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Introduction to Issue 2

One of the most relevant fields of research of our times - *comparative law and language* - necessarily rests on the parallelism between comparative law as a science, and language as a means of communication. As in traditional legal comparison, what is measured are similarities and differences among systems of rules it follows that the outcomes of comparative law research are brought to light thanks to language or are the consequences of conceptual linguistic differences.

Language and law are therefore joint disciplines in the identification of legal data and in the visualization of the results of a comparative scientific operation.

This relationship between comparative law and language has, however, a deeper, intrinsic complexity.

Once upon a time the theme recalled an apparent contribution of hierarchy in the analysis of equal dignity, rather than a conceptual symmetry between the two scientific fields of legal comparison and language: language was in an ancillary position in comparative analysis and only recently has legal translation started to be perceived as a method, and no longer as a simple means of expressing foreign law.

The contributions contained in this Issue of CLL Journal highlight how the relationship between comparative law and language demonstrate that these disciplines are not bound in a grid, simplifying, and classifying their aims, but they are more and more expanding their respective spheres of analysis.

Jan Engberg clarifies specifically that under the title of the journal *Comparative Law and Language* his contribution focuses the interest on comparisons of aspects of language and law in their interaction (Comparative Law-and-Language, instead of the also possible Comparative-Law and Language). Thus, the core of the analysis is upon the idea that law and language are each other's prerequisites, as the "law must be expressed in language in order to exist in the world—and the language elements used must be selected in order to comply with the expectations of the receivers in order to be understandable in the intended way and let the law come to existence".

However, the expanding complexity of the analysis of the relation between comparative law and language is also due to the fact that these two areas lie on an implicit pattern, fabric of reality.

This is clear in the work of Mario Ricca on "e-Health" *Transducing Bodies, Translating Health Intercultural e-Health and Legal Chorology.* Telemedicine constitutes an extraordinary tool in solving many of the problems resulting from geographical distance between patients and doctors. However, its benefit of providing medical assistance also depends on the fact that technological displacement of sick bodies requires and involves a transplant of their legal connotations, thereby a linguistic-political translation/transduction of them. The Author underlines that on the one side, the symbolic-normative dimension is a bridge between the transportation of bodies and their translation. On the other hand, "material" body is also a semantic entity to be translated as well as transported, as a part of the ecological space of lived experience and does not escape from the chorological *continuum*.

Janny Leung's contribution *Shortcuts and Shortfalls in Meta's Content Moderation Practices: a Glimpse from its Oversight Board's First Year of Operation* describes Meta's (formerly Facebook) *Oversight Board*, a body recently set up by Meta in order to handle final appeals of content moderation decisions and issues policy recommendations. The article examines the role of the Board in steering changes, by analyzing the first 20 decisions published during its first year of operation. The

cases examined by the Author rise questions about the necessity of an external oversight also on the existence of Meta's system of rules, granting a quality assurance having impact beyond individual cases and achieving a reasonable balance among competing demands.

In Maria Vittoria Buiatti's article *Gender Neutral Legal Language: A Comparative Overview* attention is dedicated to language and vocabulary from the viewpoint of gender-neutral legal language drafting. The Author posits that Gender neutrality in language can make a greatly positive impact and difference in society, as it is directly linked to human rights and their protection. What is highlighted in the contribution is often and in different legal traditions the presence of provisions already drafted in a gender-neutral legal language which significantly improves and facilitates courts and judges in granting protection of rights.

Words Travel Worlds: Language in the EU Internal Market, Linguistic Diversity and the National Identity of the Member States is a case law overview of the decisions of Court of Justice of the European Union underlining the role language and national constitutional identity play in the free movement rights of persons Hanneke Van Eijken and Eva Meyermans Spelmans. The core of the Author's analysis is the role language plays in the European free movement and how cultural diversity and national constitutional identity should be balanced with language barriers.

The Issue is completed by an interesting and profitable *Literature Review on Comparative Law and Legal Language* by Caterina Bergomi.

Transducing Bodies, Translating Health

Intercultural e-Health and Legal Chorology

Mario Ricca[1]

Abstract: The essay examines the anthropological, legal, and semiotic implications of a new method for healthcare, precisely, "e-Health". In many respects, telemedicine constitutes an extraordinary improvement that could solve many of the problems resulting from geographical distance between patients and doctors. Despite the benefits of providing medical assistance through an intensive use of e-Health, however, there are potentially serious pitfalls. These primarily stem from the apparent immediacy of the images transmitted and displayed by IT devices. Seeing the body of the *remote* patient synchronically represented on the desktop conveys the idea of an actual proximity. In other words, the visual representation could be (mis)taken for a real presence, as if the patient were 'here and now' before the doctor's eyes. However, geographical distance often includes a cultural remoteness between the two sides of the medical relationship. The patient's body and its disease are not mere empirical data, but rather epitomes of a web of experiences; they are constituted by a multifaceted relationship with life environments. These relations move through experiential landscapes, projected across space and time, and are semiotically summarized and translated in the phenomenon of "disease", the object of healthcare. Gaining knowledge of the "semiotic clouds" underlying the patient's bodily conditions is a very difficult task which doctors usually accomplish through their cultural *continuity* with the universe of sense and experience lived by the people asking for their assistance. While telemedicine can annihilate physical distances through the immediacy of its remote images, unfortunately it is not equally efficacious in bridging cultural distances. On the contrary, its immediacy could lead to a false conviction that what the doctors see on the desktop is all that they need to understand about the patient's conditions. This assumption could, however, lead to dangerous diagnostic mistakes due to the doctor's belief that his environmental and cultural imagery is the same as that of the patient.

The idea that images, taken in their iconic appearance, can convey a whole empirical reality is to be radically confuted, precisely to enable a positive exploitation of all the possibilities potentially offered by telemedicine. To illustrate the pitfalls encapsulated in the presupposition that seeing is synonymous to understanding, the author traces a sort of brief history of the *iconization* of concepts. The cognitive journey begins with prehistorical cave paintings and unfolds to include contemporary comics. The path of the representative function through the ages demonstrates the relationship between the textual and figurative elements of communication, and at the same time, the human tendency (gradually increasing) to transform the semiotic/graphemic representational sequences into symbolic/conceptual synthetic images. This process accompanied the creation of bounded cultural circuits of communication by Neolithic man, which corresponded to settled agricultural civilization, and the social transmission of implicit semantic basins that people held and used to understand each other.

If e-Health is to achieve its goals, an awareness of the landscapes of semantic implicitness that each cultural and spatial circuit of experience provides must be cultivated. Doctors and patients involved in the telemedical relationship will have to consider the body as a sort of *border* between geo-cultural spaces, to avoid the massive dangers hidden in the overlooking as well as the misinterpreting such implicit landscapes. This means that the empirical visibility of the body should be reinterpreted as an *interface of translation* between the different spaces of experience and signification which telemedicine puts in proximity, despite their geo-cultural distance. Within this new semiotic and experiential inter-space drawn by the sextant of the human body, different anthropological and legal considerations are to be trans-duced so as to coherently and pragmatically support the representational synchrony supplied by IT devices. Linguistic, experiential, and legal discrepancies could break that

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apparent conceptual unity of image, and make semantically asynchronous what only appears to be empirically represented in its whole immediacy. The risk is that this asynchronism could fuel deep cognitive biases stemming from the superimposition of the doctor's implicit knowledge and spatio-temporal framework over the patient's imaginative and experiential semiotic landscape. Should this occur, an anthropological ignorance of close-and-remote otherness could induce the ultimate danger: diagnostic errors that poison the waters for Telemedicine.

Keywords: E-Health, Medical anthropology, Legal geography, Intercultural translation, IT communication.

Summary: 1. Prologue; 2. In what ways and under what conditions are doctors allowed to intervene on (only) tele-displayed bodies? 3. The body as a thing vs. the body as a relational process; 4. Prehistoric art, comics and cognitive psychology: the chorological implications of e-Health; 5. E-Health and the Earth as a legal inter-space.

1. Prologue

E-Health, otherwise known as telemedicine, marks the entry of state-of-the-art information technology into healthcare practice. In layman's terms, it could also be labelled "distance care".[2] Personally, I like this last definition for two distinct reasons. First, it is more general and less idiomatic; second, it immediately focuses on the feature of e-Health that most concerns me: precisely, distance.

E-Health, in all its various implementations, is characterized by one essential feature: through technology, it annihilates distance, making it vanish. The body of the ill person and the scrutiny of the doctor—but not only that, as I will show below—create new ways to experience and make use of proximity, in spite of geographical remoteness. Using an icastic phraseology, it could be said that the "pathological elsewhere" and the "therapeutic elsewhere" become close, transmuting the communicative ubiquity assured by information processing into mutual *presentiality* and *topicality*.[3]

Telemedicine is proving to be extremely efficacious in the monitoring and caring for patients suffering from diseases, providing assistance with home care in the case of chronic diseases, promoting exchanges of information among healthcare professionals located in different parts of the globe, allowing for therapeutic collaboration so that the best medical/scientific care currently developed on Earth can be supplied at a local level, implementing so-called "telesurgery", capable of assuring a sort of planetary ubiquity of the best experts in different fields of surgical assistance, providing emergency medical interventions and timely assistance that were previously inconceivable in cases of natural disaster, disseminating critical disease prevention information necessary for health

[2] J. POLS, *Care at a Distance: On the Closeness of Technology*, Amsterdam, 2012. For an overview on telemedicine, outlined also from a comparativist perspective, see the text edited by Fondazione ISTUD: *Telemedicina e "Doctor Web": l'eHealth che Rinnova la Sanità*, www.istud.it/up_media/pw_scienziati/telemedicina.pdf. A survey on e-Health in the USA can be found in. M. MOHEN, P. WHITTEN, A. ALLEN, *E-Health, Telehealth and Telemedicine: a Guide to Start-up and Success*, New York, 2001, which, although not very recent, has the advantage of putting into sequence the key clinical and legal aspects (especially, p. 87 ff.) of telemedical practice in the USA.

[3] V. DUCLOS, *Bandwidth for Life: Global Health, or the Expected Space of a Common Humanity*, IFIP Working Group 9.4., 12th International Conference on the Social Implications of Computers in Developing Countries, Ocho Rios, Jamaica, 2013, pp. 889–902, http://www.ifipwg94.org/ifip-conference-2013.

education, and so on. The EU—it must be said—has been particularly engaged and far-sighted in this area of healthcare. Nearly two decades ago, European institutions responded to the challenges originally launched by the US, where telemedicine has been an area of investment for even longer. Among the most recent and relevant measures at the European Community level, Directive 24/2011on the application of patients' rights in cross-border healthcare[4] deserves particular attention, especially with regard to Art. 14 and a number of indications contained in the *Considerata*; also important is the Communication of the European Commission concerning eHealth Action Plan 2012-2020—Innovative healthcare for the 21st Century.[5]

So far, so good. E-Health really seems to be one of the fields where technological innovation can bring unquestionable benefits. Defeating "space" and the limitations it causes to the dissemination of knowledge and the development of human life is undoubtedly a target on which we can all agree, perhaps even a source of excitement. But the issue underlying this amazing enterprise is that space is not only physical and geographical; what's more, limitations deriving from distances should be measured using more than just kilometric calculations. This is because the space filled with and by human experience is not a void, indifferent to and independent from the activities carried out within it. Quite the opposite, this space is full, "articulated" by cultural practices, bent by their connotations and semantic relations. Shrinking physical and geographical space, to the point of annihilating it, engenders new communicative and existential proximities. The relativization or nullification of physical distance, however, impinges on only a portion of the lived space, the same space that hosts experience and is conceptualized through it. Conversely, it is precisely the evaporation of physical distances, their narrowing, that ends up emphasizing the semantic and cultural features of spatiality and its experience, dissociating them from those which are strictly geographical.

More generally, our perception of physical space is associated with certain modalities for putting our pragmatic know-how to use, based on ends and values forged by culture. The two aspects, physical/topographic and cultural, have been cemented to each other by history, traditions, and uses. Each of them camouflages and conflates into the other. It would a mistake, however, to think that representations of space are the mirror of an empirical reality placed *over there* and grasped regardless of subjective variables, of human ends and cognitive patterns, that are, of course, influenced by culture. The epiphany of space and its mapping are outcomes of experience and the "work" done by cultural determinants. If space is given to us as an almost de-subjectivized *thing*, it is only because our cultural habits work as a mental lens, and in this role they operate tacitly. They are so deeply integral to our view of the world that we do not perceive them at work. They seem to give us a vision of things "as they are"[6], making it impossible for us to have an immediate and irreflexive perception of their composite, dynamical features, derived from the interplay between organism and environment, in turn mediated by mental and symbolic activities.

When experience and its "usual ways", namely its habits, are hit by something new, an unforeseen event, that is the moment when we are compelled to once again bring the machine of reflection to life. In those predicaments, we imagine how things could be different than "they are", and their "being" is only "the end of a path, the outcome of a process of adaptation that has already been 'solidified' in concepts and their corresponding behavioral habits". The impact of IT tools on the possibilities to use and experience physical space is one of these subverting events. Telemedicine is capable of neutralizing geographical distance, making close and contiguous—with respect to our perceptive, communicative and cognitive capacities—that which before was destined to remain faraway or even remote. Thus, it can happen that the stuff of things and the bodies of persons placed in other latitudes are pulled into the range of our senses, cognitive faculties and, therefore, experience. Their empirical

[4] Directive 2011/24/EC of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, OJ L88 of 04.04.2011.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, eHealth Action Plan 2012 2020 - Innovative healthcare for the 21stcentury, COM/2012/0736 final of 06.12.2012.

[6] M. JACKSON, *Introduction: Phenomenology, Radical Empiricism, and Anthropological Critique*, in id. (ed.), *Things as They Are: New Directions in Phenomenological Anthropology*, Bloomington-Indianapolis, 1996, p. 1 ff.

dimension, or "thinghood/cosality", becomes perceivable by all, at least as a "virtual presence", and this can lull us into believing that seeing and hearing them in "real-time" produces an *immediacy* fully equivalent to that performed by bodies ordinarily placed within our spatial-existential horizon. From this perspective, telemedicine is a perfect example. Through an online transmission, a doctor can examine patients remotely and, given certain conditions[7], can also perform tele-surgery on demand.

In the field and through the conceptual spectrum of biomedicine, or reductionist medicine, by means of IT tools, the patient's body is made subject only to a virtual zooming in. Thanks to IT, its "being faraway", turns into a "being topical", being close, here and now. At a *closer* look, things appear, however, very different. The empirical dimension of the body—that is, what it retains after a subtraction of the cultural aspects involved in the bodily experience—lugs a series of relational, contextual and environmental connotations. These, in turn, can impinge upon the conceptualization of corporeality and the ways we conceive of the living body, the management of disease, the qualification and the legitimacy of care. The "video-represented body", in a sense almost teleported, can appear to be close and, at the same time, still distant. The analogy/equivalence between the IT displayed body and the material one, precisely produced through technology, may be incomplete or, at least, limited to its biological-quantitative[8] aspects.

The qualitative features of the body and its dimensions of sense ingrained in a whole background of experience and ends could instead remain distant and invisible, if not even more remote, substantially overshadowed by the IT-processed proximity of empirical-quantitative data.

What has just been observed could perhaps seem counter-intuitive. But this is due to the common habit of thinking of space and meaning as two distinct and unrelated domains. One is placed *over there*, and is thereby objective; the other pertains to what is inside, *here in the mind*, consequently intended as a realm of subjective projections. Even yet, to open up our thinking here, it would suffice to consider—as common language does—that these two domains, space and meaning, intersect and intertwine through widespread metaphorical expressions. The lack of proximity or co-exestensiveness of sense with respect to ideas as well as physical-geographical situations, can be signified by a single adjective, that can be phraseologically declined. Think of the expressions: "I want to keep him at a distance", and, "I distance myself from your position". Both could be ambiguous if they are not immediately contextualized. In fact, either could signify both physical and/or ideal distance. This semantic contiguity and the interrelatedness may be synthetically defined—by drawing upon a suggestion traceable to Plato's *Timaeus*, but also in the pre-modern tradition of geographical studies—as "chôra". The method for their analysis can be assumed, in turn, as "chorology". These two word-concepts mean the physical-categorical *continuum* that permeates the experience of space and, simultaneously, the appearing of space within and *before* the conscience. These words point out that space is, at the same time, both a premise and an outcome of the activity of categorization.[9]

That being said, we can now overlap the linguistic case just proposed with the specific situations generated by the "tele-medical gaze" on disease and patients treated remotely. In this regard, we could say—readapting the suggestion arising from the ambiguous nature of distance—that the doctor might face a chorological fracture. This means, more explicitly, that the empirical-perceptive distance of the patient's body could be considered as nullified, but meanwhile the ideal distance could simultaneously increase or, however, acquire increased emphasis. As will be shown below, studies on telemedicine

[7] As regards the problems related to telemedicine, and especially concerning the time required for the efficient management of remote tele-robots, see below.

[8] As for the transformative effects resulting from the involvement of the body in communicative and pragmatic processes implemented through IT tools, see M. MORT, T. FINCH, C. MAY, *Making and Unmaking Telepatients: Identity and Governance in New Health Technologies*, in *Science, Technology, and Human Values*, 4, 2008, pp. 9–33. J. G. ANDERSON, M. R. RAINEY, G. EYSENBACH, *The Impact of Cyber Healthcare on Physician-patient Relations*, *in Journal of Medical Systems*, 7(1), 2003, pp. 67–84.

[9] J. SALLIS, *Chorology: On Beginning in Plato's* Timaeus, Bloomington-Indianapolis, 1999. On legal chorology, see M. RICCA, *Sussidiarietà Orizzontale e Dinamica degli Spazi Sociali. Ipotesi per una Corologia Giuridica*, in *Scienza e Pace*, 2014, pp. 1–68, www.scienzaepace.it; id., *Uso interculturale dei diritti umani e corologia giuridica*, in *Humanitas*, 69 (4-5), 2014, pp. 734–750.

from their inception have affronted this possible discrepancy and identified its potential to create significant problems, so much so that discussion of this topic has been included in almost all of the texts on e-Health.

The problem of legal distance is the first among those which come into play and interfere with the abstract potentialities and the concrete chances for further developing telemedicine. This is not surprising. The body is a sort of pivoting icon of cultural experience and its ways of symbolic expression. If we consider that law gathers in and formalizes the axiological-cultural architraves of social life, it is nearly inevitable that the body is among the most relevant targets of legal projections and regulations. Human action is conveyed by the body's use, and law is precisely ordered to rule upon the outward expression of its subjective action plan. Moving bodies, although only virtually, also imply a joint transplant of their contextual relationships drawn by legal agencies. The technological displacement of sick bodies also requires and involves a transplant of their legal connotations, thereby a linguistic-political translation/transduction of them. But, as I shall show below, the symbolic-normative dimension is not the only bridge between the transportation of bodies and their translation. The "material" body is also an outcome of categorization processes, namely a semantic entity. Even it, thus, is to be translated as well as transported. In the same way, it is a part of the ecological space of lived experience and does not escape from the chorological *continuum*. And it is precisely to this point that I now turn.

To begin with, I should like to consider problems and constraints burdening telemedicine and driven by law, particularly, the diversity of legal systems.

2. In what ways and under what conditions are doctors allowed to intervene on (only) tele-displayed bodies?

The first problem telemedicine has to face relates to information. Let us take the body image of a geographically distant patient. Its real time transmission is only one of, even if the most intense, eHealth's possible components. This image is information in itself, but also the result of an activity of information's telematics management.[10] Even its *presentiality*—the dynamic image of the patient's body—provides incomplete information. The doctor must not only "see" but also "know". In order to accomplish therapeutic and diagnostic tasks, the tele-doctor also needs information about the "surrounding circumstances" of the patient and his body. Telemedical intervention could even be performed, at least in some cases, without "vision". A significant portion of e-Health concerns information sharing between doctors located in reciprocally distant places, such as the transmission of medical records, the development of databases, or the transfer of educational/training information focusing on the prevention and care of pathologies.

The body already shows itself to be something beyond its mere "cosality" even within the management of information. This is because it works as a crossroads where different rules on privacy and processing of sensitive data provided by different countries overlap and demonstrate, in many cases, their reciprocal incompatibility.[11] I propose some questions to better illustrate the point. What kind of data can be transmitted to the remote-doctor? Which legal parameters will be taken into account in facing and assessing this issue? Is said data to be governed by the source legal system or by the target one? And, in the case of differences between the respective state regulations, which behavioural patterns will the doctor and the institutions of the country where the patient is located follow? Furthermore, once the discrepancy between the legal systems involved within the telemedical therapeutic relationships is clear, what will be the concrete possibilities and methods of coordination

[10] I. MOSER, *Information and Its Uses in Medical Practice: A Critical Interrogation in IT Plans and Visions in Healthcare*, in *International Journal of Action Research*, 1(3), 2005, pp. 339–372.

[11] In this regard, in an already vast literature, see B. A. STANBERRY, *Legal and Ethical Aspects of Telemedicine*, in *Journal of Telemedicine and Telecare*, 12(4), 2006, pp. 166–175. A. L. TARASCO, *La Telemedicina per lo Sviluppo della Sanità nel Mezzogiorno: una Introduzione Giuridica*, in *Rivista Giuridica del Mezzogiorno*, 4, 2010, pp. 1387–1426.

between state laws with regard to respecting rules on privacy, on one hand, and the fundamental right to health care, on the other hand?

In answering the above questions, we could confine our gaze—at least, for now—to the European Union. Within these geo-normative borders, the right to appropriate medical care, supplied according to state-of-the-art technological-scientific competences, constitutes one of the teleological axes that ensure the promotion of telemedicine.[12] As regards the right to health, telemedicine looks undoubtedly like an instrument capable of assuring a *surplus* of implementation, and thereby a higher level of effectiveness. That the right to privacy and provisions for its protection at a national level may be waived as necessary to assure subjects their right to health care appears entirely plausible. This conclusion, however, should not be reached too hastily, as if it were an almost obvious outcome. Public and private duties to respect the right to bodily health must not forget or belittle the fact that the body is itself an object of representation and conceptualization. What it is, does not lie separate from the whole web of sense within which the schemes for its categorizations are forged. The importance granted to the human body depends on the value of the human being in all of her/his connotations. Among her/his features there are characteristics that do not strictly pertain to physicality. Nonetheless they beat time-life and punctuate the biography of the body intended as a living, dynamic, and social entity. Hence, it could occur that an uncontrolled use of a patient's clinical data through the transmission of information along the digital routes of telemedicine could cause severe detriments to his future life, social positioning, chances of getting a job, insurance coverage, and so on. Although through a roundabout path along time and space, all this could likely be felt by the *material* body of the patient as the intersections of life relationships enjoyed or suffered by his person. To engage with the possibilities and problems related to the management of information in telemedicine means, essentially, making a serious commitment to symbolically integrate prognoses with an understanding of all the possible the implications of healthcare. However, prognostic efforts should be carried out by taking into account not only the different legal regulations but also the various socio-cultural contexts, where the tele-patient could come to spend her/his future life.

