *The sovereignty of parliament: history and philosophy*, Oxford, 1999. More generally, also as regards the continental experience, the author of reference is R. Carré de Malberg, for a synthesis of whose thought see G. BACOT, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple ed souveraineté nationale*, Paris, 1985.

[17] Furthermore the Parliament allies itself with the judicial, as technical power, in contrasting absolutism, therefore expressing an alliance between the bourgeoisie and the aristocracy in the common interest of limiting absolute power by means of juridical norms. Cfr. the Bill of Rights, but also the Magna Carta (1215), the Petition of Right (1628), the Act of settlement (1701) and the Parliament Acts (1911, 1949). See also the Claim of Right Act, 1689.

[18] On American constitutionalism and its contribution to the rule of law, in particular for its importance as a model for the evolutions of statehood in continental Europe, see A. DE TOCQUEVILLE, *De la Démocratie en Amérique,* 4 vols., Paris, 1848.

[19] C.H. MCILWAIN, *Constitutionalism and the Changing World*, London, 1939; ID. *Constitutionalism: Ancient and Modern*, Ithaca (NY), 1947.

from the interactions between individuals and organized collectivities. And such differences are at the basis of the different structures of the forms of state, definable as different the arrangements of the relations between the public dimension and citizens.

Therefore, a *Interessenjurisprudenz* (jurisprudence of interests) approach to these problems highlights how not all of the interests that may come into contact with each other are necessarily compatible. Subsequently, the need arises for different subjective positions, originally equi-ordinate ("interests of fact") to be legally qualified by parliamentary and governmental activity. This gives different protections and allows some interests to prevail, to the detriment of others[20]. Thus, the rule of law represents an answer to the question as to which interests should prevail: the organisational solution of the rule of law is based on the idea that interests are legally qualified (i.e. are not relevant just by their pre-political force), and the governance of them is subject to the rationality of law (and not to the arbitrariness of men, *Obrigkeitsstaat).*

It's about solving the conflict between interests, making them compatible or , as a possible alternative, protecting one of those interest in conflict, to the detriment of the others. These choices integrate political options, but in the logic of the rule of law they must obtain stability, through a codification of the rules, in order to assume rationality and predictability. Therefore, only a legally qualified interest can receive protection by the system. In parallel with the idea of the rule of law and constitutionalism, as a consequence, the liberal 19th century was strongly characterised by an idea of codification of law, synergic with the more general tendencies to overcome both absolutism and legal particularism[21].

The function of politics consists in the legitimate exercise of the power to qualify interests and to confer corresponding protection of differing intensity. Exercising this power takes place through the production of legal norms. The function of the legal dimension in the rule of law consists in the protection of interests, selected and qualified by politics and against possible subsequent injuries threatened by politics itself , at the executive, or even legislative level in the "constitutional" rule of law.

Thus politics, in turn, becomes subject to the law, which limits its manifestations with different intensity, according to whether the legal limit is inserted in the legislative source or in a rigid constitutional source, suitable to confer normative rationality also to the political discretion expressed in the Parliament. The liberal form of state is then characterised by the juridical recognition of the legitimacy of the existence of a plurality of political positions, even the minority ones enjoying juridical spaces of guarantee. This is important to survive the possibly arbitrarily penalising exercise of majority executive power. Subsequently, rule of law arises as the main political tool of a naturally democratic state[22].

Such political plurality goes on to translate into the recognition of the plurality of interests and the legitimacy of their reciprocal conflict, so that pluralism is a connotative element of the institutional forms of the liberal state[23]. Pluralism, as an interest of the system, is thus elevated to a founding value in the "constitutional" state of law, which guarantees the plurality of alternative political directions, also limiting the political discretion of the legislator. In the 19th century rule of law was intended in a "liberal" way, and therefore pluralism had manifested itself in a limited electoral competition to acquire

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[20] For the two most important contributions to the legal theories of interests see R. von Jhering, *Der Zweck im Recht*, Leipzig, 1877, as well as P. Heck, *Gesetzesauslegung und Interessenjurisprudenz*, in *Archiv für die civilistische Praxis* (AcP) 112, 1914, pp. 1 ff. and Id. , *Begriffsbildung und Interessenjurisprudenz,* Tübingen, 1932.

[21] Among the extensive literature on the reasons and ideological premises of codification see G. Tarello, *Storia della cultura giuridica moderna: assolutismo e codificazione del diritto*, Bologna, 1976.

[22] See B. Mirkine-Guetzévitch, *Les constitutions de l'Europe nouvelle*, Paris 1932, 15, for whom the rule of law is "*la démocratie exprimée en langue juridique*", since only democracy can achieve the "*supématie du droit*". See also L. Carlassare, *Sovranità popolare e Stato di diritto*, in S. Labriola (ed.), *Principi e valori del regime repubblicano*, Bari, 2006, pp. 163 ff, for whom popular sovereignty and the rule of law in our culture are indissolubly joined.

[23] But on the (re)emergence only later of a more modern idea of pluralism, no longer in the order but (again) of the orders, J-G. Belley, *Le pluralisme juridique comme orthodoxie de la science du droit*, in *Canadian journal of Law and Society*, 2011, pp. 257 ff.

the legitimacy to exercise the legislative function, with suffrage notably restricted by the census[24].

Between the late19th and the beginning of the 20th century, the dynamics of the electorate on basis of the census had historically determined a disproportion in the representation of the interests of determined social classes, while the model of the form of a state "under the rule of law" was already abstractly compatible with legal protection of variegated - and not necessarily homogeneous - individual subjective positions.

Alternatively, other forms of state have represented experiences of legal recognition of a single interest instead, always prevailing: for example, the will of the monarch (in the form of the absolute state), religious authority (in the form of the confessional state), national interest (in the form of the authoritarian state), the interest of a social class (in the form of the Soviet socialist state). However, these state experiences are not "lawless states", as the law is present, but the options for qualifying the admissible interests are regulated upstream: the function of the law is not that of limiting politics, or to regulate the political clash, but to legitimize a single political option to the detriment of the others (and so, to eliminate the political clash).

Power is therefore always regulated by the law but there is no "true" rule of law when the function of the legal order is not that of regulating politics in its plural options, but only to legitimize and give strength to a single ideological option; insofar the pluralism of institutional systems, and the pluralism in the system is not recognized)[25]. In its historical manifestation, the conceptual construction of the rule of law was therefore structurally functional to found the democratic form of state, as a guarantee of the rights of individuals against the arbitrariness of qualifications of interests, pre-established in unilateral ways.

2. From the nineteenth-century rule of law to the constitutional rule of law in the post-liberal tradition

This characteristic feature, common to the systems inspired by the idea of the rule of law is, however, realised by means of a plurality of legal institutions, contributing together to limit and regulate the political power through legal norms. This plurality of technical instruments, yet, gives rise to a uniform tradition, also because the constitutionalism of the liberal and post-liberal states always moves from a common need: that of giving a legal qualification to factual interests that is not left to the sole arbitrariness of politics, but to procedural rules - in the liberal state - or even substantial rules - in the constitutional/social state- that act as a guarantee of the plurality of interests.

Modern legal systems have replaced the complexity of legal particularism with that of the structure of the system of sources of law; here, legal norms are ordered according to a hierarchical criterion, with the individual sources being given differentiated effectiveness. In this sense, the function of politics - rationalized, in the rule of law, by forcing it to express itself in the forms prefigured by the legal system - is also exercised through the choice of the degree of intensity of protection to be conferred on some interests with respect to others. The provisions of the Constitution confer protection of the highest intensity on a series of interests, while other subjective positions are only granted protection by a majoritarian political choice or by the option of administrative discretion[26].

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[24] The "bourgeois" representation that emerged, was then legitimized to exercise the legislative power by qualifying the homogenous interests of the majority, without adequate constitutional guarantees of the positions of interest of the minority , with a formal but not substantial equality that imposed the necessity of a "constitutional" system, which could not be considered as a substantial "constitutional" system (with the only limitation being the equal treatment of the homogenous interests, and not the constitutionally necessary positive actions, which the legislator had to implement in favour of the weaker positions of interest). On representative democracy, and its manifestations in the liberal era (with census restriction), as opposed to classical direct democracy, see B. CONSTANT, *De la liberté des anciens comparée à celle des modernes*, discours to the Athénée royal de Paris, 1819.

[25] On the organicistic/institutionalistic vision of law see S. ROMANO, *L'ordinamento giuridico*, Florence, 1918 and M. HAURIOU, *Principes de droit public*, Paris, 1916.

[26] There is thus a formal structure of sources, traceable to Kelsen's idea of *Stufenbau*, at the basis of the legal manageability of power. In this sense, the rule of law is a formal approach to power, so that according to J.F.

The political dialectic in the rule of law is therefore rationalized as a guarantee against arbitrariness, but not suppressed, as being the guarantee of pluralism; thus, the development of political discretion within the spaces admitted by the legal system becomes the essential moment of choice of the values founding the community, and of allocation of the means necessary to achieve the ends thus identified. The political dimension in the rule of law is characterised by the freedom of choice of means and ends. This freedom is maximum in constituent power and degrades in intensity when the public power uses normative instruments other than the Constitution to exercise discretion, making decisions taken on the rationalised form of statutes, regulations and administrative measures. Only at the constitutional level the interests are selected and qualified in order to obtain the maximum intensity of legal protection. Differently, regulating social life through other sources of law means that every manifestation of politics subsequent to the predisposition of the Constitution (constitutional revision, state and regional legislative function, regulatory function) is in some way bound to the normative choices of a superior level of power[27]. It is precisely the extension of this logic of maximum constraint of political power from the law (to which the flexible Constitution was equated) to a rigid Constitution (which also constrains Parliament) that has characterized the passage from an idea of a mere rule of law to a perspective of a "constitutional" rule of law.

The rule of law, therefore, is a compound of institutes and technical solutions implemented in order to rationalize politics and put the choices of the qualification of interests under the control of legal rules; rules which, when regulated by the Constitution, with a restriction to the amendment process that would also lead to the controllability of legislative power (*i.e., to constitutional justice*), realizes an evolution of the idea of the rule of law which is particularly strong and connected to the most mature manifestations of constitutionalism.

2.1. Plurality of technical institutes of regulation/limitation of politics that contribute to delineating a unitary concept of "rule of law".

In the face of the historical and theoretical premises as described above, the rule of law is a concept that responds to a unitary need for the legal limitation of power. This limitation is achieved through institutions and instruments of a normative nature, the plurality and different combinations of which, in the various national experiences, have not diminish this common function. The idea of the rule of law remains identifiable even when its components, with which the regulation of political power is technically pursued, vary.

A coherent form of state, characterized by the rule of law, derives from the synergetic combination of various individual institutions, such as the separation of powers, the principle of preference for the law, the reservation of the law, the supremacy of Parliament, the principle of legality, the provision of interpretative criteria, a *réferé legislatif*, authentic interpretation, and the modalities of access to judicial review for the protection of rights. These technical institutions, although present in some legal systems even in the pre-liberal era, were developed and strengthened only with the establishment of the idea of the rule of law, through their reconduction to a systematic unity.

The idea of the rule of law thus gives strength to the single normative instruments of limitation of power, connecting them together in such a way as to render their action coherent with a unitary ideology identifiable in the first constitutionalism. The rule of law therefore becomes an intention of synthesis, making visible the technical solutions useful to guarantee, through legislative rationalisation, that the individuation and qualification of interests remains a monopoly of politics and is carried out in

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Stahl the *Rechtsstaat* does not express the purpose or object of the state's activity, but only the way and method of achieving them. In these terms a formal conception of the rule of law has been affirmed, in which the system of sources is an abstract structure, in which free contents are then inserted (and the guarantee component is essentially in the formal/procedural element). See J.F. STAHL, *Die Staatslehre und die Principien des Staatsrechts*, Heidelberg, 1856, in particular p. 138.

[27] On the roles of constituted power and constituent power among the extensive literature, see the voluntarist approach of C. SCHMITT, *Verfassungslehre*, München-Leipzig, 1928. In the recent literature, see M. LOUGHLIN, N. WALKER, *The paradox of constitutionalism: constituent power and constitutional form*, New York, 2007, and the more extensive references cited therein.

constitutional forms.

The political method of producing norms was affirmed - or confirmed - as prevalent both in the common law and the civil law tradition. In common law the idea of the supremacy of Parliament was developed to protect the system from the absolutist drifts of the sovereign; differently, in the continental civil law tradition, this idea emerged once the absolutism consolidated at the end of medieval legal particularism had been overcome Law is created through the legislative function by an elective and representative political assembly, which is entrusted with the task of qualifying interests, then binding the executive and judicial powers to these qualifications

The idea of the "separation of powers", elaborated by Montesquieu in the 18th century, is central to the rule of law in order to subject the executive and judicial powers to the will of the legislative power, a political will that has been formalized into norms[28]. The rule of law, also for historical reasons, is therefore the manifestation of an attitude of diffidence towards the executive power (monarchical) as well as towards the judicial order. The system of the sources of law that follows consequently corresponds to the scheme of the *Stufenbau* and a hierarchy, manifesting the separation of the powers, between sources entrusted to Parliament (superior) and sources entrusted to the executive power or - possibly - to the judiciary (inferior). Thus, a separation among powers that is not neutral, but which identifies a clear preference for the power of Parliament, which through the "law" limits the power entrusted to the execution of the political will formalised in law (according to a limitation of politics through law that sees the legislative as a power that is still unlimited)[29].

The rule of law - as a form of state - assumes that the physiognomy of *Rechtsstaatlichkeit* (literally "legal state") [30], founded on the principle of preference for the law as the typical source of the sovereign power. This idea of rule of law is at times be preferential to the detriment of other sources, through the institution of the *riserva di legge* (reservation of the law), establishing that specific subjects have to be regulated only by the law, and not by other sources, has the precise scope of protecting democracy, guaranteed by parliamentary representation, and avoiding the dangers of the absolutization of power connected to the dynamics of majority power, typical instead, of executive power[31]. There is a corresponding attitude of diffidence towards both the acts of the executive (regulations and individual measures), and the typical acts of the judiciary function (case law decisions). In fact, the principle of Parliamentary supremacy is expressed through the principle of legality, conditioning the expressive powers of the implementation of the system, in a way that is indifferent to the third party and independence of the same (if judicial) and to the political nature that the same can continue to express in autonomous forms (if executive/government).

The principle of legality can be understood both in a formal sense - as the mandatory necessity of conferring executive and jurisdictional functions by law - and in a substantial sense - already determining in law the broad content of the exercise of implementing the powers of the system. In both cases it an essential element of the rule of law, once again realized with different solutions in the various juridical experiences[32].

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[28] *See* from C.L.S. de Montesquieu, *De l'esprit des lois*, Genève, 1748. See also M.J.C. Vile, *Constitutionalism and the Separation of Powers*, Oxford, 1967 for more extensive references.

[29] A preference based on a formal structure of sources, in the hierarchical form of the *Stufenbau* mentioned above. Precisely for this reason Kelsen saw the rule of law as a concept absorbed in statehood: if one recognizes the state as a legal system, every state is a rule of law, and this term becomes pleonastic, H. Kelsen, *Reine Rechtslehre,*. See in this sense also M. Troper, *Le concept d'État de droit*, in *Droits*, 1992, pp. 51 ff.: the idea of a state subject to the law is misleading, whereas it is more correct to speak of a state '*soumis au juge*', not to the law.

[30] See M.-J. Redor, *De l'État légal à l'État de droit. L'évolution des conceptions de la doctrine publiciste française 1879-1914*, Paris, 1992.

[31] See S. Fois, *La riserva di legge*, Milan, 1963.

[32] In particular, with a considerably lesser extension to the judiciary in common law experiences, where the rule of law does not imply those elements of distrust for the judiciary typical instead of the continental tradition of *État de droit.* On the relationship between the rule of law and the Italian Constitution, mediated by the principle of legality, see the critical considerations of S. Fois, *Legalità (principio di)*, in *Enciclopedia del diritto*, vol. XXIII, Milan, 1973, pp. 659 ff.

However, the principle of legality in the rule of law always implies, regardless of the extent of its formal or substantial component, the subordination of administrative acts to the law through the well-known "judicial review". The normative and institutional system - based on the separation of powers - is conceived as divided into a function of producing and applying norms in an administrative way (with the government as the head of public administration), and sometimes subject to strong "normative" compressions even if carried out in a judicial way. In fact, the common intention is to exhaust the dimension of politicity (i.e. of the free choice of the means and ends of state action, qualifying the interests) in the production of norms, and to eliminate, or at least strongly reduce, any residual discretion in the application of norms.

In the civil law legal systems, the affirmation of constitutionalism, which is accompanied by the emergence of the "continental" translations of rule of law, leads to the development of the concept of the judge as the "*bouche de la loi*" (literally, the mouth of the law), with the predisposition of interpretative criteria aimed at limiting the creative power of judges[33]. In this perspective, the judicial application of the law is reconstructed as a mere ascertainment of norms, an exclusively cognitive activity, assuming that a norm is susceptible to a single objectively ascertainable meaning[34].

In France at the time of the Revolution - coherently with this vision - the interpretation of the law by the courts was forbidden; a prohibition which had been proceduralised through the "*réferé legislative*", providing that judges, in case of doubts of an interpretative nature, were under the duty of requesting the intervention of the *Cour de cassation* (Council of Cassation).[35].

Such a connotation of the *État de droit*, evidently, is not part of the legal culture of common law; thus, the meaning of "rule of law" which was developed before the conceptualization of the "État de droit on the continent is specifically connected to action of the executive power of the State. In the British experience, the distrust of the judiciary - typical element of the French revolution - is almost unknown, since the judiciary and Parliament have historically been allied in limiting the attempts of the Stuart dynasty to assume absolute power[36]. This affects the English notion of "rule of law", as a principle of limitation of political power by the judiciary, originated in a system where the primary source of the law is not legislation, but case law, which is founded on the well know "stare decisis" (rule of binding precedent)[37].

In this regard, the meaning of "rule of law" in England, proved to be more adherent to a concrete reality than to a revolutionary conception of the rule of law, as far as its extension to the judiciary, rather than only to the executive political power, was concerned.

The original structure of the rule of law, in its meaning was elaborated on the Continent, was therefore strongly linked to the legal-positivistic philosophical orientations, tending to reduce the law to legislation, i.e. to the political-normative will of the historical legislator[38]. The aspiration to make the

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[33] Reference is therefore made to Montesquieu's conception, to the judge as " bouche de la loi " and to the *syllogisme judiciaire*. See K.M. SCHÖNFELD, *Montesquieu en "La bouche de la loi"*, Leiden, 1979.

[34] On cognitive theories of interpretation, see most recently for more references G. PINO, *Interpretazione cognitiva, interpretazione decisoria, interpretazione creativa*, in *Rivista di filosofia del diritto*, 2013, pp. 77 ff.

[35] This was a political body of parliamentary origin, which would provide the exact interpretation with which the judge would then resolve the case, thus respecting the separation of powers. Only later would the Council of Cassation be transformed into a court of last instance (with nomofilactic function, i.e. with the task of ensuring the uniform interpretation of the law). See P. ALVAZZI DEL FRATE, *Aux origines du référé législatif: interprétation et jurisprudence dans les cahiers de doléances de 1789*, in *Revue Historique de droit français et étranger*, 2008, pp. 253 ff.

[36] See in particular the decision of 1610 of the Court of Common Pleas in *Thomas Bonham v College of Physicians*, 8 Co. Rep. 107 77 Eng. Rep. 638, and the well-known opinion of the Chief Justice Sir Edward Coke rendered there, which formed the basis of the idea of legal limitation of royal power (and then of judicial review of legislation).

[37] Among the extensive literature see for a critical reconstruction of the institution M. SHAPIRO, *Toward a Theory of "Stare Decisis"*, in *The Journal of Legal Studies*, 1972, pp. 125 ff.

[38] For the instrumentality of legal positivism to the ideas of legal limitation of power, which can be traced back to the Enlightenment (as the philosophical current at the origin of the rule of law), see J. WALDRON, *Kant's Legal Positivism*, in *Harvard Law Review*, 1996, pp. 1535 ff.

supremacy of the law effective, guaranteeing it from the dangers of changing meanings over time underlying the hermeneutic phenomenon, is well exemplified by the tool of so-called "authentic interpretation", the interpretation given by the same body that has formulated the norm. This instrument is still used today in various legal systems, and in which the aspiration remains to exhaust the possible extension of the *voluntas legis*[39] on the level of the *voluntas legislatoris*.

Thus, the continental rule of law emphasises the predictability of the exercise of judicial power, as it is closely linked to legality, while the rule of law emphasises such predictability by investing the judicial order itself in a more direct way with functions of direct guarantee of justice and equity (in addition to, and before, legality)[40]. In both cases, the access to judicial protection for the protection of rights (against the arbitrariness of the government) becomes an essential element of the rule of law, to which the idea is implied. Indeed, it is through the guarantee of the rights of the individual (at a micro level, of single normative institutions) that became possible to guarantee the affirmation of a just order (at a macro level, of the form of State)[41].

The conceptualisation of these categories, strongly conditioned by the enlightenment but already widespread in Western legal experience and thought *(albeit in fragmentary forms, and not organic as has been the case since the end of the 18th century*), is implicitly assumed - with mature scientific reflection - in the German idea of *Rechtsstaatlichkeit*[42]. In particular, the first full adulthood of the concept of *Rechtsstaatlichkeit* can be traced back to Immanuel Kant, who conceived it as a theoretical constitutional state, developed from the observation of revolutionary constitutions, and based on the idea of the supremacy of a normative text over politics[43]. This supremacy then constituted the guarantee for the implementation of Kant's fundamental idea: that through a state "of law" one could naturally guarantee peace within and among nations, thus marking with this new category (emerging in those years in German public law)[44] the start of an evolution of the form of state in a liberal direction. An evolution that was no longer just spontaneous, but consciously oriented to the logic of the rule of law, and was characterized in itself by a strong (pre-juridical) idea of "justice", which along with the development of rigid Constitutions would only then, however, enjoy the necessary guarantees.

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[39] For example, art. 73 of the *Statuto Albertino* (the Italian Royal Constitution of 1848), placed in the context of regulating the judicial order, stated that "the interpretation of laws, in a manner that is mandatory for all, is the exclusive responsibility of the legislative power". For a comparative overview of authentic interpretation please refer to F. GUELLA, *Retroattività delle prescrizioni normative sull'interpretazione: interpretazione autentica e disposizioni definitorie in prospettiva comparata*, in *DPCE (Diritto Pubblico Comparato ed Europeo)*, 2010, pp. 1310 ff.

[40] On the evolutions and contaminations/differences of the different national experiences of statehood regulated by law see L. HEUSCHLING, *Le renard d'un comparatiste: l'Etat de droit dans et au-dela des cultures jurudique nationales*, in *L'Etat de droit en droit international*, Paris, 2009, pp. 41 ff. For Dicey's theorization on the *rule of law* it would then be consistent not to translate *Rechtsstaat* with rule of law, but with constitutional government (oriented to certainty and predictability of law, while the rule of law is predominantly focused on the ideas of *justice* and *fairness*); for ideas in this sense see J. FINNIS, *Natural law and Natural Rights*, Oxford-New York, 1980, p. 272 and J. RAZ, *The rule of law and its virtue*, in *The Authority of Law: Essays on Law and Morality*, Oxford, 1979, pp. 210 ff. For the assimilability of the different concepts of statehood regulated by law see N. MACCORMICK, *Der Rechtsstaat und die rule of law*, in *Juristenzeitung* 1984, 65 ff. and G. FASSÒ, *Stato di diritto e stato di giustizia*, in *Rivista internazionale di filosofia del diritto*, 1963, pp. 116 ff.

[41] For the idea of the "state of rights", the close connection between the form of the liberal state (of law) and the protection of the rights of liberty (as subjective rights that can be claimed against the state), in Italy has been underlined in particular starting with F. RUFFINI, *Corso di diritto ecclesiastico italiano,* Turin, 1924, pp. 156 ff.

[42] Among the extensive literature see for example M. STOLLEIS, *Rechtsstaat*, in A. ERLER, E. KAUFMANN (cur.), *Handwörterbuch zur deutscher Rechtsgeschichte*, IV, Berlin, 1990.

[43] See I. KANT, *Zum ewigen frieden*, Königsberg, 1795.