Institutional and academic approaches typically address such issues by availing themselves of a specific conceptual tool, namely regulatory alignment among legal systems. The European Union provides an emblematic example in geo-cultural terms. The ongoing homologation among European legislations even constitutes the main target of many institutional agencies set up *ad hoc* (see above). Nonetheless, the creation of an inter-legal network is not able to face all the issues currently being raised (as well as those which could be raised) by an effective and widespread dissemination of telemedicine. The concrete applicability of legal rules has to rely upon backgrounds of axiological and deontic effectiveness of a "cultural nature". If placed at work in different contexts, even identical rules or statements will produce different results, results which are, above all, neither aligned nor equivalent from an axiological point of view.[13] No matter how effectively the instruments of EU nomothetic activity can design ends adapted for the provision of procedural justice patterns, and thereby shape normative contents based on territorial contexts, I don't believe it could be sufficient to face the problems tied to the use of telemedicine efficaciously. Without an adequate understanding of the cultural-anthropological variables involved in therapeutic relationships, even normative-procedural variations cannot engender or promote the use of criteria for trans-border coordination. Determining management schedules; aligning procedures of administrative authorization regarding health care interventions; adopting a large transnational scale featuring formally undifferentiated formats for the so-called informed consent; providing standards of retribution in cases of malpractice to be applied throughout Europe to healthcare professionals and structures through coordination among the national health services and the related assistance supplied to citizens; establishing uniformed devices relating to the responsibility of medical professionals and structures (e.g. transnational schemes for the contract of hospitalization): all of these measures will still not be enough to neutralize the relevance

[12] At the judicial level, see CJEU, judgment of 28 April 1998, Raymond Kohll, case C-158/96. ECLI: EU: C: 1998: 171, especially pars. 35–36.

[13] Also, within telemedicine, the longstanding issue of the so-called *Legal Transplants* takes place. For an analysis of this question, from an intercultural perspective, see M. RICCA, *Culture Interdette. Modernità, Migrazioni, Diritto Interculturale*, Torino, 2013, pp. 53–63, 164 and id. for further bibliographical references.

of cultural difference among doctors, patients, therapeutic approaches, etc., and its heavy weight on the modalities of approaching the care relationship.[14]

The *continuum*, the ecological relationship extant between the (diseased) body and the social/environmental dimension surely also calls into play bureaucratic activity and standards. To suppose that the systemization of these standards and regulations at the Communitarian level is sufficient to engender a *European uniform space for health care* is, however, an illusion in which only inter-governmental officers, from behind their desks, can believe… just to deceive themselves. Quite the opposite, as soon as one engages in a health care relationship, the unfeasibility of such a plan would be immediately understood. This is because in that moment would come the realization that conceptual schemes, patterns for the categorization of social experience as well as the diseased condition, are the ones that work as a hub in determining the coordinates for the applications and the concrete effectiveness of the above outlined legal parameters.

Take as testing ground medical responsibility. When is it correct to say that a doctor has misdiagnosed? The formal and institutional answer might be—and, ordinarily, it will almost surely use the following formula—if he does not abide by the medical protocols established for that specific pathology by the so-called *ars medica.*[15] But, as skilled as he is, the doctor making use of telemedicine has to deal with all the problems inherent in the necessity of dialoguing with a patient that a) is located and spends her/his life—for example—5000 miles away; b) uses schemes of representation with regard to her/his symptoms tightly imbued with the *folk* medical language of the place of origin; c) inhabits an environment connoted by the presence of idiomatic pathogenetic factors; d) has a particular way of living, and therefore manages her/his own life using behavioral habits that could be novel to the doctor, and so on. Together these factors can heavily impinge on the correct anamnesis of the disease status and, consequently, the probability of supplying a correct diagnosis. Then, in all the cases in which a doctor has to assess the meaning of equivocal or poly-semeiotic clinical data (that is to say data that could simultaneously serve as clues for a possible plurality of pathologies) the same interpretation of symptoms can be gravely undermined because of the language spoken by patients and the doctor's grasp of the related words, concepts and cognitive schemas. Of course, in all such cases one possibility could be collaboration between the local and the remote doctor. However, this would not solve all problems, rather it would merely recalibrate the crux of the matter onto the intercultural translation between the two doctors (even if it is not necessarily true that such shifting of the focus would make things easier, in the first place, from an epistemological point of view).

Much the same applies to the issues concerning care. A doctor who does not know the patient's life habits (from dietary to sexual, the relationships with various kinds of environments from housing to working conditions) could even prescribe, as a treatment, pharmaceutical remedies or modalities of medical intervention that are dramatically incongruent with the exigencies of the diseased person. This incongruence could range from an incompatibility between certain prescriptions and the patient's nutritional habits to the impairment of social positioning or one's own existential conduct as a result of surgeries or other kinds of healthcare treatments.

Then, as regards the so-called informed consent, difficulties risk becoming gargantuan. Taking into account all of the cognitive, religious, ideological, psychological, etc. differences of patients belonging to various, distant cultural contexts might prove to be an uphill battle. Nonetheless, the need to make the patient aware of what he is undergoing through her/his acceptance of medical treatment requires the doctor's ability to deal efficaciously with cultural/communicative variables. The alternative can be nothing but a misleading consent, only apparent, as it would be the consequence of choices only

[14] Even if it is gauged on the Western World and the cognitive/conceptual differences that can be seen in medical protocols, see the not recent but still instructive text of L. PAYER, *Medicine and Culture: Varieties of Treatment in the United States, England, West Germany, and France*, New York, 1996. From a diachronic point of view, an interesting survey on the variations of conceptual patterns used in medical thinking and practice can be found in J. K. CRELLIN, *A Social History of Medicines in the Twentieth Century: To Be Taken Three Times a Day*, Binghamton (NY), 2004.

[15] As for the legal parameters of medical responsibility analysed from the perspective of intercultural health care, see I. QUARANTA, M. RICCA, *Malati Fuori Luogo. Medicina Interculturale*, Milano, 2012.

notionally definable as truly self-determining. Needless to say, such a situation would also clearly have a serious impact on issues relating to privacy and consent concerning the use of clinical data. Besides, if a patient does not understand the meaning of the therapeutic action performed (allegedly) on his behalf, how can he be presumptively deemed to be aware and able to ponder the consequences of the authorization that he himself delivers to legitimate the management of her/his sensitive data (… concerning the same health treatment)?

In making these observations, I do not mean to say that a standardization of European legislation on the bureaucratic/administrative/procedural aspects of e-Health is entirely useless. Quite the opposite, I want only to stress that it is not enough; and that if such legal uniformity—assuming it can be accomplished—is considered to be sufficient and exhaustive, then it will engender only false hopes or, what is worse, a sort of smokescreen, capable of obfuscating a lack of mutual understanding and consent between doctor and patient regarding assumptions, procedures, modalities and the outcomes of therapeutic treatment.

Moreover, the above reflections are based on a specific assessment of EU politics with regard to e-Health. The critical issues focused on so far become sharper against the background of the networks of actions and efforts that EU institutions are carrying out to increase the dissemination of telemedicine. Their main concern seems basically to be addressing bureaucratic or legal standards, thereby demonstrating once more the serious anthropological-cultural deficit of analysis that can be found in all the attempts at political/social standardization led by European institutions.[16] However, e-Health and the perspectives for its adoption are not exclusively confined to European spaces and inter-spaces.

Problems with legal standards can be traced, for example, even within national contexts.[17] Let us consider the indispensable coordination between different regional and/or federal systems in the case of medical assistance supplied through e-Health. Within the national environment, difficulties of cultural adjustment are partly mitigated by the official use of a common language (or, at least, a language known by most of the population), as well as life habits whose cultural differences are somewhat limited. The scenario is quite another when the demographic landscape comprises cultural groups characterized by large cultural distances. Such a situation occurs in all the national contexts where the local population includes different ethnic groups, often because of historical factors tied to colonialism and its legacy. Something similar could be traced, moreover, in countries hosting substantial numbers of migrants. The presence of persons with different cultures within geo-political national areas is increasingly a constant, and creates both linguistic and intercultural problems. On this specific aspect I will elaborate further below.[18]

Hindrances to intercultural communications intensify, of course, if we consider the planetary horizons of telemedicine. These questions are not, however, abstract. Experiments in telemedical assistance from Europe towards Southern Hemisphere countries are currently underway.[19] Indeed, in light of such efforts, e-Health seems to work as an instrument of justice, providing a kind of emancipation lead by an instrument at our disposal to counteract the deep gaps that still mark a divide between the Northern and Southern regions of the Earth. The opportunity to assure adequate health care assistance also in deprived areas, affected by an endemic lack of health facilities; allowing people places in distant corners of the globe to enjoy the so-called "medical excellences" located in particular urban or scientific districts, in many cases as the only chance for survival; making possible a consistent reduction of costs that would otherwise be unsustainable for patients lacking economic resources; providing from afar health education, prevention, and pharmaceutical information about possible therapies: all of this creates an exciting perspective to say the least, if only because

[16] I have addressed the issues connected with this deficit more broadly elsewhere, so here I propose only a brief referral. See, on this topic, M. RICCA, *United Europe and Euclidean Pluralism: On the Anthropological Paradox of Contemporary EU Legal Experience*, in *Unio Law*, 2, 2015, www.unio.law.it.

[17] As for the Italian context, for a clear and well structured analysis, see C. BOTRUGNO, *La Diffusione dei Modelli di Cura a Distanza: Verso un "Diritto alla Telesalute"?*, in *BioLaw Journal*, 1, 2014, pp. 161–177.

[18] I. QUARANTA, M. RICCA, *Malati Fuori Luogo*, cit.

[19] For further information on these projects, see the SIT (Società Italiana Telemedicina) website, www.sanitaelettronica.it and/or www.medicinatelematica.it.

telemedical proximity turns into a synonym of *human proximity.*[20] Unfortunately, despite everything, the environmental and cultural connections of the body, including legal-institutional ones, work astride distance like a dark agent that hampers the achievement of purposes intrinsic to telemedicine. With respect to these problems it is totally useless to entrust the possible solutions to legal-bureaucratic strategies—like those adopted by the EU—in an attempt to engender operative backgrounds that, at least, do not prevent the activation of telemedicine devices. Barriers relating to the schemes of categorization concerning the body, disease, *ecological* relationships between physical and social-emotional dimensions of individual existence, and so on, that patients use and that deeply differ from the correspondent Western and bio-medical patterns, are far more difficult to overcome. Not least, religious universes often raise huge communicative and operational hurdles. A computerised trans-duction of bodies, unsupported by an adequate commitment to intercultural translation, could therefore produce dire consequences, dramatically jeopardising the promises and purposes of telemedicine.

Ignoring all such obstacles and instead assuming that technological capacity accompanied by legal regulation could provide total effectiveness in this area of healthcare, would be a fatal mistake. As already elucidated, barriers in the communication between doctor and patient can even have lethal results[21] and impair the very core of health care services and the whole bio-medical enterprise/approach. The plausibility of such concerns is borne out by an analysis of Art. 2232 of the Italian Civil Code, which interweaves its provisions within the telemedical context. This article titled, "Carrying out the work", also applies to medical services. The text is as follows:

> Art. 2232. *Esecuzione dell'opera*. Il prestatore d'opera deve eseguire personalmente l'incarico assunto. Può tuttavia valersi, sotto la propria direzione e responsabilità, di sostituti e ausiliari, se la collaborazione di altri è consentita dal contratto o dagli usi e non è incompatibile con l'oggetto della prestazione.
>
> Art. 2232. *Carrying out the work*. The subject undertaking the work must provide personally for the assumed task. He can nevertheless rely on substitutes and assistants under his direction and responsibility if the cooperation of the other is permitted by contract or custom and is not incompatible with the service to be supplied.

The first question that Art. 2232 raises in its connection with telemedicine concerns the personal features of the service. The article requires that the service must be provided "personally". Let us imagine, then, that a doctor and a patient play parts in a "telemedic event", such as a diagnostic examination or a case of telesurgery, and only one of them is located in Italy. Setting aside the issues tightly linked to private international legal aspects relating to the rules applying to the case[22], it is

[20] In this regard I would refer to J. DEWEY, *Democracy and Education: An Introduction to the Philosophy of Education*, New York, 1916. There, Dewey proposes an ecological vision of social relationships woven by people. He highlights how human beings, by virtue of their nature as symbolic animals, include in their existential environment phenomena and objects that are remote in space and time. These join the "ecological proximity" of each human being; phenomena and objects that are symmetrically and geographically/topographically near can become ecologically (and I add: chorologically) remote because they are not part of the existential circuit of each individual as such drawn by her/his ends, values, culture, etc. Dewey's pages envisage, almost prophetically, the semiotic connotation of space that today is made evident, inter alia, also by telemedicine and the possibilities it affords to transcend geographical-physical limitations.

[21] I addressed such problems in more detail in I. QUARANTA, M. RICCA, *Malati Fuori Luogo. Medicina Interculturale*, cit.

[22] As a general standard, transnational statements provide that the law to be applied to medical treatment is *lex loci*, namely the law of the place where the treatment is materially supplied. However, in the case of telemedicine, it is precisely this aspect (the place) that becomes disputable, or at least uncertain. Where are the diagnosis and/or the treatment processed? In all likelihood, at least in the EU area, the norm for such cases should be traced to the Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, (replaced by Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, OJ L 304, of 22.11.2011). If other countries outside of Europe are involved in

important to understand if and how Art. 2232 of the Civil Code might align with a scheme of healthcare and therapeutic assistance that gives room to the *cultural personality* of patients as envisaged by the Italian Constitution (Art. 32, 2, and 13). However, this point is relevant even from an international private law perspective because, whereas the constitutional standard might be violated, the foreign rules applicable to the case and compatible with e-Health could face the obstacle of national public policy on the way to their reception in Italy. But this would mean that the e-Health service could not be performed from or towards Italy.

The relationship of trust between doctor and patient is a fundamental element of medical services, particularly since it conveys communicative interfaces that are necessary for the performance of basic diagnostic activities and the processing of an informed consent. A healthcare system based upon the full respect for the person, her/his capacity of self-determination and freedom, pursuant to Art. 32 and 2 of Italian Constitution[23] (but it would be the same if we changed the focus to EU law[24]) could hardly acknowledge legitimacy to a "non-personal" service. Besides, the second part of Art. 2232 envisages the possibility of relying upon substitutes, assistants and auxiliaries if this is compatible with the nature of the specific contract, uses, and service. In the case of medical assistance, this possibility would seem, however, to be excluded, at least in all the cases in which the therapeutic alliance seems integral to care. Nonetheless, scholars profess that making use of e-Health services while fulfilling the requirement of "personality" is, nevertheless, possible. The argument relies upon the specific characteristics of technological support involved in telemedical assistance. Actually—many argue—the teledoctor is "present" in real time at the scene lived and occupied by the patient. Cases of

the telemedical service, the question seems, instead, to remain open: also because its solution depends on the international private law systems of each country and the scope of contractual freedom recognized by such system with regard to the law applicable to the case. Yet within the EU area and with specific regard to telemedicine, Directive 2011/24/EU of the European parliament and of the Council on the application of patient's rights in cross border healthcare, OJ L 88, of 04.04.2011, especially Art. 4.2., could be considered. This legislation, however, does not provide any directly applicable rule but rather leaves it to each member state to ensure intergovernative and inter-regulatory collaboration in order to face the problems of telemedical responsibility. Further questions concern, then, cases of privacy violations with regard to sensitive data, product responsibility for damages caused by malfunctions of apparatuses used in telemedical service, etc. For a recent overview on these topics that includes various comparative essays, see C. GEORGE, D. WHITEHOUSE, P. DUNQUENOY (eds.), *eHealth: Legal, Ethical and Governance Challenges*, Heidelberg-New York-Dordrecht-London, 2013. Also, with specific regard to the responsibility for telemedical services in the EU area, see. I. ANDOULSI, P. WILSON, *Understanding Liability in eHealth: Towards Greater Clarity at European Union Level*, in id. (ed.), pp. 165–182, 174–175.

[23] For non-jurist readers, the text of Art. 2 and 32 of the Italian Constitution follows below:

Art. 2. The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

Art. 32. The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent.

No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person.

[24] See articles 35 and 3 of the European Charter of Fundamental Rights:

Art. 35. *Healthcare*. Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Art. 3. *Right to the integrity of the person.*

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

- the free and informed consent of the person concerned, according to the procedures laid down by law,
- the prohibition of eugenic practices, in particular those aiming at the selection of persons,
- the prohibition on making the human body and its parts as such a source of financial gain,
- the prohibition of the reproductive cloning of human beings.

emergency response in the event of accidents or disaster seem to be the typical situations in which this kind of "presence" takes place. Though "remote" in space, the doctor is "present" by his gaze, his instruments, even if it is other subjects physically on site who cooperate with him to actualize his intentions. In other cases, then, the assistant for telemedical services could be even the patient, as in remote health monitoring of people suffering from chronic disease. In the eyes of interpreters, such observations appear to be comprehensive enough to solve any problems gravitating around telemedicine, allowing for the emersion of the increased efficiency of e-Health with respect to traditional health care procedures and opportunities.[25]

According to these opinions, to say that the doctor "sees" the diseased body, "communicates" with the patient, "examines" remotely her/his clinical/diagnostic data, would seem to comply with the requirements established by both Art. 2232 of the Civil Code and Art. 32 and 2 of the Constitution. The combination of these provisions, respectively legislative and constitutional, seems therefore to put Italy (as well as any other countries having similar rules and principles) along an ascending path towards the implementation of telemedical care. In a sense, these provisions could produce a sort of indirect device to overcome and relativize the constraints deriving from sovereignty, opening both the physical and imaginary frontiers of each state to paths of political-legal connection departing from and projected by a body, precisely that of each virtual patient, which in turn becomes an icon of cosmopolitanism. "Disease and the right to good care do not know frontiers", it would seem fair to proclaim. The possibility of crossing borders and, even better, the right to overcome them to get care, of themselves sound like impressive ethical achievements, a great step along the path towards the humanization of international relationships. The question remains if and how seeing and communicating with the patient by virtue of a computer display satisfies the requirements provided by Art. 2232 with regard to professional services. In this connection, is it correct to say without a doubt that the requisite of "personality", when applied to medical services, merely implies the instantaneous or topical possibility to see and communicate? In other words, is the taking-over of a body, intended in its mere materiality, to be deemed sufficient? Or the therapeutic alliance established with a patient whose communicative possibilities are limited exclusively to the frame of a relationship doomed to remain jammed within a computer display? Can we be sure that the only space to be jumped over and dissolved is the physical-geographical space? Or, rather, just initiating form Art. 2232 of the Civil Code and its analogues in other legal systems,[26] should we examine more closely what exactly we define as "the body" when involved in a therapeutic relationship? And how should we treat the fact that the body appears as if it were both the beginning and the end, the source and the target of healthcare *ends*?

3. The body as a thing vs. the body as a relational process

The body, taken statically and as if it was an organism-object, is the epitome of the vital activities lying behind it and, at the same time, an outcome of them. These activities continually occur along the track and the sequences of its relationships with the environment. In a sense, they are the emergence, the implications of such relationships. Without air and respiration, the lungs would not be what they are, or rather they would not exist at all. The same could be said about the stomach with respect to food and the feeding process. Even the brain is no exception. Lacking environmental stimuli, it could not develop. The genetic code and its parts related to the brain, if deprived of their usual dynamic immersion in an ecological context, are without any consequences or effects, inert. This conclusion works also from a phylogenetic point of view because the human organism and its genetic information

[25] See, on this topic, Tarasco, *La Telemedicina per lo Sviluppo della Sanità nel Mezzogiorno* cit.; A. NARDONE, *Tutela della Salute e Nuove Tecnologie. La Telemedicina*, Napoli, 2005, p. 127 ff.

[26] Provisions similar to Art. 2232 of the Italian Civil Code can be found in many legal systems, where the discharge from the contract is regulated with regard to the cases in which the personal character of the performance constitutes an essential element of the contract and the fulfilment of its obligations. In all the cases that involve intellectual performance, qualified as such because of the specific competences of the person undertaking the service, the "personality" of such performance is considered to be an essential element of the contract. In this regard, a sort of general framework is supplied by the DCFR, article III. –3: 302, par. 2.

are a result of evolution, thereby they arise from the history of relationships between organism and environment.

What is useful and serves as an ecological framework to the body, from a dynamic-relational perspective, is also integral to it (where "is" is to be intended in a periphrastic sense). But if this is so, then telemedicine and its geographical projections are also to be considered to be included within corporeity. "Health" and "medicine" are synthetic expressions used to indicate the conditions and tools necessary for the organism to survive, as well as to ensure its own welfare, and overcome the challenges posed by the environment to its ongoing existence and activities. The body as a whole and every one of its parts, implicitly relate to a web of relationships with the environment that are vital to their existence, and to the production and safekeeping of their corporeality and their physical existence as entities of the world.[27]

All this means that the body topography, its "scans" and the way to weave its life relations among its various organs, draw in spatial terms, even thanks to the right to health, a political-legal geography that telemedicine is capable of widening tremendously—while ensuring a strictly temporal re-configuration of experience involving the body, disease and care.[28] However, this expansion does not concern only the physical-spatial dimension. The new geography of healthcare, urged by the exigencies of individual bodies, requires institutions to redraw the entire legal framework of corporeity, so relativizing territorial sovereignty as considered with regard to its value connotations, ends, and socio-cultural architraves. The body, if taken as a unified synthesis of experience, will be the result of such renewed legal and pragmatic interrelations. All together, they will be the driving force and, at the same time, the outcome of a new order of sovereignty. In order to achieve its own ends, and then to make *space* for itself, it is going to turn outward and hetero-integrate its contents, so as to engender an inter-space that comes from an intercultural translation among different legal-cultural languages. The pursuit of health, in other words, will utilize, as its means of achievement, spatial transposition and all the elements that connote the various involved (physical/experiential) spaces. That same pursuit will be refashioned, however, by virtue of its involvement in this new interspace. But such interspace is nothing but a new framework that finds the optical summit of its (even institutional) effectiveness precisely in the right to healthcare and its reticular implications through the experience orbiting around corporeity. In short, new potentialities of legal-spatial protection will change the "perception" of what "health" means. But this change, as in a circle, will modify the context of means, and thereby of the spaces, times, and instruments required to assure health.

With the advent of telemedicine, examining a body potentially in need of health care will be like looking at a geographical map, within which each organ will represent, almost metaphorically, the place where one can find the most skilled subjects and the competence to care for that body's afflictions. But there is more. Every organ and place (or places) will engender connotative proximities, new semantic implications, which, as such, will be joined in a unified space of experience, namely that of corporeity. In turn, the categorical space/spectrum will make visible physical, political, legal,

[27] In the vast literature on body and corporeality, their dynamic-cognitive aspects, and the process of embodiment of experience, I suggest here only a few references: B. FARNELL, *Dynamic Embodiment for Social Theory: "I Move,Ttherefore I Am"*, London-New York, 2012, R. W. GIBBS JR., *Embodiment and Cognitive Science*, Cambridge, 2005, M. JOHNSON, *The Meaning of the Body: Aesthetics of Human Understanding*, Chicago, 2007; K. SIMONSEN, *Encountering O/other Bodies: Practice, Emotion and Ethics*, in B. ANDERSON, P. HARRISON (eds.), *Taking-Place: Non-Representational Theories and Geography*, Farnham-Burlington (VT), 2010, pp. 221–239; C. SINI, *L'uomo, la Macchina e l'Automa. Lavoro e Conoscenza tra Futuro Prossimo e Passato Remoto*, Torino, 2009; E. THOMPSON, *Mind in Life: Biology, Phenomenology, and the Sciences of Mind*, Cambridge (MA)-London, 2007; S. TRNKA, C. DUREAU, J. PARK, *Introduction: Senses and Citizenships*, in id. (ed.), *Senses and Citizenships: Embodying Political Life*, New York–London, 2013, pp. 1–32; T. ZIEMKE, J. ZLATEV, R.M. FRANK, *Body, Language, and Mind*, vol. 1, 2007.