[44] For an illustration of the German debate see L. HUESCHLING, *État de droit, Rechtsstaat, Rule of Law*, Paris, 2002, taking into account the substantive and formal differences with the rule of law. That the *Rechtsstaatprinzip* is oriented towards criteria of material and procedural justice has been argued by P. KUNIG, *Das Rechtsstaatsprinzip*, Tübingen 1986, pp. 333 ff., and already by U. SCHEUNER, *Die neuere Entwicklung des Rechtsstaats in Deutschland*, in E. FORSTHOFF (Hrsg.), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Darmstadt, 1968, pp. 490 ff.

2.2. The development of the technical instruments of liberal derivation in the following evolutions towards the "constitutional" State of right

Unlike the nineteenth-century octroyed Constitutions, which were flexible insofar as they could be modified by ordinary law, the fundamental texts developed in post-liberal constitutionalism have increasingly assumed the character of long, programmatic, rigid, and guaranteed constitutions, with consequent conditioning of the form of State.

Having overcome the liberal/bourgeois form of state, the need to also include a bill of rights (oriented to the protection of individual rights against the arbitrariness of the parliamentary majority) in the constitution alongside the frame of government (directed to regulate the subdivision of government power between the monarch and the hegemonic classes)[45], has made the most modern constitutional texts more articulated, with long lists of guarantees of liberties (not only negative, but also integrated by the provisions of social rights) which flank the more strictly institutional provisions (on the abstract exercise of power).

Indeed, with the extension of the tasks of the public administrations, and the introduction of positive intervention in the economy and civil society (in the social state), there is an overcoming need for minimum regulation, typical of the liberal state, requalifying the interests of the poorest segment of the population in a first phase as legally relevant interests (through the ordinary legislation for the protection of labour, between the end of the 1800s and the beginning of the 1900s) and, in a second phase (in continental Europe, with the constitutions of the second post-war period), as interests endowed with the maximum intensity of protection. The Constitution itself imposes the promotion of such interests as a future political programme for the legislator (especially if it is a question of socially conditioned rights), using directly prescriptive subjective legal positions[46].

This complex of individual rights (no longer just negative, implying an abstention of public power from interfering in freedoms) has therefore also necessitated protection, in order to be effective, against the choices of the parliamentary majority. The legislative power being subjected to constitutional law just as - in the first manifestations of the rule of law - the executive power had been subjected to legislative law.

This result in particular has been achieved through the rigidity of the Constitution and its constitutional adjudication, which implies - in the hierarchy of the sources of law - the super-ordination of the constitutional norm to the legislative one: every modification of the Constitution (both for the dispositions on the form of government, and for those on the protection of rights) requires a procedure of aggravated revision, in such a way that ordinary law cannot contrast with the qualification of the protected interests already carried out in the constituent moment. In addition, in the case of violation, a system of constitutional justice can provide for the annulment (in the centralized systems of control) or the disapplication (in the diffused systems) of the statutory law itself.

This hierarchical relationship underlines how the dimension of political discretion, remaining in the hands of the ordinary parliamentary legislator, is narrower than that of the constituent legislator, the former being bound by the pre-selection and pre-qualification of interests carried out in the Constitution[47]. The principle of preference for the law is thus substituted by the principle of preference for the Constitution. The principle of formal and substantial legality now also binds the political

[45] On the frame of government and the bill of rights as typical contents of constitutions (and essential in order to be able to speak of a constitution), see art. 16 of the *Déclaration des Droits de l'Homme et du Citoyen* (1789): "*Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution*".

[46] On the relationship between the rule of law and the welfare state see for two perspectives of different legal tradition H.W. Jones, *The Rule of Law and the welfare state*, in *Columbia Law Review*, 1958, pp. 143 ff. and P.G. Grasso, *"Stato di diritto" e "Stato sociale" nell'attuale ordinamento italiano*, in *Il Politico*, 1961, pp. 807 ff., who highlights the antithesis of the two forms of state, pointing to the possible prevalence of the welfare state under the push of the democratic system.

[47] See on the subject of rigid constitutionalism, and its premises and consequences, A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi*, Padua, 1997.

discretion of the legislator. The attitude of distrust is also extended towards Parliament and ordinary law, the institution of the law reserve is finally integrated by the so-called reinforced law reserve (in which it is the Constitution itself that dictates part of the contents that the statutory law must then transpose, or procedural aggravations for the approval of the same)[48].

If these evolutionary features of the form of state - from a state under the rule of law to a constitutional state under the rule of law - are linked to the idea of the rigidity of the Constitution, it must then be reiterated that such rigidity only makes sense to the extent that the aggravated procedures of constitutional revision are also guaranteed by a system of constitutional justice[49]. In fact, in this new perspective, even the law is subjected to a control of jurisdictional legitimacy, which was the first to develop in American constitutionalism in the form of diffuse control (starting with the case of *Marbury v. Madison*, in 1803)[50], and which in continental systems has instead undergone developments in the form of centralised control (starting with the Kelsen idea which has been applied in the Austrian system since 1920)[51].

In these latter experiences, centralised control (in which the decision on the constitutional legitimacy of a law is entrusted to a single central judicial body, and not to any judge) is expressed by the Constitutional Court, whose members - unlike ordinary judges - are not chosen through a bureaucratic method (a public competition) but are appointed in a way that allows judges to be identified on the basis of *intuitus personae*, and, precisely because of their greater "political" nature, can intervene in derogation of the separation of powers, annulling the laws contrasting with the Constitution (and not only disapplying them, with an approach that would be less invasive with respect to the powers of Parliament, but which can only be envisaged in models of widespread control where there is a mechanism of *stare decisis*)[52].

The configuration of the constitutional state of law subsequently affects the jurisdictional function, obliging the judge to not apply legislative law in contrast with the constitution, either directly disapplying it, or raising an incidental question of constitutionality before the Constitutional Court.

The idea is affirmed whereby "judges are subject only to the law on condition that the law is constitutionally legitimate", so that it is contextually recognised that the judge is not called upon to "automatically" apply the law (according to merely cognitive theories of interpretation) but is called upon to apply it "conditionally", by its constitutional legitimacy; which provokes the need for his prior evaluation of the constitutional legitimacy of the statutory law itself, with evident recovery of evaluations and discretion in the hermeneutic function[53].

In this way, the supremacy of the law follows the supremacy of Parliament, whose role is circumscribed by the constraint of formal and substantial conformity of the statutory law with the Constitution. Furthermore, the statute, in a context of a rigid Constitution, no longer operates in an exclusive "regime of monopoly" but finds itself "competing" with a normative system that tends to be pluralist and articulated with other methods of producing law, to which the Constitution reserves spaces of regulation on the basis of the principle of competence (so that it is the hierarchical superiority of the constitutional text that allows its subordinate sources to be articulated, not only by hierarchical degrees, but also by spaces of competence).

As such, a complex system of interactions develops between institutional bodies and subjects, all

[48] See for the first affirmation of these institutions (to a lesser degree of intensity in a context of a rigid constitution) what is set out above in par. 2.1. (regarding the ordinary law reserve, distrust of the executive, the principle of legality and preference of law).

[49] For a general overview of comparative legal systems on the subject of constitutional justice see, among the extensive literature, M. CAPPELLETTI, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato,* Milan, 1968; ID. *Judicial review in the contemporary world*, Indianapolis, 1971.

[50] See P.W. KAHN, *The Reign of Law. Marbury v. Madison and the Constituction of America*, New Haven, 1997.

[51] See H. KELSEN, *Judicial Review of Legislation*, in *The Journal of Politics*, 1942, pp. 183 ff.

[52] For a comparative study on the organization of the judiciary see M. CAPPELLETTI, *Dimensions of justice in contemporary societies: studies of comparative judicial law*, Bologna, 1994; ID., *Le pouvoir des juges: articles choisis de droit judiciaire et constitutionnel comparé*, Paris, 1990.

[53] On the evaluative elements of legal discourse, see among the extensive literature R. ALEXY, *A theory of legal argumentation: The theory of rational discourse as theory of legal justification*, New York, 1989.

invested with normative (or interpretative/applicative) powers which are not only different in terms of hierarchical position, but also in terms of material spaces of intervention; powers which, furthermore, are reciprocally intertwined in a system of checks and balances where federation and member states (or regions), Government and Parliament, judicial power and political power, all find themselves carrying out connected - but separate - tasks, guaranteed in their reciprocal connections by the constitutional discipline (which is placed above the entire system)[54]. The constitutional state of law, much more than the rule of law, therefore proposes the legalisation of politics at a constitutional level (subjecting politics to legal discipline, in an institutionally balanced system) and the consequent jurisdictionalisation of politics itself (subjecting politics to judicial control, with widespread or centralised constitutional justice).

In a system of checks and balances guaranteed by the Constitution not only is the executive power subject to the law (as in the original rule of law), but the more eminently political legislative power also finds itself encountering new legal limitations.

Such a system of interactions, and checks and balances, is, in particular, the connoting element which is placed at the base of the rule of law of the British formulation, where the passage to a rigid Constitution has instead been lacking, so that the formulation of the rule of law has not been as up-to-date with the continental (and American) evolutions of the "constitutional" state of law from the point of view of the introduction of a system of constitutional justice (although with the Human Rights Act 1998, and the declaration of incompatibility, there has been a hint of the logic of judicial control on the politics expressed in Parliament)[55].

In the face of this, the minimum common denominator between the continental ideas of the (constitutional) State of law and the modern application of the rule of law in the United Kingdom, seems to be constituted by the very idea of a judicial function that participates in the system of institutional weights and counterweights, with a wide interpretative power and a decisive participation in the guarantee of rights. All this legitimizes evolutions in the sense of a "juristocracy" which would characterize the western models, where the rule of law, updated to the new interpretative theories, would have led to an important judicial activism, as a truly connoting trait of the rule of law (and of most modern legality)[56].

In the United Kingdom, a substantial space of interpretative discretion - and its role in the system of checks and balances - was already peacefully admitted on the basis of the tradition of the first affirmation of the rule of law. The comparison between "rule of law" and post-liberal continental conceptions of the (differently translated) "state of law", would therefore show how the component of the function of jurisdictional "control" in the idea of rule of law - underlying the principle of legality (central in the first affirmation of the continental idea) - is, in truth, recessive compared to the centrality of a function of the judiciary power of "contributing" to the creation of the legal order, together with Parliament.

The British idea of rule of law would therefore be more founded on values of loyal collaboration between the judiciary and politics, rather than external control, compared to the continental approach, and in this character - along with the idea of judicial activism that has spread in the most recent theoretical reflection, also within the continental systems - the passage from the rule of law to the constitutional rule of law is substantiated[57].

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[54] On the relationship between rule of law and checks and balances, see A. SCALIA, *The rule of law as a law of rules*, in *The University of Chicago Law Review*, 1989, pp. 1175 ff.

[55] See A. KAVANAGH, *The elusive divide between interpretation and legislation under the Human Rights Act 1998*, in *Oxford journal of legal studies*, 2004, pp. 259 ff. and ID., *Constitutional Review under the UK Human Rights Act*, Cambridge, 2009. See also R.A. EDWARDS, *Judicial Deference under the Human Rights Act*, in *The Modern Law Review*, 2002, pp. 859 ff.

[56] See R. HIRSCHL, *Towards juristocracy: the origins and consequences of the new constitutionalism*, Harvard University Press, 2009; L.F. GOLDSTEIN, *From democracy to juristocracy*, in *Law & society review*, 2004, pp. 611 ff.; M. GRABER, *Foreword: from the countermajoritarian difficulty to juristocracy and the political construction of judicial power*, in *Maryland Law Review*, 2006, pp. 1 ff.

[57] On the physiological or pathological character of judicial activism, among the vast literature see K.D. KMIEC, *The Origin and Current Meanings of "Judicial Activism"*, in *California Law Review*, 2004, pp. 1441 ff. On the

The systematic centrality of interpretative discretion, as an emerging dimension - from the point of view of judicial activism, in the legal experiences of the most recent constitutionalism - therefore constitutes a characteristic feature of the evolution of the post-liberal form of state. This recovery of interpretative discretion is evident - even in the continental models of centralised control of constitutionality - in particular if one analyses the typology of the sentences of the Constitutional Courts, which are not only acts of a negative legislator (annulling the law) but also jurisdictional measures truly productive (in a positive way) of a new law, intervening with manipulative statements[58] (which add or modify parts of the legal system)[59].

In the constitutional state of law, therefore, all powers are limited: both the legislative by the constitution, and the judicial by the technical character of its mode of expression. In this sense, it is particularly relevant to highlight how it is the so-called supreme principles of the system (of a juridical nature, and therefore referable to the sphere of legitimacy) that limit both the political discretion (parliamentary and executive) and the interpretative discretion (of the ordinary or constitutional judge) to the maximum degree.

The supreme or fundamental principles of the constitutional order represent the fundamental nucleus of an evolved idea of constitutional legality, and an application of the logic of the rule of law (understood as the possibility for the juridical to limit arbitrariness) that reaches the widest practical extension. These principles, however, are in turn problematic to manage on a logical-formal level, being identified by way of interpretation of the essential nucleus of the preceptive values characterising the form of State and the constitutional order[60]. We are dealing, therefore, with principles whose individuation is already connoted by spaces of discretion (and by elevated political content), but whose protection, however, is claimed to be brought back to the sphere of juridical power, and not of politics.

Above all, although the existence of supreme principles that are truly exclusively normative in character (and not the result of a political decision) can be debated, their preceptive function within the post-liberal form of the state remains undeniable. In fact, the functions of the supreme principles of the constitutional order are to be found both in orienting interpretative discretion so as in limiting the constitutional revision (rationalising it not only in consideration of logical-formal needs, but also directing it towards fundamental values coherent with the political setting of the system, founding judgments of reasonableness and balancing of rights)[61]. This mean that even the legislator who intervenes with the aggravating process of approval of constitutional laws cannot act without limits[62], all power - even that of constitutional amendment - therefore being subjected to the law (and, in particular, to "supreme" constitutional law).

3. The standardization of institutions (and terminology) in the internationalization of the concept of rule of law, towards a "global legality"

The idea of a law able to bind power is confronted today with a context in which the system to be considered (for the purposes of regulating the manifestations of power) is no longer only the domestic one, but also the international and supranational one (which assumes its own specific value of guarantee

normal character of a strong role of the judiciary in the rule of law see G. TREVES, *Considerazione sullo Stato di diritto*, in *Rivista trimestrale di diritto pubblico*, 1959, pp. 399 ff., which brings the *Stato di diritto* closer to the rule of law and to due process precisely because it does not imply only a 'state according to law or according to the constitution' but also 'a state according to a judge', with the related values of independence and impartiality.

[58] On the Constitutional Court as a positive legislator see E. CHELI, F. DONATI, *La creazione giudiziale del diritto nelle decisioni dei giudici costituzionali*, in *Diritto pubblico*, 2007, pp. 155 ff.

[59] While recognising to the constitutional justice only the function of "legitimacy", without interference in the "merit" of the political decision. See for example - for the Italian system - art. 28 of law no. 87 of 1963: "The review of legitimacy of the Constitutional Court on a law or an act having the force of law excludes any assessment of a political nature and any review on the use of the discretionary power of Parliament".

[60] See C. MORTATI, *La costituzione in senso materiale*, Milan, 1940.

[61] The identification of a hierarchy of norms within the Constitution also has consequences on the methods of judgement: an element of strengthening of the balancing of values is introduced as a technique of judgement of the Constitutional Court, and the use of the principle of reasonableness is reinforced.

[62] See for Italian law Constitutional Court no. 1146/1988.

of rights, and not only of regulation of the relations between States)[63]. It is a question of verifying whether a "global rule of law" therefore exists, suitable to make up for that crisis of sovereignty and crisis of the national State which is highlighted as characterizing the present historical phase, binding also the new supra-state expressions of power.

Therefore, it must be ascertained whether the (partial) overcoming of the state is also leading to the overcoming of the rule of law, and of its basic institutions (when applied to supranational and international phenomena), or whether the basic idea of the rule of law and the principle of legality can even survive in the supranational dimensions of regulation instead.

Today, rather than a radical crisis of the state, we are in fact witnessing a transformation of the modes of action of the state, with new manifestations of statehood beyond national borders[64]. At the same time, it is legitimate to expect a transformation of the rule of law which - as has happened with rigid constitutions - leads to an updating of its categories in the direction, this time, of the applicability of the persistent need for normative limitation of power, also to interests of a cross-border dimension (and therefore to expressions of supra-state political and financial power).

The distinguishing feature in an era of globalisation is the need for interests to be redefined in a system with increasingly uncertain boundaries[65]. The interests of consumption, production, savings, taxation, etc. must take into account the crisis of national sovereignty and, in its place, the *de facto* power of the markets, which require new regulation at a supra-national level. In this context, the already established tendency to set standards of common rights at the international level[66] has also been supplemented by the need for a re-regulation of economic and social phenomena - which goes hand in hand with the *de facto* blurring of national boundaries - to avoid uncontrolled dynamics in global markets. In the impossibility of adequately guaranteeing rules and rights at the state level, the need arises for higher-level systems; systems that must themselves be juridical (deriving from the states), and hopefully, through their legal nature, aim at limiting power according to the paradigms of the "government of laws" and the "government of judges" seen previously applied for national experiences (in place of an arbitrariness of politics and interests, which from national would become transnational, and as such would be even less controllable).

Global legality is therefore accompanied by forms of power that assume ever greater spaces of uncontrollability, placing themselves as an alternative to state political power. In particular, it is a question of international power, when the level of integration between state systems remains low, or supranational power, when integration is more substantial, and carried out through international organizations that - like the EU - operate directly into the systems of member states. Powers that are used to efficiently regulate the economic phenomenon and de-territorialized interests, no longer controllable by the state.

Financial globalisation has also brought with it the partial globalisation of law, with global institutions aiming to regulate power, both political (with supranational and international charters of rights) and economic (with a highly articulated international and supranational discipline to regulate the

[63] On the role of rule of law in the internationalization of law see in general E. SANTORO, *Diritto e diritti: lo stato di diritto nell'era della globalizzazione*, Turin, 2008 and the wider literature cited therein.

[64] See among the vast literature S. CASSESE, *La crisi dello Stato*, Roma-Bari, 2002 and the references cited therein.

[65] Among the vast literature on the implications of globalization see S. STRANGE, *The retreat of the state: The diffusion of power in the world economy*, Cambridge, 1996.

[66] Among the international human rights instruments, which have established standards of protection to which states have bound themselves in various forms and measures, see e.g. some of those adopted at the UN and with convention status: the Second Facultative Protocole to the International Covenant on Civil and Political Rights to Abolish the Death Penalty (CCPR-OP2-DP); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Facultative Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the Facultative Protocol to the Convention on the Rights of the Child, regarding the involvement of children in armed conflict (CRC-OP-AC). There are also declarations with a scope always extended to all the United Nations, but with a lesser degree of juridicisation, and numerous regional conventions (such as the ECHR).

markets, which seems to be directed towards the construction of a new *lex mercatoria*)[67].

In this sense, state sovereignty stands as an obstacle to the market, and a global market, therefore, undermines the effectiveness of sovereignty. However, in the most recent legal experience state sovereignty certainly does not seem destined to be replaced by an empty space of law, but by the emergence of new global rules, and of new integrated (appropriately or not) categories of legality (made of the common logic to the rule of law, *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto*, etc.)[68].

These rules and categories are set in a peculiar system, like the international one is, where there is no sovereign subject and the modes of relation between the subjects acting in such a context tend to be equal (on a formal level), operating through sources of law that can be traced back to an agreement (international treaties) or to custom. In this context, the paradigms of the rule of law must be adapted to the peculiarities of a system of diffused power, so that the first guarantee for the national rule of law lies in the necessary acceptance of external constraints. Such globalization of law, however, lead to dangers of coercion of the weaker national positions, and to a selective transposition of the guarantees developed in the different legal traditions[69]. The capacity of the categories of the State of law (of western origin) to also pass to the international and global level, with a rule of law that has become a common terminology in the global ambit (and is also incorporated in the institutions and in the international agreements), is therefore certainly prospectable, but it is necessary to verify the effectiveness in the face of the interests to the protection of which it becomes instrumental.

In other words, the transfer of sovereignty in an era of crisis of the state is accompanied by a global transfer of the rules of the rule of law, but used for purposes and in ways that do not coincide with the traditional ones, and applied to national systems (in this circulation of legal models) that originally carried values other than the rule of law[70].

This transition has therefore taken place partially, and in varying degrees in the various institutions (depending on their aims): in the WTO with requirements for the protection of rights placed as exceptional limits to the dominant interest in trade, being incorporated in the case-law of the panels used to settle disputes rather than in the treaties themselves[71]; in the UN, on a level that is still largely political, with little remedial effect but with a broad rhetoric of rule of law[72], which is instead used in properly legal forms and much more practical in the context of bilateral agreements and related international arbitration[73]; in the IMF and the World Bank through the democratic conditionality of

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[67] See, e.g., F. GALGANO, *The New Lex Mercatoria*, in *Annual Survey of International & Comparative Law*, 1995, pp. 99 ff.

[68] In the Italian literature see especially the writings of S. CASSESE, *C'è un ordine nello spazio giuridico globale?* In *Politica del diritto*, 2010, pp. 137 ff.; ID., *Oltre lo Stato*, Roma-Bari 2006; ID. *Il diritto globale*, Turin 2009.

[69] See M. BUSSANI, *Il diritto dell'Occidente*, Turin, 2010.

[70] On the subject, for example, on the so-called *Asian values*, and their alternative or non-alternative character to the *rule of law*, see among the vast literature R. PEERENBOOM (ed.), *Asian discourses of rule of law*, London, 2003; ID. *China's long march towards rule of law*, Cambridge, 2002; X. LI, *'Asian Values' and the universality of human rights*, in *Philosophical dimensions of public policy*, 2003, pp. 171 ff.

[71] See J. BACCHUS, *Groping Toward Grotius: The WTO and the International Rule of Law*, in *Harvard International Law Journal*, 2003, pp. 533 ff.

[72] For references to UN documents referring to the rule of law, see O. CORTEN, *L'Etat de droit en droit international: quelle valeur juridique ajoutee?*, in *L'Etat de droit en droit international,* Paris, 2009, pp. 13 ff. In the Report of the Secretary-General S/2004/616 of the UN Security Council (Rétablissement de l'état de droit et administration de la justice pendant la période de transitino dans les sociétés en proie à un conflit ou sortant d'un conflit) a definition of the rule of law is given: "*Il désigne un principe de gouvernance en vertu duquel l'ensemble des individus, des institutions et des entités publiques et privées, y compris l'État lui-même, ont à répondre de l'observation de lois promulguées publiquement, appliquées de façon identique pour tous et administrées de manière indépendante, et compatibles avec les règles et normes internationales en matière de droits de l'homme. It implies, on the other hand, measures to ensure respect for the principles of the primacy of law, equality before the law, accountability to the law, and equity in the application of the law, the separation of powers, participation in decision-making, legal certainty, the refusal of arbitration and the transparency of legal procedures and processes*".

[73] See in particular the case law of the arbitration panels of the International Centre for Settlement of Investment Disputes (ICSID).

clauses that (sometimes) subject the financing of development programs to respect the rules of the rule of law[74]. In the face of this variegated panorama, above all it is the experience of the European Union where this passage from the state level to the supra-state level, not only of sovereignty but also of the rules (and therefore of the logic of the rule of law), has taken place in a more complete manner, despite the fact that there is still a democratic deficit that makes its implementation partial.

The homogeneity between normative solutions and judges' interpretations manifested in different constitutional systems, and therefore the existence of shared juridical traditions (of which a certain level of spontaneous dialogue between the courts of different states is emblematic[75]), is at the basis of the highest levels of implementation of the institutions of the rule of law within some regional realities, among which the European area is certainly of primary importance. In this area, in fact, both the ECHR system developed in the Council of Europe, and the regulatory framework of the European Union, have based their operation on numerous institutions that can be traced back to the tradition of the rule of law. This has been done both at an interpretative level, with the implementation of the rule of law schemes in the case-law of the Court of Justice[76] and the European Court of Human Rights, and at a positive level, with catalogues of rights based on the legal tradition of Western constitutionalism, and a real reference to the constitutional traditions common to the member states as a source of general principles (with the consequent physiological transit of the institutions guaranteeing the rule of law at a supranational level, when considered "common")[77]. A process of homogenization linked to a fungible use of national categories, insofar as they can be traced back to a common legal tradition, which, in the ambit of the EU institutions has also led to the interchangeable use of the terminology - of the rule of law, *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto*, etc. - while not ignoring the different origins and detailed applications.