[28] In this regard, an important referral concerns the so-called m-Health, which can be considered as a sort of subclass of e-Health. It consists of the mobile medicine, today enabled by mobile technology. Its relevance emerges in all the situations in which an emergency response is requested; or, for example, when timely guidance from a distance, guaranteed by a remote doctor during the performance of a medical treatment—as in rescue operations—can actually save lives or avert irreversible damages.

economic, and communicative proximities that before now would have been inconceivable. The "remote" and the "present" as mirrored in the body will become co-topical, simultaneous, contiguous, drawing a new chorological dimension. It is, doubtless, a proximity made possible by the new cognitive and operative possibilities disclosed also by telemedicine. But the intercultural/inter-spatial encounter does not stem exclusively from the empirical-factual dimension of experience. Actually, at the regulatory level—national and supranational—the right to get the best care available worldwide is recognized, and works as a motor of inter-spatial and intercultural encounters that calls telemedicine into play, so as to engender new experiences that use inter-spatiality and interculturality as their own means.

At this point, it is about understanding whether telemedicine, with its advanced technologies and quick turn-around times, is capable of being responsive to the chorology of the human body and its intercultural transformation given the symbolic displacement effectuated by IT tools. In my view, a broad adoption of e-Health devices could be very perilous if it is carried out with no concern for the relatedness inherent to the body. In this regard, it should be emphasized that the form and the perceived thingness/materiality of the body have a merely epitomizing character because they synthetize the web of experiential and semantic implications underlying corporeal life. What we call the head, the stomach, the perception of pain and disease, etc., do not compose self-evident and universal truths, and above all they are not data that exist independently from culture or that can be processed regardless of our cultural schemes of categorization. The connections of sense in which the head, the stomach, the sense of pain, and the same experience of life and illness are nestled, foster and fill the connotative spectrum of what each human being sees, perceives, experiences, and calls "head", "stomach", "pain", and so on. Nonetheless, such connections are variable according to the ecological relationship between mind and environment, an environment that is more than simply the physical, the external, that which is presumptively placed *out there*. On the contrary, it is the synthesis of the symbolic and material elements included in the innumerable tracks of experience along with the related modalities of categorization.

All of this does not coincide with a bodily image displayed on a computer screen, however dynamic it may be, alongside the emerging flow of a communicative stream. Possible misunderstandings could be lurking at each step; moreover, they could tragically haunt the processing of the anamnesis, the diagnosis and all the opportunities for intervention and/or care. These risks are the shadow projected by the hidden side of the expression "personality of service" as related to the medical field. They are also the dark side of biomedicine and its reductionist approach and synthesis entirely focused on *thingness* and the alleged immediacy of corporeality. Instead, both these connotations should be understood as the outcome of processes of conceptual condensation that epitomize all the relations of sense (namely social, environmental, psychological, affective, etc.) placed at the doctor's disposal through his cultural knowledge.[29]

In any case, since I can imagine that such reflections taken alone might appear to be somewhat counter-intuitive and not decisive enough to call into question the breathtaking advances afforded by telemedicine, I will try to further elucidate their meaning in a way that is a bit unorthodox, but hopes to be efficacious.

4. Prehistoric art, comics and cognitive psychology: the chorological implications of e-Health

The body image rendered by the computer screen and the sequence of included technical information are the constitutive elements of telemedicine and, at the same time, its innovative aspects. In this regard, I think some questions should be posed. Are the innovations delivered by e-Health completely interchangeable with the tools and processes afforded and assured by the doctor's traditional diagnostic experience/practice? Is seeing a body inside a virtual frame *the same thing* as

[29] In this regard, S. DEIN, *Explanatory Models and Oversystematization in Medical Anthropology*, in R. LITTLEWOOD (ed.), *On Knowing and Not Knowing in the Anthropology of Medicine*, Walnut Creek (CA), 2007, pp. 39–53, but, even before, the essays published in A. M. BRANDT, P. ROZIN, (eds.), *Morality and Health*, New York-London, 1997. Moreover, I. QUARANTA, M. RICCA, *Malati Fuori Luogo*, cit.

examining it in real life? Is receiving the diagnostic data and setting up a discussion through the limited contingencies of an online encounter fully comparable to the doctor-patient relationship woven within a specific life context, one that is typically well known and shared by both these actors?

I believe the answer is no. That is, unless some measures have been taken in order to seriously confront and consider those aspects of the therapeutic relationship and the chorological-intercultural transformations that are coextensive to telemedical care. Otherwise, the image rendered by the computer screen will generate only an illusion of simultaneity and co-spatiality. Doctor and patient, each one living in a space-time warp that is "scanned" and forged by his own cultural habits, will actually experience different *spaces* and *times*. And perhaps, these could be reciprocally closed-off—in a "Babel effect" of sorts—precisely by the assumption that *virtual tools* have "nullified" all spatial and temporal distances (along with the related connections of sense, however), imposed by the *real world*.

To take a pragmatic approach, we can begin to ask ourselves what the doctor's path and efforts should be if he were called to supply his professional services on behalf of a long-distance patient without the use of telemedicine. First of all—I believe—the doctor should travel. And, however trivial this consideration might seem, it could prove to be rife with important clues regarding the issue at stake. Anyone who travels does more than simply dis-place his own (physical) body. Notwithstanding the innovations in transportation that render travel far less challenging and adventurous than in the days of Marco Polo or Columbus, space cannot simply be "skipped", or put in brackets. To get to his patient, the doctor must *traverse* the distance, move through it and make contact with everything that populates it. Such a task would already involve him in environmental, social, linguistic, architectural, bureaucratic, and innumerable other differences. He will personally experience these differences over time and through a global immersion in the various environments. In the doctor's consciousness a new idea of distance would begin to slowly make its way, precisely, a clear perception that distance is not only physical but also climatic, aesthetic, ethical, linguistic, and so on. Moreover, he will gain such an awareness through a continuous and inevitable comparison of the "contents" of this distance with his own environment and cultural habits. The patient would then represent a kind of final stop—also conceptual—of the journey. Furthermore, the patient (and his disease) will place himself within the overall context that is progressively traced by the trajectories covered to traverse space and its distances; a context fashioned and connoted by the transformations ensuing from the same experience of space. "Reading" the patient's body, figuring out his words, etc., would constitute, then, activities that are tightly integrated within the process of environmental repositioning faced by the doctor. At the first contact with the patient, the idea of having to cope with difference, somehow incrementally disclosed by the crossing of various kinds of distances, would function as an already acquired attitude. At that point, the travel itself will have engendered or otherwise suggested an understanding that the patient's body is an integral element to a web of relations of sense and experience different from those that are familiar to the doctor and molded according to cultural schemes different from his. So, the impression that *something else* beyond biomedical-therapeutic expertise is required to meet the patient's needs would come the doctor's mind automatically—or, at least, it would have a reasonable chance of appearing on the stage of his conscience.

Can we assume that an equivalent inclination to such cognitive adaptations will occur also in telemedical practice? That the awareness that the sick body is placed elsewhere could be sufficient to engender, inside the doctor's mind at least, a positive inclination towards environmental analysis, including both the material life context and the imaginary landscapes the patient has traversed in his life? Or, quite the opposite, is the telemedical image a sort of reduction-to-an-icon of the whole phenomenon of the "sick person", a phenomenon that is somehow freeze-dried and sclerotized so completely that it consists in a few drastically de-contextualized symbolic indices? And if that were true, how could this impinge on the efficacy of the "personal" service the doctor must supply? Or better, to what extent is the necessary "personality of healthcare service" impaired if we parameterize such requirements in the typical medical experience that has always implicitly included them as part of the traditional therapeutic standards?

To better illustrate the cognitive and conceptual gap between traditional and telemedical healthcare approaches if not supported or balanced by careful anthropological-intercultural training, we might benefit from a few examples deriving from an analysis of the visual arts.

In the prehistoric era, graphic representations made on rock walls draw a path across time that is not only artistic but also cognitive, providing traces of ancient times. In the earliest cave paintings, attributed by palaeontologists to the so-called Archaic Hunters (before 10.000 B.C.), isolated images of animals or other subjects are rarely found. The individual figure, framed and separated from the rest, does not seem to inhabit the cognitive-representational imagery of those humans. On the contrary, researchers have consistently ascertained, across the length and breadth of the world, the presence of choral or composite representations. The figures are accompanied by symbols and ideograms. All together these elements seem to speak, as if the individual elements were enunciative syntagmas, constitutive parts of logical-conceptual structures. However, the sets of figures and signs do not articulate unified scenes or episodes (interrelated series of events) condensed into synthetic images or shapes that work as icons evoking narrations having a beginning and an end, fixed and bound up with itself. Conversely, the logic underlying the cave paintings drawn by Archaic Hunters seems to shed light on webs of semiotic associations, "ideographic" rather than "pictographic" schemes[30], to wit: comparable neither with Platonic ideas nor with Aristotelian essences.

Fig. 1. Excerpt from E. Anati, *Origini dell'arte e della concettualità*, Milano 1988: Jaca Book

Such representational patterns—and this is where it gets really interesting—seem to be universal up until a particular epoch, almost as if they constituted a sort of common language for all of humankind. When, instead, at the time of the Advanced Hunters, the scene or episode began to replace the graphemic associations, the representations progressively began to vernacularize, and to take on specific idiomatic forms depending on the different geographical areas. Precisely when the iconic, synthetic figures superseded the sequential logic of graphemes mixed with images, so too did the relationships among signs become figurations, therefore no longer syntagmatic, but rather pictographic elements. They epitomized something that was taken as implicit, that is, the relationships constitutive of experience and its recurring patterns. The clarity of representations and their figurative concentration afford communicative immediacy, but only provided that those who are seeing the painting are already acquainted with their "mute parts", that is, the implicit or "*not said*" concerning the relational and indexical elements of the depicted scene.

[30] E. ANATI, *Il Museo Immaginario*, cit., pp. 28–29, argues, "Vi sono tipi di associazione che si assomigliano. L'animale raffigurato in una certa maniera nel contesto degli altri segni associati non riflette la realtà naturalistica come vorrebbe la nostra immaginazione di oggi, queste immagini si ubicano nello spazio della parete in modo ripetitivo, in base a delle impostazioni che dovevano avere un senso nel loro insieme, ma che non rappresentano il tipo di composizione, e il tipo di visione comune della nostra cultura contemporanea. Sembra ad esempio che nell'arte dei Cacciatori Arcaici non esistesse, salvo qualche rara eccezione, un concetto di base, o di piano di calpestio. I grandi animali sono sovente raffigurati sulle pareti delle grotte, come se fossero sospesi per aria. Lo stesso avviene in Europa come in Tanzania o nella Terra di Arnhem".

Fig. 2. Excerpt from E. Anati, *Origini dell'arte e della concettualità*, Milano 1989: Jaca Book

This stylistic passage marks a simultaneous cognitive and communicative transformation, which severs its links with the archaic past and its representative logic in conjunction with the end of the hunter-gatherer era.

Fig. 3. Excerpt from E. Anati, *Il Mueso immaginario della Preistoria. L'arte ruprestre nel mondo*, Milano 1995: Jaca Book. This image gives a sort synthetic representation of the passage from the archaic style to the neolithic one in the making of the cave painting. The giraffe was depicted on a subsequent occasion, as an individual and unrelated figure, defined in greater detail. On the contrary, the archaic figurations are very stylized and consist for 2/3 of graphems.

From that point on, cave art becomes more and more vernacularized, anchored to places and "cultural dialects". This "conceptual localization" had an effect that remains persistent and is experienced even today by paleoanthropologists. Effective interpretation of cave paintings apart from the most archaic, therefore, dating back to the Neolithic period, varies according to the cultural continuity and proximity between the observer and the examined figure. In other words, paintings placed in the West or in the East are easier to decipher depending on whether the paleoanthropologist comes from the same part of the World or not. The more the figurative concentration—and thereby the coincidence between concept and iconic representation—increases, the more the rate of cultural differentiation of the paintings and their meanings seems to widen. The figure/icon conceals, by taking

for granted the significant relationships inherent to experience. So, anyone who lacks the cultural knowledge coextensive to the "mute parts" of these figurative representations will be not able to puzzle out the sense of these semiotic condensations, unrelated individual figures, or self-bound scenes. Cultural Otherness, transmitted tacitly and unawares over the ages, turns into a "rocky bump" on the road of trans-epochal and trans-cultural understanding and communication. It marks a threshold of discontinuity, a cognitive hiatus between human beings inhabiting different spaces and times.

In a sense, the passage, the figurative-cognitive transition traceable from palaeolithic-archaic, as well as neolithic cave paintings could find an analogy or diachronic metaphor in the emerging sequence between traditional and telemedical medical practices. The body image rendered through the computer screen, and relating to spatially remote "scenes of sickness", resembles a sort of iconic reduction of the relations of sense experienced and interwoven by the doctor when he is dealing directly with the life spaces of a patient and his social environment, considered in both their symbolic and material aspects. The same difficulties that paleoanthropologists have with neolothic pictures placed in parts of the world different from their own could haunt the teledoctor's activity. Nonetheless, there is an important and somehow problematic difference between these two kinds of professionals. Paleoanthropologists tend to assume the psychological attitude of a person that must cross a temporal and cultural-spatial distance that is bridgeable only through decryption, thereby availing himself of mere hypothetical assumptions. Conversely, the teledoctor is inclined to imagine a sort of evaporation of spatial forking, empowered by *technology*, by the achievements of *progress*, and processes of *civilization*. His inability to understand spatial and cultural Otherness could be completely overshadowed precisely because of the universalizing abstractions typical of reductionist medicine.

Actually, taking a look at a range of telemedicine texts, including those that analyze the related legal problems, the cognitive discrepancies tied to the iconic reduction of therapeutic experience seems not to be of much concern. Even so, the interplay of crossed question-and-answer and cognitive co-construction that weaves through the doctor-patient relationship during the anamnestic, diagnostic, and therapeutic steps, takes shape through a sequential process that is both distributed over time and generative of experience. This is, specifically, the experience of care, the object of which is the dynamic and cooperative interpretation of the disease state, that the doctor has to carry out along with the sick person. Somehow, the voices of both the patient and the doctor, in their succession and subsequent condensation within diagnosis, represent something equivalent to that which in movies and comics is defined as the technique of "shot reverse shot". I believe a few comments and images can be useful to clarify and make more explicit the potential difficulties tied to e-Health and the dramatic psycho-cultural dangers that could result from their underestimation.

The technique of *shot reverse shot* originates in cinema, and is used by filmmakers to represent dialogue. To create the effect of a dialogue, two different, consecutive shots of the characters are filmed, and then edited together. The same technique can be used to show a character observing an object. The director shows the object first, and then the character, or vice versa. In order to make the technique effective—and this is the cognitive-cultural element inherent to such a technique—the two shots put in sequence must be coherent, and share a consistent "sense continuity". This continuity is established retrospectively by the spectators, as soon as they see the second shot. By virtue of memory, the viewer gives the sequence a unified sense, capable of transcending the diachronic sequencing of images and their appearance before the eyes. However, all this requires familiarity with the categorical/conceptual schemes involved in the realization of the shot reverse shot sequence. Otherwise, the use of this technique would be a complete and utter failure. It could, moreover, leave the spectator bewildered, leading him to deep misunderstandings that could be overcome only through the subsequent or previous unfolding of the movie and its plot—that is, thanks to the overall narrative context.

The *shot reverse shot* technique is also employed in comics. Furthermore, the cartoonish depictions seem to share a line of continuity with cave paintings and their representational styles, as illustrated above. Actually, a comic comprises pictorial figurations and words, therefore linguistic signs. In a sense, it is like a synthesis of cave art of both the Archaic and Advanced Hunters before, and the Neolithic painters, after. In drawn representations, the towering elements are the scene and the

figurative concentration, but not only these. The communicative efficacy of the comic relies heavily upon signs and the weft of relations of sense defined through the plot and its inner cross-references. Cartoonists use the *shot reverse shot* technique in a different way than filmmakers. They realize this shot/counter-shot effect by means of two consecutive frames, placed side by side—and, in this case, the analogy with movies is very close—but also within a single frame. Everybody will remember frames in which an action carried out by a character and the consequence of that action are given simultaneously, for example one character landing a punch and the other one falling down. Although in real experience these actions/events are necessarily consecutive, in a comic book they are shown simultaneously, concentrated in a single scene. Essentially, it is a figurative implementation of the same process the mind undergoes when it interprets *shot reverse shot* cinematographic effects. It is almost as if the single frame provides a retrospective representation, an iconized epitome of the interpretation/categorization of an experience distributed over time. However, if the image is understandable, in spite of the absurdity of the simultaneous presence of the cause and its effect, it is because this is the way our mind works: the mind of post-neolithic human beings.

A specific example could help to explain.

Fig. 4. Excerpt from R. Goscinny & A. Uderzo, *Asterix e il giro di Gallia*, Milano 2015: Hachette Livre/Mondadori (translated by Luciana Marconcini)

As we can see in this genius frame, drawn from "Asterix and the Banquet (*Asterix et le tour de Gaul*)", the little hero of the saga beats a Roman legionary by means of a cork popping off from a full amphora of sparkling brut. This scene is really extraordinary because it uses the *shot reverse shot,* exploiting the cultural/historical absurdity of the represented situation. Within one single frame the legionary loses his balance at the exact moment that Asterix pops off the cork. The sequence/connection here is both clear and simultaneously estranging, and this precisely because of the kind of weapon used by Asterix, which is completely inconceivable for the legionary. However, the meaning of the scene is fully understandable exclusively if the reader avails himself of the cross-references in the preceding frames:

Fig. 5. Excerpt from R. Goscinny & A. Uderzo, *Asterix e il giro di Gallia*, Milano 2015: Hachette Livre/Mondadori (trad. it. Luciana Marconcini)

The ambiguous semantic trans-colouring of the word "brut", undergoes a cumulative layering of re-contextualizations, it makes a sort of trans-epochal transition that hints at how much the figurative *shot/counter-shot* relies upon culturally pre-acquired meanings for its intelligibility. A clear interpretation of this scene would be very difficult if the cartoonists could not refer to the background knowledge of the reader about the typical characteristics of brut wine and the bursting effect that usually accompanies the popping of the bottles. In the absence of such a previous knowledge, the figurative concentration of *shot reverse shot* would not be understandable. In other words, the frame is a sort of static map of the represented event. And, like any map, it is not a reproduction of reality but rather the outcome of a process recombining experiential data by virtue of connotative selections and synthetic abstractions. What is shown within the frame is therefore a result of cultural, teleological, and communicative choices, as in any artefact.

Imagine subtracting the background knowledge that implicitly connotes Fig. 1. In this case, the *shot/counter-shot* effect suddenly vanishes. To make each "shot" intelligible, the cartoonist must convey a huge amount of information in a relational and narrative way. In this case, indeed, the unintelligibility would derive from the fact that the reader would not have at his disposal the conceptual/experiential patterns that would allow him to concentrate within an icon events or phenomena that in "real life" are distributed over time.

This last remark could be, however, at least partially challenged through a specific referral to the constructive techniques of the comics. They often provide as a criterion for drawing dialogues—or other scenes to be represented using *shot counter-shot* within a single frame—the alignment of the logic and chronologic succession of narrative events in the direction in which reading usually proceeds. To put it concretely, if within a dialogue a character talks first, then her/his speech bubble should be drawn on the left side of the frame, so that the reader going from left to right can see the image of that character and his/her speech bubble first; the other character, namely the interlocutor, and her/his speech bubble should be positioned on the right side of the frame. Of course, this pertains to Western and other cultures that read from left to right; it should necessarily be changed in the case of cultures reading in the opposite direction. In any case, if the *shot/counter-shot* effect were

considered as the other side of the coin with respect to the left to right sequence, then the simultaneity of representations would shatter. Instead, beyond the figurative appearance, a diachronic element would be at work. Its operativeness would be assured by the interactions between the text and the reader, and embodied in the gesture of reading or, even better, in its sequential proceeding from left to right.

Nonetheless, the above objections can be sustained by observing that simultaneity is present inside the minds of those who read regardless. And it is so just at the moment when the reader realizes the sense of what is happening in the frame, statically represented. In other words, what allows for the *shot/counter-shot* effect to work is the semantic congruence of the image, the consistent consequentiality and coherence of what is observed before and what is seen after. Besides, such a semantic congruence is the result of a retrospective processing. Only relying upon that which is read before, indeed, can the reader grasp the sense of what he reads after; and, vice versa, only on the basis of what is read after, can what is represented before, namely on the left side of the frame, efficaciously convey its meaning. It could be sufficient to put together in a single frame two figures and speech bubbles that are incongruent from the semantic-cultural point of view to achieve a double-vanishing effect. Not only would the coherence of the *shot/counter-shot* evaporate, but also the consistency between the spatial-temporal sequence allegedly inherent to the direction of reading, and the figures actually represented in the frame. This consideration can be verified, in a contrastive way, by a frame taken from another episode of the Asterix saga:

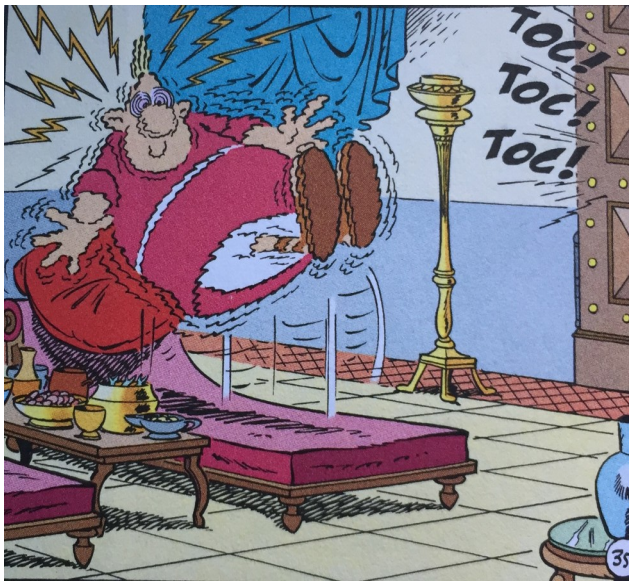

Fig. 6. Excerpt from R. Goscinny & A. Uderzo, *Asterix e il Regno degli Dei*, Milano 2015: Hachette Livre/Mondadori (translation Luciana Marconcini)

We can easily observe in this frame that the chronological sense of events does not follow the left to right direction of reading at all. Someone is knocking on the door and the Roman, until that moment sprawled on the triclinium, jumps up in fear. The door and the sound of knocking, despite their chronological and logical priority, are represented and positioned on the right side of the frame, meanwhile the Roman, and his reaction, are placed on the left side. The scene is clear and perfectly understandable…provided that the reader is already acquainted with the reasons why the Roman is "jumping up from the triclinium", and with the use of lightning bolts around the character's head to indicate his feeling of fear. Otherwise, also in this case, a correct interpretation would be really difficult to achieve without a prior understanding. The narrative recounts how the Gauls try to terrorize the Romans in a series of intimidating-dissuasive actions. Their goal is to force the Romans to vacate a giant apartment building that Caesar had wanted to build beside their village to sabotage, with the alluring proximity of "civilization" and its consumer-driven mermaids, the Gaul's resistance against colonization.

This frame too shows how the efficacy of *shot reverse shot* depends on the mind and its ability to manage the "not said" and the iconic condensation of sign relationships. A sort of polyphonic implementation of this attitude can be further traced in the following frame:

Fig. 7. Excerpt from R. Goscinny & A. Uderzo, *Asterix e il Regno degli Dei*, Milano 2015: Hachette Livre/Mondadori (trad. it. Luciana Marconcini)

Here, we can find neither direction nor sequence in reading. The image is polyphonic, omnidirectional and synthetic. It represents the final action through which the Gauls succeed in dislodging the Romans from the apartment building. The (intelligibility of the) scene plays on the contemporary reader's familiarity with the architectural structure of such buildings, their apartments, etc. Once again, simply by erasing this background knowledge, as well as the narrative context, the frame becomes almost incomprehensible. Imagining such kinds of subtractions of the implicit might seem to be merely an artificial hypothesis oriented to surreptitiously break the "natural normality" of the representation and its easy, immediate intelligibility. However, n*ormality* and *intelligibility* are in turn the result of an artifice—to be intended in its etymological sense—because they are one with the *cultural nature* of the artefact that is the comic book. Cartoonists avail themselves of a communicative action based on their "knowledge of background knowledge" and the cultural habits of readers. It is almost if this background knowledge becomes an integral part of the narrative form and conflates with the contingent scene/episode.

In practice, however, no one concocts intelligibility and its cultural devices. Culture undoubtedly works as the orchestrator of all communicative relationships, but it does not act by planning artefacts oriented towards efficacious communication. Experience can surprise us, put us face to face with phenomenic sequences that do not fully correspond to predetermined scenes and icons that are immediately intelligible. This circumstance becomes almost endemic wherever individuals from different cultures have to coexist. *Shot and reverse shot*, if embodied by different subjects having different cognitive and behavioural schemes, end up engendering shattered, incongruous contextualities and indecipherable simultaneities, as if the individuals involved in the "life frame" belonged to different times and places, but above all were doomed to continue living within them.

E-Health runs a huge risk of coming across such situations. Within the "frame" that is the computer screen, the view of the distant patient, as well as that of the remote doctor, can foster the conviction that they are the equivalent of a static, instantaneous, dialogically-dried and concentrated

representational icon of the medical action and the situations concretely and personally lived by the actors of the therapeutic relationship; rather, simultaneity can work even as a cause of misleading representations and misunderstandings.[31] Because of its visual "evidence", virtual reality performed by telecommunications facilities could suggest that the "fact" or the "body" to be examined is exactly the same condensed within the *hic et nunc* transmitted by the computer screen. The surrounding environment, both material and imaginary, would remain thereby overshadowed by the glaring obviousness and "presentiality" of the virtual image, a device capable of producing a proximity that miraculously annihilates time and space.

To realize how difficult it can be to interpret the figurative artefacts creating simultaneity between distant locations with ecological awareness, it could be useful to turn once again to comics.

Fig. 8 and 9. Excerpt from S. Tulipano, S. Dossi, *Zio Paperone e il tesoro più grande del mondo*, in *Paperino* n. 347 – May 2009, Milan: *The Walt Disney Company Italia s.r.l.*

In the above two frames (Fig. 8 and 9), *shot reverse shot* is seen in two images in sequence. However, this illustrative/narrative technique is employed to represent two situations that are not consecutive but rather *really* simultaneous. It is clear, however, that the sequential distinction here is merely an artifice. Rather than concentrate the space for representations according to the unitary time of the figured event, the distinction widens and differentiates it. This figurative strategy allows the cartoonists, however, to show and communicate the simultaneity of two events that are reciprocally distant in space. The effect is reached by virtue of the ubiquity of trans-framing speech bubbles, which make it so that characters say exactly the same words within the "same space-time", that is, into the same "chorological unit". But it is up to the graphemic or discursive elements of the frame to provide an intelligible simultaneity. It would be sufficient to erase the speech bubbles for the coupling and the consequentiality of the two frame to become incomprehensible or, at least, amenable to an infinite number of interpretations.

The same effect of "sequenced simultaneity" is quite spectacularly achieved in another couple of frames drawn with extraordinary ingenuity.

[31] On this topic, a very inspiring reading has now become a classic, E. GOMBRICH, *Art and Illusion: A Study in the Psychology of Pictorial Representation*, Princeton, 2000. See, furthermore, for a cognitive-intercultural and historical reconstruction of the prospective representation in arts, H. BELTING, *Florenz und Bagdad: eine westöstliche Geschichte des Blicks*, München, 2008; id. (C. H. BECK VERLAG trans.), *I Canoni dello Sguardo. Storia della Cultura Visiva tra Oriente e Occidente*, Torino, 2010.

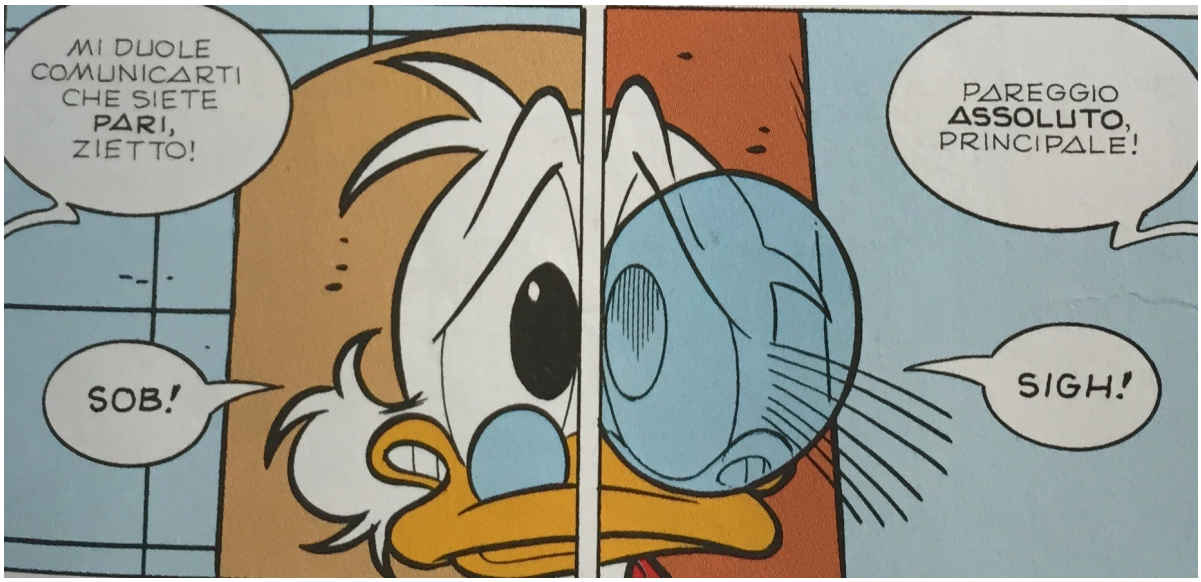

Fig. 10. Excerpt from B. Concina, F. D'ippolito, *Zio Paperone e la quarta stella*, in *Le più belle storie Disney in Cucina*, Milano 2014: *The Walt Disney Company Italia s.r.l.*

In this kind of double-frame (Fig. 10), the simultaneity of the scenes and their spatial distance are rendered through a *shot reverse shot* consisting in the juxtaposition of two frames forming a single aberrant figure: that is, a face resulting from the combination of two half faces, one beside the other. In this case, the speech bubbles clarify the sense of the figuration only a little. The absurdity of the combined image before the reader annihilates the consecutiveness, but at the same time makes its meaning almost unintelligible. Without knowing the whole narrative context, it would all appear at the very least enigmatic. The story of the comic recounts a competition between two restaurants run by two perpetually contending multimillionaires—Uncle Scrooge and Rockerduck—who as entrepreneurs-restaurant owners, are battling to obtain the fourth star in the quality ranking, each at the expense of the other; the competition will be won by the contender with the highest number of restaurant clients. As soon as the narrative context is explained, the meaning of the double-frame becomes clear. If this is the case, however, it is only because the above composite image epitomizes and translates in visual terms an extensive web of relations of sense that unwinds through a narrative plot that is quite broad and open. However, such semiotic breadth will not exceed the borders of the background knowledge of the potential readers too much. Otherwise, without a previous or complementary activity of intercultural translation, the reciprocal trans-position and the visual concentration between two different, spatially remote events/places could become inefficacious or, even worse, damaging.

Unfortunately, in the case of telemedicine what can occur is similar to what is seen in the frames above. In fact, the telemedical image of the patient would be complemented by a modest set of discursive elements, barely more substantial than the speech bubbles of comics, but designed to explicate the entire context populated by the situations and experiences that, through space and time, the therapeutic relationship should call into play. If the doctor and the patient belong to distant spatial-semiotic circuits, medical anthropologists strongly emphasize how the condition of disease is to be considered and treated as the result of an effort of co-construction that is cooperatively accomplished by both subjects involved. When the paradigms of sense and experience are culturally *remote* it is absurd to think that communication could be carried out through a sort of direct mind transfer of information. It would be even more inconceivable that this transfer could take shape through the simple unilateral pronunciation of a few words or the making a few gestures.

Making a diagnosis is a process within which the body is to be taken as a space-time map. A medical semiosis is also an ecological semiosis. A diagnosis is projected into the life environment of the patient through the doctor's anamnestic efforts. A specific symptom, topographically placed in the body, is the emersion of a phenomenon resulting from complex and reticular relations interwoven both inside and outside the organism along with a process of adaptation to the environment and its

stratifications. Such a symptom is, at the same time, an epitome and a translation, which concentrate in themselves a plot of events and connections that is to be traced in view of the construction of the diagnosis for the case, that is, the interpretation and categorization of the symptom within a categorical-conceptual scheme.[32]

Medical anthropology stresses the need for an effort of co-construction to be carried out cooperatively and creatively by the doctor and his patient. Actually, without such an interpretive convergence, this therapeutic alliance could fail dramatically. But the result could be a severe deficit with respect to the efficiency of healthcare and the prospects for its inclusion in a therapeutic path perceived to be significant to (and therefore complied with by) the patient. Commitment to co-constructive communication, however, helps to do more than simply avoid the excesses of reductionism and thereby the tendency to track only a physiological cause of disease always and in all cases. Looking at the other side of coin, co-construction allows doctors to recognize the etiological chains that have their roots in social situations, and the way in which these are represented and lived through processes of socialization and the ecological interrelation of corporeity. More simply, I do not believe that co-construction serves only hermeneutical and psychological purposes, as if the objectives, paths, and assumptions of biomedicine, taken in themselves, are to be considered immune or separate from the practices of communication between doctors and patients. In many cases, the lack of a proper approach to the cultural habits and cognitive schemas of patients, to the sense of their narratives, can instead undermine the doctor's diagnosis and its results. The activity of co-construction does indeed concern the intrinsic ends of biomedicine. In view of them, doctor-patient communication qualifies as a form of participation that is absolutely indispensable because it is a means to dynamically connect knowledge and cognitive patterns that previously were reciprocally isolated and remote. If interplayed, these factors can engender new cognitive landscapes across the dynamics of the therapeutic relationship, within which what is far will match what is near. In this way, and pursuing the specific purposes of care, new patterns for medical (but also human) experience and knowledge can emerge.

Without such participative and co-constructive coordination, the proximity afforded by telemedical devices would become, ineluctably, inoperative. Further, this outcome is almost certain if the doctor does not realize that his ecological-cultural framework as well as his patient's, must be questioned in order for them to emerge and become an integral part of the therapeutic relationship and its cognitive paths. The cooperativeness of doctor-patient communication and the "personality" of medical services thus appear to be coextensive, not least because there could be no participation without personal interaction, nor personal involvement without participation. The "personality" of medical assistance, in short, implies a pro-active disposition to shape new universes of experience and communicative environments, both of which will produce yet another environment, if compared with those articulated and lived by the doctor and his patient in their respective pasts.

Precisely because e-Health represents a sort of upheaval with regard to many traditional therapeutic patterns and the related cognitive habits, it brings to light in a very salient fashion the pivotal importance of an ecologically intercultural approach to the medical care of persons who are located remotely. The ignorance or lack of awareness of their environmental conditions, what might be their customs and existential habits, the related pathogenetic contexts, etc., could impair not only the co-construction of the "disease/illness sense" but also the diagnostic assessment and its results. The importance of what is beyond "*here*" and "*now*", namely the *presentiality* of the body under observation, is grossly evident in the telemedical context, and this is precisely because distance—though predominantly declined in a geographical sense—features distinctive axes. However, as noted above, the environmental distance has not only physical features, but also semiotic, cognitive, cultural, and so on. And, indeed, the observations just made with regard to the remote patient, made virtually close by e-Health, apply also to the foreign patient or, indeed, even local patients who share cultural habits with the doctor, but have undergone existential experiences or "stories" that are out of the ordinary—all this without wishing to minimize how every patient, every human being, has his own

[32] With regard to these anthropological-intercultural aspects of medical activity, I refer to I. QUARANTA, M. RICCA, *Malati Fuori Luogo*, cit., and the further bibliographic referrals in that text.

story. For the doctor to have an ecologically sound approach to the foreign patient he must be prepared for hermeneutical journeys toward remote *spaces of sense*. This is the only way he can contribute along with the patient to create a semiotic and experiential inter-space that can allow an efficacious coordination of diagnostic and therapeutic efforts so as to increase the chances of recovery.

Both telemedicine and intercultural healthcare show a common constellation of problems that orbit around the proper recipe for making the tacit, or unknown newly visible and significant,[33] but not less constitutive of both disease/illness and care experiences. This critical kernel coincides with the need to make sure that the *space* of therapeutic contingency is understood, and then uncovered as something coextensive with the connotative, relational *space* lived by each actor of that contingency—that is, both the doctor and the patient. It must be so because the *space* of the healthcare encounter is an effect, an emergence of the interplaying between two whole phenomenic/semiotic paths. A reference to comics can help, once again, to make less counterintuitive what has just been outlined. To avoid dangerous mistakes, an efficacious practice of telemedicine, as well as a non-virtual intercultural practice of e-Health, should avail themselves of the same cognitive processing underlying the structure of comic frames. Apart from the visual dimension and the virtual or physical proximity, the teledoctor should endeavour to trigger a semiotic, graphemic and dialogical development of the element surrounding "the body on the screen". Looking beyond the mere image and the morphological appearance of the words spoken by the telepatient should be understood as an imperative that is inherent to such medical practices.[34] The meaning and the nature of the single disease does not inhabit the mere symptoms or the "topicality" of the body, but rather comes from and includes the entire life plot of the patient and her/his organism. Retracing such "stories" requires specific skills, preparatory endeavours, and a complementation between medical and cultural anthropological knowledge. Otherwise, the dictatorship of the image—a direct consequence of its absolutization—in turn supported by the illusion of a complete proximity[35], runs the risk of engendering situations of cultural dominance that are doomed to result, ultimately, in medical malpractice.

As in the magnified comic speech bubbles, or in the relational graphemes of the prehistoric cave art, the dialogical-narrative apparatuses should accompany, frame, and sometimes even precede the activation of telemedical *channels*. The patient's image and its actual proximity would be doubtless empowered, transfigured and repositioned within an ecologic-semiotic landscape crucial to rooting out pathogenetic tracks and, through them, the proper diagnosis and therapeutic intervention able to provide effective treatment.

Across the spectrum of doctor-patient relationships, the body would increase its processive connotations, thereby becoming the source and motor for the emersion of new inter-spaces of experience and chrological dimensions. The ongoing interweaving of various universes of sense, spaces, subjects, and objects would give rise to global semiotic dynamics, which would *ferry* across the geographical and cultural distances innumerable features of social action and their legal aspects.

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[33] See the essays included in LITTLEWOOD, *On Knowing and Not Knowing in the Anthropology of Medicine*, cit.

[34] ...but not only. This discourse can be extended to every situation in which individuals with different cultures come into contact or when the life environment causes human beings to face unexpected circumstances. On the semiotic-relational approach to the categories and for an explication of philosophical, anthropological and psycho-cognitive references, see M. RICCA, *Intercultural Law*, *Interdisciplinary Outlines*: *Lawyering and Anthropological Expertise in Migration Cases: Before the Courts*, In *Rivista dell'Associazione italiana di Studi Semiotici*, 2014, pp. 1–53, www.ec-aiss.it; id., *Culture interdette,* cit., p. 84. See, furthermore, at least the two following authors: C. S. Peirce, *Collected Papers*, free download on web at https://colorysemiotica.files.wordpress.com/2014/08/peirce-collectedpapers.pdf; G. LAKOFF, *Women, Fire and Dangerous Things: What Categories Reveal about the Mind*, Chicago, 1987.

[35] Once again, the reading of Gombrich's, *Art and Illusion*, cit., from the first pages, can help tremendously in understanding the parallel asymmetry between the obviousness of images, considered in their empirical and morphological appearance, and the cultural schemas that are indispensable "to (even physically) see" them, on one side, and the anthropological contexts respectively lived and inhabited by the doctor and patient involved in the telemedical relationship, on the other.

5. *e-Health and the Earth as a legal inter-space*

There are many applications of telemedicine and each of them, on account of its particular characteristics, can lead to different legal chorological concerns. A few specific situations can help demonstrate more clearly the very relevant legal implications resulting from the use of e-Health.

The first issue to examine relates to medical responsibility. From a semiotic point of view, the virtual images of a body show a sort of spatial or chorological *excess*. They relate to an ecological background that is likely to be replaced, however, by the background(s) the doctor is accustomed to refer to when he sees patients who live in his own geographical or cultural area. The body's telemedical image—as in Neolithic paintings or modern comics—if taken alone, in an unrelated way epitomizes and condenses wide webs of sense and environmental connections. Therefore, the tele-doctor might be led to "unroll" the narratives inscribed on and inside the patient's body following coordinates of signification that do not meet those actually trod by the patient along her/his experience. The immediacy of the remote image could, in short, end up misleading the medical assessment. The apparent evidence and proximity of that image could stimulate and facilitate the superimposition of interpretative schemas that the doctor learned and used within his own usual environmental context. The semantic and geographical (in a word: chorological) excess of the telemedical image could give rise, therefore, to serious misinterpretations. This eventuality could be liable to transform the erroneous translation of factual data and symptomatic indexes into corresponding and likewise wrong diagnostic schemas, scientific hypotheses, and therapeutic courses. When the doctor analyzes clinical data, unless it consists in completely unequivocal symptoms or test results, he could go down an erroneous pathogenetic or etiological path precisely because of insufficient knowledge of the patient's life environment. "Decoding" the pathological landscape following improper interpretive patterns leads very often to translations and diagnosis that are dramatically off-target. All this occurs because the doctor tends to project, even unawares, cognitive biases upon the disease/illness situation, that is, prejudices due to the a priori adoption of schemes of pre-conceptualization. On the other hand, not being on-site and using computerized systems that produce a particular communicative concentration and timeframe could encourage a sort of blindness with regard to the possible indexes of disambiguation, launching the doctor towards a view featuring inadequate diagnostic and therapeutic patterns. The question that arises in these cases is whether or not the semiotic excess of a virtual image can be, when misinterpreted, a source of medical responsibility.

I think that the mere possibility of the occurrence of such dangers could serve as a decisive disincentive to the use of telemedicine in the eyes of many doctors. This is both a viable possibility and, doubtless, a heavy loss. Identifying the limits and problems tied to e-Health implementation does not mean it should be demonized. Rather, a thoughtful recognition of its chorological/cognitive concerns can help us to devise possible remedies to avoid the diagnostic-therapeutic mistakes resulting from a misuse of its potentialities. It is also true, however, that the urgency to look for these remedies will increase as the inefficiencies, according to the official standards required for medical services, are at risk of being a source of malpractice.

But just on the professional responsibility front and once again in the "personality of medical service" context, the crucial chorological connotation of telemedicine resurfaces. In a way, we can say that within telemedical services, the computer screen works as a sort of interface between different worlds, a device capable of transferring the connotations of each of them into the *space* of the other. Using a different metaphor, we could say that through the contact surface afforded by the virtual body, it is as if the borders of two separate figures suddenly vanish, so as to determine a complete reconfiguration of the elements and connotations that previously shaped each of those figures. If only for heuristic purposes, let us think of Fig. 11 above, and more generally, of the *shot reverse shot* techniques. The unification within a single figurative frame of different temporal and spatial sequences draws a new, hybrid (but, maybe, it would be better to say, *condensed*) space, where every previous element can assume very different meanings from those produced by a segmented representation. However, frames of comics presuppose a background conceptual scheme that is prefigured by the cartoonist and the scriptwriter on the basis of their knowledge of their readership and their already acquired cultural competences and categorical schemas. Somehow the intelligibility of every frame is

a (relatively) presumed result, which is culturally underpinned and pre-ordered since it follows well-worn tracks of signification that find a condensed synthesis precisely in the figures drawn within the frame. Such pre-codifications and communicative optimizations are instead lacking in real life as well as in virtual medicine. When categorical universes or different environments come into contact, perhaps conveyed by persons on the move, something new and unforeseeable happens, something that *has yet* to be iconified or reduced into a condensed concept. For this to be accomplished, a selective and creative translation of those universes will be required. However, there is no guarantee that the final result will be achieved, nor is there the possibility to predetermine what it will be.

Through the computer screen, telemedicine provides a pathway of communication between discursive universes and webs of sense that until that moment has never undergone a process of iconization or mutual categorization in the context of remote healthcare. The images of both the teledoctor and the telepatient are—in figurative sense—aleatory (comic) frames, contingently engendered along coordinates that cannot be preordained. Their meaning, therefore, dwells on the horizon rather than behind and/or before the spatial and temporal frame of the computer screen and the process of understanding and translation to be undertaken between doctor and patient. Both these subjects can only ascertain the "fact" emerging from the encounter and the "nature" of the disease *retrospectively*. This "fact" (taken in the etymological sense of "made", from Latin *facere*) will be a construction, or rather a co-construction, to the extent that the communicative efforts of the actors lead to personal and bilateral participation, the core of the therapeutic relationship. Telemedicine should combine the visual potentialities of IT devices and the cultural aspects of healthcare services. If this occurs, within the new, semiotically enriched image produced by telecare, all the therapeutic elements will be remoulded as a consequence of an inter-spatial trans-lation process. This is because through e-Health, the spaces and environment of both doctor and patient conflate, shaping an inter-space that is, at the same time, a new semiotic-relational *continuum*, a new context of signification.

Medical responsibility issues can be very intensively influenced by such a chorological reconfiguration. The standards for a proper delivery of medical services (including anamnesis, diagnosis and therapy, on one side, and the absence of malpractice, recklessness and gross negligence, pursuant to Art. 2236, Italian Civil Code, on the other)[36] should be properly coordinated to the specificities of e-Health. For this purpose, the law should take into account what actually comes into the teledoctor's range in the shadow of the electronically displayed body. Any and every judgment on his work should imply, therefore, a previous filling of the category of "legal responsibility" as applied to the teledoctor, with meanings, data, standards, circumstances, linguistic-communicative features, background knowledge, etc., in many respects different from those characterizing the geographical-cultural environment of national or local healthcare professionals. Indeed, medical services and related issues of responsibility cannot be configured as if the remote patient belonged to the same geo-cultural circuit as the teledoctor. This, simply, makes little sense, if for no other reason that it negates the very strength of telemedicine: that is, its ability to overcome spatial borders.