Despite these traits of adherence of the supranational order to the idea of the rule of law, the basic shortcomings in the transposition of adequate guarantees of rights remain evident, especially if one considers the phenomenon from the point of view of the democratic nature of the supranational context. This is even more evident in the context of the financial crisis, with the connected unsustainability of social rights, which highlights the tendency towards government by technicians instead of government by-laws or judges, where the *sozialstaat* has led to the crisis of the *rechtstaat*. And also in the European Union the operation of the stability pact and the various fiscal pacts highlights a situation in which the most politically delicate decisions (against social rights) are taken at a supranational level, outside the direct representative system.

4. Concluding remarks: does a common and "translatable" notion run the risk of being less strong than a historically connoted legal concept?

Fundamental choices are thus taken in seats more distant from representation because, with globalisation, the level of interests has become wider, and the consequent qualification needs new dimensions (in which the democratic nature of the system is, however, diluted)[78]. The force of supra-state economic facts - where the market stands as a rational institution in itself, to which politics and law both become instrumental - thus emerges in all its strength in a context where state sovereignty has been relativized. On the reality of market facts, without boundaries, political power and the legal system

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[74] See, for example, E.R. GOULD, *Money talks: Supplementary financiers and international monetary fund conditionality*, in *International Organization*, 2003, pp. 551 ff.

[75] See, for example, G. DE VERGOTTINI, *Oltre il dialogo tra le corte: giudici, diritto straniero, comparazione*, Bologna, 2010.

[76] In particular, from ECJ, *Les Verts*, C-294/83 (23-04-1986) it was stated that the European Community is a "community of law"; see par. 23 of the judgment.

[77] See art. 6, par. 3, TEU. It should also be noted that in the new Eastern European constitutions explicit references to the rule of law are very frequent (see e.g. articles 1 and 9.2, Czech Const. Czech Republic; Art. 4, Const. Bulgaria; Art. 2 and 51, Const. Poland; Arts. 1 and 7, Const. Russia; Arts. 1 and 134, Const. Slovakia;) and to the social state under the rule of law (see e.g. Art. 1 Const. Serbia; Art. 10, Const. Estonia; Art. 2 and 3a, Const. Slovenia; Art. 1.3, Const. Romania).

[78] See, for example, K. FEATHERSTONE, *Jean Monnet and the 'democratic deficit' in the European Union*, in *JCMS: Journal of Common Market Studies*, 1994, at 149 ff.

cannot affect in a truly authoritative way, and only a partial control is possible, aiming at rationally regulating its management (within a series of possible technical solutions) rather than entrusting the choice of democratically preferable options to the political will (possibly untied from what is financially/technically admissible)[79].

The power of technology, therefore, emerges in a supra-state context characterised, by its nature, by important deficits of democratic representation. A context in which new mechanisms for the recovery of a global rule of law would therefore be needed to ensure new forms of effective manifestation of the basic idea of the rule of law: no longer to just bind political power to law, but also to bind technical/financial power to adequately effective legal rules.

The recovery of the rule of law in the global context, which is lacking in terms of representative institutions, however, takes place partially outside of democratic channels, through jurisdiction (which already in previous phases has represented a fundamental element of guarantee in the rule of law and in the constitutional state of law)[80]. When there is a remedy in the international or global context, the judge of the same tends to use the tradition of the rule of law as a strong reference model.

Thus, the rule of law - the idea that power is subject to normative rules - re-emerges even in the international and global arena, although often outside the channels of representation (which had been the origin of the rule of law): global legality survives insofar as it is linked to the justiciability of rights even at the supra-state level, although democracy is mediated by the state and, therefore, by the executives that engage at international level, so that the citizen, at the end, loses representation. The category of rule of law, and the related terminology, nevertheless return to be a strong element of guarantee, in a context where power is no longer limited by sovereignty, but where it is still compressed within the constraints of legal logic.

In this context, the European Union is a particularly rich system for the application of the rule of law. On the one hand, the creation of a union has required the use of autonomous legal notions, so that the Court of Justice or the Commission speak indistinctly of *État de droit*, *Rechtsstaatlichkeit*, *Stato di diritto*, rule of law, etc. (translatable into all the languages of the member states), as concepts in which the different common constitutional traditions are summed up. On the other hand, the permanence of national sovereignties and differentiated constitutional identities (recognised by the European Union itself, expressly after the Lisbon Treaty) requires that the rule of law be used with caution “against” states. Does a common and “translatable” notion ultimately risk being less strong than a legal concept that is nationally and historically connoted?

The case-law of the Court of Justice concerning violations of judicial independence in Poland and Hungary leaves the question open. The progressive reinforcement of the rule of law in the process of European integration and in the area of freedom, security and justice seems to be accompanied by different trends: on the one hand, in the institutional evolution of the Union, there is the gradual absorption of the principle of the rule of law into primary law, so that the rule of law is no longer a generic political synonym of legality but becomes a common container for specific individual rules conditioning the member countries, such as the independence of the judiciary. On the other hand, it becomes difficult for the Court of Justice to apply these individual detailed rules as it has to justify their homogeneity against national approaches to legality, that unfortunately have remained (or are trying to became again) historically differentiated. However, this difficulty can be overcome by a real cultural

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[79] On the suitability of the same logic of the rule of law to limit technology, as a pre-existing requirement of globalization and connected to the welfare state (where the action of the administration can no longer be limited to the execution of the law according to the dictates of the principle of legality, but must develop its functions by “technicalising” itself in order to ensure a wide range of services to society), see E. FORSTHOFF, *Der Staat der Industriegesellschaft*, München 1971, pp. 105 ff.

[80] Representation, on the other hand, was characteristic of the original idea of the rule of law. In this regard, it has to be stressed how the concept of law and legislative power is, for liberal theorists of the *Rechtsstaat*, inclusive both of the content aspects (generality and abstractness) and of the profiles pertaining instead to representation; see in particular E. BÖCKENFÖRDE, *Gesetz und gesetzgebende Gewalt*, Berlin, 1958, pp. 178 ff. On the figure of the judge in supra-state contexts, as an agent of juridification of the global administrative order, see instead among the vast literature S. CASSESE, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Rome, 2009.

evolution of the common and autonomous legal concepts of the Union, which is not limited to a single translation but aims at establishing a strong European culture beyond the different words of the national law.

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Comparative Law and Language

Regulatory Linguistic Requirements for Product Labelling in the Internal Market of the European Union

How the curious Case of the Irish Dog demonstrates the Need for a more coherent EU Language Policy

Stefaan van der Jeught[1]

Abstract: The free movement of goods is one of the four core freedoms in the EU internal market. In that regard, the linguistic diversity of the EU can form an obstacle to the achievement of that aim, when on a national or even subnational level specific regulatory linguistic requirements are imposed on the labelling of products. The tension between market integration and economic efficiency on the one hand and linguistic diversity, on the other, has been dealt with in a wide array of linguistic arrangements laid down in various EU regulations and directives. However, rather than tackling this issue in a general and uniform way, EU legislation proceeds on a case-to-case basis. The lack of a global and coherent policy in this regard has resulted in heterogeneous linguistic arrangements, which are inconsistent as to the distribution of power between the EU and its Member States, and create some degree of legal uncertainty. It is argued in this article that more coherence is needed on the basis of clear and transparent general criteria such as product hazards, public health and consumer protection. As a general rule, a better balance should be struck between the essential principles underlying any linguistic regulatory provision, namely the freedom of language (for manufacturers, importers and distributors) to market their products in the EU internal market on the one hand, and the territoriality principle on the other, according to which EU Member States may determine the use of languages on their territory in order to protect end-users and consumers.

Keywords: European Union – Free Movement of Goods – Linguistic Requirements for Labelling – Freedom of Language – Territoriality

Summary: 1. Introduction. – 2. The Interaction between Territoriality and Language Freedom – 3. The Free Movement of Goods and Regulatory Linguistic Requirements – 3.1 Stringent Territoriality: the Official Language(s) of the EU Member State of Marketing – 3.2 Conditional Territoriality: EU Member States are entitled to Impose Language Requirements – 3.3 Mitigated Territoriality: EU Member States must allow for the Use of a Language Easily Understood or Pictograms – 3.4 Language Freedom – 3.5 Shifts in Linguistic Arrangements – 4. Towards Greater Coherence? – 5. Concluding Remarks

1. Introduction

[1] *Court of Justice of the EU and Vrije Universiteit Brussel (mail: Stefaan.van.der.jeught@vub.be).* The views and opinions expressed in this article are solely my own and do not reflect the position of the Court of Justice. Part of the research for this article is based on the PhD thesis I defended at the *Vrije Universiteit Brussel* in 2015 (*Conflicting Language Policies in the EU and its Member States,* published as: S. VAN DER JEUGHT, *EU Language Law*, Groningen, 2015). For the purposes of this article, the research on this particular aspect of EU law has been updated and broadened.

Recently, in 2020, a linguistic labelling issue jeopardised the supply of veterinary medicines in Ireland. An Irish dog owner from the the Irish-speaking region *Gaeltacht* objected to the fact that such medicines were labelled in English only and not in Irish, while under the applicable European Union (EU) legislation the use of the "*official languages of the country of marketing*" was compulsory (i.e. English and Irish in Ireland). The case made its way up to the European Court of Justice, which confirmed (in March 2021) the enforceability of the linguistic arrangements as stipulated by EU law.

Other issues with regard to linguistic requirements and product labelling have already been raised before the Court of Justice in the past. In his opinion in one of these cases, advocate general Cosmas remarked in a forthright way that "*the policy of the Community institutions in this area is characterised by the lack of any systematic and coherent view*."[2] In addition, he pointed to the fact that no conclusion could be drawn "*as to the reasons which guided the Community institutions each time they opted for one or other form of words*".

Against that backdrop, also taking into account that this opinion was given more than two decades ago, it seemed relevant to assess current EU legislation laying down regulatory linguistic requirements for product labelling in the internal market. For that purpose, I have identified 27 relevant EU regulations and directives in this field and analysed them in a systematic way, so as to determine differences in wording and legal effects on product labelling. The results of this survey are discussed under 3.[3]

It would indeed seem that the EU still does not tackle this issue in a general and uniform way, but proceeds rather on a case-to-case basis. The lack of a global and coherent policy in this regard has resulted in heterogeneous linguistic arrangements. These are inconsistent as to the distribution of power between the EU and its Member States and create some degree of legal uncertainty as regards the protection of consumers. To give just one example of such inconsistencies, why do more stringent linguistic arrangements in EU law apply to the labelling of textiles than to detergents or explosives for civil use?

It is argued that a more coherent EU language policy should be based on clear and transparent general criteria such as product hazards, public health and consumer protection and that, as a general rule, products should be labelled in the local language(s), as determined by the EU Member States. Some suggestions will be made in that respect (under 4 and 5). First and foremost (under 2), the general scene of the regulation of language use will be set. In essence, such regulation is the result of the interaction between the principles of territoriality ("*cuius regio eius lingua*") and linguistic freedom.

2. The Interaction between Territoriality and Language Freedom

The interaction between territory bound language policies and the freedom of language is at the core of language law.

In essence, territoriality in language law refers to the general principle according to which national (or subnational authorities as the case may be) establish, on their territory or part thereof, an official language regime and rules on the use of languages.[4] Under international law, it is indeed generally accepted that, in principle, a State has the right to determine freely which language(s) it grants official status on its territory (or part thereof).[5]

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[2] Opinion of Advocate-General COSMAS of 19 February 1998 in the Goerres case, C-385/96, ECLI:EU:C:1998:72, pt. 56. See also R. CREECH, *op.cit.*, 73.

[3] In Annex 1, a table is provided which contains the text of these linguistic provisions.

[4] See in this sense P. VAN PARIJS, *On linguistic territoriality and Belgium's linguistic future*, in P. POPELIER, D., SINARDET, J. VELAERS, & B. CANTILLON (Eds.), *België, quo vadis*, Antwerp/Cambridge, 2012.

[5] See UN Human Rights Committee, Ballantyne et al. v Canada, Communication No 359/1989 and 385/1989, views of 31 March 1993, CCPR/C/47/D/359/1989, Office of the United Nations High Commissioner for Human Rights 1993 (hereafter: "HRC Ballantyne, 1993"), pt. 11.4). Very often, territoriality means that on each particular territorial unit (State, region or municipality) only one language has legal and political standing (F. GRIN, *Using territoriality to support genuine linguistic diversity, not to get rid of it. The linguistic territoriality principle: right violation or parity of esteem*, Brussels, 2011; D. ROBICHAUD & H. DE SCHUTTER, *Language is just a tool! On the instrumentalist approach to language*, in B. SPOLSKY (Ed.), *The Cambridge handbook of language policy*, Cambridge, 2012). Yet, a territorial regime does not necessarily protect one single language and may very well

Although language regimes are primarily concerned with language use in the State public domain (by the administration or in the courts and the schools),[6] they may to some extent also encompass the private domain (for instance the labelling of foodstuffs, medicines and other products, or even the use of languages in the "landscape", such as private shop signs, etc). At any rate, where the private domain is concerned, individual freedom of language puts essential limits on the territoriality principle and the power to legislate in linguistic matters.

Language freedom is based on the prohibition of discrimination on linguistic grounds,[7] read together with basic fundamental rights such as the freedom of expression, of assembly and association, of religion, respect for private and family life, as well as educational rights.[8] Regardless of official language use, residents may therefore in principle freely use the language of their choice in the purely private domain.[9]

However, this individual language freedom does not preclude every State intrusion: for reasons of public health or consumer protection, the mandatory use of the State official language(s) on the labels of products which are available on the territory may be imposed. Under no circumstances, however, such regulatory linguistic requirements may exclude the use of other languages, alongside with the national official language(s). This principle of non-exclusivity is an essential red line not to cross for linguistic regulation in the private domain.

The Ballantyne case offers a good illustration of the interaction and balance between the principles of territoriality and language freedom. The dispute concerned English-speaking shop owners in the province of Quebec (Canada). Local legislation (the Charter of the French Language)[10] mandated the use of French on all commercial shop signs, thus implicitly precluding the use of English. Several shop owners were found to be in breach of the law. One of them, an undertaker, had a company sign reading "*Kelly Funeral Home*", a name that, incidentally, had been in use for more than 100 years by his family.[11] Eventually, the case ended up before the UN Human Rights Committee which referred, in its decision, to the freedom of expression,[12] and held that a "*State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.*"[13] This ruling confirmed a landmark judgment of the Canadian Supreme

establish a multilingual regime (as is, for instance the case in the bilingual Belgian capital, Brussels or in the bilingual province of Bozen/Bolzano) (see, in this regard, P. VAN PARIJS, Linguistic Justice for Europe and for the World, Oxford, 2011, 4, 137 and 240).

[6] A very important exception to State powers in this regard is the protection of historical linguistic minorities. The International Covenant on Civil and Political Rights (ICCPR) provides in its article 27 that persons belonging to such minorities must not be denied the right "to use their own language". The scope of this provision is, however, under debate (F. DE VARENNES, *Language, minorities and human rights*, Proefschrift Rijksuniversiteit Limburg, 1996, 157-159) and it remains unclear whether this provision imposes a mere passive linguistic tolerance on States or, whether, it contains a positive obligation.

[7] See art. 21 Charter of Fundamental Rights of the European Union (OJ C 326 of 26.10.2012, 391); art. 14, European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 2, Universal Declaration of Human Rights.

[8] R. CREECH, *Law and language in the European Union: the paradox of a Babel "United in Diversity"*, Groningen, 2005, 132. Such a language freedom may be explicitly enshrined in a constitutional provision, particularly in multilingual States (for Belgium, see art. 30, Const., see *infra*; see also Switzerland (art. 18, Const.).

[9] It is important to note that private freedom of language is not limited to the languages of a State, or to minority languages historically present on the territory concerned. Freedom of language therefore allows all residents, immigrant communities included, to freely use their language in associations, private schools, electoral campaigns, shop names or advertising, magazines and books, even using other scripts, such as Arabic or Cyrillic (F. DE VARENNES, *To speak or not to speak – The rights of persons belonging to linguistic minorities, Working Paper prepared for the UN Sub-Committee on the rights of minorities*, 7).

[10] *Charte de la langue française (Québec)*, http://www.legisquebec.gouv.qc.ca/fr/showdoc/cs/C-11 (last visited 11.09.2021).

[11] HRC Ballantyne, pts. 2.2 and 2.3.

[12] Art. 19 International Covenant on Civil and Political Rights, 16 December 1966, *United Nations Treaty Series*, vol. 999 (1976), no. 14668, 171.

[13] HRC Ballantyne, pt. 11.4.

Court.[14] As a result of this, the Charter of the French language was adapted and currently no longer precludes the use of other languages than French, but only requires signs to be in *at least* the French language.

Case law in Belgium points in the same direction. The backbone of the Belgian language regime is indeed the interaction between the principles of territoriality and individual language freedom. The federal State of Belgium comprises a Dutch-speaking, a French-speaking and a German-speaking region, as well as a bilingual region (Brussels-Capital).[15] The official language use in every region is strictly regulated and clearly reflects the territoriality principle. By contrast, the language freedom which is enshrined in the Constitution,[16] sets clear restrictions for lawmakers in the private domain, where individuals are free to use any language they wish.[17] In that regard, the Council of State has held that the preclusion of using a certain language in the labelling of foodstuffs and medicines is incompatible with the freedom of language.[18] However, some degree of regulation of private language use may be allowed, for instance, when consumer rights or public health is at risk. The obligation for a tanning salon to use at least the language of the region was, for instance, held compatible with the freedom of language, as long as the use of other languages was not precluded.[19]

A case in point of far-reaching regulation of language use is the so-called Toubon Law in France.[20] As to the labelling of products, for instance, the use of French is mandatory in all acts and documents linked to the sale and the promotion of such goods. This includes instructions for use, warranty certificates, bills and receipts, as well as labels, prospectuses, catalogues, brochures and other informative documents. Instructions programmed into computer software programs and games, which are displayed on screens or other audio announcements, are also considered to be instructions for use. Exception is made, however, for slogans that form typically part of a trademark, such as for instance "Nike Just Do It".[21] Also exempted are names of typical products and specialties of foreign origin known by the general public. Examples are chorizo, cookie, couscous, gin, hot dog, jeans, paella, pizza, sandwich, etc., as well as foreign names protected in France pursuant to international agreements (such as gorgonzola, scotch whisky, etc.).[22] Engraved or woven mentions such as "on/off", "made in…" or "copyright" are also admissible. In line with case law of the *French Conseil Constitutionnel*, the use of other languages is, however, never precluded.[23]

Regulatory linguistic requirements may also derive from regional legislation. Under the Consumer Code of Catalonia, labelling of products in Catalan is compulsory in Catalonia.[24] According to this code, consumers have the right to receive, in Catalan, "*the information necessary for the proper consumption,*

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[14] Supreme Court of Canada, Devine v Québec (Attorney General), 15 December 1988, 2 S.C.R. 790.

[15] Art. 4 Const. of Belgium.

[16] Art. 30 Const. states that: "*The use of languages spoken in Belgium is optional; only the law can rule on this matter, and only for acts of the public authorities and for judicial affairs*." (English translation available at https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf, last visited 5.9.2021).

[17] N. Bonbled & S. Weerts, *La liberté linguistique*, in M. Verdussen & N. Bonbled (Eds.), *Les droits constitutionnels en Belgique*, Brussels, 2011, 1097–1147.

[18] Council of State (Belgium), opinion of 12 July 1990, *Doc. Parl. Chambre*, 1989-90, nb. 1086/2.

[19] Council of State, opinion of 12 March 2002, M.B./B.S. of 1.8.2002, 33741. Weerts & Bonbled provide for a similar example regarding the obligation to use at least Dutch and French on safety signboards on a construction site (N. Bonbled & S. Weerts, *op. cit.*, 1121).

[20] *Loi no 94-665 relative à l'emploi de la langue française*, 4 August 1994, JORF of 5 August 1994, 11392. named after the Minister of Culture at the time,

[21] N. Mc Carthy & H. Mercer, *Language as a Barrier to Trade: The Loi Toubon*, in *European Competition Law Review*, vol. 5, 1996, 310.

[22] In the past, French courts are reported to have held that terms such as cheeseburger and hamburger were not commonly understood (N. Mc Carthy & H. Mercer, *op. cit.*, 310, referring to a judgment of the Court of Appeal of Versailles of 24 June 1984).

[23] *Conseil constitutionnel* (France), Décision no 94-345, 1994, JORF of 2.8.1994, 11240.

[24] Act 22/2010 of 20 July on the Consumer Code of Catalonia, Official Journal of the Generalitat of Catalonia (no. 5677); see Spanish version: Boletín official del Estado, 13 August 2010, 196/ 71949.

use and handling of goods […], in particular, the mandatory data directly related to the safeguarding of the health and safety”.[25] The Spanish constitutional Court upheld this linguistic requirement.[26]

There seems therefore to be a large consensus on this point in international and constitutional law: the private use of a language cannot be precluded, although a positive obligation to use at least and non-exclusively the local official language(s) may be permissible in certain circumstances.

3. The Free Movement of Goods and Regulatory Linguistic Requirements

The free movement of goods is one of the four core freedoms within the EU internal market.[27] In essence, this freedom entails that quantitative restrictions on imports between Member States are prohibited, as well as “*all measures having equivalent effect*”.[28] A regulatory linguistic requirement does, in principle, fall within the ambit of this prohibition. The EU is indeed a patchwork of linguistic areas, the borders of which almost invariably coincide with those of the national States composing the EU. Hence, when specific national regulatory linguistic requirements are imposed on the labelling of products, these may form barriers to the free movement of goods. Producers, importers and distributors will in that case have to adapt the labelling of their products for the different national (or even regional) markets.

The prohibition is, however, not absolute as restrictions or equivalent measures may be justified for reasons explicitly laid down in the Treaty[29] or on other grounds on the basis of a “rule of reason’ that has been established by the European Court of Justice. In its case law regarding the freedom of goods, the Court has held that the protection of public health and the rights of consumers are legitimate justifications for linguistic requirements.[30] In addition, however, the Court performs a proportionality scrutiny in this respect. Accordingly, even when a legitimate justification is provided, linguistic or other obstacles may still be disproportioned and therefore incompatible with EU law.

What is more, even when linguistic requirements are laid down in the EU legislation itself, the Court of Justice may verify the validity thereof. A case in point is the *Meyhui* judgment, in which the Court upheld an obligation to inform consumers in the Member State of marketing in the language(s) of that country, as an appropriate means of protection.[31] The issue was raised in a dispute between *Schott Zwiesel Glaswerke* (Germany), a crystal glass producer, and *Meyhui* (Belgium), a company which imported *Schott's* products, regarding *Schott's* refusal to affix to its products their description in the

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[25] Art. 128(2)(b) Consumer Code of Catalonia, see Generalitat de Catalunya, FAQ on the Consumer Code of Catalonia, http://preproduccio.consum.gencat.cat/empreses/et_formem/index_en.html (last visited: 11.9.2021). In Spanish the provision reads as follows: “*2. Las personas consumidoras, sin perjuicio del respeto pleno al deber de disponibilidad lingüística, tienen derecho a recibir en catalán: (…) b) Las informaciones necesarias para el consumo, uso y manejo adecuados de los bienes y servicios, de acuerdo con sus características, con independencia del medio, formato o soporte utilizado, y, especialmente, los datos obligatorios relacionados directamente con la salvaguardia de la salud y la seguridad*.”

[26] Spanish Constitutional Court, judgment of 4 July 2017, 88/2017, BOE 171 of 19 July 2017, ECLI :ES :TC :2017/88 and judgment of 25 January 2018, 7/2018, BOE 46, 21 February 2018, ECLI:ES:TC:2018:7.

[27] Along with the free movement of persons, services and capital (see Titles II and IV of the Treaty on the Functioning of the European Union (TFEU), consolidated version, *OJ* C 326, 26.10.2012, 47).

[28] Art. 34 TFEU. It should be noted that the freedom of goods applies to “(…) *products originating in Member States and to products coming from third countries which are in free circulation in Member States*.” (art. 28(2) TFEU).

[29] See art. 36 TFEU which provides that are not precluded, prohibitions or restrictions on imports, exports or goods in transit “*justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*.”