The above remarks regarding medical responsibility concern many applications of e-Health. One example is the use of cameras for the telemonitoring of patients affected by chronic diseases. The privacy issues, in these cases, obviously become sensitive and difficult to address. However, their assessment and related solutions cannot be divorced from a commitment to translate meanings and experiences across different physical-cultural environments: this means making an effort of inter-spatial and intercultural trans-lation that will engender, in turn, a new chorological (spatial/connotative) *continuum*. The patient's home and the doctor's studio will represent, then, a unified environment—at least, as regards certain cognitive and experiential potentialities. Such a unification must not be merely material or visual. Where and how the doctor casts his gaze through the camera must be considered as variables that depend on a balanced adjustment between the exigencies of both privacy and care, taking into account the particular modalities of space categorization and use

[36] Art. 2236 of the Italian Civil Code. *Seller's Responsibility*. If the performance in question makes it necessary to overcome complex technical difficulties, the vendor (*prestatore d'opera*) will not be held accountable for any consequent damages of faulty performance, except where intentional wrongdoing or gross negligence are involved.

that each patient follows. There can be nothing absolute or universal in this. A single space can be lived and configured in completely different ways, and this diversity is likely to have implications even for health telemonitoring and its legitimate use. No one should suppose that a Western doctor could *look* inside the home of a Muslim, a Chinese person, or an Indian, using the same access key or respecting the same prohibitions as if he were telemonitoring a Western home. This would be a colossal mistake. Under these conditions, the possibilities of a misunderstanding or a refusal of telemedical services would be highly likely. This discourse, however, could be extended further to patterns used to interpret the gestures of people at home, the sense given to spaces and the dynamics of movement within and across them.

In any case, what arises from the above considerations is the importance of the right to health as a geographical and cultural interface if and when it joins telemedicine. By virtue of such combinations between rights and IT tools, spaces that are distant both geographically and semiotically, along with their contexts of sense, move across the borders of legal sovereignty, reconfiguring the conceptual categories of state law and filling them with new projections of sense. It is almost as if a third space takes shape, not so much absorbing all other prior spaces or those previously separated, but rather as a new kind of collateral, posed beside them and working as an interface of connection and translation/transformation within a new chorological dimension. Another relevant profile, regarding again the "personality" of medical service, concerns tele-surgery and the related use of advanced robotics. In some respects, the doctor who avails himself of a robot to make a surgical treatment at a distance seems to radically exclude the personality of any service, and this would seem to be endorsed by the actual modalities of tele-surgical treatment. Furthermore, the difficulties of web connections and temporal lags, sometimes caused by the time needed to transmit data, tend to deter interventions in real time. For security reasons, therefore, the telesurgeon usually makes a recognitive mapping of the patient's body, and then prepares a computer program for the surgical procedure according to pre-determined schemes that are transmitted in advance to the computer/robot performing the surgery. At the patient's location, a team assists the remote surgeon. They will control the implementation of the programmed procedure and be prepared to intervene in the eventuality that something unexpected happens. In any case, they would be guided by the remote surgeon in his role of primary responsibility for the surgical procedure. Under these conditions, the requirement of "presentiality"—taken as simultaneity and spatial proximity—would seem to be excluded. However, I do not fully agree with this approach. After all, robots and the Internet are instruments, means, prostheses of the doctor's mind, playing the same role as a scalpel or other tools used to interact with the patient's body. Any eventual mistakes resulting from a malfunctioning of the robot or of the tele-transmission are integral parts of the new environment, the new communicative and/or operational space shaped by the use of telemedicine. Such a different perspective implies a renewed ecological reading of nature/culture relationships, capable of overcoming the traditional medical/epistemological schemes and updating them. If we consider the robot-computer as equivalent to a scalpel, an electroencephalograph, or a heart monitor used during a surgical procedure, then telesurgery only represents a different way to configure the relationships between mind and world. More specifically, this means that telemedicine adds something into the dimension of the "human" and the "personality" of *her/his* action, maybe because of its unusual characteristics, that is (prejudicially and culturally) thought of as outside, external to that dimension. Assuming this different perspective on the "human being/technical supports or prosthesis" divide, or "person/thing", requires, however, some cultural effort. This, in turn, will end up reverberating across the legal categories designed to rule medical services and the related terms of responsibility.

Another example—though they are innumerable—concerns the so-called informed consent and its acquisition procedures. What data is to be included in the communication between doctor and patient, what tracks of sense are to be followed in therapeutic relationships, how to understand the patient's mind so as to make clear to him what kind of health treatment he will undergo, what kind of conceptual/cultural vocabulary is to be used to translate the medical technicalities for the patient, how to decipher the existential perspective and meet the expectations of patients, and so on: all these and other similar questions appear writ large (and impeded) in the telemedical relationship. The procedure to get informed consent is not only a mere bureaucratic task—even in normal medical practice,

unfortunately, it is equivalent more or less to the gathering of a signature. This consent should be, instead, the result of a shared therapeutic path and, above all, should come from an understanding of the existential implications of both the diagnosed affections and the healthcare approach. To be sure that the patient has understood all this—as is required by medical codes of conduct and the jurisprudence of courts all over the world—the doctor has to know the imaginary background, the landscape of sense in which each patient lives and thinks. But when there are cultural differences between the two sides of a therapeutic relationship, ascertaining the patient's actual understanding becomes more difficult and must be supported by anthropological assistance. In any case, what is lacking is often the availability of time, perhaps the main hindrance to intercultural medicine. When cultural distances join lack of time and the dialogical *rarefaction* determined by the modalities of telemedical visualization of the patient body/person, the possibilities of misunderstanding can increase dramatically. Informed consent, in these cases, can become a kind of farce, thereby fundamentally threatening both the "personality and/or presentiality" of medical services and the "personality and autonomy" of the patient's choice to *comply* with a healthcare path.

In some respects, it may be observed that the contact between patients and healthcare professionals via e-Health, rather than diminishing the time-frames for dialogue and interaction, could instead widen them, and this because e-Health avoids cost and downtime inherent to spatial displacement. The time-savings is indisputable and must be recognized, provided that, however, we do not underestimate that in order to be efficaciously bridged, the gap in environmental commonalities requires a reconstructive and semiotic commitment that is necessarily stronger than in traditional medical practice. This, however, implies a prior, specific training for healthcare professionals, who should engage in more drawn-out dialogical relationships.

This overall set of considerations has far-reaching legal implications. The right to health is seen to be an agent of heterointegration of national legal systems and a factor of outward facing de-territorialization of state sovereignty. Through its involvement with the body and the ecological-relational process underlying its iconic/conceptual representation, the right to health within telemedicine produces a semantic-spatial *continuum* capable of re-connoting the semantics of legal categories inherent to the various national legal systems. Everything that orbits around the body and is tied to it—therefore also the social-economic aspects that do not seem to immediately pertain to the organic conditions of the patient—will become prone to factual assumptions within the process of legal qualification of the "disease and/or illness" and its due treatment, which legal systems working via e-Health must accomplish. So, for example, if committed to the care of a patient located in Africa, the doctor working from a European state must recognize the importance of the dimensions of sense that forge the experience of corporeality in that African locale. The assessment of those circuits of sense and their inclusion in the accomplishment of medical duties must influence the interpretation of European state law ruling the doctor's activity. Such an influence will bring with it semantic connotations and indexes of values that, in turn, can engender new relationships (or conflicts) between the right to health and other principles provided by supranational or European law. The process of contamination/re-configuration should be reciprocal, so as to trigger a multilateral and multilevel "rebound effect" between the different countries and legal systems involved in the e-Health relationship. The process of reciprocal adjustments will continue until it evolves into an all-encompassing coordination—even if doomed to be only provisional—of all the existential and legal aspects involved in e-Health: that is to say, the defining factors of the disease and/or illness with the related assessments of the possibility to care for it on one side, and the corresponding legal statements along with their potentialities of interpretive-chorological transformation, on the other. Along this path, obviously, doctor and patient will not only be passive subjects, but they too will make a substantial contribution to the direction of all the implied activities by means of their own subjectivities and ideal and pragmatic potentialities.

The proliferating of the cognitive/cultural backgrounds of the therapeutic relationship and its reciprocal adaptation will generate an intrinsically political and creative phenomenon, although carried out by using normative platforms that are already in force with a positive disposition to semantic self-transformations. The chorological dimension emerging from this process will draw the trans-territorial space in which the involved subjectivities will actually live. On the other hand, the coordination

between legal systems and their statements, so often invoked by transnational legislations—such as the European one—to allow the achievement of potentialities afforded by telemedicine will also be influenced and managed according to the hermeneutical and reconstructive exigencies coextensive with those inherent to intercultural and interspatial translations. The use of international-private rules must take into account this previous cognitive/axiological interaction between the inter-space of sense shaped by the e-Health experience and the specific state legal systems. Only by relying on the semantic adjustments determined at all legal levels by such inter-spatial interactions will it be possible to establish: a) what rules of *other* legal systems are to be applied through a *renvoi*; b) among these, which rules are to be considered compliant with the public policy principle of each state legal system; and c) more generally, what is the direction the coordination-alignment of the various state legal provision is to follow.

As for e-Health, the main task is to create spaces of sense and a legal chorology that are consistent and responsive with regard to the subjectivities involved in the "telemedical relationship". Achieving such a result has a sort of logic and chronological priority as compared to any formalistic-positive legal inter-systemic alignment. This is because the "elsewhere", the "remote", moves beyond the computer screen and gives the experience consumed "here" an autonomous constitutional and humanitarian relevance. The computer-spatial transfer will drive the questioning, the hermeneutical stressing of the constitutional principles and rights platforms provided by each legal system, so as to promote a pluralistic attitude in their interpretation. This effect would engender, precisely, a trans-cultural, trans-ductive pluralism geared towards the production of sense, considering cognitive patterns before formalistic ones, encouraging normative inter-systemic interactions. "Phenomena" such as telemedicine, accompanied and conveyed by the over-territoriality and over-nationality of values like those encapsulated in the right to health, seem thus to introduce within the contemporary legal experience a transfiguration, in a cosmopolitical sense, of both local and national social-normative dynamics. These are spurred to engage and gauge with an inter-space potentially able to *presentify* the overall planetary extension. It is a direct consequence of the possibility, allowed by technology, to *transcend* the geographical distances. Every "constitutional circuit" will tend, therefore, to work as an intercultural and inter-spatial hub within a polycentric and pluralist web, precisely the other side of the coin of a potentially global dimension of legal subjectivity and its chorological projections. The most interesting aspect of such transfigurations is that, if sequenced in these terms, they can give birth to a bottom-up metamorphosis, materializing from the quotidian unfolding of human needs beyond the traditional "sense of place". All this—I think—could make the law's responses attuned with the same dimension that, through e-Health, hosts the process of corporeity: the Earth.

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Gender Neutral Legal Language: A Comparative Overview

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Abstract: The intent of this article is that of analyzing how influential language can be in carrying out discrimination and inequalities. More precisely, the essay elaborates on legal language and the importance of drafting legislation in a gender-neutral legal language. Through concrete examples and a comparative overview, which overlooks six different countries, it is shown how easily language can create discrimination and inequalities. This study on legal language, and particularly gender-neutral legal language, offers an effective way of avoiding biases and providing a stronger and broader protection for human rights. The different experiences all around the world bring different element to the conversation on legal language and legal drafting, each one of them offering viable solutions to the problem of discrimination through language. Moreover, even though relevant issues are present in the different systems taken into consideration, the problem themselves have proven to be a useful starting point for an improvement in drafting and favouring equality and non-discrimination. The aim of the contribution is that of showing that alternatives to the legal language currently used are possible and effective.

Keywords: Gender neutrality, Legal language, Comparative law, Non-discrimination, Legal drafting.

Summary: 1. Introduction: gender, gender neutrality and legal language; 2. Legal language in the United States of America: navigating the uncharted sea of gender-neutral legal language; 3. A champion of inclusivity and equality: Canada; 4. Different approaches across Europe; 5. The leading example of Malta: groundbreaking legislation and its power; 6. The struggle of Italy with gender issues and gender equality; 7. Testimonies from Mali: the importance of oral tradition and language in law; 8. The role of non-binary gender roles in the Indian legal panorama; 9. Conclusions.

1. Introduction: gender, gender neutrality and legal language

Legal language occupies a key position in the domain of juridical sciences and its importance grows continuously. The vocabulary used in the legal domain is considered to be extremely peculiar, rich, complicated and unique, and for this reason it has gained the nickname *legalese*. Because of its complexity, numerous scholars, judges and professors have dedicated their studies and work to the drafting of legislations and documents that are available and comprehensible to all citizens. Such interest, of creating more accessible laws and regulations is directly connected to the creation of a more inclusive and non-discriminatory legal panorama.

Attention to language and vocabulary in laws can make an immense, and greatly positive, impact and difference in society. It is for this precise reason that the focus on drafting in a gender-neutral legal language becomes such an important and current matter. Gender neutrality in language is also directly linked to human rights and their protection. Within the broader domain of human rights, gender related issues and more in particular gender bias and gender discrimination, have become steadily more analyzed, researched and the protection of such, implemented. For these specific

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reasons, fighting discrimination and protecting human rights, it is possible to prove that there is an actual need for legal sources to be drafted in a gender-neutral legal language.

When it comes to gender and gender-neutrality each and every language appears to be different and characterized by specific attributes and features. Languages can in fact be categorized in different groups based on how they behave towards gender. Three groups can be identified: gendered languages, natural gender languages and genderless languages. Gendered languages are those in which a grammatical gender is present. The grammatical gender is a specific form of noun class system in which the division of noun classes forms an agreement system with another aspect of the language, such as adjective, articles, pronouns or verbs. Examples of gendered languages are Spanish, Arabic and Hindi. Natural gender is the phenomenon in a language that resembles grammatical gender but is not.[2] In natural gender the choice of pronouns, adjectives and so on, related to a specific noun is not based on the noun but is indeed based on the actual sex of the person to whom the noun refers, languages such as the Scandinavian ones belong to this class. Lastly genderless languages are the ones that have no distinctions of grammatical gender, that is, no categories requiring morphological agreement for gender between nouns and associated pronouns, adjectives, articles, or verbs. This last category of languages does have multiple means of recognizing natural gender, such as gender-specific words, as well as gender-specific context, both biological and cultural. This structure is present in Estonian, Finnish and Hungarian, to name a few. It is of the utmost importance not to confuse genderless languages with gender-neutral language. Gender-neutral language is neutral with regard to natural gender, whereas a genderless language does not need to be gender-neutral, and vice versa.

The importance of gender in words and, more broadly, in language is demonstrated also by the fact that experts have found that words can have impact and influence on thoughts and images which are created in the audience's mind. Cognitive effects of features involving grammatical gender have been consistently demonstrated.[3] It has been shown that when native speakers of gendered languages are asked to imagine an inanimate object speaking, the fact that its voice is male, or female usually corresponds to the grammatical gender of the object in their language.[4] The results of these studies done by linguists clearly demonstrate how crucial the role of language is, and what kind of influence it has on our minds and consequently on our behaviors. This element is particularly relevant when it comes to gender-neutral language, specifically to explain why its use should be supported and implemented.

In order to understand the reasons why gender-neutral language, and gender-neutral legal language in particular, should be vastly utilized, it is necessary to define and describe this specific language. Gender-neutral language, also referred to as gender-inclusive language, is a language that avoids bias towards a particular sex or social gender. It is a language that is not gender-specific and which considers people in general, with no reference to women or men.[5] For what concerns gender-neutral legal language there is no specific definition to be found. So far, legal scholars, legal experts, lawyers and judges, have been working on developing this language more and more. The concepts on which the language is based are the principle of fairness, that of inclusivity, and that of equality. The way in which gender-neutral legal language is enforced is that of drafting legislation, contracts, case law and legal opinions in universal terms, actively ignoring and/or avoiding gender-specific situations and power relations between women and men that underpin sex and gender-based discrimination, including gender-based violence, in particular against women.[6]

In recent times, interest towards gender-neutral legal language has grown significantly. This technical vocabulary is the most faithful way in which legal language can represent society and its issues. With the steady enhancement of the voice of the LGBTQIA+ community, the growing support for more inclusive legislation, and recognition, towards intersexual people, and the steadily growing

[2] *Natural Gender*, in *Merriam-Webster.com dictionary*, 2022.
[3] C. HOCKETT, *A Course in Modern Linguistics*, New York, 1958, p. 231.
[4] J. H. MCWHORTER, *The Language Hoax*, New York, 2014, pp. 1–224.
[5] European Institute for Gender Equality, Glossary & Thesaurus, https://eige.europa.eu/thesaurus/terms/1191.
[6] European Institute for Gender Equality, Glossary & Thesaurus, https://eige.europa.eu/thesaurus/terms/1192.

number of people identifying themselves as non-binary, gender-neutral legal language has seen a thriving support in the legal domain.

The path towards gender-neutral legal language dates back to the 12th Century. However, present efforts have been inspired by the modern feminist movement of the 1970s, which started a wave for a renewed look at non-inclusive language. A groundbreaking event took place in 1980, when Casey Miller and Kate Swift published their book "The Handbook of Nonsexist Writing", whose purpose was to provide an aid to writers, editors and speakers to free their language from unconscious semantic bias[7] and to supply practical possibilities to subjects who already committed to use an equal and clear style of language. In 2000 Strunk and White acknowledged in their book "The Elements of Style", that numerous writers find generic masculine pronouns limiting or offensive,[8] and the authors offered alternatives to such themselves. Various researchers reported a trend toward nonsexism, a trend sparked by the social and cultural movements that started in the seventies and eighties. This trend was well displayed in the authors' efforts to make the wording of the definitions and illustrative examples gender-neutral, and to point up, in relevant Usage notes, current usage, choices, and attitudes regarding gender-neutral and gender-specific terms.[9]

Currently the request for a Gender-neutral Legal Language is growing exponentially. Clients of legal experts are actively requesting for their documents to be drafted using gender-neutral language, and these requests have been increasing.[10] Moreover, discussions on gender and gender-neutral language are become more and more mainstream. An example is that most modern legal writing texts and style manuals recommend that writers use gender-neutral language, which is achieved by avoiding the use of "gendered generics".[11]

Gender as it is portrayed in laws is a result of historical and cultural processes. It is easy to assume the "artificial" nature of gender and how it has been exploited in a discriminatory way, in family and marriage laws all over the world, just to give an example. Through the analysis of law, it is crystal clear how sexism and discrimination are vehiculated through language, and language is the most fundamental element of law. The strengthening of Gender-neutral Legal Language and its diffusion could slowly but surely allow more inclusive and less discriminatory legislations and regulations, providing subjects with higher level of protection and freedom. Legal experts have listed specific reasons for which non-discriminatory language should be used in the legal domain: it would promote accuracy in legal speech and writing; it would help to conform to requirements of professional responsibility; and it would satisfy equality guarantees in laws and constitutions.[12] Moreover, when discrimination happens through language, and particularly the legal language, it becomes a legal issue.

The elements and reasons cited so far allow us to understand which is the main pillar, and at the same time the main goal, of gender-neutral legal language: the principle of fairness. Through a broad egal interpretation of the term fairness, we can confidently state that it means uniformity of the application of the law. Fairness is the key to overcoming arbitrary application and interpretation of the law, actions that can be facilitated by a not gender-neutral legal language. The main goal of gender-neutral legal language is that of avoiding discrimination and facilitating and improving inclusion. In order to achieve these aims fairness is necessary. Continuing to use a language which favors, even simply numerically, one gender over the other cannot be considered fair, which is why gender-neutral legal language demonstrates to be the right approach with language.

The following paragraphs have the intent of briefly analyzing the different approaches present in multiple countries towards legal language and more precisely gender-neutral legal language. In order

[7] C. MILLER, SWIFT K., *The Handbook of Nonsexist Writing*, New York, 1980, pp. 1–196.

[8] W. JR. STRUNK, E. B. WHITE, *The Elements of Style*, New York, 2000, pp. 1–109.

[9] *Random House Webster's Unabridged Dictionary*, 2nd edition, New York, 1999.

[10] K. I. PAJAK, *How to Write Gender-Neutral Contracts*, in *National Law Review*, vol. 9, n. 294, 2019, https://www.natlawreview.com/article/how-to-write-gender-neutral-contracts .

[11] L. M. ROSE, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, in *Duke Journal of Gender Law & Policy*, vol. 20, 2019, pp. 101-150.

[12] M. J. MOSSMAN, *Use of Non-Discriminatory Language in Law*, in *Canadian Bar Review*, vol. 73, n. 3, 1994, pp. 8–14.

to have an organic representation of the different legal systems and their experiences with language, the countries analyzed are situated in different continents and all have seen their legal panorama to be influenced in different ways by history, culture, language and society. The comparison among the different states proves to be very effective when deducting an analysis on a specific topic such as language: it allows to highlight the differences, but at the same time it brings out the similarities and the ways in which the different systems can take inspiration from one another in order to improve their legal drafting and the protection of rights. The following paragraphs will show how in the case of The United States of America, Canada and more broadly the European Union, English and the neutrality of it has allowed for a very effective use and development of the gender-neutral legal language and has also proven to be very effective and contagious because of its simplicity and numerous possibilities for gender-neutrality. The study of the case of Malta results very important because of the groundbreaking steps taken by the small country, in particular being the first one to ever issue gender-neutral identification documents. The article also highlights how in countries like Italy, even though part of the western legal tradition, culture has a very strong and deep impact on the legal language and the grammatical gender of Italian itself have made the road to gender-neutral legal language very complicated. Moreover, cases such as those of Mali and India, that do not belong to the western legal tradition, show how the cultural, and sometimes religious, factor can have a significant impact on both the law and its language and particularly how specific language and social elements can provide an important input for inclusion and a different perspective on non-discriminatory language, even in countries that still struggle with gender-equality.

Language is at the base of the law and given the society we live in change is always necessary, in order to have a legal language which actually represents and protects the citizens of the world. It is of the utmost importance to be able to draft and to be able to benefit of gender-neutral legal language, because only through such vocabulary efficient and adequate protection and representation can be granted to all individuals.

2. Legal language in the United States of America: navigating the uncharted sea of gender-neutral legal language

All legal systems develop certain linguistic features that differ from those of ordinary language.[13] It is interesting to notice how Americans have rejected many features of the British tradition, but they retained the common law system, including the notion of precedent.[14] The American legal experience is different than that of other ex-British colonies such as Australia and New Zealand, and this can be pointed out by analyzing the legal language: American Legal English is in fact quite different from British Legal English than that of the other English-speaking countries.

Legal English in the United States developed both on a written and spoken (oral) level, differentiating itself from the language used in the British legal domain. Another element to keep into consideration is the discourse in the US courtroom. The way discourse developed inside courtrooms shows, once again, how difficult, complex and elitist Legal Language is. The key role that power plays in courtroom shows just how fundamental it is for laypeople to understand legal English, especially in the United States where the legitimacy of law derives from this understanding. If trial language moves further away from ordinary language, the need for explanations to laypeople increases.[15]

The specific development that courts had in the United States shaped the way in which courts of any and every level work. It is well known how influential case law is in such systems, which means that the way in which cases are written and interpreted sets a standard for the whole system. It is not surprising to see how the courts' language has evolved and become unique in the United States: both in the writing and in the oral discourse. When studying case law, the precise vocabulary must be learned. This is even more important when approaching the American Legal System, because the language contains extremely specific words, that are not present in any other context. Examples are those of holding and dicta. The first one represents the rule of law or legal principle that comes from

[13] P. M. TIERSMA, L.M. SOLAN, *The Oxford Handbook of Language and Law*, New York, 2016, pp. 1–557.

[14] P. M. TIERSMA, L.M. SOLAN, *op. cit.*, pp. 1–557.

[15] P. M. TIERSMA, L.M. SOLAN, *op. cit.*, pp. 1–557.

the decision or judgement plus the material facts of the case, and this is an example of binding authority. The second is any other statement in the decision that do not form a part of the holding, and it is a type of persuasive authority (non-mandatory). These specific elements of the American Legal System allow us to understand how the system works and why language is so important, in particular that of the courts.

It has to be noted that in the American experience with legal language considerable efforts have been made in order to broaden the use and development of gender-neutral legal language. Starting in the 1980s, a significant number of gender task-force studies appeared in various American jurisdictions, both at a state and at a federal level.[16] Taskforces had been created at a State Legislature level, or within judicial committees and so on. These groups of experts were in charge of analyzing the way language was used within the legal field, and in particular to highlight how gender was used. The final reports often showed that the use of gender-neutral language was to be stressed and implemented, especially to avoid gender-bias, sexual discrimination and unequal treatments of subjects. Following this wave of specific studies on gender-neutral legal language, legal institutions moved forward. Some states adopted gender-neutral language in their constitutions[17], statutes, or other legal discourse, and sections on gender-neutral language began to appear in legal writing textbooks.[18]

As stated earlier, the relationship between courts and the importance of language is very tight, which consequently allows the judges to play a very important role in the United States legal system. The growing significance and position of the courts is directly linked to the caseload that has been steadily assigned to judges for more than fifty years. Courts have responded to people's needs and they have reinforced them, expanding legal rights and reducing institutional barriers to litigation.[19] Landmark cases have been decided by the Supreme Court and have shaped the legal panorama in the United States and it is precisely these cases that represent how powerful the courts and the language they use are. Because of the impact that case law has, language has to be precise, inclusive, correct, fair and non-discriminatory at all times.

Two important studies have analyzed the language use by the Supreme Court Justices, and that of Federal Appellate Judges. The authors chose to analyze the Supreme Court language and that of the Courts of Appeals, because they are considered to be the most influential courts in the American legal field. Both analyses consider a temporal evolution, meaning opinions from two different time frames have been compared, in order to establish if there has been a positive trend in the use of gender-neutral legal language. Another element taken into account is that of the sex of the justices. Parallel evaluations are done to identify a possible pattern of differences between the language of female justices and that of male justices. For what concerns the study on the Justices of the Supreme Court, the author found that the court, as a whole, presents a fragmented picture. On the spectrum of gender-neutral language it does very well in the aspect of occupational titles and other nouns, and by fiercely avoiding the generic use of the word man, by itself or as a compound. In many of the cases analyzed the phrasing itself suggested that judges made conscious efforts to use gender-neutral language.[20]

Although a big step forward has been done towards gender-neutral legal language, it is safe to say that as of today most judges in the U.S. still use male-gendered generics regularly and biased language still continues to appear. Thus, indicating a need for continued progress. The lack of gender-neutrality in the choice of language freezes the Supreme Court, the courts of appeals, and all other judges, in the non-inclusive and imprecise writing style of *Marbury* and *Lochner*. Not to mention that it perpetuates

[16] J. D. FISCHER, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, in *University of San Francisco Law Review*, vol. 43, issue 3, 2009, pp. 475–476.

[17] D. MCGRATH, *Six State Constitutions Use Gender-Neutral Wording*, in *Women's ENews*, 09.12.2001, https://womensenews.org/2001/12/six-state-constitutions-use-gender-neutral-wording/ .

[18] See, e.g., L. H. EDWARDS, in *Legal Writing: Process, Analysis, and Organization*, 2006, pp. 217–221; R. K. NEUMAN, S. SIMON, *Legal Writing*, 2008, pp. 157–158; L. CURRIE OATES, A. ENQUIST, *The Legal Writing Handbook: Analysis, Research, and Writing*, 2006, pp. 681–685.

[19] A. CHAYES, *The Role of the Judge in Public Law Litigation*, in *Harvard Law Review*, vol. 8, issue 7, 1976, pp. 1281–1316.

[20] J. D. FISCHER, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, *op. cit.*, pp. 475–476.

a style of communication that no longer suits the needs of modern legal practice.[21] In this day and age, many states have created jury instructions in a gender-neutral language and others have issued state court style manuals that advise attorneys to use gender-neutral language.[22] Justices acknowledge that it is their responsibility to make their opinions accessible to a broader audience, beyond the legal community.[23] Their use of the language is extremely important because in addition to reflecting their own views, judges' language can also influence their readers' cognitive schema. Framing theory has demonstrated that if judges use gender-biased language, they construct a frame through which all individuals see men as the dominant norm.[24] This is an element that once again stresses the important role that judges have as legal writers and experts.

3. *A champion of inclusivity and equality: Canada*

> I am a Canadian, free to speak without fear, free to worship in my own way, free to stand for what I think right, free to oppose what I believe wrong, or free to choose those who shall govern my country. This heritage of freedom I pledge to uphold for myself and all mankind.[25]

Canada is considered to be a mixed legal system, and it is based on a combination of Common Law and Civil Law.[26] This peculiar, but defining, characteristic of the Canadian legal system dates back centuries. It originated after the British gained control over the mostly French province of Quebec. After the incorporation Quebec was allowed to maintain its pre-existing legal system, which then lead Canada to have a dual legal system. The Constitution of Canada includes the Constitution Act of 1867, with which what we call today Canada was officially created; and the Constitution Act of 1982, which reaffirms the dual legal system and includes Aboriginal rights and treaty rights.[27] This specific recognition in 1982 is the first of many steps taken by the Canadian government to protect and affirm specific rights for specific groups in the Country. In 1977 Canada enacted the Canadian Human Rights Act that protects human rights in the federal public and private sectors. In particular the act strongly protects the right to equality and non-discrimination in the areas of employment, housing and the provision of services.[28] In 1982 the Canadian Charter of Rights and Freedoms was signed, assuring a broader and more efficient protection of rights and freedoms, in particular freedom of expression and the right to equality. The Charter has been an invaluable source of change, progress, protection of rights, and the affirmation of societal values. Courts have rendered numerous decisions in which the Charter is applied to bring laws in line with the principles and values of society. In particular the Charter has been of fundamental relevance with respect to language rights, the Charter has in fact

[21] L. M. ROSE, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, *op. cit.*, p. 102.

[22] See Cal. Rules of Court, Rule 2.1058, 2009; State of Connecticut Judicial Branch, Criminal Jury Instructions, 2001; Maryland State bar Association, Inc., Standing Committee on Pattern Jury Instructions, Maryland Criminal Pattern Jury Instructions, 2006; State Bar of Michigan, State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and Legal Profession Executive Summary, 8, 1997; New York State Unified Court System, Criminal Jury Instructions, 2D, 2001; Arkansas Judiciary, Style and Usage Guide, 20, 2008; Colorado Office of Legislative Legal Service, Colorado Legislative Drafting Manual, 11–5 to 11–10, 2008; Legislative Council, Maine State Legislature, Maine Legislative Drafting Manual, 83–89, 2004; Office of the Revisor of Statutes, Minnesota Rules: Drafting Manual with Styles and Forms, 269, 2002; Oregon Appellate Courts, Style Manual, 14–15, 2002; Texas Legislative Counsel, Texas Legislative Council Drafting Manual, 103, 2008.

[23] The Supreme Court, *Kennedy Interview*, Part I; see also *Thomas Interview*, Part I; *Ginsburg Interview*, Part II, and *Alito Interview*, Part I.

[24] J. D. FISCHER, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, *op. cit.*, pp. 475–476.

[25] J. Diefenbaker, House of Commons Debates, 01.07.1960.

[26] Department of Justice of Canada, *Canada's System of Justice*, 2015, https://www.justice.gc.ca/eng/.

[27] Department of Justice of Canada, *Canada's System of Justice*, *op. cit.*

[28] Department of Justice of Canada, *Canada's System of Justice*, *op. cit.*

reinforced the rights of official language minorities, and in regard of equality rights, by leading to the recognition and enforcement of the rights of a number of minorities and disadvantaged groups.[29]

The Charter is particularly important because it is a very specific and detailed source of law. This was one of the first steps that outlined Canada as a pioneer government with regard to inclusivity, equality, protection and representation for its citizens. In particular, equality of rights is at the core of the Charter. They are meant to ensure that everyone is treated with the same respect, dignity, consideration, without discrimination, regardless of personal characteristics such as race, national or ethnic origin, color, sex, age, mental or physical disability, sexual orientation, gender identity, marital status or citizenship.[30] Normally this means that people are treated the same by the law, and that individuals deserve the same benefits. What is of the utmost importance though, is that the government of Canada in interpreting and explaining the provisions of the charter stated that it is not required to always treat people in the same way. More precisely, protecting equality might mean that rules and standards must be reasonably adapted to take account of people's differences, including allowing people to observe different religious holidays without losing their jobs, or creating specific supports to enable people with disabilities to access government's services. Furthermore, the Government stated that it is a constitutional duty for it to put in place programs to improve the situation of individuals belonging to groups that have historically been discriminated in Canada.[31]

The early development of such broad protection of a large variety of human rights, allowed the Canadian Government to pursue an even wider range of protection of rights. For some years now, Canada has been establishing new policies, and continues to do so, in order to implement inclusion, non-discrimination and equality through the sources of the law. One of the most pressing issues today is that of gender-neutrality in language. As of today, the Canadian government has launched multiple initiatives in order to reach the goal of a current and continuous use of gender-neutral legal language. Fort starters the department of justice has published multiple articles describing how to obtain gender-neutrality when expressing themselves. This guide aims to provide an input both, in and out of the legal context, bluntly stating that one of the goals of the department is that of achieving gender-neutrality in language. The institution when explaining the use of *they*, states that achieving gender-neutrality in language allows to eliminate gender-specific language and a heavy or awkward repetition of nouns[32]. The document details the way in which the pronoun *they/them* can be used, the appropriate linguistic situations in which to use it, and also offers a table of graphic examples. At a National level, Canada's Government has been defending employees asking to use gender-neutral terms for many years now, and the federal agency that links citizens to government services and benefits issued guidelines on how to use gender-neutral and gender-inclusive language, in order to avoid portraying a perceived bias towards a specific gender, or sex. The Canadian Government's Accessibility Resource Centre has published guides explaining how to use a correct and respectful language in regard of people with disabilities, and the Government has also launched the Centre for Gender, Diversity and Inclusion Statistics. The purpose of this research center is to allow citizens to access information in order to promote gender equality, inclusivity and diversity. Another significant effort is that of the Translation Bureau of Canada. The Institution is concerned with the official languages of Canada, English and French, and it supports the Government's efforts in communicating with citizens correctly in both languages. The Office issues linguistic recommendations, and it has published specific ones for gender-inclusive writing: both in English and French.[33]

One relevant and peculiar characteristic of gender-neutral and gender-inclusive language in Canada is the presence of words and terms adopted from indigenous culture and language. In Canada inclusive language involves the use of correct terms to refer to indigenous people, and indigenous people themselves have a specific way of expressing in gender-neutral language. Many different Aboriginal

[29] Constitution Act, Part I, *Canadian Charter of Rights and Freedoms*, 1982.
[30] Department of Justice of Canada, *Canada's System of Justice*, *op. cit.*
[31] Department of Justice of Canada, *Canada's System of Justice, op. cit.*
[32] Government of Canada, Department of Justice, Reports and Publications, *Legistics Singular "They"*, 2020.
[33] Public Works and Government Services of Canada, Translation Bureau, *Writing Tips*, 2015, https://www.tpsgc-pwgsc.gc.ca/bt-tb/index-eng.html .

tribes did in fact use gender-neutral terms a long time before Canada was colonized.[34] The most used term was, and still is today, "Two-Spirit", which is a translation of the Anishinaabemowin term *niizh manidoowag*, and it refers to a person who embodies both a masculine and feminine spirit.[35] In indigenous culture gender and sexual orientation were openly discussed and accepted, the clash with the colonizers and the bans imposed on Aboriginal made it so that certain terms and tradition could not be performed anymore. With the evolution of the relations between the Canadian Government and Indigenous people, and the recognition of more and more indigenous rights, many concepts and traditions have been reestablished. As of today, there is a fervent and strong LGBTQ2S community within Aboriginal tribes, and with the contribution of First Nations members, queer people of both Aboriginal and European descent can benefit from gender-neutral language and inclusive tradition of the Indigenous populations.

4. Different approaches across Europe

"In Varietate Concordia" is the European Union's motto—"United in Diversity". While through the years a sense, and an actual, European Citizenship were born, this never meant that single States ceased to be such or lost their integrity or distinctiveness. Diversity actually made the Union stronger. Recognizing and valuing each Member State characteristics, needs and ideals allowed the Union to become more united and more competitive at an international level in multiple domains. The importance given to every state's culture, history, and language went a long way. The appreciation given to these fundamental elements of society made a significance difference for the outcomes and success of the EU. Members did not feel stripped of their identities, rights, and uniqueness, but they rather felt closer because they shared common goals, ideals and values.

Diversity is one of the winning and most characterizing factors of the European Union, and this can be perfectly seen when one encounters multilingualism. The protection of diversity in many different domain, cultural, social, historic, legal and linguistic, allows the EU to be extremely competitive and appealing as an actor in the international politics stage. Linguistic diversity is one of the essential contributions to the European project. Through languages people have the opportunity to communicate, they make other countries and cultures accessible, and they allow and strengthen intercultural understanding. Multilingualism goes hand in hand with one of the pillars of European identity, culture and legal principles, which is that of the free movement of persons.[36] This principle allows European citizens to move, and subsequently establish themselves, freely within the borders of the European Union. Needless to say, multilingualism is a greatly important tool that has given more and more people the chance to learn multiple language and therefore it has facilitated individuals to move, travel, and work in different countries, easily integrating themselves thanks to the knowledge of the language of that specific country.

As of today, the European Union continues to work on its behavior towards language, showing how language can be the perfect carrier for a broader and more appropriate protection of rights. Law and languages represent community, and each language as well as each legal system carries the elements of a particular culture and tradition.[37] The EU has demonstrated its steady efforts and progress towards the creation of the most welcoming, inclusive, and accepting environment for its residents. European Institutions first, and Member States later, learnt how change happens through language and have since been advocates for an appropriate way of expression, in every field of human life. This is particularly true for the legal field, since all of its elements, such as values, standards, judicial knowledge and living law, are closely connected to language and are studied in relation to it. In Europe the importance of language is such that words itself allowed stronger protections of rights,

[34] M. FILICE, *Two Spirited*, in *The Canadian Encyclopedia*, https://www.thecanadianencyclopedia.ca/en/article/two-spirit .

[35] M. FILICE, *Two Spirited*, *op. cit.*

[36] Art. 32 of the Treaty on European Union (TEU), Art. 21 of the Treaty on the Functioning of the European Union (TFEU), Art. 45 of the Charter of Fundamental Rights of the European Union.

[37] M. BAJČIĆ, *The Role of EU Legal English in Shaping EU Legal Culture*, in *International Journal of Language and Law*, vol. 7, 2018, pp. 8–24.

and this has been strengthened by the interconnection among Member States and the role played by the European Court of Justice and the European Parliament.

5. The leading example of Malta: groundbreaking legislation and its power

The Republic of Malta has always been a pioneer in regard to equality and non-discrimination rights in the European Union. Throughout the years the Republic has put into place many reforms, modifications, guidelines, tools and legislative acts in order to achieve a substantial and significant level of gender equality and non-discrimination. As early as 1973 changes were to the Civil Code in order to amend certain gender discriminatory provisions presents, and to grant rights to women that were not previously at their disposal. With Act XIX of 1991 protection against discrimination on the basis of sex was introduced in the Constitution of Malta. Subsequently, Act XXI of 1993 made other significant changes to the Maltese Civil Code, such as the introduction of the concept of *equal partners in marriage*, a gender-neutral wording that later on easily allowed the inclusion of same-sex marriages. The legislative power of Malta did not stop here though but made many other changes in laws and even enacted specifics acts in the domain of employment, equality and labor law.[38] Malta has long been committed to creating strong legal basis for gender-equality and non-discrimination, in particular using as preferred mean changes in the legal language. The Government did not stop at modifying laws or putting reforms into place, Malta enacted an entire act called Gender Identity, Gender Expression and Sex Characteristics Act[39] in 2015. The law mainly focused on the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.[40] Such legislative Act represents a one-of-a-kind approach of legislation in the European panorama and demonstrates Malta's commitment in keeping up with social developments and citizens' needs. The law focuses on granting protection and non-discrimination to all individuals, indiscriminately from the gender and/or sex. The Gender Identity, Gender Expression and Sex Characteristics Act represents the culmination of the Country's continuous efforts to achieve gender-equality.

Up to today one of the most remarkable steps taken by the Maltese government towards inclusivity and gender-equality is that of establishing the possibility for Maltese citizens to choose the alternative gender marker "X" on their Identity Card or Passport. The introduction of alternative gender marker was a commitment undertaken by the government when adopting the LGBTIQ Action Plan 2015-2017. The "X" marker was officially introduced in September 2017 and is available to all persons who are entitled to hold a Maltese ID Card or Passport.[41] Even though the legal gender of the individual remains that of the birth or adoption certificate, official and valid identification documents will not show it and there is no need to specify it. The procedure to choose such option is very easy, and the government also created the possibility for foreign residents to have access to the alternative gender marker on their Residence Card. The attention given, by the Maltese government, to what is considered to be a small detail shows how important wording and language are, and what deeper legal consequences it entails. Gender-neutral legal language provides all individuals recognition and protection under the law. Establishing gender-neutral legal language as the ordinary in administrative documents, such as IDs and certificates, is an important step towards more inclusive legislation and governmental institutions, a step towards a more respectful and attentive society. The possibility for individuals to choose the alternative gender marker is particularly significant, for at least a few main reasons. Firstly, any and every individual can choose to have the "X" as their gender marker, and even this might not seem like an important detail, it is in fact such. Initially only intersex people (individuals who are born with any of several variations in sex characteristics, not necessarily falling

[38] National Commission for the Promotion of Equality, *Gender Mainstreaming for the legal Sector Toolkit, The Gender Aspect from a Legal Perspective*, ESF/no. 46, 2008.

[39] Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (XI of 2015) (Cap. 540).

[40] ILO International Labour Organization, NATLEX, *Database of National Labour, Social Security and Related Human Rights Legislation*, https://www.ilo.org/dyn/natlex/natlex4.home?p_lang=en .

[41] Legal Gender Recognition and Bodily Integrity, Constitutional Provisions, Government of Malta, https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-Recognition-and-Bodily-Integrity.aspx.

under the female or male category) were allowed to choose such element of identification, but following the Gender Identity, Gender Expression and Sex Characteristics Act of 2015, all citizens are able to choose the third gender marker for themselves. The new possibility has granted intersex people, who already received great protection under Maltese law, more safeguard knowing that they do not need to necessarily identify in one of the two binary genders and will not need to provide medical history to have a specific marker. The same could be said for transgender people, which are discriminated and whose rights are violated in many European countries. With the possibility of a third gender marker, they will not need to provide medical proof of surgeries and other procedures in order to choose their gender marker. Finally, new parents are now made able to choose to use the alternative gender marker "X" at their baby's birth as well. These examples help understanding why a third gender marker is so important and even more why a neutral gender marker can guarantee a wider protection of human rights.

The specific articles dedicated to the rights of intersex people in the Gender Identity, Gender Expression and Sex Characteristics Act of 2015, provide a stronger and more appropriate protection for such individuals. The ban on normalizing surgeries and medical interventions on intersex children was the first ever of this kind in the world. Such provisions allow for the legal recognition of gender neutrality, showing how an individual does not need to choose or legally determine between genders: neither in regard of physical features nor legal gender marker elements.

Following the enactment of the Act many changes have been brought about in legal texts, but not only. Other institutions such as the University of Malta have taken a great interested in language and its relationship with equality. For what concerns the legal amendments an example is the ACT No. LXV of 2020, whose preamble states that it is "an act to amend the provisions of the Civil Code, Cap. 16, and Various Other Laws in connection with the choice of surnames and to provide for other matters dealing with it or ancillary thereto and other matters in relation to the Public Registry".[42]

The linguistic element is another piece that denotes Malta's unique experience. Bilingualism facilitated the development and use of gender-neutral legal language, thanks to the intake of the English language. Nonetheless, the peculiarity of Maltese demonstrated how any language, even a particularly peculiar one, can be made to convey gender-neutrality, therefore dismissing the point that many use against gender-neutrality: that of the impossibility of being neutral because of the grammatical gender structure of the language. The absence of a neutral element in language does not necessarily imply the inability of expressing gender-neutrality. Malta can be an example for English speaking countries, and for gender-neutrality in English, but it can also show Countries that speak gendered languages that alternative solutions can be found. One must simply look beyond the ordinary and conservative rules of language.

In conclusion the actions taken by Malta on the theme of gender-neutrality and equality, for the most part involved the government and legislative bodies of the country, showing that leading the way in written sources of law allow for an easier and better integration of development at judicial and administrative levels.

6. The struggle of Italy with gender issues and gender-equality

> All citizens have equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinions, or personal or social condition. It is the duty of the Republic to remove those obstacles of an economic and social nature that, by in fact limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.[43]

[42] ACT No. LXV of 2020, https://legislation.mt/eli/act/2020/65/eng/pdf.
[43] ITALY CONST., Art. 3.

Italy is one of the original members of the European Union, and it has always shared and enriched the ideals and values of the Union. At the same time its efforts in respecting obligations deriving from European commitments have not always been steady and adequate, or equivalent to those of the other Member States. This can be seen even from a gender equality perspective, where most progress has stemmed directly from the need to adopting to EU directives and the use of European funds where equal opportunities were the main theme.[44] Italy has seldom adopted laws or promoted legal texts towards inclusion and equality in an autonomous and independent manner and has not been a groundbreaker with regard to human rights and their protection.

The Italian legal history shows that the country has not yet reached gender equality, nor that Italian efforts towards it have reached their peak. In 2006 the National Code of Equal Opportunities[45] has been enacted and it is considered to be the Italian legal framework on gender equality. In the code eleven laws on equal opportunities are gathered, with the aim of rationalizing and harmonizing the legislative texts on gender equality and promoting equal opportunities between women and men (specifically) in the areas of ethical, social and economic relations, civil and political rights. The concept of gender mainstreaming was also introduced, which obliged the government to take it into account in their work.[46] Nevertheless, Italy lacks a specific national strategy on gender-equality and non-discrimination, and if the problem originally only concerned the relation between man and women, currently the lack of an agenda for equal rights and protection involves the LGBTQIA+ community as well. The latter often being targets of discrimination in the workplace, politics and healthcare as well. To today the only protection granted to members of the community against discrimination is a law enacted following the Directive 2000/78/CE, which protects individuals from being discriminated based on their sexual orientation in the workplace.[47]

The lack of legislative sources that provide wide protection from discrimination and violence to all individuals creates a significant gap in the recognition of rights and their subsequent defense. This problem arises principally from the letter of the law. When analyzing Italian norms and administrative acts it is in fact striking to encounter exclusively masculine pronouns and male specific terms. Such wording even though is said to be referred to the general public and to be inclusive of all individuals cannot be considered such, especially because it makes it even harder for judges to provide adequate protections, decisions, opinions and legal statements. This happens for two main reasons: one being the structure of the Italian legal system, and the role that judges have; and the other one being the morphology and grammar of the Italian language. These two elements together make it almost impossible for protection, defense or care to be granted to individuals or are not specifically and precisely included in the text of the law. The Italian experience lacks judicial examples in which judges have granted protection to individuals through the so called *interpretazione estensiva* (one of the principles of interpretation established for Italian law). The Italian language does not provide for words to be interpreted in multiple ways, unless they are words who can be referred to both sexes by their definition. This characteristic together with the extremely high technicality of the letter of the law[48], make it almost impossible to guarantee protection or equality to subjects who are not specifically mentioned in the legal provision involved in the particular situation. The linguistic elements, the legal language elements, and the lack of case law and law itself on equality and non-discrimination, create a legal environment which is highly dangerous for some persons and that does not provide its citizens with the protection and trust they should expect from the legal system.