[30] See, for instance, ECJ, judgment of 17 December 2020, A.M, case C-667/19. ECLI:EU:C:2020:1039, pt. 47.

[31] ECJ judgment of 9 August 1994, Meyhui NV v Schott Zwiesel Glaswerke AG, case C-51/93, ECLI:EU:C:1994:312 (hereafter referred to as “ECJ Meyhui judgment”).

languages of the Member State in which they were marketed, in this instance Belgium.[32] The argument that such a linguistic obligation caused additional packaging costs was discarded and the linguistic obligations imposed by the EU legislator were considered proportionate.[33]

In sum, the aim of market integration, whereby national regulatory requirements for product labelling are seen as restrictions to trade, shows friction with (sub)national territory bound language policy, the compatibility of which with EU law may always come under scrutiny.

Against the backdrop of these general principles, the EU legislator has explicitly provided for language arrangements regarding the free movement of goods in the EU, at least with regard to harmonised mandatory particulars. The legal solutions which have been chosen in the broad array of EU regulations and directives in this field are quite varied and range on a scale from "territoriality" to "freedom of language". In this regard, history partly explains these variations in the legal framework, as the EU initially focused on market integration, favouring the language freedom of producers when exporting goods. It was only at a later stage that consumer protection (i.e. the obligation to use at least the languages of the country of marketing, i.e. territoriality) was channelled into the existing legal framework.[34]

Accordingly, applying a stringent territoriality principle, the EU regulation or directive may stipulate that the official language(s) of the EU Member State of marketing must be used for the purposes of product labelling. In a less stringent form, this obligation would be "conditional" upon the existence of national regulatory linguistic requirements. Moving further on the scale towards freedom of language, EU legislation may provide that products may be marketed throughout the EU territory when labelled in a "language easily understood", with pictograms, or other EU languages, thus in effect limiting national jurisdiction to require the use of the national official language(s).

It should be noted that EU linguistic arrangements are limited to compulsory particulars on the labelling of products. When language requirements are not harmonised, the EU Member States remain, in principle, free to provide for language arrangements, although their competence is not unlimited in that case either as the freedom of language may come into play again. This was shown in the *Colim* case, which was initiated by *Colruyt N.V.*, a company of which *Colim* is a subsidiary, against the *Bigg's* store in Kuringen-Hasselt in the Flemish Region of Belgium, where products were sold which did not carry, on the packaging or labelling, any particulars in Dutch, the language of the region.[35] The Court confirmed that in the absence of full harmonisation of language requirements, the Member States may adopt national measures requiring such information to be given in the language of the area in which the products are sold or in another language which may be readily understood by consumers in that area. Such national measures must, in any event, apply without distinction to all national and imported products and be proportionate to the objective of consumer protection which they pursue. They must, in particular, be restricted to information which the EU Member State concerned makes mandatory and which cannot be appropriately conveyed to consumers by means other than translation (by designs, symbols or pictograms).

Likewise, in the older *Fietje* case, the compatibility of the Dutch "*Likeurbesluit"* with the free movement of goods was called into question, as it required the use of the word "*Likeur*" (Liquor) on labelling.[36] A German product did not have that indication, and had, accordingly, to be relabelled before

[32] ECJ Meyhui judgment, pt. 2. The case concerned more in particular the obligation to use the language(s) of the country of marketing, as provided for by the EU legislation which was applicable at that time (Council Directive 69/493/EEC of 15 December 1969 on the approximation of the laws of the Member States relating to crystal glass, *OJ L* 326/36 of 29.12.1969, English special edition: Series I Volume 1969(II), 599).

[33] ECJ Meyhui judgment, pts. 13 and 20.

[34] European Commission, *Studies on Translation and Multilingualism*, *Language and Translation in International Law and EU Law*, issues 6, Luxembourg, 2012, https://termcoord.eu/wp-content/uploads/2013/08/Study_on_language_and_translation_EU.pdf (last visited: 11/9/2021) (hereafter: "Studies on Translation and Multilingualism 2012).
https://termcoord.eu/wp-content/uploads/2013/08/Study_on_language_and_translation_EU.pdf, 7.

[35] ECJ judgment of 3 June 1999, Colim NV v Bigg's Continent Noord NV, case C-33/97, ECLI:EU:C:1999:274, pt. 10.

[36] ECJ judgment of 16 December 1980, Criminal proceedings against Anton Adriaan Fietje, case 27/80, CLI:EU:C:1980:293. See also infringement proceedings against Italy about the use of the term "*aceto*" (vinegar)

being allowed on the Dutch market. The Court emphasized that, in the absence of common rules relating to the production and marketing of alcohol (at that time), it was, in principle, for the Member States to regulate all matters relating to the marketing of alcoholic beverages on their own territory, including the description and labelling. The Court held, however, that the national provision at issue was equivalent to a prohibited quantitative restriction. The national judge had to assess whether the details given on the original label (in German) supplied the consumer with information on the nature of the product, equivalent to that in the description prescribed by Dutch law.

3.1. Stringent Territoriality: the Official Language(s) of the EU Member State of Marketing

For a series of products, the EU regulations or directives explicitly provide for a stringent territoriality principle concerning language arrangements as to labelling and packaging. This is, for instance, the case for medicines for human use,[37] as well as veterinary medicinal products,[38] animal feed,[39] dangerous preparations,[40] tobacco products,[41] textile products,[42] and single-use plastic products[43]. However, while the common denominator of these arrangements is that information should be given in the official language(s) of the Member State of marketing, the wordings used are astoundingly diverse.

A first variation in wording and scope concerns multilingual Member States: may they impose the use of more than one official language? This seems to be the case as to veterinary medicines,[44] dangerous preparations,[45] textile products[46], tobacco,[47] and animal feed, since the plural term "languages" is used.[48] Similar arrangements have been made as to medicines for human use, with the

for vinegar which is not based on wine (ECJ judgment of 9 December 1981, Commission v Italian Republic, case 193/80, ECLI:EU:C:1981:298).

[37] Art. 63(1) and (2), Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311/67 of 28.11.2001.

[38] Art. 59(3) and art. 61(1), Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, OJ L 311/1 of 28.11.2001.

[39] Art. 14(1), Regulation (EC) No 767/2009 of the European Parliament and the Council of 13 July 2009 on the placing on the market and use of feed, amending European Parliament and Council Regulation (EC) No 1831/2003 and repealing Council Directive 79/373/EEC, Commission Directive 80/511/EEC, Council Directives 82/471/EEC, 83/228/EEC, 93/74/EEC, 93/113/EC and 96/25/EC and Commission Decision 2004/217/EC, OJ L 229/1 of 1.9.2009.

[40] Art. 17(2), Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, OJ L 353/1 of 31.12.2008.

[41] Art. 8(1), Directive 2014/40/EU of the European Parliament and the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127/1 of 29.4.2014.

[42] Art. 16(3), Regulation (EU) No 1007/2011 of the European Parliament and Council of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council, OJ L 272/1 of 18.10.2011.

[43] Art. 3, Commission Implementing Regulation (EU) 2020/2151 of 17 December 2020 laying down rules on harmonised marking specifications on single-use plastic products listed in Part D of the Annex to Directive (EU) 2019/904 of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment, OJ L 428/57 of 18.12.2020.

[44] Art. 58(4) and 59(3), Directive 2001/82/EC.

[45] Art. 17(2), Regulation (EC) No 1272/2008.

[46] Art. 16(3) Directive 1007/2011.

[47] See art. 11 and art. 12, Directive 2014/40/EU. Specific rules are laid down as to the size of multilingual warnings regarding those EU Member States having more than one official language.

[48] Sometimes worded as "*the language or languages*", sometimes "*in the official language(s)*".

extra specification, furthermore that those languages may be determined by the Member State concerned.[49]

By contrast, however, as to animal feed, the reference to "language" is singular: animal feed may be marketed "*in the official language or at least one of the official languages of the Member State or region in which it is placed on the market*". The reference to the language of a region is unique: it is the only example that can be discerned in the array of regulations and directives at issue. The inconsistent wording of the provision is not unproblematic. It implies that EU Member States having more than one official language which may be used throughout their territory, such as Ireland, Malta or Luxembourg may only require the use of one of their official languages. For a State such as Belgium, which is organised on a territorial (linguistic) basis, the reference to the language of a region, seems to allow adapted language regulation for the monolingual regions, yet makes it impossible to impose the use of both French and Dutch in the bilingual region of Brussels.

A second noteworthy variation in the wording of the linguistic arrangements in some of the regulations or directives concerns the explicit permission to Member States to deviate from the language arrangements, in other words grant a sort of waiver for the use of one or more of its official languages. This is the case for dangerous preparations[50] and textiles[51]. In the same vein, as to medicines for human use, where the medicine is not intended to be delivered directly to the patient, or where there are severe problems in respect of the availability of the medicinal product, the competent authorities may grant an exemption to the obligation to use the official language(s).[52]

The explicit wording of an exemption possibility seems to imply that, *a contrario*, without such explicit discretionary power for the Member States, the use of all their official languages is obligatory. This is not just a theoretical question. A case in point is Ireland, where veterinary medicinal products were being marketed exclusively in English.[53] An Irish-speaking dog owner, originating from the Irish-speaking *Gaeltacht* brought a case before an Irish judge. He argued that the applicable EU directive (2001/82) imposed the use of the official languages of the country of marketing, and that accordingly, both English and Irish should be used. The Irish judge followed his reasoning, yet had questions concerning the legal remedies. The judge had doubts as to whether he was obliged to declare that, as Directive 2001/82 had been incorrectly transposed into Irish law, Ireland was under an obligation to amend its national legislation to impose labelling in both English and Irish. The judge wished to ascertain if he had the discretionary power *not* to grant the remedy sought. He took into consideration in that regard that an obligation of bilingual labelling could lead to suppliers and distributors of veterinary medicinal products to withdraw from the Irish market, which would have serious consequences for animal health and on economic and social circumstances. Furthermore, the benefit that the applicant could derive from the requested measures was very limited owing to the imminent applicability of a new Regulation (2019/6) replacing Directive 2001/82. The new linguistic provisions regarding veterinary medicinal products permit the Member States to determine other language arrangements.[54] The case was brought before the Court of Justice, which, in essence, confirmed the enforceability under national rules of the linguistic requirements under EU law enshrined in the

[49] Art. 63(1), Directive 2001/83/EC.

[50] "(…) *The label shall be written in the official language(s) of the Member State(s) where the substance or mixture is placed on the market, unless the Member State(s) concerned provide(s) otherwise*" (art. 17(2), Regulation (EC) No 1272/2008).

[51] Art. 16(3) Directive 1007/2011.

[52] Art. 63(3) Directive 2001/83.

[53] The Irish law, which had transposed the EU Directive 2001/82, stipulated that the information had to be given in English or Irish.

[54] Art. 7(1) Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC (OJ L 4/43 of 7.1.2019) reads as follows: "*The language or languages of the summary of the product characteristics and the information on the labelling and on the package leaflet shall, unless the Member State determines otherwise, be an official language or languages of the Member State where the veterinary medicinal product is made available on the market.*" Art. 160 of the Regulation stipulates that it applies as from 28 January 2022.

veterinary medicinal products directive (2001/82) which was applicable at the time.[55] Going against the opinion of the advocate general, the Court held that the incorrect transposition of the provisions of the directive (the linguistic requirements, as determined by the national Irish judge) should warrant the available national measures (i.e. the obligation for bilingual labelling). It confirmed there was no discretion in that regard by the national judge, regardless of the imminent applicability of new provisions.

3.2 Conditional Territoriality: EU Member States are entitled to impose Language Requirements

In some regulations and directives, albeit again in inconsistent wordings, the EU legislation does not impose the use of the language of the State of marketing, but grants permission to EU Member States to do so. This is the case for cosmetics,[56] detergents,[57] as well as in vitro diagnostic medical devices.[58]

Again, as was discussed *supra*, the use of the singular term "language" in the wording may give rise to problems. Indeed, the Cosmetics Regulation stipulates that the "*language of the information (...) shall be determined by the law of the Member States in which the product is made available to the end user.*" It should be noted that in the previously applicable provision (of the Cosmetics Directive), the plural "*national language(s)*" was used.[59] As was explained *supra*, the fact that only one official language may be required is problematic for Member States having more than one official language.

Arguably, such a literal interpretation would be contrary to the aim and scope of the legislation (the protection consumers and public health). In that regard, reference may be made to the Polish Cosmetics case which was brought before the Court of Justice.[60] The Polish owner of a beauty salon (A.M.) had bought cosmetic products (creams, masks and powders) from an American manufacturer. The packaging of the products contained information in English only, but a pictogram (representing a hand with an open book) referred to a general product catalogue, in which information was provided in Polish. According to A.M. (who wished to terminate the contract of sale), the labelling of the products did not comply with Polish legislation, which requires the compulsory information to be provided in Polish, on the packaging itself (on the basis of the EU Cosmetics Regulation). The Court ruled in favour of the protection of consumers and public health. It implicitly accepted the territoriality principle, holding that consumers must be informed about the use, function and ingredients of cosmetics in the language of the country where the product is marketed. The distributor cannot escape his obligation by citing translation costs or organisational problems (relabelling or even repackaging). A mere reference by means of a pictogram to a detailed product catalogue (replacing the indications on the label) is not sufficient in that regard.[61] Indeed, as the Court clearly states in its judgment, "(...) *The protection of human health cannot be comprehensively ensured unless consumers are fully informed about and understand, inter alia, the information about the function of the cosmetic product concerned and the*

[55] ECJ, judgment of 17 March 2021, C-64/20, An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne, ECLI:EU:C:2021:207.

[56] Art. 19(5), Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, OJ L 342/59 of 22.12.2009.

[57] Art. 11(5), Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents, OJ L 104/1 of 8.4.2004.

[58] Art. 4(4), Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L 331/1 of 7.12.1998.

[59] Art. 7(2), Directive 76/768/EEC of the Council of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ L 262/169 of 27.9.1976.

[60] ECJ, judgment of 17 December 2020, A.M, case C-667/19, ECLI:EU:C:2020:1039.

[61] The EU Cosmetics Regulation (Article 19(2)) does indeed allow information to be given "*on an enclosed or attached leaflet, label, tape, tag or card*" but only if it is impossible in practice to give the information on the label itself. However, the Court points out that this exception applies only to particulars concerning the special precautions for use of the product and its ingredients (article 19(1)(d) and (g)), and not to those concerning the product's function (Article 19(1)(f)). Information on the function must therefore always appear on the label itself.

particular precautions to be observed in use. (…)".[62] Following through on the Court's reasoning, it may be argued that information in one language only in a State having more than one official language may not be sufficient.

Yet another wording has been chosen as to in vitro diagnostic medical devices. EU Member States may require the use of their official language(s) when the product reaches the end-consumer, but it is explicitly provided that, in doing so, Member States must take into account the principle of proportionality and, in particular, whether the information can be supplied by harmonised symbols, recognised codes or other measures as well as the type of user anticipated for the device.[63] This precision seems to reinforce potential judicial scrutiny of language requirements.

As to detergents,[64] national law may determine the language arrangements regarding instructions for use and special precautions, yet the wording is again different. The relevant provision reads as follows: "*In cases where a Member State has a national requirement to label in the national language(s), the manufacturer and distributor shall comply with that requirement*". At least in this wording it is clear that the use of more than one language may be imposed and that the national legislator is under no obligation to act (which is however regrettable from the point of view of the consumer).

3.3 Mitigated Territoriality: EU Member States must allow for the Use of a Language Easily Understood or Pictograms

At the outset of the internal market, the concept of a language "*easily understood*" was quite common in legislation concerning the free movement of goods. Admittedly, from a perspective of market integration, using such a concept, which allows for greater language freedom, presents clear advantages compared to a territorial policy which systematically imposes, either directly or through national laws, the use of the official language(s) of each and every Member State. However, the concept is undefined and unclear: which language is "easily understood" by consumers and end-users of various products? Are English and other widely spoken languages such as French, German, or even Italian and Spanish easily understandable throughout the EU? Does this vary from one Member State to another? How should this be assessed and by whom? Unsurprisingly, the application of the concept led to legal uncertainty and controversy and the European Court of Justice was called upon to clarify the issue, with regard to foodstuffs.[65]

Several cases were brought before the Court by national judges through preliminary proceedings. The first case (Piageme/Peeters I),[66] in 1989, concerned the import of mineral water in Belgium. *Évian*, *Appolinaris*, *Vittel* and importers of mineral water complained that, whereas they respected local linguistic requirements, one of their competitors, a certain Peeters, did not. Peeters allegedly sold

[62] Pt. 47 of the judgment. The Court essentially confirmed its decision in the Schwarzkopf case (ECJ, judgment of 13 September 2001, Schwarzkopf, C-169/99, ECLI:EU:C:2001:4392001). That case concerned hair care products intended for hairdressers and other professionals, not for ordinary consumers (as in the Polish case). The mandatory information was not on the packaging (in German), but referred to a leaflet (specific to the product, by contrast to the general catalogue in the Polish case).

[63] Art. 4(4), Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L 331/1 of 7.12.1998.

[64] Art. 11(5), Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents, OJ L 104/1 of 8.4.2004.

[65] In its version of 1979, the Foodstuffs Directive on labelling of consumer products required that a language should be used "*which the consumer can easily understand, unless he or she is sufficiently informed otherwise about the characteristics of the product*." (art. 14, Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, as amended by Commission Directive 93/102/EC of 16 November 1993, OJ L 33/1 of 8.2.1979 (hereafter referred to as the "Foodstuffs Directive 1979").

[66] ECJ, judgment of 18 June 1991, Piageme/Peeters, C-369/89, 1991, ECLI:EU:C:1991:256

mineral waters in the Dutch-speaking Region of Belgium (Flanders),[67] in French or German only, and not in the language of the linguistic Region concerned, i.e. Dutch. In his defence, Peeters argued that both French and German were easily understandable languages in Flanders and that his labelling was in line with the European directive. In its judgment, the Court clearly referred to the market integration aim of the directive, which "*seeks in particular to eliminate the differences which exist between national provisions and which hinder the free movement of goods*."[68] The Court ruled that, from that harmonisation goal ensued that EU Member States could prohibit the sale of products whose labelling was not easily understood by the purchaser, yet not require the use of a particular language.

Needless to say that in Belgium, with its fragile and delicate linguistic balance, the judgment of the Court came as a bit of a shock. In 1994, a follow-up question was submitted to the Court (Piageme/Peeters II).[69] In this case, the domestic court made abundantly clear that the Belgian legislation did, in fact, not require the exclusive use of the local language and allowed for the possibility of using other languages as well. The Court of Justice, nevertheless, reiterated its stance and held that the obligation to use a specific language for the labelling of foodstuffs, even without precluding the use of other languages, still constituted a requirement more stringent than the obligation to use a language easily understood, as provided for in the Foodstuffs Directive (1979). The Court left it, however, for the national judge to determine in each individual case whether the compulsory particulars given in a language other than the language mainly used in the Member State or Region concerned could be easily understood by consumers in that State or Region. As to that, it indicated that various factors could be relevant, though not decisive in themselves, such as the possible similarity of words in different languages, the widespread knowledge amongst the population concerned of more than one language, or the existence of special circumstances such as a wide-ranging advertising campaign or widespread distribution of the product.

Both judgments were quite heavily criticised.[70] A few years later, in the *Goerres* case (2000), regarding products which were commercialised in Germany, in French, English and Italian, but not in German, though mandatory pursuant to national law, the Court did, by contrast with its judgments in Piageme I and II, clearly hold that a Member State may prescribe the use of a specific language for the labelling of foodstuffs, whereby it also permitted, as an alternative, the use of another language easily understood by purchasers.[71]

In the same year, the Court ruled in the same sense in the French case *Geffroy*.[72] In 1996, at an inspection carried out at the *Géant* Hypermarket in Clermont-Ferrand (France), French food inspection officials had found that the labelling on certain drinks, namely bottles of Coca Cola, Merry Down cider and Red Raw ginger ale, was not in French. Geffroy, who acted on behalf of the Hypermarket, was fined according to the provisions applicable at that time but invoked the incompatibility of French rules with EU law (the Foodstuffs Directive 1979 which accepted a language easily understood). The *Cour d'Appel* of Lyon referred questions to the European Court of Justice, which ruled that French linguistic requirements were too strict, as they not only made the use of French mandatory, but also precluded the use of another language easily understood by purchasers. In essence, the exclusiveness of the mandatory use of French posed a problem. The French authorities adapted the legislation in that sense, specifying explicitly that the use of other means to inform the consumer, such as drawings, symbols or pictograms

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[67] It is somewhat unfortunate, particularly in a language related case, that the incorrect term "*the Flemishspeaking region of that country*" or "*la région linguistique flamande*" is used in both ECJ Piageme I (pt. 3) as ECJ Piageme II (pt. 2). The Dutch version is correct ("*in het Nederlandse taalgebied*").

[68] ECJ Piageme I, pt. 15.

[69] ECJ, judgment of 12 October 1995, Piageme/Peeters, C-85/94, 1995, ECLI:EU:C:1995:312.

[70] Creech argues that in its vagueness the Court seems to rival the oracle of Delphi in the cases concerning language requirements and free movement in general (R. CREECH, *op. cit.*, 72). Schilling asserts the Court's findings were based on erroneous assessment (T. SCHILLING, *The labelling of foodstuffs in a language easily understood by purchasers*, *European food law review*, 1996/1, 59).

[71] ECJ judgment of 14 July 1998, Goerres, case C-385/96, ECLI:EU:C:1998:356, pt. 21.

[72] ECJ judgment of 12 September 2000, Yannick Geffroy, case C-366/98, ECLI:EU:C:2000:430.

were not precluded.[73] The Commission was nevertheless not satisfied with the amendments and started infringement proceedings against France, urging that Member State to formally adapt its legislation to the ruling of the Court.[74] In its opinion, the Commission used chicken wings as an example: the Foodstuffs Directive would allow a carton of chicken wings sold in a fast food restaurant in France to refer to the product concerned in a language other than French, such as the term chicken wings, provided the carton carried a photo clearly depicting its contents.[75] As a result, new legislation was adopted allowing for the additional use of other languages than French.[76]

In the light of the case law of the Court of Justice, the European Commission issued an interpretative communication regarding the concept of a language easily understood.[77] According to the Commission, the Member States are allowed "*considerable scope*" for interpreting that concept. Generally speaking, a language easily understood is the official language(s) of the country of marketing.[78] Nevertheless, a number of terms and expressions in a language foreign to the ultimate consumer will be familiar, such as "*made in* . . ." or terms and expressions which differ from the same words in the official language(s) of the Member State of marketing only in their spelling.[79]

In a reaction, the European Parliament has considered, in any case, that information should be available in the official language(s) of the country of marketing.[80]

In the current state of affairs, the concept is still used in several regulations and directives, albeit in a mitigated form and in very heterogenous wordings. The result is, yet again, a patchwork of regulatory linguistic arrangements.

A first option is the one that has been chosen for foodstuffs. The currently applicable Foodstuffs Regulation (1169/2011) still stipulates that mandatory food information must appear in a language easily understood by the consumers of the Member States where a food is marketed.[81] There is no

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[73] *Circulaire relative à l'application de l'article 2 de la loi du 4 août 1994 relative à l'emploi de la langue française*, JORF of 27.10.2001, 16969. This circular letter is interpretative only and does not change the text of the law. It was drafted immediately after the Geffroy judgment.

[74] See Commission Press Release IP/02/1155 of 25 July 2002, Free movement of goods: infringement proceedings against France, Belgium and Austria, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1155&format=HTML&aged=1&language=EN&guiLanguage=en (last visited: 11.9.2021). Already in 1996, the Commission had been examining the trade restrictions the Toubon law entailed (see reply of commissioner Monti to question E-2833/95 of 18 October 1995 by Gerhard Schmid, "Law on the Use of the French Language (Toubon Law) and Free Competition in the Internal Market", OJ C 56/45 of 26 February 1996), but it took action only after the ECJ judgment in 2000.

[75] Commission Press Release IP/02/1155.

[76] See art. 1, *Décret no 2002-1025, modifiant les dispositions du code de la consommation relatives à l'étiquetage des denrées alimentaires*, 1 August 2002, JORF of 2.8.2002, 13161.

[77] European Commission, Interpretative communication concerning the use of languages in the marketing of foodstuffs in the light of the judgment in the Peeters case, COM/93/532 final of 10.11.1993, pt. 20.

[78] Interpretative communication, pt. 23 and 30. See the confirmation of this Commission policy in 2016 (Commission Notice, *The 'Blue Guide' on the implementation of EU products rules 2016*, (2016/C 272/01), OJ C 272/1 of 26.7.2016 (hereafter "Blue Guide 2016").

[79] Interpretative communication, pt. 37 and 40. Likewise, there the Blue Guide 2016 (pt. 4.2.2) stipulates that there is "*no obligation to translate into all necessary languages the words 'manufactured by', 'imported by' or 'represented by'. These words are considered to be easily understandable in all official EU languages*".

[80] Resolution of 22 April 1994 on the interpretative Commission communication concerning the use of languages in the marketing of foodstuffs in the light of the judgment in the Peeters case, OJ C 128/469 of 9.5.1994, under H to I. In a study assessing whether the current labelling requirements on foodstuffs in the EU result in clearer information to help citizens to better understand the composition and health effects of food, language requirements are, unfortunately, not assessed (European Parliament, *Food Labelling for Consumers, EU Law, Regulation and Policy Options, Study requested by the PETI committee*, Directorate General for Internal Policies of the Union, Brussels, 2019, https://solidarites-sante.gouv.fr/IMG/pdf/food_labelling_for_consumer_eu.pdf (last visited: 11/9/2021)).

[81] Art. 15(1), Regulation (EU) No 1169/2011 of 25 October 2011 of the European Parliament and of the Council on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European

specification that Member States may determine which languages are easily understood. Alternatively, such mandatory information may also be conveyed by means of pictograms or symbols. It is up to the European Commission to establish the criteria on the basis of which such information may be expressed by pictograms or symbols, "*taking into account evidence of uniform consumer understanding*".[82] Yet, within their own territory, the EU Member States in which foodstuffs are marketed may stipulate that the particulars are to be given in one or more languages from among the official languages of the Union.[83] The complicated and seemingly contradictory wording of these provisions reflect the historic evolution of linguistic arrangements for labelling in the internal market. Essentially, the current rules imply that, when a Member State does not issue specific linguistic requirements, foodstuffs may be marketed on its territory in a language easily understood or pictograms. Yet also when specific language requirements are issued on a national level, it would seem that products with pictograms or symbols which have been endorsed by the European Commission have to be accepted.

A second option, which is in fact the most common one, is to mitigate the effects of the acceptance of "a language easily understood by the consumer", by allowing the Member States to determine which language is "understandable". Among the products to which this variation applies, though the wordings differ, may be cited: appliances burning gaseous fuels,[84] explosives for civil use,[85] toys,[86] lifts,[87] pyrotechnic articles,[88] as well as fertilising products[89]. As to toys, all Member States seem to have indicated that their own official language must be used (and only one for the Member States having more than one official language),[90] with the exception of Belgium, which accepts also toys labelled in English or German in the Dutch-speaking region in certain circumstances.[91]

Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304/18 of 22.11.2011 (hereafter referred to as "Foodstuffs Regulation 2011").

[82] Art. 9(3), Foodstuffs Regulation 2011. The Commission has to adopt delegated and implementing acts under scrutiny from the European Parliament and the Council.

[83] Art. 15(2), Foodstuffs Regulation 2011. This provision essentially repeats the relevant language provisions of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ L 109/29 of 6.5.2000 (hereafter referred to as "Foodstuffs Directive 2000"). The reference to "languages of the EU" excludes languages which have only a national or regional status (such as Luxembourgish or the Spanish co-official languages).

[84] Art. 7(7), 9(4) and 10(2) Regulation (EU) 2016/426 of the European Parliament and of the Council of 9 March 2016 on appliances burning gaseous fuels and repealing Directive 2009/142/EC, OJ L 81/99 of 31.3.2016.

[85] Art. 5(5)b, (6) and art. 7(3)(4) and art. 8(2), Directive 2014/28/EU of 26 February 2014 of the European Parliament and Council on the harmonisation of the laws of the Member States relating to the making available on the market and supervision of explosives for civil uses, OJ L 96/1 of 29.3.2014.

[86] Art. 4(7), 6(4), 7(2), 11(3), Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170/1 of 30.6.2009).

[87] Art. 7(7), 8(7), 10(4) and 11(2), Directive 2014/33/EU of the European Parliament and Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, OJ L 96/251 of 29.3.2014. As to the contact details of installers, a language easily understood by end-users is required (but Member States may apparently not determine 'understandability', see art. 7(6)).

[88] Art. 8(7), 10(1), 12(4), Directive 2013/29/EU of the European Parliament and of the Council of 12 June 2013 on the harmonisation of the laws of the Member States relating to the making available on the market of pyrotechnic articles (recast), OJ L 178/27 of 28.6.2013.

[89] Art. 6(7), 8(4) and 9(2), Regulation (EU) 2019/1009 of the European Parliament and of the Council of 5 June 2019 laying down rules on the making available on the market of EU fertilising products and amending Regulations (EC) No 1069/2009 and (EC) No 1107/2009 and repealing Regulation (EC) No 2003/2003, OJ L 170/1 of 25.6.2019.

[90] English in Malta and Ireland, and either French, German or Luxembourgish in Luxembourg (European Commission, *Overview of the national language requirements for warnings, information and documentation as foreseen by the Member States' transposition legislation of Directive 2009/48/EC on the safety of toys*, https://ec.europa.eu/growth/sectors/toys/safety/guidance_en (last visited: 11.9.2021), hereafter: "Overview language requirements toys").

[91] Art. IX.9 of the Belgian Code of Economic Law requires the use of a language understandable for the consumer, considering the linguistic region where the products are placed on the market. This somewhat more flexible rule

Still many other variations on the same theme may be discerned in the various regulations and directives.

As regards edible caseins and caseinates (milk products), for instance, EU Member States must "prohibit" marketing thereof on their territory if the particulars do not appear in a language easily understood by the purchaser and the information is not given by "other means".[92] This oddly formulated provision does, in actual fact, limit national jurisdiction, although its wording seems to imply the contrary. Presumably, the reference to "other means" implies the use of pictograms or symbols. Similar language arrangements are provided for the sale of extraction solvents.[93]

Still another wording is to be found in the Footwear Directive,[94] which leaves the manufacturers and their agents the choice between using pictograms or written indications about the material of the footwear. Regarding the linguistic option, the Member States of "*consumption*" may determine the language(s) to be used "*at leas*t", "*in accordance with the Treaty*". Member States "*shall ensure that consumers are adequately informed of the meaning of these pictograms, while ensuring that such provisions do not create trade barriers*." Furthermore, definitions and corresponding pictograms or written indications concerning the parts of the footwear are identified in Annex 1 of the directive. Particularly complex solutions have been found in several regulations regarding additives in foodstuffs. In that regard, neither the flavourings Regulation,[95] the Food Enzymes Regulation,[96] or the Food Additives Regulation[97] contain language arrangements protecting the final consumers. They do, however, refer in a general way to "*other labelling requirements*" in "*more detailed or more extensive laws, regulations or administrative provisions*".[98] The scope of this provision is not entirely clear. Does this mean that other linguistic requirements in, for instance, the Foodstuffs Regulation apply? Oddly enough, the same regulations do contain language arrangements when the products at issue are *not* intended for the final consumer. In that case, a language easily understandable to purchasers is required, yet, within its own territory, the Member State in which the product is marketed may, in accordance with the Treaty, stipulate that the information shall be given in one or more of the official languages of the "*Community*", to be determined by that Member State. It is unclear why these arrangements do not simply apply to the final consumers as well.

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would allow the use of English for some products, or the use of German - provided it is very close to Dutch - in the Dutch language region for some products. The possibility to make use of this rule depends very much on the actual products and the circumstances (Overview language requirements toys, *loc. cit.*).

[92] Art. 4(2), Directive (EU) 2015/2203 of the European Parliament and of the Council of 25 November 2015 on the approximation of the laws of the Member States relating to caseins and caseinates intended for human consumption and repealing Council Directive 83/417/EEC OJ L 314/1 of 1.12.2015.

[93] Art. 7(4), Directive 2009/32/EC of the European Parliament and of the Council of 23 April 2009 on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients, OJ L 141/3 of 6.6.2009.

[94] Art. 4(2), Directive 94/11/EC of the European Parliament and the Council of 23 March 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer, OJ L 100/37 of 19.4.1994.

[95] Art. 14(1)(2), Regulation (EC) No 1334/2008 of the European Parliament and of the Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods and amending Council Regulation (EEC) No 1601/91, Regulations (EC) No 2232/96 and (EC) No 110/2008 and Directive 2000/13/EC, OJ L 354/34 of 31.12.2008.

[96] Art. 10(1)(2), Regulation (EC) No 1332/2008 of the European Parliament and of the Council of 16 December 2008 on food enzymes and amending Council Directive 83/417/EEC, Council Regulation (EC) No 1493/1999, Directive 2000/13/EC, Council Directive 2001/112/EC and Regulation (EC) No 258/97, OJ L 354/7 of 31.12.2008.

[97] Art. 21(1)(2), Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives, OJ L 354/16 of 31.12.2008.

[98] See art. 13 Food Enzymes Regulation: "*Articles 10 to 12 shall be without prejudice to more detailed or more extensive laws, regulations or administrative provisions regarding weights and measures or applying to the presentation, classification, packaging and labelling of dangerous substances and preparations or applying to the transport of such substances and preparations.*" See in the same sense, art. 25, Food Additives Regulation and art. 18, Food Flavourings Regulation.

Finally, hazardous substances in electrical and electronic equipment may be marketed in a language easily understood by consumers and other end-users, without the precision that the Member states may determine it.[99]

3.4 Language Freedom

In 9 out of the 27 regulations and directives regarding free movement of goods which are being discussed in this article,[100] it is explicitly stipulated that Member States must make allowance for labelling particulars in several languages. This is actually a recognition of the principle of language freedom, which is, incidentally, superfluous as it also applies without such specific confirmation.

An isolated example of even greater linguistic freedom (and hence limits to the territoriality principle and the jurisdiction of Member States) is to be found in the Textiles Regulation: individual textile items may be marketed in any of the EU languages.[101] Likewise, in the case of certain orphan medicinal products, particulars may, on reasoned request, appear in only one of the EU official languages.[102] It is not clear who has to make the request (the producer?) nor to whom (the national authorities?). An equally obscure wording has been chosen for in vitro diagnostic medical devices: "*Provided that safe and correct use of the device is ensured, Member States may authorise the information referred to in the first subparagraph to be in one or more other official Community language(s)*."[103] Does this mean that no other languages may be used unless "*safe and correct use is ensured*"? Or, on the contrary, that products labelled in other EU languages may be sold when the "*safe and correct use is ensured*"?

For aromatised wines, particulars, where expressed in words, must appear "*in at least one of the official languages of the Union.*".[104] Accordingly, it would seem that Member States may not impose the use of their own language. At any rate, certain sales denominations (set out in Annex II of the Regulation and including *Vermouth*, *Sangria*, *Glühwein*, …) are not to be translated on the label.

3.5 Shifts in Linguistic Arrangements

Not only are the language arrangements and their wordings inconsistent, they are also quite frequently amended, without apparent reasons.

As to a shift towards more stringent territoriality, laid down in the EU regulation or directive (i.e. the mandatory use of the language(s) of the Member States of marketing), animal feed, and dangerous preparations may be mentioned. Previously, it was left to the Member States to determine linguistic requirements for these products.[105] The linguistic arrangements on the labelling of cosmetics are another

[99] Art. 10(a), Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ L 174/88 of 1.7.2011.

[100] See Annex 1, *infra*.

[101] Items such as bobbins, reels, skeins, balls or any other small quantity of sewing, mending and embroidery yarns are meant (art. 16(3), Regulation (EU) No 1007/2011).

[102] Art. 63(1), Medicines for Human Use, Directive 2001/83/EC.

[103] Art. 4(4), Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L 331/1 of 7.12.1998.

[104] Art. 8(1), Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, OJ L 84/14 of 20.3.2014.

[105] See for the previous arrangements: Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs, *OJ L* 86/30 of 6.4.1979, as amended by Council Directive 96/24/EC of 29 April 1996 amending Directive 79/373/EEC on the marketing of compound feedingstuffs, OJ L 125/33 of 23.5.1996 and Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, OJ L 200/1 of 30.7.1999.

case in point: over the years several changes have been made resulting first in a more lenient system, but eventually in more stringent rules than was initially the case.[106]

By contrast, as to veterinary medicinal products, a shift in the opposite direction may be noticed: as of 2022, it is up to the Member States to determine language arrangements, whereas previously EU legislation itself imposed the use of the official languages of the country of marketing.[107] Likewise, more lenient language rules are stipulated for appliances burning gaseous fuels than was the case previously. It is currently sufficient for labelling to be done in a language which can be easily understood, as determined by the Member States, whereas before 2016, instructions and warning notices were required to be in the official language(s) of the EU Member States of destination.[108] More leniency and language freedom may also be noticed as regards aromatised wines. Whereas until 2014 the product particulars had to be given in one or more EU official languages in such a way that the final consumer could readily understand each item (unless purchasers were provided with the information by other means),[109] in the current state of affairs, Member States may no longer impose the use of their own language(s).

4 Towards More Coherence?

Unfortunately, the remarks of advocate general Cosmas, two decades ago, regarding the lack of any systematic and coherent view as to the linguistic labelling arrangements in EU law, still hold true to some extent.[110]

As the case of the Irish dog owner shows, the lack of coherence may have serious consequences, not least for the supply of products. On a positive note, there is undoubtedly greater awareness of linguistic issues and the need to protect consumers, which seems to be reflected in the new legislative approach, which permits, or even imposes, an obligation on Member States to require the use of the language of the place of marketing on the product labels.

Yet, in the wide array of regulations and directives quite diverse language arrangements are still imposed and it must be conceded that the EU legislator has demonstrated a remarkable legal creativity in rules and wordings. The result is a patchwork of provisions without clear criteria on the basis of which more or less stringent language arrangements have been laid down. The inconsistencies concern the following elements:

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[106] See Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ L 262/169 of 27.9.1976. Pursuant to art. 7 thereof, in its original version, Member States could require that certain particulars be expressed at least in their own national or official language or languages. Art. 7 of Directive 76/768 was, however, amended by Council Directive 93/35/EEC of 14 June 1993 amending for the sixth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, OJ L 151/32 of 23.6.1993. For certain particulars, EU Member States could require the use of at least their own national or official language or languages, for other particulars, they could only require the use of a language easily understood by the consumer (art 7(2), Directive 76/768). As of July 2013, a new regulation has entered into force, which provides that the language in which the particulars must be given, is determined by the law of the Member States in which the product is made available to the end-user (art. 19(5), Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, OJ L 342/59 of 22.12.2009).

[107] Art. 7, Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC, OJ L 4/43 of 7.1.2019.

[108] Art. 7(7), 9(4) and 10(2), Regulation (EU) 2016/426 of the European Parliament and of the Council of 9 March 2016 on appliances burning gaseous fuels and repealing Directive 2009/142/EC, OJ L 81/99 of 31.3.2016. In the previous version, of 2009, instructions and warning notices had to be in the official language(s) of the EU Member States of destination (Annex 1, pt. 1(2), Directive 2009/142/EC of the European Parliament and of the Council of 30 November 2009 relating to appliances burning gaseous fuels, OJ L 330/10 of 16.12.2009).

[109] Art. 8(6), Council Regulation (EEC) No 1601/91of 10 June 1991 laying down general rules on the definition, description and presentation of aromatized wines, aromatized wine-based drinks and aromatized wine-product cocktails, OJ L 149/1 of 14.6.1991.

[110] Opinion of Advocate-General COSMAS of 19 February 1998 in the Goerres case, loc. cit..

First, as to national or EU jurisdiction, it remains unclear why, for some products, the EU legislator imposes the use of the official language(s) of the State of marketing in the EU legislation itself, while for other products, that decision is left to the Member States. The solutions seem interchangeable and, furthermore, shifts may be noticed from one to the other system without apparent reasons (animal feed, dangerous products, veterinary medicinal products, …).

The criterion does not seem to be the hazardous nature of the product either. It is, for instance remarkable that the EU Cosmetics Regulation does not simply impose that certain statements on the labels of cosmetic products must be in the language(s) of the country where they are marketed, but leaves that to the EU Member States.[111] After all, as the Court has rightly confirmed in a case related to that regulation, consumer protection and public health are at stake. By contrast, such a solution (compulsory use of the language(s) of the Member State) has been adopted in the case of, for example, medicines or tobacco products.

In the same vein, it is unclear why for some products reference is made to a "language easily understood" or pictograms. Why do, for instance, such less stringent linguistic arrangements apply to explosives for civil use, but not to textiles? Are linguistic issues more frequent with animal feed than foodstuffs for humans, warranting thus more stringent linguistic requirements for animal feed? Are veterinary medicinal products more dangerous than appliances burning gaseous fuels?

It is recommended that the EU legislator in future lays down more uniform language arrangements for the labelling of products in the internal market, particularly in relation to consumer and public health protection. According to clear criteria such as the hazards and risks linked to the incorrect use of the product, due to linguistic misunderstandings, the most stringent rules should apply, namely the mandatory use of the languages of the Member State of marketing.

Alternatively, when Member States are granted jurisdiction to stipulate regulatory linguistic requirements, it could be made clear that they are in actual fact obliged to act. Indeed, as the Court clearly states in its judgment related to the Cosmetics Regulation, the "*protection of human health cannot be comprehensively ensured unless consumers are fully informed about and understand, inter alia, the information about the function of the cosmetic product concerned and the particular precautions to be observed in use.* (…)".[112] Arguably, the Court seems to imply that, in the absence of EU provisions, Member States should stipulate language arrangements.[113]

Incidentally, the general product safety directive[114] provides that, for any product that could pose risks in certain conditions, EU Member States may "*require that it be marked with suitable, clearly worded and easily comprehensible warnings, in the official languages of the Member State in which the product is marketed, on the risks it may present*". This provision seems to give a general and additional legal basis for Member States to impose language arrangements. It also raises the question whether such a general provision would not be preferable to divergent and often unclear linguistic regulatory provisions in the various regulations and directives.

Second, the European Commission should provide an easily accessible and comprehensive overview, for each and every product, of the regulatory linguistic requirements laid down on the basis of both EU and national legislation in the various Member States.[115]

Third, the variety in solutions and wordings may lead to legal uncertainty. In this regard, it is sometimes unclear whether more than one language may be made mandatory on product labelling, in

[111] See *supra* under 3.2.

[112] Pt. 47 of the judgment, *loc. cit*.

[113] The use of the term "*shall*" in the relevant provision of the Cosmetics Regulation seems to impose an obligation. By contrast, the French version : « *La langue dans laquelle sont rédigées les informations (…) est déterminée* » seems to be less stringent. Likewise, the Explanatory Guidance Document on the Toys directive explains that "*Member States will determine in their national law the language(s) which they will consider as easily understood by consumer*s" (Overview language requirements toys, *loc. cit*.). Arguably, the wording seems to imply an obligation as well.

[114] Art. 8(1)(i), Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11/4 of 15.1.2002.

[115] The Overview language requirements toys provided by the Commission is very useful in this respect and may serve as an example.

particular when the term "language" is used in the singular (e.g. animal feed[116] and cosmetics[117]). This may lead to problems in Member States having more than one official language. This wording inconsistency is not unproblematic. It implies that EU Member States having more than one official language which may be used throughout their territory, such as Ireland, Malta or Luxembourg, may require the use of only one of their official languages. Likewise, this also raises problems for Belgium, which is organised on a territorial (linguistic) basis (admittedly, the reference to the language of a "region" in the Animal Feed Regulation seems to allow adapted language regulation for the monolingual regions in Belgium, yet makes it impossible to impose the use of both French and Dutch in the bilingual region of Brussels).

Interestingly, in some regulations and directives an "opt-out" has been granted to the Member States using the phrase "*unless otherwise provided*". This may be useful in order to avoid too rigid linguistic arrangements, such as for instance in the Irish dog case, where Ireland actually allowed market veterinary medicinal products to be marketed in English only, whereas EU legislation made the use of the national languages (English and Irish) compulsory.[118]

Fourth, in some regulations and directives the choice of languages is limited to those having EU official status (e.g. foodstuffs), in other instances there is no such limitation.[119] As this issue is in actual fact within the remit of the Member States, the limitation seems pointless. The EU should leave this issue to be dealt with by the Member States themselves, yet not make it impossible *per se* to make the use of a regional language compulsory. A case in point is the Consumer Code of Catalonia which makes labelling of goods in Catalan compulsory in Catalonia.[120] The Catalan non-governmental organisation *Plataforma per la Llengua* contacted the company *Lego* to ask them to comply to that obligation. Lego declined and referred in its answer to the Toys Directive. In reply to a parliamentary question about this issue,[121] commissioner Breton replied that in Spain, the Toys Directive was transposed by a Spanish law, which provides only for the use of at least Spanish ("*al menos en castellano*")[122] for the instructions and safety information on toys. Accordingly, toy manufacturers and distributors in Spain are required by law to label their products at least in Spanish, although this does not prevent them from using other languages, such as Catalan. The Toys Directive does not limit the choice of languages to those which have EU status, so it would seem that Spain could require the use of Catalan as well, for the marketing of toys in Catalonia. At any rate, it is a decision that should be dealt with at a national level, without EU legislation making it impossible *per se*.

5. Some Concluding Remarks

A multitude of laws in a country is like a great number of physicians, a sign of weakness and malady, Voltaire is believed to have said. Regulatory linguistic arrangements for product labelling have developed over the years and show elements reflecting the aim of market integration (and linguistic freedom) as well as (and increasingly so) territoriality (the mandatory use of the languages of the country of marketing for the sake of consumer protection). A comprehensive overhaul in order to standardize and simplify the existing patchwork of different solutions and wordings would increase both consumer protection and legal certainty for producers, importers and distributors.

The importance of language rights (and their divisive potential) may not be underestimated. EU policy in this field should therefore strike a delicate balance between the preservation of market integration and economic efficiency on the one hand, while protecting European consumers, on the other, yet at the same time leaving sufficient leeway for national and regional language arrangements.

[116] See under 3.1.
[117] See under 3.2.
[118] Malta and Luxembourg may be in the same case.
[119] See under 3.3.
[120] See under 2.
[121] European Parliament, question for written answer E-000723/2021 to the Commission, Jordi Solé (Verts/ALE), Diana Riba i Giner (Verts/ALE), 31 March 2021 and answer given by Mr Breton on behalf of the European Commission, 31.3.2021.
[122] Art. 5(7), 7(4), 8(2), 12(3) and 14(2) of the *Real Decreto* 1205/2011.

In that regard, the conceptualization along constitutional lines (in terms of freedom of language and territoriality, although this is usually not acknowledged in such terms in EU law), may lead to more coherence in the sharing of powers between the EU and its Member States in the linguistic field. After all, the issues the EU is dealing with are not so different from those in federal States, such as Belgium. In essence, EU law should establish as a general principle that labelling of products must be at least in the local language(s) as determined by the Member States.

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ANNEX: EU REGULATIONS AND DIRECTIVES (regulatory linguistic provisions)

Product	**Wording of regulatory linguistic provisions regarding labelling particulars**
Stringent Territoriality	
Medicines for human use[123]	Art. 63(1) The particulars for labelling listed in Articles 54, 59 and 62 shall appear in an official language or official languages of the Member State where the medicinal product is placed on the market, as specified, for the purposes of this Directive, by that Member State. The first subparagraph shall not prevent these particulars from being indicated in several languages, provided that the same particulars appear in all the languages used. In the case of certain orphan medicinal products, the particulars listed in Article 54 may, on reasoned request, appear in only one of the official languages of the Community. Art. 63(2) The package leaflet must be written and designed in such a way as to be clear and understandable, enabling users to act appropriately, when necessary with the help of health professionals. The package leaflet must be clearly legible in an official language or official languages of the Member State where the medicinal product is placed on the market, as specified, for the purposes of this Directive, by that Member State. The first subparagraph shall not prevent the package leaflet from being printed in several languages, provided that the same information is given in all the languages used. Art. 63(3) Where the medicinal product is not intended to be delivered directly to the patient, or where there are severe problems in respect of the availability of the medicinal product, the competent authorities may, subject to measures they consider necessary to safeguard human health, grant an exemption to the obligation that certain particulars should appear on the labelling and in the package leaflet. They may also grant a full or partial exemption to the obligation that the labelling and the package leaflet must be in an official language or official languages of the Member State where the medicinal product is placed on the market, as specified, for the purposes of this Directive, by that Member State.
Veterinary medicinal products[124]	Art. 59(3) The particulars mentioned in the third and sixth indents of paragraph 1 shall appear on the outer package and on the container of the medicinal products in the language or languages of the country in which they are placed on the market. Art. 61(1) (…) The insert shall be in the official language or languages of the Member State in which the medicinal product is marketed. Art. 7 (1) The language or languages of the summary of the product characteristics and the information on the labelling and on the package leaflet shall, unless the Member State determines otherwise, be an official language or languages of the

[123] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311/67 of 28.11.2001.