[44] European Institute for Gender Equality, Gender Mainstreaming, Country specific information, Italy, https://eige.europa.eu/gender-mainstreaming/countries/italy .

[45] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 5 July 2006.

[46] Joint Practical Guide of the European Parliament, *the Council and the Commission for persons involved in the drafting of European Union Legislation*, pp. 1–75.

[47] Decreto legislativo n. 216 (attuazione della Direttiva 2000/78/CE *per la Parità di Trattamento in Materia di Occupazione e di Condizioni di Lavoro*) del 9 luglio 2003.

[48] E. IORIATTI FERRARI, *Linguaggio Giuridico e Genere*, in *Diritto e Genere. Analisi Interdisciplinare e Comparata*, 2nd edition, 2016, pp. 51–62.

When analyzing gender, and gender issues, in legal language a couple of relevant elements arise: the obvious lack of interest and effort from the legislators, the linguistic elements of the Italian language, and lastly the difficulties that arise when modifying law in Italy. Firstly, it is extremely easy to detect the disregard of the Italian political class towards gender issues, and this unfortunately mirrors a cultural and societal perspective of the country. Studies conducted by the Eurispes Research Institute have focused on the approach that Italians have towards the LGBTQIA+ community, on how women feel living in Italy (safety, employment, domestic violence etc.), on what Italians think about father staying at home with their kids and so on. As a result, it has been seen that even though Italians' opinions are changing, as people they tend to be conservative and do not necessarily believe that there are gender issues, obstacles, or discrimination and do not feel like there is an actual need for reforms in legislation.[49] In addition to the lack of this sentiment from the population, modifying legislation appears to be particularly complicated. Such difficulty is due to the fact the legislative reform procedure is particularly long and because legal concepts and language itself tend to be static and hard to change.[50]

Nonetheless at a regional level multiple documents have been enacted showing that local administrations do take gender-neutrality and gender issues into account. The documents enacted by local governing organs and by national administrations focus precisely and specifically on language and gender in language. Through language not only reality is described but we also contribute to the creation and the enforcement of cultural models and their developments.[51] The authors describe how the constant use of masculine as the generic is alienating individuals and is picturing a distorted reality. Moreover, such use of male terms allows mistakes, confusion and little clarity in legal and administrative contexts.[52] Domain such as the legal one where precision to the detail is crucial, cannot carry out their tasks adequately if the language favors loopholes, lack inclusion and does not grant protection to all individuals.

Such efforts have demonstrated that a change in language is possible, and this development started from the local level can be transposed at national level as well. Nowadays equal rights and equality are vehiculated in language, their recognition comes from the language used.[53] Gender differences must be acknowledged to be eliminated or taken into account in the correct way. Only one official and relevant document has been published by the central administration, the only one at a national level. The study shows an effort from the Italian central administration towards the interest to work on gender issues, and the way in which legal language expresses concepts, it is titled "Sexism in the Italian Language".[54] This research was brought about by the Commission for the realization of equality between women and men, whose aim was that of erase all of the prejudices present in regard of women.[55] In the document it is clearly stated that for things to change actions have to be taken at a legislative level in order to eradicate discrimination. Through the letter and the language of the law solutions can be found, but one must first acknowledge the differences in treatment that are actually present in society. Analyzing linguistic elements, especially in relation to gender, allow us to understand how a wrong use of words, such as the generic use of masculine to refer to all individuals, perpetrate an incorrect depiction of reality.[56] It is necessary for all individuals to be represented through language, because the

[49] *Gli Italiani e i Gay: Il Diritto Alla Differenza*, https://eurispes.eu/ricerca-rapporto/gli-italiani-e-i-gay-il-diritto-alla-differenza-2003/; *Temi Etici: L'Opinione degli Italiani*, https://eurispes.eu/wp-content/uploads/2020/07/2020_eurispes_-indagine-temi-etici.pdf.

[50] *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union Legislation*, pp. 1–75.

[51] Agenzia delle Entrate, Comitato Unico di Garanzia, *Linee Guida per l'Uso di un Linguaggio Rispettoso delle Differenze di Genere*, in *Piano Triennale di Azioni Positive dell'Agenzia delle Entrate*, https://www.agenziaentrate.gov.it/portale/documents/20143/1742359/Linee_guida_linguaggio_genere_2020.pdf/0327598d-9607-4929-ceae-a3760b081ab4 .

[52] Agenzia delle Entrate, Comitato Unico di Garanzia, *Linee Guida per l'Uso di un Linguaggio Rispettoso delle Differenze di Genere*, *op. cit.*

[53] R. Copersino, A. Di Nicola, *Guida all'Utilizzo Corretto del Genere nel Linguaggio* Amministrativo, 2019.

[54] A. Sabatini, *Il Sessimo Nella Lingua Italiana*, Roma, 1987, pp. 9–122.

[55] A. Sabatini, *Il Sessimo Nella Lingua Italiana*, *op. cit.*

[56] S. Cavagnoli, *Linguaggio Giuridico e Lingua di Genere: Una Simbiosi Possibile*, Alessandria, 2013, pp. 1–159.

borrowing of language created for another subject does not guarantee protection, representation and inclusion.[57]

Italy surely has taken steps forward, but it did not change and reform its laws and language enough. Scholars, professors, activists and youth are the main actors of this change and this path towards gender-neutrality. Often these individuals have a more sensitive outlook and a more pragmatic approach, being the first ones to actually put gender-neutral language into use. The route to satisfying protection and equality is still long and one wonders if the actions taken by the academics and the younger generation will be enough, but at this time it is too soon to tell what the future of gender-neutral legal language in Italy will be.

7. Testimonies from Mali: the significance of oral tradition and language in law

"Muso kòni danbe ye cede yè" is a Bambara saying that translates into "It is the man who makes a woman's dignity". Bambara is the most common language in Mali with a forty percent of the population speaking the language. Other twelve languages are recognized as national languages, which are sénoufo, songaï, peul or fulfuldé, maninka, soninké, dogon, bozo, tamasheq, khassonké, bomu, poular and hassanya. These languages represent the rich variety of people living in Mali and each of them is linked to a specific area of the state and is connected to a particular ethnic group. Despite the presence of such a diverse linguistic panorama the only official language of Mali is French.[58] This is a direct effect of the almost 70 years of European occupation. Although French is the only official language recognized, most Malians do not speak it nor understand it, as it is learnt only by the most educated and rich part of the population, making French the language of the intellectual elite. This is demonstrated also by the fact that around 70% of the population of Mali lives in rural areas[59], and agriculture is to this day the number one source of GDP in the country. The fact that most individuals in Mali speak Bambara, but this is not recognized as an official language, creates a significant gap between social classes.

All of the legal sources, government and administrative documents, trials, international communication and much more are done in French, a language that is often unknown and disliked by Malians. Mali is considered to be the least francophone country out of all of the ex-French colonies of Africa. The French occupation has left deep scars in the country, thus making French the language of the colonizer, which has been violently imposed.[60] A relationship of this sort between the people and their official language has not made it easy for diplomatic connections or even for citizens to know the laws and to be involved in the public life. Bambara remains to this day the most important language of Mali and for this reason through the years its study and knowledge has been implemented.

The first element that is considered when approaching a language is its vocabulary and the generative capacity of such. Linguists consider the alphabet to be the vocabulary of a natural language, at the same time the vocabulary itself can be identified as a language therefore allowing to study and understand the generative capacity of the language. The Bambara language has a weak generative capacity.[61] This is related to the fact that Bambara was born as an exclusively oral language, with no written transcription whatsoever, and to the fact that its construction is in the form of *Noun o Noun*, meaning that two nouns have the same form. Virtually the language and all of its constructions, the agentive one and the nominal one, have no restrictions on the choice of the words, they are recursive, meaning that the terms in the constructions can be of the same form. The only real restriction could be

[57] A. CAVARERO, *Costruiamo un Linguaggio Sessuato al Femminile*, *in Diotima: Il Pensiero della Differenza Sessuale*, Milano, 1987, pp. 43–63.

[58] A. CLARK, *Mali*, in *Encyclopaedia Britannica*, 2022, https://www.britannica.com/place/Mali .

[59] Food and Agriculture Organization of the United Nations, *Gender and Land Rights Database*, *Country Profiles*, https://www.fao.org/gender-landrights-database/country-profiles/en/ .

[60] D. DOUYON, *Le Mali, le Pays le Moins Francophone d'Afrique*, in *Infosud Tribune de Droit Humains*, 2010, https://droits-humains-geneve.info/Le-Mali-le-pays-le-moins,9100 .

[61] C. CULY, *The Complexity of the Vocabulary of Bambara*, in *Linguistics and Philosophy*, vol. 8, n.3, 1985, pp. 345–351.

that of interpretability.[62] All of these characteristics together make up for a complex and out of the ordinary language, whose tradition is that of oral literature and tales passed on orally from one individual to another. Such characteristics make it particularly hard to allow good interpretation and translation, and even more they impede the possibility of Bambara becoming the official language, the language used in the legal and administrative domains.

The Republic of Mali is among the countries where traditions and customary laws are still extremely important and relevant to this day. Because of the geographical distribution of the population, mostly in rural areas, the low level of literacy and education and its history of European colonization, customary norms are still one of the most significant sources of law. There is a strong connection between the Bambara language and these sociological norms, because these rules are passed on orally, through tales in Bambara-Malinké oral literature. Such characteristic emphasizes the nature of orality of the Bambara language and shows the way in which customary law is structured and works. Most of the tales of the oral literature focuses on gender roles, family relationships, marriage and social standards. In tales some of the most important and basic social rules are formulated, in particular marriage and its social nature, thus making tales a fully-fledged source of law in Mali. Through the depiction of marriage in Bambara tales some specific social norms are created, social norms that are considered part of the customary law. For instance, in tales the prohibition of marriage among blood relatives is explicitly stated.[63] The role of the father, the prominent situation that men occupy in the Malian society, a strongly patriarchal one, the position of the woman in social situations and the fact that she is always seen either as good or bad and the fact that women are always taken into account in connection to men, are all elements with some legal value that are transposed into narrative images through the oral literature.

The language and stories that make up the tales vehiculate the domination and power of men over women. The events described in oral literature are the representation of the ideological discourse, which is a product of societies, especially of the collective representations that are then manipulated in religious texts, traditions and folklore.[64] Male control is practiced through means of patriarchal, patrilineal and virilocal family organization. This practice results in the image of the woman being one coming from an exclusively male vision of social and gender relations. Men's control is unlimited over the imaginary is unlimited and this favors male dominance in many other domains, particularly that of actions and standards of social behavior. The male supremacy is a social norm that is traditionally and historically accepted and is spread largely through initiation. Initiation is the process through which adults are obliged to respect fundamental values and ideals, that are taught to the rising generation with songs, proverbs and tales.[65] Initiation is a group of principles that are instilled in young people, and they establish that an individual's main social duty is that of actively participating in a network of relations that include blood relatives and the relatives acquired through marriage. Such element represents the fact that the collective interest is always superior to the individual and personal ones. Moreover, the subordination to the collective level also reflects the authority structure, teaching the young generation that it owes respect to people to which superiority was designated, because of age or because of social status.[66]

The striking degree of subordination to which women are subdued seems to be partially compensated by the relevance that is recognized to the maternal role of women in society. In many tales, motherhood is depicted in a positive and uplifting way, traditionally interpreted as the way in which feminine destiny is fully achieved. Positive social recognition comes with a numerous offspring

[62] C. CULY, T*he Complexity of the Vocabulary of Bambara*, *op. cit.*, pp. 345–351.

[63] V. GÖRÖG-KARADY, *The Law of The Father: Paternal Authority and Marriage in Bambara Malinké Tales*, in *Merveilles & Contes, Interpreting Folktales: Marriage Tests and Marriage Quest in African Oral Literature*, vol.6 n. 2, 1992, pp. 60–82.

[64] V. GÖRÖG-KARADY, *Social Speech and Speech of the Imagination: Female Identity and Ambivalence in Bambara-Malinké Oral Literature*, in *Oral Tradition*, vol. 9, issue 1, 1994, pp. 607–682.

[65] V. GÖRÖG-KARADY, *Social Speech and Speech of the Imagination: Female Identity and Ambivalence in Bambara-Malinké Oral Literature*, cit., pp. 607–682.

[66] V. GÖRÖG-KARADY, *Social Speech and Speech of the Imagination: Female Identity and Ambivalence in Bambara-Malinké Oral Literature*, cit., pp. 607–682.

and often in tales women's suffering is linked to their inability or impossibility of becoming mothers.[67] The language used in tales to describe women is one that creates a negative discourse about them, seldom stating that women are not to be trusted or that they are the reason for bad happenings. This rhetoric is used to convey the general message that social regulations should be chosen over individual impulses, always, especially in crucial decisions about one's life.

Custom and collective norms vehiculated in tales are considered equivalent to legal sources, to wisdom, therefore they must be preferred over personal desires. These elements represent a real form of legal norms that are strongly protected by the Bambara people, norms that are passed on only through the Bambara language. The connection between language and rules is one-of-a-kind in the case of Bambara, precisely for the reason that tales contain social norms and customary law which are strictly respected by the Bambara people. The fact that it is a mainly oral language and the most spoken in the Republic of Mali, even more than colonial French, demonstrates how important oral literature and tales are in Malian society. A dual spirit lives within Mali: that of post-colonial French era, and that of tribal Mali and its indigenous people.

The analysis of Bambara language and its tales should spark a discussion at a legal level, where customary law should be considered in a more adequate way, especially when it comes to gender issues, social stereotypes, and gender equality. French is still the only official language, but how can the government pretend to enact and enforce positive legal sources when less than half of the population speaks or understands French? There is a need for a connection between the most tribal and traditional elements of Malian culture, exemplified in the Bambara language, and national legal sources. All individuals should have the right to access law and understand the rules that could potentially be enforced against them.

Such complexity in the Malian legal domain is related to the many decades of French occupation and the imposition of western legal tradition, which did not care for traditions and customary law, that were in fact seen as archaic.[68] As of today, Mali has adopted and uses codes of law that are of European origin, but at the same time another very important feature of the legal system is that of legal pluralism.[69] Pluralism consists in what has been previously stated: the presence of a state law, strictly derived from European legal tradition; and other many normative orders deriving from customary law. Even though there is a state law, all over the country other different means are used to solve conflicts and as an order according to which individuals conduct their lives. The interconnection between the state level and the local/customary one is very strong, and an indicator is the fact that in contemporary courts experts on the custom involved are present and providing information to assist and help judges.[70] Another very important source of law is the Sharia, or Islamic law, which has been incorporated even within the Bambara language, in which the term *sàriya* literally means law. Current family law and marriage law is the result of the combination of rules imported or imposed by the Europeans, Islamic law, and customary law.

The language used for legal sources is French, as French is the only official language of Mali. Nevertheless, the legal language has been deeply influenced by Bambara customs and Islamic laws because it had to convey certain rules, and they had to be in French because, as just stated, it is the only official language. At the same time many Islamic sources have been translated into Bambara in order to reach a wider audience and to distribute more broadly the fundamentals of Islam.[71] Such a pluralistic panorama often opens the path to conflicts, especially between customs or Islamic law and post-colonial, of European origin, Malian legislation. These conflicts are particularly frequent in the domain of land tenure and family law. It is interesting to notice that regardless of Islamic and customary law, Malian state law recognizes gender equality and is set as a legal principle.

[67] A. CLARK, *Mali*, *op. cit.*

[68] A. CLARK, *Mali*, *op. cit.*

[69] B. F. SOARES, *The Attempt to Reform Family Law in Mali*, in *Die Welt Islams, Islam in Contemporary West Africa: Literature, orality and Law*, vol. 49, issue 3–4, 2009, pp. 398–428.

[70] M. DE LANGEN, *Les Assesseurs at la Justice, Configuration du Droit et de la Coutume Dans Les Conflits Fonciers à Douentza*, in *Mali Rapport d'une Recherche de terrain*, The Hague, 2001, pp. 10–66.

[71] F. ZAPPA, *Ecrire l'Islam en Bambara: Lieux, Réseaux et Enjeux de l'Entreprise d'al-Hajj Modibo Diarra*, *Archives des Sciences Sociales del Religions*, 54e année numéro 147, 2004, pp. 167–186.

Unfortunately, even though gender equality is specifically established in Mali's 1992 Constitution, which states that "Every Malian shall be born and remain free and equal in rights and obligations. All discrimination founded on social origin, color, language, race, sex, religion and political opinion shall be prohibited"[72], many laws, in particular those in the domain of family, land and inheritance, do not treat individuals as equals. For instance, in the *Code du marriage et de la tutelle*, which is still in effect today, the husband is considered to be the head of the family and the provider for the family.[73]The entirety of legal sources is filled with gender stereotypes, and even the legal provisions which are supposed to be the most modern ones have surrendered to the influence of custom or Islamic law.

To this day orality is such an important part of Malian culture, as much as the word of the Sharia is important, therefore there is a need for such languages to be revised and reformed in order to allow an improvement in terms of gender equality, non-discrimination and inclusivity. Through the experience of the French occupation, it has been demonstrated that words cannot simply be imported from one legal system to another for the purpose of enacting new legal rules. Bambara language has survived through centuries without an alphabet or without being written, and the integration of French in the country has not changed the central role that Bambara has in Malian culture. This analysis strongly supports the necessity of the reform of the legal systems and the legal sources towards a legal domain that includes customary law to achieve gender equality.[74] The experience of Mali shows how strong a language can be and how relevant its presence is, especially in an unwritten cultural and legal tradition. Reforms based on the coexistence of French imported state law and customary and Islamic laws is necessary to be able to improve towards gender equality. But such step forward cannot be taken unless language is put at the center of the discussion.

8. The role of non-binary gender roles in the Indian legal panorama

Hindi is constitutionally recognized as the main language of the Republic of India. It is spoken by more than half of the population, considering both native speakers and second language speakers, and it is the main language used for official administration, judiciary matters, legislative work and political affairs. The Indian government has endorsed its use together with that of English, which following the long British colonization, has remained a widely spoken language in the country, so much that it has been recognized as the "associate official language".[75]

Linguistic anthropologists have researched and showed the connection between social classes and linguistic elements. Differences have been identified between dialects and the social stratification, pointing out how castes, typical characteristic of Indian society, influence Hindi. Together with castes other elements such as religion, social relations, place of residence and work occupation surface and must be taken into consideration.[76] What is interest to notice when approaching Hindi, is that for example it has three second-person pronouns, which have to be used correctly based on the consideration of multiple social aspects, therefore showing that this Indian language does not rely on static social roles or identity.[77] There needs to be a constant pondering on the choice of words, because the expression in Hindi language involves social positions, the topic of the discourse, marital status, age, intentions and gender, in very important ways. The identification of such elements, of both linguistic and social nature, allows to understand how strong of a connection there is between language and social structures in India.

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[72] THE REPUBLIC OF MALI CONST., Art. 2, https://www.constituteproject.org/constitution/Mali_1992.pdf?lang=en .

[73] C. CULY, *The Complexity of the Vocabulary of Bambara*, in *Linguistic and Philosophy*, vol. 8, n. 3, 1985, pp. 345–351.

[74] T. MOR, *Why Gender Equality Must Include Customary Laws*, World Economic Forum, Gender Parity, 2015, https://www.weforum.org/agenda/2015/08/why-gender-equality-must-include-customary-laws/ .

[75] K. HALL, "*Unnatural" Gender in Hindi*, in *Gender Across Languages: The Linguistic Representation of Women and Men*, vol. 2, 2002, pp. 425–440.

[76] J. J. GUMPERZ, *Dialect Differences and Social Stratification in a North Indian Village*, in *American Anthropologist*, vol. 60, issue 4, 1958, pp. 668–682.

[77] N. W. JABBRA, *Sex Roles and Language in Lebanon*, in *Ethnology*, vol. 19, n. 4, 1980, pp. 459–474.

Discrimination is very much common, especially gender-based one, but at the same time there has always been protection and consideration for a particular group of people, the *hijras.* Hijras are people of non-binary gender expression that have played an important role in society for more than 2000 years. They are called the third gender and the evidence of their presence and existence can be easily found in religious and holy texts of the Hindu society.[78] This is a striking difference with the western world, where the key role played by Christianity deeply influenced gender roles, gender bias and gender-based discrimination, strongly supporting the binary system of gender. Hijras individuals are often born as biologically male, more rarely they are intersex individuals, but they dress, speak and have manners that are of feminine nature. Regardless of their biological sex, hijras recognize themselves as being a third gender altogether.[79]

Hijras were always respected and protected in Hindu culture, but following the British colonization such relationship with the rest of society was deeply changed. British made hijras criminals in 1871, such decision taken based on Christian beliefs, that clearly clashed with the existence of a third gender. For almost 200 years hijras were stigmatized, but they never ceased to be present and to fight for their rights. By 2014 India, and other neighboring countries, had officially recognized third gender people as ordinary citizens deserving of equal rights and treatments.[80]

It is important to highlight a linguistic element regarding the hijra community. Hindi is a gendered language, meaning that nouns are divided into feminine and masculine classes. Hijras identify themselves as belonging to a third gender, therefore not being female nor male. When it comes to hijras talking about themselves they alternate between the use of feminine and masculine linguistic reference reflecting through their speech local and dominant ideologies concerning the roles of the binary genders in Indian society.[81] Such alternate use of feminine and masculine is a clear and conscious choice made by hijras that strongly state their belonging to a third gender. The alternating between male and female words is particularly significant in Hindi because, like many other languages, it carries an inherent gender bias. This can be proven by the fact that male terms are often used to compliment individuals and as words of endearment, whereas female words are used as an insult, especially in reference to male individuals or hijras, often attacked by the use of female terms to offend and humiliate them.[82]

The attention to language given by the hijra is directly connected to their gender identity. Their identification as third gender has been so important that in 2014 it reached the Supreme Court of India, in which a landmark case was settled. A number of members of the transgender community in India was seeking the legal declaration of their gender identity, with hijras and eunuchs claiming the recognition of legal status as a third gender. The case was filed by the National Legal Services Authority (NALSA), in order to recognize individuals who, fall outside of the binary spectrum of gender, including people who identify as a third gender.[83]

The judgement established that "gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female, or transgender or transsexual person. […] Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth […] Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category". [84] The Court used this argument in order to enforce the fact that every individual should be allowed to enjoy human rights without being subdued to any type of discrimination, in particular those based on gender and sexual orientation. As stated in the Constitution of India "the State shall not deny to any person

[78] Hinduism Case Study – Gender, *The Third Gender and Hijras*, 2018, pp. 1–3.

[79] S. NANDA, *Neither Man nor Woman: The Hijras of India*, 2nd edition, Belmont, 1998, pp. 1–158.

[80] S. NANDA, *Neither Man nor Woman: The Hijras of Indi*, *op. cit*., pp. 1–158.

[81] S. NANDA, *Neither Man nor Woman: The Hijras of India*, *op. cit*., pp. 1–158.

[82] K. HALL, "*Go suck your husband's sugarcane!" Hijras and the Use of Sexual Insult*, in LIVIA A., HALL K. (eds.), *Queerly Phrased: Language, Gender, and Sexuality*, New York, 1997, pp. 430–460.