[124] Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, OJ L 311/1 of 28.11.2001.

New rules as of 28.1.2022[125]	Member State where the veterinary medicinal product is made available on the market. Art. 7 (2) Veterinary medicinal products may be labelled in several languages.
Animal feed[126]	Art. 14(1) The mandatory labelling particulars shall be given in their entirety in a prominent place on the packaging, the container, on a label attached thereto or on the accompanying document provided for in Article 11(2), in a conspicuous, clearly legible and indelible manner, in the official language or at least one of the official languages of the Member State or region in which it is placed on the market.
Dangerous preparations[127]	Art. 17(2) The label shall be written in the official language(s) of the Member State(s) where the substance or mixture is placed on the market, unless the Member State(s) concerned provide(s) otherwise. Suppliers may use more languages on their labels than those required by the Member States, provided that the same details appear in all languages used.
Tobacco products[128]	Art. 8(1) Each unit packet of a tobacco product and any outside packaging shall carry the health warnings provided for in this Chapter in the official language or languages of the Member State where the product is placed on the market.
Textile products[129]	Art. 16(3) The labelling or marking shall be provided in the official language or languages of the Member State on the territory of which the textile products are made available to the consumer, unless the Member State concerned provides otherwise. In the case of bobbins, reels, skeins, balls or other small quantities of sewing, mending and embroidery yarns, the first subparagraph shall apply to the inclusive labelling referred to in Article 17(3). Whenever these products are individually sold, they may be labelled or marked in any of the official languages of the institutions of the Union, provided they are also inclusively labelled.
Single-use plastic products[130]	Art. 3 The information text of the marking shall be written in the official language or languages of the Member State(s) where the single-use plastic product is placed on the market.
Conditional Territoriality	

[125] Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC, OJ L 4/43 of 7.1.2019.

[126] Regulation (EC) No 767/2009 of the European Parliament and the Council of 13 July 2009 on the placing on the market and use of feed, amending European Parliament and Council Regulation (EC) No 1831/2003 and repealing Council Directive 79/373/EEC, Commission Directive 80/511/EEC, Council Directives 82/471/EEC, 83/228/EEC, 93/74/EEC, 93/113/EC and 96/25/EC and Commission Decision 2004/217/EC, OJ L 229/1 of 1.9.2009.

[127] Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, OJ L 353/1 of 31.12.2008.

[128] Directive 2014/40/EU of the European Parliament and the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127/1 of 29.4.2014.

[129] Regulation (EU) No 1007/2011 of the European Parliament and Council of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council, OJ L 272/1 of 18.10.2011.

[130] Commission Implementing Regulation (EU) 2020/2151 of 17 December 2020 laying down rules on harmonised marking specifications on single-use plastic products listed in Part D of the Annex to Directive (EU) 2019/904 of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment, OJ L 428/57 of 18.12.2020.

Cosmetics[131]	Art. 19(5) The language of the information mentioned in points (b), (c), (d) and (f) of paragraph 1 and in paragraphs (2), (3) and (4) shall be determined by the law of the Member States in which the product is made available to the end user.
Detergents[132]	Art. 11(5) In cases where a Member State has a national requirement to label in the national language(s), the manufacturer and distributor shall comply with that requirement for the information specified in paragraphs 3 and 4.
In vitro diagnostic medical devices[133]	Art. 4(4) Member States may require the information to be supplied pursuant to Annex I, part B, section 8 to be in their official language(s) when a device reaches the final user. Provided that safe and correct use of the device is ensured, Member States may authorise the information referred to in the first subparagraph to be in one or more other official Community language(s). In the application of this provision, Member States shall take into account the principle of proportionality and, in particular: (a) whether the information can be supplied by harmonised symbols or recognised codes or other measures; (b) the type of user anticipated for the device.
Mitigated territoriality	
Foodstuffs[134]	Art. 9(3) Where the Commission adopts delegated and implementing acts referred to in this Article, the particulars referred to in paragraph 1 may alternatively be expressed by means of pictograms or symbols instead of words or numbers. (…) In order to ensure that consumers benefit from other means of expression of mandatory food information than words and numbers, and provided that the same level of information as with words and numbers is ensured, the Commission, taking into account evidence of uniform consumer understanding, may establish, by means of delegated acts in accordance with Article 51, the criteria subject to which one or more particulars referred to in paragraph 1 may be expressed by pictograms or symbols instead of words or numbers. Language requirements Art. 15(1) Without prejudice to Article 9(3), mandatory food information shall appear in a language easily understood by the consumers of the Member States where a food is marketed. Art. 15(2) Within their own territory, the Member States in which a food is marketed may stipulate that the particulars shall be given in one or more languages from among the official languages of the Union. Art. 15(3) Paragraphs 1 and 2 shall not preclude the particulars from being indicated in several languages.
Appliances burning	Art. 7(7) Manufacturers shall ensure that the appliance is accompanied by instructions and safety information in accordance with point 1.5 of Annex I, in a language which can be easily understood by consumers and other end-users, as determined by the Member State concerned.

[131] Regulation 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, OJ L 342/59 of 22.12.2009.
[132] Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents, OJ L 104/1 of 8.4.2004.
[133] Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L 331/1 of 7.12.1998.
[134] Regulation (EU) No 1169/2011 of 25 October 2011 of the European Parliament and of the Council on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304/18 of 22.11.2011.

gaseous fuels[135]	Art. 9(4) Importers shall ensure that the appliance is accompanied by instructions and safety information in accordance with point 1.5 of Annex I, in a language which can be easily understood by consumers and other end-users, as determined by the Member State concerned. Art. 10(2) Before making an appliance available on the market, distributors shall verify that the appliance bears the CE marking and that it is accompanied by instructions and safety information in accordance with point 1.5 of Annex I, in a language which can be easily understood by consumers and other end-users, as determined by the Member State in which the appliance is to be made available on the market, and that the manufacturer and the importer have complied with the requirements set out in Article 7(5) and (6) and Article 9(3) respectively.
Explosives for civil use[136]	Art. 5(6) Manufacturers shall ensure that explosives which they have placed on the market are accompanied by instructions and safety information in a language which can be easily understood by end-users, as determined by the Member State concerned. Art 7(4) Importers shall ensure that the explosive is accompanied by instructions and safety information in a language which can be easily understood by end-users, as determined by the Member State concerned. Art. 8(2) Before making an explosive available on the market distributors shall verify that the explosive bears the CE marking, that it is accompanied by the required documents and by instructions and safety information in a language which can be easily understood by end-users in the Member State in which the explosive is to be made available on the market, and that the manufacturer and the importer have complied with the requirements set out in Article 5(5) and Article 7(3) respectively.
Toys [137]	Art. 4(7) Manufacturers shall ensure that the toy is accompanied by instructions and safety information in a language or languages easily understood by consumers, as determined by the Member State concerned. Art. 6(4) Importers shall ensure that the toy is accompanied by instructions and safety information in a language or languages easily understood by consumers, as determined by the Member State concerned. Art. 7(2) Before making a toy available on the market, distributors shall verify that the toy bears the required conformity marking, that it is accompanied by the required documents and by instructions and safety information in a language or languages easily understood by consumers in the Member State in which the toy is to be made available on the market, and that the manufacturer and the importer have complied with the requirements set out in Article 4(5) and (6) and Article 6(3). Art. 11(3) In accordance with Article 4(7), a Member State may, within its territory, stipulate that those warnings and the safety instructions shall be written in a language or languages easily understood by consumers, as determined by that Member State.
Lifts[138]	Art. 7(7) Installers shall ensure that the lift is accompanied by the instructions referred to in point 6.2 of Annex I, in a language which can be easily understood by end-users, as determined by the Member State in which the lift is placed on the market.

[135] Regulation (EU) 2016/426 of the European Parliament and of the Council of 9 March 2016 on appliances burning gaseous fuels and repealing Directive 2009/142/EC, OJ L 81/99 of 31.3.2016.
[136] Directive 2014/28/EU of the European Parliament and Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market and supervision of explosives for civil uses (recast), OJ L 96/1 of 29.3.2014.
[137] Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170/1 of 30.6.2009.
[138] Directive 2014/33/EU of the European Parliament and Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, OJ L 96/251 of 29.3.2014.

	Art. 8(7) Manufacturers shall ensure that the safety component for lifts is accompanied by the instructions referred to in point 6.1 of Annex I, in a language which can be easily understood by end-users, as determined by the Member State concerned. Art. 10(4.) Importers shall ensure that the safety component for lifts is accompanied by the instructions referred to in point 6.1 of Annex I in a language which can be easily understood by consumers and other end-users, as determined by the Member State concerned. Art. 11(2) Before making a safety component for lifts available on the market, distributors shall verify that the safety component for lifts bears the CE marking, that it is accompanied by the EU declaration of conformity, by the required documents and by the instructions referred to in point 6.1 of Annex I, in a language which can be easily understood by end-users, as determined by the Member State concerned and that the manufacturer and the importer have complied with the requirements set out in Article 8(5) and (6) and Article 10(3), respectively.
Pyrotechnic articles[139]	Art. 8(7) Manufacturers shall ensure that the pyrotechnic article is accompanied by instructions and safety information in a language which can be easily understood by consumers and other end-users, as determined by the Member State concerned. Art. 10(1) Manufacturers shall ensure that pyrotechnic articles other than pyrotechnic articles for vehicles are labelled visibly, legibly and indelibly in the official language(s) of the Member State in which the pyrotechnic article is made available to the consumer. Art. 12(3) Importers shall indicate on the pyrotechnic article their name, registered trade name or registered trade mark and the postal address at which they can be contacted or, where that is not possible, on its packaging or in a document accompanying the pyrotechnic article. The contact details shall be in a language easily understood by end-users and market surveillance authorities. Art. 12(4) Importers shall ensure that the pyrotechnic article is accompanied by instructions and safety information in a language which can be easily understood by consumers and other end-users, as determined by the Member State concerned. Art. 13(2) Before making a pyrotechnic article available on the market distributors shall verify that the pyrotechnic article bears the CE marking, that it is accompanied by the required documents, and by instructions and safety information in a language which can be easily understood by consumers and other end-users in the Member State in which the pyrotechnic article is to be made available on the market, and that the manufacturer and the importer have complied with the requirements set out in Article 8(5) and (6) and Article 12(3) respectively.
Fertilising products[140]	Art. 6(7) Manufacturers shall ensure that EU fertilising products are accompanied by the information required (…). The information shall be in a language which can be easily understood by end-users, as determined by the Member State concerned, and shall be clear, understandable and intelligible. Art. 8(4) Importers shall ensure that EU fertilising products are accompanied by the information required (…). The information shall be in a language which can be easily understood by end-users, as determined by the Member State concerned. Art. 9(2) Before making an EU fertilising product available on the market distributors shall verify that it is accompanied by the required documents (…), in a language which can be easily understood by end-users in the Member State in which the EU fertilising product is to be made available on the market (…).

[139] Directive 2013/29/EU of the European Parliament and of the Council of 12 June 2013 on the harmonisation of the laws of the Member States relating to the making available on the market of pyrotechnic articles (recast), OJ L 178/27 of 28.6.2013.
[140] Regulation (EU) 2019/1009 of the European Parliament and of the Council of 5 June 2019 laying down rules on the making available on the market of EU fertilising products and amending Regulations (EC) No 1069/2009 and (EC) No 1107/2009 and repealing Regulation (EC) No 2003/2003, OJ L 170/1 of 25.6.2019.

Edible caseins and caseinates (milk products)[141]	Art. 4(2) A Member State shall prohibit the marketing of milk products defined in points (a), (b) and (c) of Article 2 in its territory if the particulars referred to in the first subparagraph of paragraph 1 of this Article are not marked in a language easily understood by the purchasers of that Member State where those products are marketed, unless such information is provided by the food business operator by other means. Those particulars may be marked in several languages.
Extraction solvents[142]	Art. 7(4) (…) Each Member State shall, however, ensure that the sale of extraction solvents within its territory is prohibited if the particulars provided for in this Article do not appear in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed. This provision shall not prevent such particulars from being indicated in various languages.
Footwear[143]	Art. 4(2) The information shall be conveyed on the footwear. The manufacturer or his authorized agent established in the Community may choose either pictograms or written indications in at least the language or languages which may be determined by the Member State of consumption in accordance with the Treaty, as defined and illustrated in Annex I. Member States, in their national provisions shall ensure that consumers are adequately informed of the meaning of these pictograms, while ensuring that such provisions do not create trade barriers.
Flavourings[144]	Labelling of flavourings not intended for sale to the final consumer Art. 14(1) Flavourings not intended for sale to the final consumer may only be marketed with the labelling provided for in Articles 15 and 16, which must be easily visible, clearly legible and indelible. The information provided for in Article 15 shall be in a language easily understandable to purchasers. Art. 14(2) Within its own territory, the Member State in which the product is marketed may, in accordance with the Treaty, stipulate that the information provided for in Article 15 shall be given in one or more of the official languages of the Community, to be determined by that Member State. This shall not preclude such information from being indicated in several languages.
Food Enzymes[145]	Labelling of food enzymes and food enzyme preparations not intended for sale to the final consumer Art. 10(1) Food enzymes and food enzyme preparations not intended for sale to the final consumer, whether sold singly or mixed with each other and/or other food ingredients, as defined in Article 6(4) of Directive 2000/13/EC, may only be marketed with the labelling provided for in Article 11 of this Regulation, which must be easily visible, clearly legible and indelible. The information provided for in Article 11 shall be in a language easily understandable to purchasers. Art. 10(2) Within its own territory, the Member State in which the product is marketed may, in accordance with the Treaty, stipulate that the information

[141] Directive (EU) 2015/2203 of the European Parliament and of the Council of 25 November 2015 on the approximation of the laws of the Member States relating to caseins and caseinates intended for human consumption and repealing Council Directive 83/417/EEC OJ L 314/1 of 1.12.2015.

[142] Directive 2009/32/EC of the European Parliament and of the Council of 23 April 2009 on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients, OJ L 141/3 of 6.6.2009.

[143] Directive 94/11/EC of the European Parliament and the Council of 23 March 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer, OJ L 100/37 of 19.4.1994.

[144] Regulation (EC) No 1334/2008 of the European Parliament and of the Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods and amending Council Regulation (EEC) No 1601/91, Regulations (EC) No 2232/96 and (EC) No 110/2008 and Directive 2000/13/EC, OJ L 354/34 of 31.12.2008.

[145] Regulation (EC) No 1332/2008 of the European Parliament and of the Council of 16 December 2008 on food enzymes and amending Council Directive 83/417/EEC, Council Regulation (EC) No 1493/1999, Directive 2000/13/EC, Council Directive 2001/112/EC and Regulation (EC) No 258/97, OJ L 354/7 of 31.12.2008.

	provided for in Article 11 shall be given in one or more of the official languages of the Community, to be determined by that Member State. This shall not preclude such information from being indicated in several languages.
Food Additives[146]	Labelling of food additives not intended for sale to the final consumer Art. 21(1) Food additives not intended for sale to the final consumer, whether sold singly or mixed with each other and/or with food ingredients, as defined in Article 6(4) of Directive 2000/13/EC, may only be marketed with the labelling provided for in Article 22 of this Regulation, which must be easily visible, clearly legible and indelible. The information shall be in a language easily understandable to purchasers. Art. 21(2) Within its own territory, the Member State in which the product is marketed may, in accordance with the Treaty, stipulate that the information provided for in Article 22 shall be given in one or more of the official languages of the Community, to be determined by that Member State. This shall not preclude such information from being indicated in several languages.
Hazardous substances in electrical and electronic equipment[147]	Art. 10 Member States shall ensure that: (a) when making an EEE available on the market, distributors act with due care in relation to the requirements applicable in particular by verifying that the EEE bears the CE marking, that it is accompanied by the required documents in a language which can be easily understood by consumers and other end-users in the Member State in which the EEE is to be made available on the market (…)
Linguistic Freedom	
Aromatised wine[148]	Use of language in the presentation and labelling of aromatised wine products Art. 8(1) The sales denominations set out in italics in Annex II shall not be translated on the label or in the presentation of aromatised wine products. Additional particulars provided for in this Regulation shall, where expressed in words, appear in at least one of the official languages of the Union. Art. 8(2) The name of the geographical indication protected under this Regulation shall appear on the label in the language or languages in which it is registered, even where the geographical indication replaces the sales denomination in accordance with Article 5(4). Where the name of a geographical indication protected under this Regulation is written in a non-Latin alphabet, it may also appear in one or more of the official languages of the Union.
General product safety[149]	Art. 8(1) For the purposes of this Directive, and in particular of Article 6 thereof, the competent authorities of the Member States shall be entitled to take, inter alia, the measures in (a) and in (b) to (f) below, where appropriate: (…) (b) for any product that could pose risks in certain conditions: (i) to require that it be marked with suitable, clearly worded and easily comprehensible warnings, in the official languages of the Member State in which the product is marketed, on the risks it may present;(..)

[146] Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives, OJ L 354/16 of 31.12.2008.
[147] Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ L 174/88 of 1.7.2011.
[148] Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, OJ L 84/14 of 20.3.2014.
[149] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11/4 of 15.1.2002.

Comparative Law and Language

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.

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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].

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[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

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C.J.JAMES, *Wie sagt man das*?, *Die Unterrichtspraxis / Teaching German* , Vol. 22, 1, 1989, 83-85, available on *JSTOR*, 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].

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[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

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[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

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[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.

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[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 a*s* 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

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[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.

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[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.").

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Comparative Law and Language

The legal recognition of sign languages in an intersectional perspective

Lucia Busatta*

Abstract: Sign language is a key instrument of communication for the deaf community. For this reason, it is important that sign language finds recognition at a legislative level and is promoted as an inclusive means let people to use it, to communicate and to receive information.

This article presents the increasing importance of sign languages with a special focus on the recent legislative acknowledgement in the Italian legal context. After the presentation of the theoretical framework in which sign languages are considered, the article proposes a model to describe and analyse the various level of recognition and protection that sign languages could have in different legal systems, with a particular focus on European states. This brings to the presentation and the critical assessment of the recent recognition of Italian Sign Language (LIS) in Italy. Conclusions suggest the preferable way for sign languages recognition and promotion, with the aim of guarantee the effective right to use it to all, irrespective of their individual conditions.

Sign Languages; Italian sign language; linguistic diversity; disability rights; social inclusion.

Summary*:* 1. Introduction: sign language(s) and the law. – 2. The intersectional approach promoted by the international deaf community. – 3. The shift of paradigm: from to protection to promotion, through empowerment. – 4. The Legal recognition of sign languages: which models?. – 5. The recognition of Italian Sign Language: so much promise, so little delivery?. – 6. To draw some conclusions: the desirable model and sign languages for all.

Sign language is a dance with words,
to be enjoyed from babyhood through childhood to adulthood…
(Marylin Daniels, Dancing With Words: Signing for Hearing Children's Literacy,
Praeger Pub Text, 2000)

1. Introduction: sign language(s) and the law

With the expression "sign language", we commonly refer to "any means of communication through bodily movements, especially of the hands and arms, used when spoken communication is impossible or not desirable"[1].

Even though it could be confused with casual or conventional gestures, it should be firstly pointed out that sign language is actually a complete and full-fledged language, with grammar, lexicon, structure, shades of sense and every aspect that could contribute to the formal definition of language. It is probably one of the oldest forms of communication for the human being, and some authors consider it even older that spoken language.

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[1] Encyclopaedia Britannica, *Sign language*, 12 Nov. 2020, https://www.britannica.com/topic/sign-language. Accessed 9 January 2022.

Commonly, it is known as the language for the deaf community, but this is only a limited and partial assumption: as highlighted above, sign language is not *per se* related with a hearing disability. Sign languages are adopted *also* by the deaf community but could be used by everyone in any sort of circumstance. For example, in recent years, it has been gaining circulation the so-called baby-sign language, a set of basic signs that can help a toddler to acquire familiarity with communication tools and to express herself, even before being able to communicate.

Differently from what could be commonly though, moreover, sign language is not unique and universal: there are actually several sign languages; they do not properly correspond to national languages, even if we could basically organize them into linguistic groups[2].

If from a linguistic and ethnographic viewpoint there are many aspects of interests concerning the essence and development of sign languages, even the legal dimension presents some relevant aspects of interest. We recalled the ancient origin of sign languages and its theoretically wide application, being it a language not only for the deaf community. Nevertheless, the most important steps for its legal recognition and its promotion both by the international community and by national legal orders has to be ascribed to the commitment by the World Federation of the Deaf (WFD), by its national or continental articulations and by specific national associations. It is thanks to these bodies if today we can celebrate an International Day of Sign Languages[3] on September 23rd and if several constitutions and legislation recognise the importance of sign language for social inclusion and adopt concrete instruments to promote its diffusion and accessibility for all[4].

Given these premises, the aim of this article is to present and discuss the different models for the legal recognition of sign language, with a specific focus on European countries and on the recent legislative acknowledgement of Italian Sign Language[5]. Before doing so, it is necessary to depart from an overview of international instruments for the promotion of Sign Languages and their degree of implementation by other legal systems, both at a constitutional and at a legislative level. This will bring us to present the constitutional framework of language rights in the Italian Constitutions and the approaches that the law-maker could adopt, by mixing the long-standing protection of linguistic rights that is entrenched in the Italian legal system and the particular level of promotion of disability rights that stems from several constitutional principles and laws. Finally, a comparison between some regional experiences and the recent national legislative intervention will drive to some conclusions concerning the future perspectives of concrete and effective promotion of Italian Sign Language (LIS).

2. The intersectional approach promoted by the international deaf community

At an international level, as mentioned above, the central role for the promotion and legal recognition of Sign Languages has been played in the last years by the World Federation of the Deaf (WFD), a global organization devoted to the promotion of inclusion and equality for the community of deaf people and of persons with hearing disabilities. The WFD, established in Rome, on 23 September 1951, as to today counts representatives of 125 countries and has a consultative status at the United Nations, as it usually collaborates with the UN and its Agencies advocating for the development and the improvement of human rights' recognition for deaf people and for the accessibility of services for all.

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[2] J. HOSEMANN, M. STEINBACH (eds.), *Atlas of Sign Language Structures*, SIGN-HUB project, 2021, available at https://www.sign-hub.eu/atlas.

[3] United Nations General Assembly Resolution A/C.3/72/L.36/Rev.1 recognising 23rd September as the International Day of Sign Languages as part of the International Week of the Deaf. The document has been adopted on 14 November 2017 and is available here: https://undocs.org/A/C.3/72/L.36/Rev.1

[4] For some more details on the World Federation of the Deaf and on its commitment for the promotion of deaf community's rights, see: https://sog.luiss.it/sites/sog.luiss.it/files/WP66_The%20Rights%20of%20deaf%20people%20and%20Sign%20language_V3.pdf, p. 10.

[5] In the following paragraphs, we will come with more details on the legislative recognition of Italian Sign Language, that has been realized by means of Article 64-ter of Law no. 60/2021, which converted with modifications law-decree no. 41/2021.

Among the vast number of its activities, it is worth mentioning its advocacy for the development and approval of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted by the UN General Assembly in 2006 and in force since 2008[6]. As we will discuss more in detail later, moreover, it has been strongly involved in taking actions and initiatives against the isolation and social marginalization of deaf people during the pandemic emergency, worldwide. To make an example, it is definitely thanks to the WFD and to national deaf associations if almost any press conference or institutional communication during the Covid 19 pandemic has been accompanied by a sign language interpreter. As it is easily understandable, this has an immeasurable impact for the visibility of the needs of the deaf community and for the possibility to make all levels of information and communication really accessible to all.

A crucial step for the advancement in the international level of promotion of sign languages is the WFD Charter on Sign Language Rights for All, a soft law instrument, adopted in 2019, and open to the signature by governments, institutions, organisations or other relevant stakeholders committed to the enhancement of human rights of deaf people. The WFD Charter adopts a very inclusive definition of Sign Language and of its addressees. In fact, in the first articles of the WFD Charter we can read that Sign Language is "the key to the inclusion of deaf people in society" and that "Sign Language Rights for All includes the rights of deaf people, deaf children, deaf youth, deaf women, deaf elders, deaf LGBTQIA+, deaf migrants, deafblind people, families of deaf children, children of deaf adults (CODA), and all other people using sign language to benefit from full and effective access to the community, including the Deaf Community and mainstream services through the use of sign language"[7].

Central to the promotion of deaf community's human rights is the recognition of their intersectionality. More generally, intersectionality is a key concept for the understanding of contemporary society, as it encompasses the inherent pluralism of current social groups, which on the one hand call for an identity recognition and, on the other hand demand inclusion[8]. A brief focus on the concept of intersectionality is functional to the understanding of the complexities subtended to the claims of groups that demand recognition of their identity to avoid social marginalization. The term intersectionality was introduced during the 80s by Kimberlé Williams Crenshaw in feminist studies, mainly with reference to the multiple discrimination suffered by African women. The concept was then quickly and successfully applied to other areas and social groups, such as migrants or people with disabilities and LGBTQ+.

From a legal viewpoint, Crenshaw's theories are extremely important for the discussion and the development of antidiscrimination laws and studies, as they clearly contributed to point out that the legal approach tends to address only one ground of discrimination at a time, whereas most commonly

[6] On the role of these bodies for the promotion of fundamental rights of persons with disabilities see J. McVeigh, M. MacLachlan, D. Ferri, H. Mannan, *Strengthening the Participation of Organisations of Persons with Disabilities in the Decision-Making of National Government and the United Nations: Further Analyses of the International Disability Alliance Global Survey*, in *Disabilities*, 1(3), 2021; 202-217.

[7] World Federation of the Deaf, Charter on Sign Language Rights for All, available at https://wfdeaf.org/news/resources/wfd-charter-on-sign-language-rights-for-all/.

[8] The term intersectionality was firstly used in K. Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, in *University of Chicago Legal Forum*, 1989, 139. In Crenshaw's words, intersection concerns contexts characterised by multiple grounds of discrimination and need to be addressed under an intersectional perspective: "Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating "women's experience" or "the Black experience" into concrete policy demands must be rethought and recast" (K. Crenshaw, *Demarginalizing*, cit., 140).

the grounds for discrimination are interrelated and it is possible to detect and address one level of discrimination by putting it in relationship with another[9].

This quick digression on intersectionality is extremely functional to the deep understanding of the revolutionary range that characterizes the WFD Charter on Sign Language Rights for All, as it qualifies the deaf communities as a "part of a unique intersectionality of rights, belonging to both linguistic and cultural groups, and the disability movement" (Article 2.3).

This is a key point of the WFD Charter, because it finally makes evident and clear that, when discussing on the legal recognition of sign languages, the choice to exclusively adopt the perspective of disability rights is terribly limited and scarcely inclusive. On the contrary, the intersectionality approach teaches us that sign language is a matter of culture not only for the deaf community but for the whole society that acknowledges its importance, on several grounds. First of all, it has to be considered combining the disability rights approach and the linguistic rights dimension, because it is also a "means of promoting, protecting and preserving the diversity of languages and cultures globally" (Art. 2.3). Moreover, it must be considered not only an instrument for the deaf community, but rather a communication bridge in the society as a whole.

3. The shift of paradigm: from to protection to promotion, through empowerment

The widely positive evaluation of the WFD Charter could be easily confirmed by a glance at its further contents. They space from the claim for the fundamental right of deaf children to bilingual education both in the national sign language and in the written language, to the need to train the wide social community to communicate in sign language. This is considered as the way to ensure completely inclusive language environments and to promote the use of sing language and inclusive languages also in technologies (i.e. televisions, website, etc.).

The strong promotional approach adopted in the Charter on Sign Language Rights for All is very much in line with other international documents and conventions endorsing and advocating for inclusive human rights, such as the 1989 United Nations Convention on the Rights of the Child, the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the 2006 United Nations Convention on the Rights of Persons with Disabilities, just to name few.

In perfect syntony with these international documents, the WFD Charter insists significantly on the concept of *empowerment*, which clearly embraces an important paradigm shift in fundamental rights' acknowledgement and recognition, from a paternalistic model to a promotional one. This means that the role of institutional bodies is not more to ascertain the existence of right also for "disadvantaged" groups or for minorities, but rather that people claim for the recognition of their rights and institutional bodies have the duty to effectively grant them[10]. In brief, it means that addressees and beneficiaries of rights just take action or initiative to claim those rights and to make them effective, breaking the subordination paradigm, in which the recognition of rights depends on the decision by actors in power. This has become a crucial concept in legal studies on antidiscrimination policies or – using Crenshaw's words – in intersectional legal studies.

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[9] For more references see VV.AA., *Reach everyone on the planet: Kimberlé Crenshaw and intersectionality. Texts by and for Kimberlé Crenshaw*, Berlin, 2019, available online at https://www.boell.de/sites/default/files/crenshaw_-_reach_everyone_on_the_planet_en.pdf; O. HANKIVSKY, J.S. JORDAN-ZACHERY (eds.), *The Palgrave Handbook of Intersectionality in Public Policy*, Cham, 2019; S. ATREY, *Intersectionality and Comparative Antidiscrimination Law*, Leiden, 2020.

See, on critical race theories, K. CRENSHAW, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *Harvard Law Review*, 101(7), 1988, 1331–1387.

[10] On this respect, see how the concept of empowerment could be applied to minority rights: T.H. MALLOY, *National Minorities between Protection and Empowerment: Towards a Theory of Empowerment*, in *Journal on Ethnopolitics and Minority Issues in Europe*, 13(2), 2014, 11-29.

As we have seen, empowerment could have multiple meanings and could be applied to different contexts. For the purposes of the present analysis, the concept of empowerment we are referring to is pretty much related to the idea of mobilization of marginalized group, which succeed in overturning the cause for their marginalization from a factor of weakness to a point of strength.

In these terms, empowerment has gained increasing importance in legal studies, mainly in connection with the claim for social distributive justice, in a Rawlsian sense[11]. Some even refer to an autonomous concept of "legal empowerment, as distinct from other fields, such as economics or management, that has to be understood "strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community. It's about grassroots justice – about ensuring that law is not confined to books or courtrooms, but rather is comprehensible and available to ordinary people"[12].

More specifically, when making reference to empowerment in the perspective of human rights recognition, it is necessary to recall the capabilities approach theory, connecting human development and human rights[13]. Under the capabilities approach theory, we should not consider only how equality is granted, because actually it often happens through the supply of additional goods or services (substantial equality or, in Rawls's words, distributive justice). Capabilities tell us something more, because they could show us how people behave with the resources received and how they make them flourish. In sum, the importance of capabilities approach is that it focuses on individual specificity and heterogeneity[14].

For this reason, it found broad success in many intersectional fields of research, such as disabilities studies, gender studies or minority rights. Coming back to Sign Languages, through the lenses of the capabilities approach we can really understand not only the value of empowerment and inclusion that these languages bring with them, but also their potential as real and effective communication bridges in the society.

Therefore, a fundamental way to ensure empowerment is through employment. Recalling the Un Convention on the Rights of Persons with Disabilities (CRPD), the WFD Charter affirms that "deaf people must be given the opportunity to thrive in an accessible and inclusive working environment" (art. 4.1). This is attainable through sign language, which permits them to fully express their potential and contribution to society. Sign languages, therefore, must be not only accessible, but commonly known. In terms of empowerment, it is worth highlighting the fully promotional nature of the right to work and employment as expressed in Article 27 CRPD, whereby access to employment for persons with disability is described in terms of promotion of opportunities for vocational training programs, for career advancement, for continuing training but also promotion of self-employment[15].

Employment and work are crucial to human enhancement, to social inclusion and, definitely, to free an individual from the chains of dependency. It is not coincidence that it is strongly reaffirmed in

[11] The reference is obviously to J. RAWLS, *Theory of Justice*, 1971.

[12] Open Society - Justice initiative, *Legal Empowerment: An integrated approach to justice and development*, 21 March 2012, available at https://www.justiceinitiative.org/uploads/149596ab-d845-4882-935d-04e99021642c/lep-working-paper-20120701.pdf

[13] It is well known that the capabilities approach theory has been developed, with some differences, by Amartya Sen and Martha Nussbaum. See, in particular, A.K. SEN, *Commodities and Capabilities*, Amsterdam, 1985; A.K. SEN, *Well-being, agency and freedom*, in *The Journal of Philosophy*, LXXXII(4), 1985, 169-221; M. NUSSBAUM, *Women and equality: the capabilities approach*, in *International Labour law Review*, 138(3), 1999, 227.

[14] Martha Nussbaum further developed the capabilities approach described by Sen, by applying it to women rights and to disability studies. See for example, M. NUSSBAUM, *Women and Human Development: The Capabilities Approach*, Cambridge, 2000; M. NUSSBAUM, *Capabilities and social justice*, in *International Studies Review*, 4 (2), 2002, 123-135; M. NUSSBAUM, *Capabilities as Fundamental Entitlements: Sen And Social Justice*, in *Feminist Economics*, 9(2-3), 2003, 33-59; M. NUSSBAUM, *Women's Bodies: Violence, Security, Capabilities*, in *Journal of Human Development*, 6(2), 2005, 167-183. On disability rights see M. NUSSBAUM, *Frontiers of Justice: Disability, Nationality, Species*, Cambridge, MA, 2006.

[15] See, for example, K. VORNHOLT ET AL., *Disability and employment – overview and highlights*, in *European Journal of Work and Organizational Psychology*, 27(1), 2018, 40-55.

contemporary constitutionalism, as the key to human dignity. Besides being promoted in international charter, not only in connection with disability rights, but as a fundamental right for all, the right to work and accessibility of employment is recalled also in the Charter of Fundamental Rights of the European Union[16] and in a multitude of European Constitutions. Among them, seminal is the example of the Italian Constitution, which makes work the fundamental principle of the Republic[17].

In the following paragraphs, we will discuss more in depth the level of recognition of sign languages in Europe and, more specifically, in the Italian legal order. To this end, we will take as a privileged perspective an intersectional view, in which the recognition of sign languages is a means for social inclusion, irrespective of the context in which it is applied to promoted. In other words, the discourse on sign languages promotion will not be considered exclusively as an expression of disability rights recognition but, more broadly, as an important advancement also for linguistic pluralisms and for development of alternative means of communication. This will lead us, in the conclusion, to assess the most recent recognition of Italian Sign Language by law and to highlight which further steps are needed.

4. The Legal recognition of sign languages: which models?

To complete the panorama on the multiple aspects of interest that characterise sign languages, the presentation of the various possibilities concerning their legal recognition proves to be necessary and functional to a full understanding of the Italian legal framework.

As already mentioned, the intersectional nature of sign languages implies that it should be connected not only to the protection and promotion of disability rights, but that it has also be recalled when dealing with language rights and linguistic pluralism. Furthermore, it should not even be forgotten that the legal status of sign languages might also be completed by sectorial legislation, such as legal provisions of education, on accessibility of public services, laws on media and on communication as well as the guarantee of the right to an interpreter in judicial proceedings.

Therefore, this confused scenario deserves to be organized into models, which present the advantage to offer an efficient way of presenting different levels of guarantee and promotion of sign languages. This methodology also permits to highlight the potential paths of legal intervention that could contribute to flatten the gaps in legal protection, to grant more equality and to achieve a higher level of inclusion in the contemporary legal discourse[18]. From this point of view, in fact, sign language could also be considered as a good paradigm of civil society empowerment and a positive example of taking action to promote a common good and to contribute to the development of the whole society.

Coming to the possible models concerning the legal recognition of sign languages, a traditional approach distinguishes between five different levels of acknowledgement, which are: (a) constitutional recognition; (b) general language legislation; (c) dedicated sign language act; (d) sign language and other forms of communication act; (e) legislation on the functioning of the national language council[19]. Even if this model portrays in a precise way different possibilities that can stem from the legal solutions adopted by national legislators, for the purposes of the present analysis it seems more appropriate to focus on a simpler categorization, which also takes into account non-legislative recognition and the lack of legislation.

Therefore, in order to present the main legal solutions concerning sign languages recognition, we will make reference to (a) dedicated legislation; (b) sectoral legislation; (c) mere administrative acts or

[16] See, in particular, Articles 15 (Freedom to choose an occupation and right to engage in work), 26 (Integration of persons with disabilities) and 31(Fair and just working conditions).

[17] Article 1 of the Italian Constitution affirms that “Italy is a democratic Republic founded on labour”.

[18] On legal comparison see E.J. EBERLE, *The Method and Role of Comparative Law*, in *Washington University Global Studies Law Review*, 8, 2009, 451; J. HUSA, *Methodology of comparative law today: from paradoxes to flexibility?*, in *Revue internationale de droit compare*, 58(4), 2006, 1095; P.G. MONATERI (ed.), *Methods of Comparative Law*, Cheltenham, 2012.

[19] This model has been proposed by M. DE MEULDER, *The Legal Recognition of Sign Languages*, in *Sign Language Studies*, 15(4), 2015, 498–506.

lack of legislation. This approach seems to be more functional to highlight the level of protection that sign languages encounters in different legal orders; it is worth mentioning that the focus will be mainly pointed on the European context, even though across the world there are several extremely interesting solutions adopted in South America, Africa or Australia[20].

Before describing the essence of each of the proposed models, though, it is necessary to make a reference to the constitutional recognition of sign languages, which have been entrenched in several recent fundamental laws around the world. As it is easily perceivable, a constitutional acknowledgement of sign language either in promotional terms or even in pair with the proclamation of the official language of the state is fascinating for its implications, above of all in terms of inclusion, pluralism and equality[21]. Nevertheless, it is worth underlining that, despite its strong symbolic nature, a constitutional promotion of sign languages does not implicate *per se* a solid legal status for the right of persons who use this language. In other words, the constitutional acknowledgement does not make the legal status of the national sign language effective, because in any case dedicated or, at least, sectorial legislative provisions are always necessary.

Among the most significant examples of constitutional recognition of sign languages, however, a very noteworthy example in the European panorama is represented by Section 17.3 of the Constitution of Finland (on the Right to one's language and culture), which since 1995 provides that "…The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act"[22]. Despite the fact that nowadays this formulation might seem quite limited, in the light of the considerations that have been developed in the previous paragraphs, it cannot be underestimated the fact that this represents one of the first constitutional recognitions of a sign language[23]. Therefore, despite the fact that it does not make reference to the national sign language (but refers generally to sign language), it constitutes an important achievement for the deaf international community. It was not until 2015, however, that Finland adopted a dedicated legislation on sign language[24], which replaced the several sectorial provisions that were spread in other pieces of legislation.

[20] Just to make a few examples, Art. 20.1 of the Constitution of Kenya, since 2010, recognises Kenyan Sign Language as an official language of Parliament; Mexican Sign Language was declared a "national language" in 2003, and it began use in public deaf education; in 2006 New Zealand Sign Language became the country's third official language, joining English and Māori. For some more examples see M. WHEATLEY, A. PABSCH, *Sign Language Legislation in the European Union, European Union of the Deaf*, Brussels, 2012; M. DE MEULDER, *The Legal Recognition of Sign Languages*, cit.; M. De MEULDER, J.J. MURRAY, R.L. MCKEE, *The Legal Recognition of Sign languages: Advocacy and Outcomes Around the World* Bristol, 2019.

[21] For some reflections on the legal recognition of pluralism in Constitutions, see R. TONIATTI, *Minorities and Protected Minorities: Constitutional Models Compared,* T. BONAZZI, M. DUNNE (eds.), *Citizenship and Rights in Multicultural Societies*, Keele, 1995, 45-81.

[22] The English official version of the Finnish Constitution is available on the website of the Ministry of Justice and from the portal of national legislation, following this link: https://finlex.fi/en/laki/kaannokset/1999/en19990731.

[23] In the same year, Uganda introduced the recognition of sign language among the cultural objectives (Art. XXIV), of its 1995 constitution: the State shall "promote the development of a sign language for the deaf". The text of the Constitution of Uganda is accessible here: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf.

[24] This is the Finnish Sign Language Act, no.359/2015.

To complete the European panorama, besides Finland, sign languages nowadays find constitutional recognition also in Portugal[25], Austria[26] and Hungary[27]. What is interesting to notice concerns the shift of paradigm that the constitutional recognition of sign languages has gained from the Nineties to the twenty-first century: if before it was a linguistic right connected to other rights, such as culture or education, it later obtained an autonomous status.

Coming now to the legislative regulation of sign languages, as mentioned above, we can distinguish three main categories, that range from a dedicated legislation to sectorial provisions. The model is completed by the category of lack of legislation, that might be compensated by administrative acts or similar interventions.

More precisely, the first group, on dedicated legislation, may include both a piece of legislation expressly dedicated to the national sign language and the legislation on national language, which also includes provisions on sign language. This is the most relevant level of guarantee and promotion of sign language, which finds its proper recognition in the legal order and which tends to be regulated in several spheres and areas. Another positive aspect of this category is that it often mixes linguistic and disability rights, abandoning a perspective purely based on the inclusion of people with a hearing disability which, as we have extensively discussed above, is too limited and decisively disrespectful of the inherent versatility of sign languages.

On this respect, a very significant example of the comprehensive features of sign languages could be found in the 2011 Icelandic Sign Language[28]. After having proclaimed that Islandic is the national language of Iceland and that everyone living in Iceland must be given the possibility to learn the language, its Art. 3 states that: “1. Icelandic sign language is the first language of those who must rely on it for expression and communication, and of their children. It must be fostered and supported by public authorities. 2. All persons who have a need for sign language must be given the opportunity to learn Icelandic sign language and to use it from the beginning of their language acquisition, or as soon as deafness, hearing impairment or deaf-blindness has been diagnosed. Their immediate family members shall have the same right”[29].

The law makes the national sign language a means for people who want to use it, irrespective of their status of relationship. This is the most inclusive way to address the regulation of sign languages, because it splits the promotion of sign language from the lexicon of disability rights and makes its use a pure personal choice, irrespective of the features of the individual that uses such language. This approach is perfectly in line with the contemporary understanding of the multi-layered universe of disability, the so-called bio-psycho-social model.

Another significant example of dedicated legislation is the Swedish Language Act, passed in 2009, which sums the need for the recognition of national linguistic minorities, with the state’s duty to protect and promote the Swedish Sign Language[30].

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[25] Art. 74.1.h of the 1997 Portuguese Constitution is dedicated to education and states that “Protecting and developing Portuguese sign language, as an expression of culture and an instrument for access to education and equal opportunities”.

[26] Art. 8.3 of the 2005 Austrian Constitution on the national official language and on linguistic and cultural pluralism recognizes sing language in these terms: “The Austrian sign language is recognized as independent language. Details are regulated by the laws”.

[27] Similarly to Austria, the controversial Hungarian Constitution of 2011 provides that “Hungary shall protect Hungarian Sign Language as a part of Hungarian culture” (art. H.3, on the national official language).

[28] Law no. 61/2011, Act on the Status of the Icelandic Language and Icelandic Sign Language.

[29] The English text of the law is available on the website of the Islandic government: https://www.government.is/media/menntamalaraduneyti-media/media/frettir2015/Thyding-log-um-stodu-islenskrar-tungu-og-islensks-taknmals-desember-2015.pdf.

[30] Art. 9 of the Swedish Language Act, no. 600/2009 provides that “The public sector has a particular responsibility to protect and promote Swedish sign language”. An English translation of the act is available here: https://www.regeringen.se/contentassets/9e56b0c78cb5447b968a29dd14a68358/spraklag-pa-engelska. On

As mentioned above, examples of dedicated legislation may also include acts that are focused only on sign language, such as the 2015 Finnish Sign Language Act, which finally gave effectiveness to the constitutional provisions[31]. The law has a strong promotional imprinting and a significant aspect concerns the provision of services directly in sign language, through an updating of sectorial relevant legislation. The structure of the law proves also to be inclusive, in the terms we have been discussing above, because it leaves apart the strict link with the deaf community and makes references only to "sign language users" as persons "whose own language is sign language" (art. 1). An aspect that probably would have deserved more space concern resources needed to ensure effective access to services in sign language and the actual availability of interpreters when needed: rights need resources to be effective and sometime s the law-maker just provides to the legal recognition of a right, without providing the necessary resources for its effective guarantee.

Coming to the second category, by sectorial legislation we refer to those countries in which sign languages do not have an autonomous recognition (yet), but in which the presence of a sign language interpreter or the possibility to use sign language is recognized in specific fields of legislation. In these cases, sign language, unfortunately, does not have an autonomous legal status but its presence in the legal order is connected to the regulation of other rights, approach which makes the use and the development of sign language rather limited and definitely sectorial. An example might be the legislation on educational services, that could affirm the right to use sign language in school or the recognition of the right to a sign language interpreter in legal proceedings. The most relevant flow of such legislation is that they are quite anachronistic, depicting social needs as organized in categories and groups. In this kind of model, sectorial legislation reflects a sectorial way of addressing problem which, despite being rather pragmatic and probable quite effective, has the limit of seeing social phenomena in a flat perspective.

To make an example of sectorial legislation, we can refer to Ireland, where a comprehensive legislation on sign languages was adopted in 2017[32]. Before the recent entry into force of such law, the Irish legal order was sprinkled with dedicated provisions on the use of sign language in sectorial legislation, such as with reference to criminal proceedings, educational services, health services and the like[33].

Similarly, also Germany refers to sign languages only in the Equality for Persons with Disabilities Act, where it is provided that persons with a hearing disability must be granted the right to have a, interpreter at no costs[34].

In any case, by now this seems to be a residual model which is destined to disappear, given the increasing recognition of dedicated sign language legislation in most countries. As already mentioned, the most critical aspect of this model concerns its heterogeneous and dispersive nature, because sectorial provisions on access to sign language is specific services find legal acknowledgement in different times and period and, therefore, are scarcely coherent. On the other side, though, sectorial provisions might be anyway effective, despite their anachronistic nature, provided that the legislator allocates resources to ensure the accessibility of services.

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the law and its implementation see M. LANDQVIST, J. SPETZ, *Ten years with the Swedish Language Act*, in *Current Issues in Language Planning*, 21(5), 2020, 532-547.

[31] The law is entitled Sign Language Act, no 359/2015. For a comment see M. DE MEULDER, *Promotion in times of endangerment: the Sign Language Act in Finland*, in *Language Policy*, 16, 2017, 189–208.

[32] Irish Sign Language Act 2017, commenced in 2020. See https://www.gov.ie/en/press-release/50472-minister-rabbitte-announces-commencement-of-the-irish-sign-language-act-2017/.

[33] For example, there was an express provision for interviews in criminal proceeding in art. 12(8)(a) of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations. 1987; S.I. No. 119 of 1987. Section 7 of the Education Act of 1998 provides that appropriate support shall be granted to pupils with disabilities and the Disability Act 2005 sets out requirements relating to access to buildings, services and information.

[34] Equality for Persons with Disabilities Act (BGG), 2002, § 6, 9 para. 1. On the topic see M. KOCK, *Disability Law in Germany: An Overview of Employment, Education and Access Rights*, in *German Law Journal*, 5(11), 2004, 1373-1392.

Finally, there are still countries in which sign languages are unrecognized and do not find legislative any normative protection. Nevertheless, even without legislative interventions, in some cases the effective possibility to use sign language and to have sign language interpreters has been provided either through secondary legislation or administrative acts. In these cases, often it happens that the legislation is under discussion, but the representative body has not yet found an agreement on the typology of legal recognition. The most significant example of this kind of approach is, probably, the case of the United Kingdom, where a Statement by the Department of Work and Pensions in 2003 named the British Sign Language as a language in its own right, but where there is no explicit legal protection of any kind[35].

The categorization through models is very useful to confront the approaches adopted in different countries and can concretely highlight which could be the positive or the critical aspects of the solutions adopted. Before analysing the recent recognition of Italian Sign Language (LIS), it has to be pointed out that the acknowledgement of sign languages is, of course, a political matter belonging to the representative assembly. Nevertheless, the law-maker is quite bound to give positive recognition and effective implementation to the language due to several international documents on its promotion and protection: above all the CRPD. A profile that deserves due consideration in the final part of this short essay concerns the choice to recognise it into a general law on national languages or by means of a special law dedicated exclusively to sign language. As we will see, this is quite a crucial choice, in the light of the theoretical framework we depicted in the previous paragraphs.

5.The recognition of Italian Sign Language: so much promise, so little delivery?

Finally, Italy has given legislative recognition to Italian sign language, by mean of Art. 43-ter of law-decree no. 41/2021, converted by law no. 69/2021, on urgent supports for economic operators, in connection to Covid-19 emergency[36].

First of all, it has to be pointed out that this recognition, which has been anyway positively welcomed by the community of persons using the Italian Sign Language, does not properly belong to none of the previously described models. Trying to trace some lines, we could ascribe it to the second category, on sectorial legislation, even though it seems that Italy has still a long way to go on the matter. The problem is that just one article of a heterogeneous law-decree providing for several measures connected to the recovery and to the instruments to overcome the pandemic emergency has been dedicated to LIS. Consciously or not, the Italian law-maker missed the important opportunity to distinguish in the European panorama through the approval of a comprehensive, dedicated and inclusive law, written with a contemporary intersectional language with references also to other forms of communication and with a strong technological commitment.

This, of course, would have been the privileged option to encounter the proposals that the deaf community has been advocating for several years. Unfortunately, this has not been the case; actually, the legislative activity of the Italian parliament, for too long a time, is flattened on emergency issues and the two chambers of the Parliament have basically lost any innovative energy, occupying most of their time is the discussion of governmental projects and proposals, often based on urgent provisions. Without entering too much in the dynamics of the political dialogue, it is worth pointing out that there are several fields of law in which a legislative intervention is long awaited and the two branches of the Parliament are in severe delay in providing appropriate regulation[37].

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[35] See M. De Meulder, *The Legal Recognition of Sign Languages*, cit., 504. More precisely, this is the current British situation. At the moment, a bill is being discussed in Parliament as the British Sing Language Bill. For more details see https://bills.parliament.uk/bills/2915. In Scotland, since 2015, there is the British Sign Language (Scotland) Act 2015, which promotes the British sign language (for more details see https://www.legislation.gov.uk/asp/2015/11/contents).

[36] The Italian text of the law-decree is available on the website of the Italian Official Gazzette, here: https://www.gazzettaufficiale.it/eli/id/2021/05/21/21A03181/sg.

[37] Just to make a few seminal examples, the Parliament is currently discussing some legislative proposals on assisted suicide, whereas already in 2018, the Constitutional Court urged the Parliament to regulate the matter. Similarly, with regards to assisted reproduction technologies, after some significant decisions by the

The law also fails to adopt a wider perspective on Sign Language, abandoning it from a mere disability rights approach and giving value to its inclusive nature, as a means of communication. The first paragraph of Art. 34-ter, in fact, recalls the relevant constitutional and EU law principles on non-discrimination (Artt. 2 and 3 of the Italian Constitution and Art. 21 of the Charter of Fundamental Rights of the European Union), and on disability rights (Art. 26 of the EU Charter and relevant provisions of the CRPD). This means that the recognition of LIS is strongly related to a disability rights model of guarantee, whether it could have been considered as a language *per se*, to be promoted and protected.

On the contrary, to references to language protection is recalled in the text of this (short) article, even though Italy has a long-standing and important tradition of language protection and promotion, given the presence of historical linguistic and ethnic minorities on its territory. Actually, this would have not be an easy aspect to deal with, as the acknowledgment of linguistic minorities is in itself a quite discussed topic in the Italian legal order: Art. 6 of the Constitution is dedicated to the protection of linguistic minorities and it was not until 1999 that a dedicated law was adopted (Law no. 482/1999)[38]. Despite the long time needed for its approval, this law only addresses the topic of historical linguistic minorities, which are identified by a closed list provided by Art. 2 of the Law. It also adopts a strictly territorial approach, whereby linguistic right to minorities are recognised only in those territories in which minority have been historically located and not on a wider basis. These two elements (the closed list and the territorial principle) preclude per se the introduction of any useful reference to LIS in this law. It has also to be pointed out that this approach excludes not only LIS (and other similar forms of communication) but also the possibility to find any sort of protection for languages of relatively recent linguistic minorities, such as groups od migrants or the like. Even though this approach has been discussed also in the light of the need for its renewal, it seems that there are currently no paths for a deep and profound revision of principles concerning linguistic pluralism in Italy. Watched under a wider perspective, for a country which makes pluralism and its promotion one of its key constitutional features, it is a pity that a reconsideration on the approach towards the promotion of the official language of the State, as well as of *any* other language present and used in the country, is considered either in the political or in the institutional agenda[39].

From another perspective, the strong link with the legal framework on disability rights confirm the important and serious commitment that Italy has on the promotion of inclusive rights and on the dedication in trying to give to the composite universe of disabilities all possible means to grant effective equality[40]. Even if this has, of course, to be considered under a positive light, the considerations we have been developing, especially on intersectionality and empowerment suggest that even when dealing with disability rights in general, it is time to abandon a sectorial approach.

Nevertheless, what could be definitely saved of this tempted recognition of LIS in the Italian legal order concerns the provision on the professional acknowledgement of interpreters and of the formative courses through which a person could be certified as a LIS interpreter. Even though it might seem rather bureaucratic and maybe a little too much formal, it is an important step for the recognition of professional commitment of persons who work hardly to grant information and communication accessibility and who, nevertheless, had no formal acknowledgement until this legislative intervention

Constitutional Court, which inflexibly intervened on the text of the 2004 law, no legal amendment was made. Furthermore, it was just in 2017 that a law on informed consent and advanced directives was adopted, after more than ten years of political debate and it was only in 2016, after the Strasbourg Court 's condemnation that a law on same-sex civil unions was adopted.

[38] On the legal protection of Italian linguistic minorities see S. Penasa, *From Protection to Empowerment through Participation: The Case of Trentino - A Laboratory for Small Groups*, in *Journal on Ethnopolitics and Minority Issues in Europe*, 13(2), 2014, 30-53.

[39] On these issues, see also C. Geraci, *Language Policy and Planning: The Case of Italian Sign Language*, in *Sign Language Studies*, 12(4), 2012, 494–518.

[40] On the link with disability rights legislation see also S. Darretta, *The Rights of deaf people and Sign language: the importance of the explicit recognition of sign language in Italy and in France*, in *Luiss School of Government, Working Paper Series*, SOG-WP66/2021.

in the Italian legal system. Finally, to make the legislative provision effective, the law-maker also provides for some economic resources addressed to the realisation of the objectives of the law.

Even if the recognition of LIS is a great and log-awaited result, we cannot do without noticing that the law-maker did the minimum possible for the legal acknowledgement of an important topic such as the diffusion of sign languages is[41]. More precisely, in the last years, there a multitude of public events (such as political debates or convention, for example) has been paired by a LIS interpreter; as already mentioned, moreover, every institutional press release during the pandemic emergency has seen the presence of a LIS interpreter. The widest diffusion of LIS in institutional and official contexts is a clear and positive indicator of the commitment of Italian institutions for a wider inclusion of persons who communicate with sign language. Nevertheless, the choice to adopt a "minimal" regulation of LIS is a huge missed opportunity for the Italian law-maker, who could have used this occasion to revise the approach towards linguistic rights and to renew its whole approach to language, in a historical era in which the expansive presence and use of English, as well as migration flows require to reconsider the concept of linguistic minorities, firstly in order to preserve and promote the value of the Italian language.

6. To draw some conclusions: the desirable model and sign languages for all

The opportunity to offer an insight on the several implications of the legal recognition of sign languages has been given by the recent acknowledgement of Italian Sign Language by law. Even if Italy came after several other European countries in which sign language has been recognised since several years and through very inclusive legal instruments, the decision to introduce a provision on this specific form of communication must be positively welcomed. The occasion to analyse this law has also given us the opportunity to focus on sign languages status in other countries where there are different and interesting levels of guarantee and promotion of sing languages.

Above all, what emerges as a first result of our analysis is the crosscutting nature of sign languages. In fact, our discussion proved that they are more than a mere instrument for people with hearing disabilities – that is the way in which they are commonly considered – but they are languages in a proper sense, with all the features and fragilities that any contemporary language has. This is the reason why they need legal recognition, which must include both protection and promotion. Sign languages shall be taught and learned, as this is the only way to make a language alive and to make it flourish and keep the pace with the natural evolutions of the society.

Another conclusive line to be drawn concerns the different levels of recognition of sign languages not only in Europe but widely around the world. On this respect is has be pointed out that since the mid-Nineties, sign languages started to meet the interest of law-makers and of legal orders. This is mainly thanks to the strong commitment that the WFD dedicated to the advocacy the recognition of sign language not as a mere instrument for people with disabilities, but more widely as an important resource for the whole humanity.

Among the different model of legislative recognition of sign languages, obviously, the most preferable is the one we have been referring to in terms of dedicated legislation, which showed an overall and comprehensive approach to the various needs of sign languages users. In particular, in this category we distinguished between the regulation through the general law on language and a specific sign language law. Both the two solutions present positive sides, but it has to be remarked that, in line with the intersectional approach we have been discussing, the recognition of sign language as one of the languages used in the country seems to be the solution more appropriate and more compliant with the prevalent contemporary discourse on linguistic and disabilities rights. In both fields, in fact, the "minoritarian" approach based on the need of recognition with the claim for substantial equality and the demand for diversity acknowledgement is progressively being abandoned. This approach, which opposes a majority to other minorities, is leaving the room to a more inclusive and egalitarian approach,

[41] For a critical view see also A. Mazzola, *La lingua dei segni nell'alveo dell'art. 6 Cost.*, in *BioLaw Journal*, 3, 2021, 375.

where there's no juxtaposition between minorities and a majority but where there are multiple different situations and conditions that require attention form the legal order[42]. The intersectional approach tends to give relevance to the person per se rather to her features and, under a constitutional law perspective, seems to be more in line with the personalistic principle that characterises contemporary constitutionalism.

A final consideration concerns the fact that, at least in Europe, the countries in which sign languages have been recognised in the constitution or by legislative acts, with a strong level of protection are countries in which the theme of language acknowledgement is an important aspect of national identity, for example for the presence of different linguistic groups or due to the role of national language one of the elements of national identity or independence. We have seen that the first legal recognition of sign languages has been approved in Finland and that other Nordic countries, such as Sweden, are forerunners of an innovative approach to sign languages inclusion into the legal discourse. On these bases, once again, it seems that the Italian recent legislative recognition of sing languages cannot be considered a good exercise of legislative power, but rather a missed opportunity to qualify as a positive model of inclusion both for language and disability rights.

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[42] It is the essence of Crenshaw's intersectional theories: "By so doing, we may develop language which is critical of the dominant view, and which provides some basis for unifying activity. The goal of this activity should be to facilitate the inclusion of marginalized groups for whom it can be said: 'When they enter, we all enter'", K. CRENSHAW, *Demarginalizing*, cit., at 167.

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The entangled relationship between law and language in the globalized world. A report from the first edition of Winter School L.L.I.N.G.U.E, University of Trento, 13th-17th December 2021

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At the beginning of December 2021 the Faculty of Law of the University of Trento (Italy) hosted the first edition of the Winter School "L.L.I.N.G.U.E: *Legal Languages In National, Global and Uniform Environments*". The event, organised in cooperation with Trentino School of Management (Trento Province), Utrecht University (Netherlands) and Sird (*Società italiana per la ricerca nel diritto comparato*) gathered an international public of PhD students, postdoctoral researchers and civil servants with the idea to discuss and study the relationship between law and language with regard to citizenship and the characteristics of regional, national and, more generally, European and world legislation drafted in different languages. The aim of the Winter School was to raise awareness of participants about the importance of legal translation techniques and methodologies, in order to reduce the economic and social impact of linguistic and legal barriers that prevent the full enjoyment of citizenship rights with particular attention to the European Union. The programme of the School consisted of theoretical introductory lectures held by academics and experts on legal translation, as well as courses delivered by practitioners in the field of legal translation. The Trento South-Tyrol region and University of Trento, as a historically important centre of comparative law studies , constituted the perfect setting for discussing challenges of law and politics in multilingual environments.

The Winter School's particular approach to the discussed issue consisted of a combination of conceptual frameworks and practical techniques and solutions specific to certain disciplines (comparative law, linguistics, translation methodologies) which share the common interest in the functioning of law as a linguistic phenomenon in the cross-cultural and cross-language contexts. Far from a strict and purely lecture-based programme, the coordinators provided for a work organization allowing for extensive discussions with the invited experts and exchange with the participants. The special value of the School resided in a confrontation of different profiles and backgrounds, both on the side of the experts as well as the public which was composed not only of researches but also civil servants, translators and other professionals working in the field of the subject matter of the school. Such circumstances have allowed for fruitful discussion based on an impact of different, sometimes even contradictory claims and approaches and, by this, to draw the crucial conclusion on importance of openness to different methodologies in the field of law and language. Through a dynamic exchange of views and competences, the Winter School has provided for a precious opportunity to delve into the challenges resulting from the influence of multilingualism on legal orders by their evergreater fragmentation accompanied, on the other side, by a growing interdependence following globalization of law. An overview report of the presentations made during the Winter School is described below.

Law and multilingualism: mutual interdependence and inevitable tensions (13th December)

The morning session on Monday 13th of December was devoted to introductory contributions on the basic issues of law in multilingual environments as a source of legal, cultural and political clashes in a form of a roundtable. In his presentation ''EU Law and Language. A bird's eye view' professor **Sybe de Vries** (Utrecht University, The Netherlands) drew some insightful observations on how linguistic diversity and linguistic rights, although protected under EU anti-discrimination law, can pose a barrier to the very foundations of the European Union based on market freedoms such as free movement of persons or services. This barrier is both of a legal and factual nature. By pointing out the autonomous character of EU legal order, the Speaker highlighted the second tension which is produced between the Member States' and the EU legislative power by the fact that the European law, by its very essence, produces its own language in a process of a complex practice of cross-cultural language creation (see also: P. Phoa, *EU law as Creative Process*, European Law Publishing, 2021). This is particularly

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observable in reliance of EU law on autonomous concepts the meaning of which is negotiated and determined in the case law of the Court of Justice of the European Union (hereinafter CJEU) and which, far from the mere linguistic exercise, requires in many cases some substantial or even ethical choices which may go counter their interpretations in some of the Member States (see: case law related to EU Biotechnology Directive and the notion of an ‘embryo’ or the CJEU case-law on the concept of ‘worker’). A third ‘intra-order’ tension created by European rules consists of a mutual contradiction between the concept of national constitutional identity protecting national languages (art. 4 par. 2 TEU) and the EU anti-discrimination requirements with regard to minority languages (Article 22 of the Charter of Fundamental Rights). This tension generates a need for a careful balance and proportionality which finds its expression in the CJEU’s case law. All in all, professor Sybe de Vries’ presentation made an important contribution to the discussion about relationship between law and language in the EU by presenting its inherent contradictions and non-obviousness of the issues at stake.

During the second presentation, **Eliana Morandi** (notary) showed how much the expertise in inter-cultural communication is important for the exercise of every legal profession. By reference to the concept of law as a linguistic creation, she developed a metaphor of legal professionals as translators of individual claims into legal language. The interpretation of relationship between law and language expressed in this presentation drew attention to an important anthropological thesis in this matter under which the law and language are intrinsically intertwined as a cultural process. With regard to this, Eliana Morandi drew a critical approach to objective concepts of law by underlining its social anchorage and dependence on common and shared belief in values and rules by which the law as a textual phenomenon is driven. The Author argued, with reference to the globalized and multi-language character of contemporary legal orders, which was the subject matter of the Winter School, that there is a strong need, not only in the academia but also in everyday legal practice, to apply observations made in the science of both descriptive and comparative legal ethnography in order to accommodate pluralism in law by promoting mutual understanding in all the diversity of socially determined meanings and ideas. In the conclusion of the presentation, she argued that the main challenge for the further development of globalized legal orders is to build some sort of a ‘transcultural legal language’.

The third speaker in the morning roundtable, professor **Flavio Guella** (Trento University) gave an insightful presentation on the linguistic and legal diversity of the Trentino Alto Adige/Süd Tyrol region. The author developed on the importance of historical experiences of multilingualism, which, although has now become a global issue, is not a new phenomenon in the history of Europe which has already in the past had to deal with the problem of diversity in the context of the exercise of power through law. With reference to the history of this region as multi-ethnic area, the Speaker developed on the importance of a negotiating and consensual approach to multilingualism as a specific constitutional and political setting.

In the afternoon session, **William Robinson** (University of London) gave an extensive presentation on the problematic issue of the language of the so-called ‘Brussels bubble’. The Guest speaker delved on possible threats of alienation of the society as an ‘outside world’ from the discourse produced by political and legal milieus at EU level. Such phenomenon is, according to Robinson, at odds with the idea of democratic legitimacy of EU institutions which are more and more drifting apart from the societies (and their languages) that are to be represented by them. As argued in the presentation, English and EU specific terminology, which are rarely used in non-EU contexts, dominate the discourse and create a barrier for outsiders to understand or challenge how the Union’s institutions work. In the second part of the presentation the Speaker developed on the historical background of EU linguistic regime as a unique and far-reaching solution based on full multilingualism in order to tackle the problem of democratic deficit. As demonstrated on the basis of Treaty provisions (Article 342 and unanimity of vote on linguistic regime) and case law of the CJEU, the issue of preserving multilingualism and protecting linguistic connections of European societies with the EU institutions is of a crucial importance. Despite that, as everyday practice shows, multilingualism in the EU has to be subject to some restrictions in order for its institutions to remain operative. By reference to the CJEU’s case law

the presentation also drew some interesting observations on the tension between the requirements of diversity and the pragmatical need for some common, culturally and linguistically neutral and translatable communication leading back to the idea of alienated EU discourse as something inevitable.

Between theory and practice: comparative legal studies as a bridge between law and linguistics (December 14th)

The first presentation on December 14th made by the coordinators of the Winter School, professor **Elena Ioratti** and **Mrs Caterina Bergomi** (University of Trento), was devoted to an introduction to the idea of comparative law studies as a cross-discipline tool mixing linguistics and legal studies. The Speakers developed on both the theoretical and practical function of comparative legal studies which can be used in various ways but, among them, also a contribution to a better understanding of the proper, national legal system. The presentation gave a very insightful view of the history of the discipline with a special focus on the local but renowned school of comparative law based on the so-called *Trento thesis*, a scientific Manifesto elaborated by prof. Rodolfo Sacco. By this, the Speakers insisted in particular on the primarily scientific character of comparative law, disseminating knowledge, as a deliberate and systematic approach to the study of legal phenomena. The presentation covered, therefore, some key methodological assumptions of comparative law as a science, mainly the concept of operational rules based on the observation and analysis of the legal effects of legislation combined with a cautious scrutiny of the textual dimension of law. With regard to the study of legal concepts in multi-level and multilingual legal orders, the Speakers attracted the attention on the need of a piece-by-piece and case-by case analytical and contextual approach to them by pointing out possible misleading approaches based on pure textual equivalence (see: E. Ioriatti, "*EU legal language and comparative law. Towards a European Restatement*?", Gobal Jurist, 2021).

By developing the idea of misconception of textual equivalence, **Marco Battaglia** (Kodeks legal languages firm), gave an extensive overview of different strategies in legal translation allowing for accommodation of disparities between legal concepts in different languages during the afternoon session. Battaglia focused in particular on situations of legitimate use of loanwords, calques on one side and functional and descriptive equivalents on the other as translation strategies requiring more analytical approach to translation mixing legal and linguistic competences.

Researching legal translation: textual nature of law in cross-language contexts (December 15th)

In her presentation in the morning session, prof. **Łucja Biel** (University of Warsaw, Poland) delved into textual complexities of law by highlighting the most specific features of legal languages which render legal interpretation and translation difficult. With regard to this, she presented some key examples of syntactic and conceptual complexities of legal language characterized by i.a. the tradition of long sentences, complex nominal groups, peculiar punctuation rules, as well as by a significant conservatism, formality and formulations of textual conventions of legal language. In parallel to these considerations, the Speaker insisted on the specificity of legal terminology by arguing that legal terms are system specific rather than language specific and do not refer directly to the general language but to an autonomous social legal discourse developed within it. Bearing in mind this specificity, she presented a general historical overview of approaches to legal translations which tend to oscillate between strict literalism and functionalism expressed in the strategies of domestication and foreignization of legal terms. In this context, the speaker developed on crucial factors that have had impact on the beginning of legal translation, such as characteristics of inter- and intra-systemic translation, language constraints, the idea of purpose driven by a receiver-oriented approach to translation as well as the diversity of legal genres, legal systems (unitary or composed) and on purely pragmatical constraints of translation practice. In the last part of her presentation, professor Biel mentioned some recent trends in research of legal translation such as the user design approach, plain language schools and the newest technological changes in the area of translation.

With a link to these issues, **Guendalina Carbonelli** from the Directorate-General Translation of the European Commission gave a very practical presentation sharing some know-how and tips on the use of computer assisted translation tools in the work of legal translators for the EU institutions. The presentation focused on pragmatical problems of the EU multilingualism policy as an important communicational challenge of everyday institutional practice.

Law making and law enforcement in multilingual contexts (December 16th)

The fourth day of the Winter School was devoted to the specificities of law-making and law enforcement challenges in cross-language legal systems. In the morning presentation prof. **Jacqueline Visconti** (University of Genoa, Italy) focused on legal drafting as a complex, communicational exercise. The Speaker delved into inherent limits of legislative work with regard to the idea of general and abstract character and the ideal of consistency of the positive law. In this context, she insisted on the specificity of legal drafting as an exercise of linguistic precision and attentiveness combined with speculative, prospective analysis of foreseeable circumstances of application of the drafted piece of legislation. The Speaker also mentioned some key recommendations of the plain language as crucial factors for operability of composed, multilingual legal systems such as the EU (see for example: CJEU Recommendations to national courts 2021 on preliminary ruling proceedings). At the same time, she pointed out the inevitable textual complexity of law in multilingual institutional contexts driven by polyphony of legal orders and actors involved in it, as well as by plurality and diversity of addressees of drafted laws. By reference to the example of the EU, prof. Visconti explained how English is 'going European' in case of the European legislation by further development of its linguistic autonomy and complexity observable in its conservative and, in some cases, even artificial character.

The issues introduced in this presentation have been completed in an interesting way by the considerations developed by prof. **Silvia Ferreri** (Turin University) during the afternoon session. The Speaker gave an extensive overview of pitfalls and advantages of multilingualism in law. She insisted, in particular, on the issues of impossibility of full and simple analogies between legal concepts in different languages which are to be, by the very principle, considered with cautiousness as potential 'false friends' despite their linguistic resemblance. In this perspective, prof. Ferreri's presentation offered an important contribution to the idea that legal terminologies require independence and autonomy in order to safeguard equal treatment of legal systems within the EU. As pointed out by the speaker, , despite the inherent cultural founding of every social institution, multilingual legal orders inevitably tend to be more and more linguistically self-referential and closed by use of neutral language as a way to accommodate diversity both in the context of law making and law enforcement.

Mutual understanding: communication aspects of internal market and public sphere (December 18th)

During the morning session of the last day of the Winter School professor **Stefaan van der Jeught** (Brussels University and Court of Justice of the European Union) made a comprehensive presentation of language rules in the internal market law of the EU. The Speaker developed on a diversity of approaches in EU legislation opting for full, conditional or mitigated territoriality of linguistic requirements refereeing to information on products and services, in particular to packaging in the context of their free movement. The analysis was accompanied by an overview of the CJEU's case law on permissible restrictions and direct applicability of EU rules in this matter. The second part of the presentation was devoted specifically to free movement of workers and anti-discrimination law of the EU. The Speaker insisted on mutual tensions between the free movement requirements supported by the strong-standing Treaty prohibition of discrimination on the basis of nationality and the necessary restrictive character language policies of individual actors in the Internal market following the need of their operability. With regard to this, professor developed on the idea of proportionality of language discrimination based on objective assessment of work and employment conditions with reference both to the provisions of secondary EU legislation (see Regulation 492/2011 on freedom of movement for workers and Directive 2005/36/EC on the recognition of professional qualifications) and the case law

of the CJUE. The presentation highlighted the importance of communication requirements for the functioning of the internal market for which linguistic diversity constitutes an important factual challenge.

The communication issues have been completed by the presentation made by **Loredana Pancheri** (Language and Communication Factory, Trento) on communication skills and public speaking, which closed the Winter School's first edition.