[83] Supreme Court of India, judgment of 15 April 2014, National Legal Services Authority (NALSA) v. Union of India, case AIR 2014 SC 1863.

[84] Supreme Court of India, writ petition (civil) number 400 of 2012 with writ petition (civil) number 604 of 2013, National Legal Services Authority v. Union of India and others, par. 19.

equality before the law or equal protection of the laws within the territory of India"[85], and law should guarantee to everybody equal and effective protection from all sorts of discrimination, especially because "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them"[86]. In the decision judges clearly states that the main purpose and aim of justice and the laws should be that of protecting individuals and granting them the recognition and enjoyment of human rights. The rights to privacy, to life, to equality and non-discrimination, recognition before the law, the protection from medical abuse and others are mentioned in the judgement, and they are all taken into consideration. Finally, in the conclusion the judge states that transgender people should be treated as third gender, in particular in relation to the safeguard and enforcement of the Constitution and the rights that it grants.

The decision became a landmark event for LGBTQIA+ rights in India, because the Court openly established that local and state government need to recognize a third gender outside the binary and have to create adequate instrument for citizens to have access to such recognition. Moreover, the Court has held that it is a state responsibility to provide LGBTQIA+ members tools through which they can seek psychological and medical health of any kind, especially in regard to discrimination and gender identity issues. Such action taken by the Court was sparked by the concerns that the Supreme institution had over the mental trauma and mental suffering that the LGBTQIA+ community had, and has, to face. The Court was able to establish the protection of transgender people's rights through the interpretation of Art. 21 of the Constitution, holding that the rights present in the article incorporated the safeguard of the LGBTQIA+ community and that the Constitutional Court has a duty to grant and protect such rights.[87] The Court was able to express such judgement because of the language in which the article is written is gender-neutral language. The terms used in the Constitution are universal and generic, thus being able to refer to all individuals regardless of their biological gender and gender identity.

Even though there are still many cultural and social impasses to overcome, such as castes or the male dominance, many important steps forward have been taken in India. Sexist language is present in India as well, and it is a reality that strongly enhances gender-based discrimination. Such language is found in particular in textbooks, which represent gender bias both in content and in language itself. This demonstrates that language is an issue on many levels, and it has to be considered in different aspect of society. Language is a tool, but at the same time when we use it, we become used ourselves. This goes to show that sexist language is profoundly negative and vents, spreads and reinforces gender roles stereotypes.[88] Language in textbooks and laws deeply impacts our mindsets, and for this reason it should be the least reliant on gender stereotypes.

The Constitution has demonstrated once again to play a key role in granting rights and safeguarding citizens from gender-based violence and discrimination. Over again the gender-neutral formulation of the law has been crucial in the recognition of rights and protection of people, and although progress is still very much to be made, the direction is the right one. Language stays an essential element of law and only with its right use years of unreasonable and unjustifiable discrimination and inequalities can be addressed and solved. There is a need for policies initiatives to empower all individuals and to overthrow patrilineality cultural institution. Affirmative actions need to be developed in order to dismantle the system that favors males over everybody else and creates negative stereotypes[89]. Only through legal positive actions such system can be dismantle and language represents the basement on which such change can flourish.

[85] INDIA CONST., Part III, Art. 14.

[86] INDIA CONST., Part III, Art. 15.

[87] M. K. SAHU, *Case Comment on National Legal Services Authority v. Union of India & Others (Air 2014 SC 1863): A Ray of Hope for the LGBT Community*, in *BRICS Law Journal*, 2016, pp. 164–175.

[88] N. N. KALIA, *Women and Sexism: Language of Indian School Textbooks*, in *Economic and Political Weekly*, vol. 21, n. 18, 1986, pp. 794–797.

[89] S. SHARMA, *Achieving Gender Equality in India: What Works, and What Doesn't, United Nations University, Gender, Culture and Religions*, 2016, https://unu.edu/publications/articles/achieving-gender-equality-in-india-what-works-and-what-doesnt.html .

9. Conclusions

Legal language can be defined as being the variety of specific terms used by legal professionals in the legal field. Such vocabulary is different in every language, therefore there are no universal rules or characteristic that are applicable to every idiom, besides the fact that said vocabulary belongs specifically to the domain of juridical sciences.

A significant element that has emerged is the very important role played by judges and courts. This represents a shared characteristic between the two North American Legal systems, the European one and, surprisingly enough, the Indian one. Judges all over the world have been the first actors in the legal field to efficiently act against sexism and gender-based discrimination and inequalities; they were not the first experts to identify these negative characteristics very often disguised in legal sources. It was in fact sociolinguists, psychologists, feminists and anthropologists to first point out the presence of discriminatory and utterly sexist language and to describe how deeply rooted in laws gender stereotypes and gender norms were. Their observations sparked a debate which is still very much alive today. Since the topic was raised, judges have actively tried to make a difference and start important discussions that would lead to significant reforms.

The attention ensured to language, its detailed analysis and the steady efforts made by judges to achieve a consistent level of gender-neutrality have surely started to show their results, even if at times it only means that they have been able to spark a discussion about it. What has been highlighted by justices and courts all over the globe is that in order for justice to be more equal and less discriminatory, positive legal sources have to be directly drafted in a gender-neutral language. It has been in fact observed that the presence of legal provisions already drafted in a gender-neutral legal language would significantly improve and facilitate the work of courts and judges, thus allowing for a broader and more specific protection of rights. Lawmakers need to be intentional about the wording chosen when drafting legislation, so that interpretation can be easier, clearer and less conflicts of rules can arise from it. Although this approach has been welcomed by the majority of legal professionals, there are still many that are skeptical and oppose the development and common use of gender-neutral legal language.

Gender mainstreaming is the reorganization, development, improvement and evaluation of policy making processes, that ensure that a gender equality perspective is integrated into policies, particularly in legislation. The main aim is that of eliminating any form of gender gap, thus creating equal access, opportunities and protection for everyone. The reason why gender mainstreaming is so important, and I have considered it in this thesis, is that in order to tackle gender inequalities and gender-based discrimination they have to first be acknowledged, the differences identified by experts are in fact present, especially in certain legislative area, and the only way in which such gaps can be filled is if they are recognized and the discourse around gender changes. Gender mainstreaming policies take into account specific necessities and characteristics related to gender, because through a correct and detailed analysis of the gender-based differences an adequate step forward in laws can be made. As of today, in order to reach gender equality a specific empowerment needs to take place, because so far in history only a very small group of population has always been involved in political and legislative processes. Considering the peculiar needs of every different social group helps creating more satisfactory legislation, one that is aware of the variances, and it uses them to improve present rules.

As stated, and supported with examples throughout the whole thesis, gender-based discrimination is very easily conveyed in laws and regulations. Experience has shown that the most effective way to fight inequalities and said gender stereotypes is to have a completely different approach in the drafting of legislation. The opposite approach that is needed, is that of an acknowledgement of such discrimination and the efficient prohibition of it. The countries that have reached the most significant results in the fight of gender bias and gender-based discrimination, are those that have enacted rules that firmly, and actively, prohibit the support of gender inequalities and gender-based violence.

Today we find ourselves needing to make significant changes in our society, in order to live in a world that is a realistic reflection of its population. Gender issues have grown and are now under the spotlight, in particular in the legal domain. Language expresses gender, in many different ways, and only through a conscious choice in wording certain bias and discriminations can be fought and

eliminated. Now more than ever there is a need for effective actions to be brought forward by legislators and the awaited results can be easily achieved, but the change needs to start with the acknowledgement of gender bias and gender-based discrimination. This starting point can lead the way toward inclusivity and gender equality and the perfect carrier of such message is nothing other than gender-neutral legal language.

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Shortcuts and Shortfalls in Meta's Content Moderation Practices:

A Glimpse from its Oversight Board's First Year of Operation

Janny Leung[1]

Abstract: Social media companies regulate more speech than any government does, and yet how they moderate content on their platforms receives little public scrutiny. Two years ago, Meta (formerly Facebook) set up an oversight body, called the *Oversight Board*, that handles final appeals of content moderation decisions and issues policy recommendations. This article sets out to examine Meta's approach to content moderation and the role of the Board in steering changes, as revealed by the first 20 decisions that the Board published during its first year of operation. The study identifies interpretive shortcuts that Meta's content moderators frequently deployed, which led to pragmatic deficiency in their decisions. These interpretive shortcuts are discussed under the notions of decontextualisation, literalisation, and monomodal orientation. Further analysis reveals that these shortcuts are design features rather than bugs in the content moderation system, which is geared toward efficiency and scalability. The article concludes by discussing the challenge of adopting a universal approach to analysing speaker intentionality, warning against a technochauvinistic approach to content moderation, and urging the expansion of the Board's power to not only focus on outcomes but also processes.

Keywords: Content moderation, Social media, Meta, Oversight Board, Context.

1. Private governance of online speech

In January 2021, when the now former president of the United States Donald Trump was blocked from accessing his social media accounts, the world began to wake up to how much power private companies wield in controlling public discourse. Meta[2], which owns the social media platform Facebook, has been policing the speech of its 3.64 billion users[3]—at a larger scale than any national government or intergovernmental organisation has ever done. As noted by law professor Jeffrey Rosen, "Facebook has more power in determining who can speak and who can be heard around the globe than any Supreme Court justice, any king or any president". [4]

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2 The company Facebook changed its name to Meta in October 2021. For the sake of consistency, I will use the term Meta to refer to the company and Facebook to refer to the product, except in citations.

3 As of Q1 of 2022. This only takes into account Facebook. Meta also owns and moderates content on Instagram.

4 M. HELFT, *Facebook Wrestles With Free Speech and Civility*, in *The New York Times*, 13 December 2010, https://www.nytimes.com/2010/12/13/technology/13facebook.html.

Also happened in the same month is another notable event concerning the private governance of online speech: the Oversight Board (hereafter the Board), newly established by Meta, issued its "rulings" for the first time. The Board represents an attempt to strengthen Meta's public accountability in its content moderation practices. Decisions published by the Board also offer a peek at Meta's internal operation, as content moderation in social media companies typically happens behind closed doors under the companies' supervision. Other than through journalistic investigations[5] or cases that caught media attention, the public rarely have access to how content moderation rules are applied in practice.

This paper sets out to examine Meta's approach to content moderation and the role of the Board in steering changes, as revealed by the first 20 decisions that the Board published during its first year of operation. Section 2 of this paper reviews content moderation practices at Meta and its Board, providing background information about how content moderation is done and what appeal mechanisms exist. Section 3 examines the first 20 decisions that the Board published. These decisions reveal not only the outcome of individual cases, but also offer a glimpse of how Meta moderates content. Drawing from linguistic analyses, I identify interpretive shortcuts frequently taken in Meta's content moderation practices, which result in interpretations that could deviate from intended meaning. Section 4 discusses the extent to which these shortfalls are attributable to the poverty of context in the online communication environment or to the design of the content moderation process, as well as Meta's policy of defaulting towards removal. Section 5 concludes by critiquing Meta's normalization of pragmatic deficiency and evaluating how the shortfalls could be met.

2. Content moderation and the appeal system

Many legislative bodies are concerned with the need to regulate online expressions and how social media companies moderate content and treat their users. In the European Union, the General Data Protection Regulation (GDPR) targets privacy and data collection breaches, and the Digital Services Act (DSA), which came into force in 2022, imposes a set of obligations on gatekeeping digital platforms, prohibiting unfair practices, and also obliging platforms to cooperate with "trusted flaggers" of illegal content (Art. 19) and to offer users the opportunity to challenge content moderation decisions (Art. 18). Both France and Germany have recently enacted laws that combat illegal hate speech on social media, and the United Kingdom is in the process of enacting an Online Safety Bill that requires platforms to assess risks associated with some categories of legal but harmful speech. A similar legislation on online harms is also being discussed and developed in Canada.[6] Even in the US, where Section 230 of the Communication Decency Act grants online intermediaries broad immunity from liability for user-generated content posted on their platforms, there is no shortage of advocacy for content-based regulation.[7] Apart from national governments, civil society groups, the media, and intergovernmental organizations also put pressure on platforms to hold them publicly accountable.

As external pressure mounts, online intermediaries like Meta have developed more and more elaborate content moderation structures. Although Meta originates from the United States and its company culture is deeply rooted in American free speech norms, it operates globally and needs to navigate local regulation. Through "geo-blocking", which determine whether users can post or view certain content based on their internet protocol (IP) addresses, the company puts geographical restrictions to content in order to comply with local laws.

Meta moderates much more content than is needed to comply with local laws. In other words, a significant portion of content moderation is done in accordance with the platform's internal rules. My

5 Such as S. T. ROBERTS, *Behind the Screen: Content Moderation in the Shadows of Social Media*, New Haven, 2019, pp. 1–266.

6 https://www.canada.ca/en/canadian-heritage/campaigns/harmful-online-content.html.

7 See for example, M. A. FRANKS, *The Cult of the Constitution*, Stanford, 2020. The First Amendment implications on content moderation are an unsettled debate, centring on whether online intermediaries act like the state and are therefore constrained by First Amendment, whether they function like a speech conduit like radio and television and therefore attract regulation, or whether the companies enjoy First Amendment protection as speakers. See K. KLONICK, *The New Governors: The People, Rules, and Processes Governing Online Speech*, in *Harvard Law Review*, 131, 2018, pp. 1958–1670.

description of Meta's content moderation below is largely based on Klonick's work[8], which offers a comprehensive account of Meta's content moderation practices and its creation of the Board. Based on its Community Standards[9], Meta restricts speech that involves violent and criminal behaviour or poses safety concerns, as well as speech that it considers objectionable or inauthentic.

Content moderation may be conducted ex ante before content is published, or it may be ex post, after it has been published. Ex ante moderation is done through automated detection by a combination of automated tools that screen for extremism and hate speech, and "hash technology" that compares the newly uploaded content with a database of known impermissible content. Apart from an army of 15000 human content moderators who manually look for and delete content that violates its Community Standards, Facebook and Instagram users also contribute to the moderation process by reporting content, which will then be reviewed by a human content moderator; outcome of the moderation feeds back into Meta's algorithms as data points.

Meta publishes a Community Standards Enforcement Report every quarter, as an effort to demonstrate transparency in content moderation. For example, in Q1 of 2022, for the violating category of Adult Nudity and Sexual Activity alone, Meta acted on 31M pieces of content. Of the violating content they acted on, 96.7% of them were identified proactively before being reported by its users.[10] In the same quarter, 287k of the actioned content was restored after being confirmed to be false positives. Since the data represent the combined result of human and automated content moderation, they do not reveal how much work was performed by each and how much correction human moderators made to automated decisions. Neither do they tell us how much time passes before action is taken, and how many impressions pieces of violating content made before they are taken down. Despite the volume and regularity of data-sharing, such data do not always reveal the efficacy of content moderation processes.[11]

In 2018, Zuckerberg acknowledged that moderation decisions were wrong in more than 10% of cases.[12] Meta's automated detection works relatively well in detecting image-based copyright violations and child pornography, which are based on similarity matching with existing databases, but struggles more with text-based content such as hate speech and bullying, which involves the open texture and contextual dependence of language. As Eric Goldman observes, content is particularly difficult to classify if understanding it requires "extrinsic information"—that is, information *outside* the image, video, audio, or text.[13] What he refers to—meaning that arises from context and negotiated *in situ*, is known as pragmatics in the study of language and communication. As we will see, pragmatic deficiency is indeed a problem in content moderation.

According to Klonick, Meta's human moderators are organised into three tiers: Tier 3 moderators are employees and contract workers around the world who do the bulk of day-to-day reviewing; at Tier 2 are experienced or specialised moderators who review escalated or prioritized content, as well as a randomized sample of Tier 3 decisions; Tier 1 moderation happens at the legal or policy head-

8 K. KLONICK, *The New Governors: The People, Rules, and Processes Governing Online Speech*, cit., pp. 1958–1670; K. KLONICK, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, in *The Yale Law Journal*, 129, 2020, pp. 2418–99.

9 Until April 2018 Community Standards were different from the internal rules actually used by content moderators.

10 Community Standards Enforcement Report, Q1 2022. Available at https://transparency.fb.com/data/community-standards-enforcement/. The proactive rate is calculated based on the number of pieces of content actioned that they found and flagged before users reported them, divided by the total number of pieces of content actioned.

11See discussion of transparency theatre E. DOUEK, *Content Moderation as Systems Thinking*, in *Harvard Law Review*, vol. 136, January 10 2022, SSRN: https://ssrn.com/abstract=4005326 or http://dx.doi.org/10.2139/ssrn.4005326.

12 P. M. BARRETT, *Who Moderates the Social Media Giants? A Call to End Outsourcing*, New York, June 2020, pp. 1–32.

13 J. VINCENT, *AI Won't Relieve the Misery of Facebook's Human Moderators*, in *The Verge*, 27 February 2019, https://www.theverge.com/2019/2/27/18242724/facebook-moderation-ai-artificial-intelligence-platforms.

quarters.[14] Currently, although users could tell Meta why they disagreed with the platform's content removal decision, they are not always given the option to appeal.

To improve Meta's public accountability in their regulation of online speech, the Board began its operation in 2020 as an independent body that selectively reviews Meta's content moderation decisions. Created through a trust funded by Facebook, the Board operates at arm's length from Meta, working like a Supreme Court.[15] Its members include law professors, journalists, a former Prime Minister, and a Nobel laureate, coming from diverse geographical locations. Meta's move to set up the Board may be seen as a form of power sharing, just as it could be seen as a public relations stunt, a convenient scapegoat for controversial decisions, a way of deflecting regulatory pressures, or an attempt to build or retain user trust. As Klonick suggests, Meta has "myriad incentives" in creating an oversight body.[16]

The Board's powers are set out in its Charter and Bylaws. Since the Board only selects a very limited number of cases to review, it seeks to consider cases that have the greatest potential to guide future decisions and policies (Art. 2.1 of Charter). The Board's decisions to allow or remove content are binding on Meta; it can also make policy recommendations, which Meta is not obliged to accept but has committed to considering (Art. 4 of Charter).

The Board's decision-making is informed by Facebook's Community Standards, its values, and relevant Human Rights Standards. Facebook's values, as outlined in the introduction to the Community Standards, include the paramount value of "Voice", which may be limited in service of four other values: "Authenticity", "Dignity", "Privacy", and "Safety". In terms of Human Rights Standards, the Board draws from the UN Guiding Principles on Business and Human Rights (UNGPs), which articulate a voluntary framework for the human rights responsibilities of private businesses. The international human rights standards that the Board frequently relies on include the right to freedom of expression (Art. 19 of the International Covenant on Civil and Political Rights, or ICCPR; General Comment No. 34 of the Human Rights Committee 2011), the right to non-discrimination (ICCPR Art. 2 and 26), the right to life and security (ICCPR Art. 6 and 9). According to Douek, companies are quick to adopt the language of International Human Rights Law into their content moderation governance, but the impact of such adoption is quite limited.[17]

3. *The Board's first year of adjudication*

3 Overview

The Board started to work on cases in 2020 and issued its first decisions in January 2021. It published 20 decisions in 2021[18], averaging 1.6 cases per month. These cases were selected among over a million user appeals and a few dozens of referrals from Meta. In its first year of operation, the Board overturned Meta's decision in 14 out of 20 of cases, or 70% of the time (see Fig. 1). As an independent grievance mechanism, the Board takes pride in the frequency at which it overturns Meta's decision—it publishes a similar figure (16 overturned decisions out of the first 22 cases) on its website to illustrate "the Power of the Board" (https://oversightboard.com/appeals-process/).

14 K. KLONICK, *The New Governors: The People, Rules, and Processes Governing Online Speech*, cit., pp. 1639–1641.

15 Zuckerberg stated in an interview that he envisioned the Oversight Board as "a Supreme Court, that is made up of independent folks who don't work for Facebook, who ultimately make the final judgment call on what should be acceptable speech in a community that reflects the social norms and values of people all around the world." E. KLEIN, *Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next*, in *Vox*, 2 April 2018, https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge.

16 K. KLONICK, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, cit., pp. 2426–27.

17 E. DOUEK, *The Limits of International Law in Content Moderation*, in *UC Irvine Journal of International, Transnational, and Comparative Law*, 6(1), 2021, pp. 37–76.

18 This excludes a case (2020-001-FB-UA) on hate speech in Malaysia that the Board selected but did not adjudicate on, as it became unavailable for review after the user deleted the post.

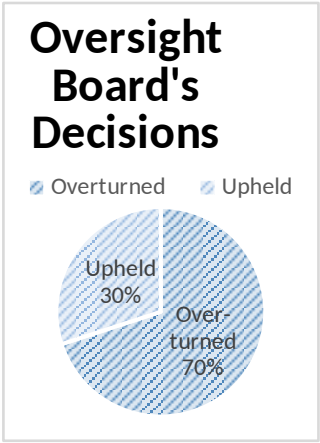

Fig. 1. Percentage of Meta's decisions that were overturned or upheld by the Oversight Board between Q4 2020 and Q4 2021

Of the 20 cases that the Board selected, hate speech is the most frequent type of violation, occurring in 50% of the cases, as shown in Fig. 2. The two other most frequent violations are Dangerous Individuals and Organisations and Violence and Incitement, occurring in 25% and 20% of the cases respectively. Hate speech is also the type of violation that generated most user appeals (36%), according to the Oversight Board's Transparency Reports.[19] However, the same reports indicate that Violence and Incitement and Dangerous Individuals and Organisations account for 13% and 6% of user appeals only. The Board has only handled one case involving Bullying and Harassment (5%), even though this type of violation generated 31% of user appeals. The Board's case selection reflects its priorities and its perception of policy areas that require more urgent guidance.

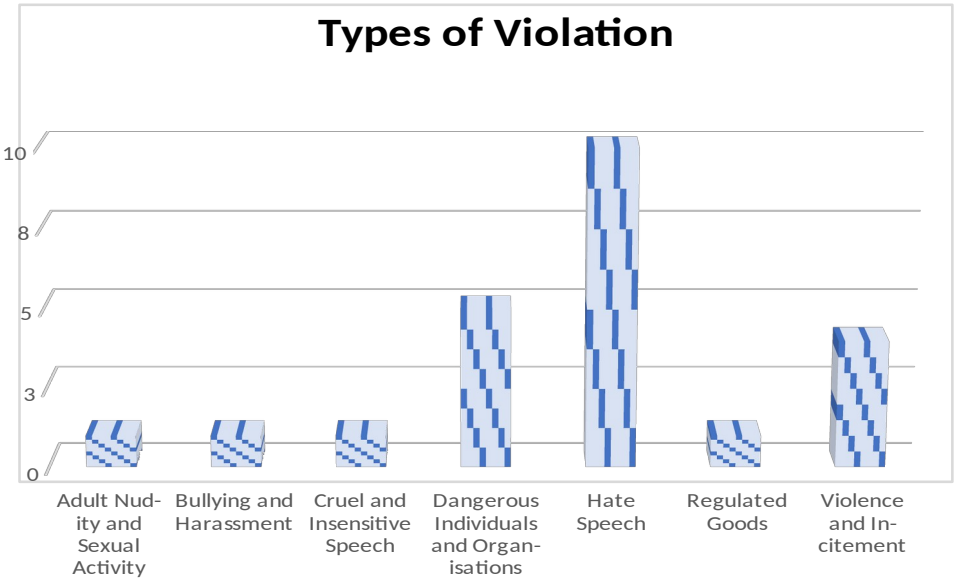

Fig. 2. Type of violation in the first 20 cases decided by the Oversight Board, by number of cases. Note that there may be multiple types of violation involved in a single case

Closely related to types of violation, it is observed that the allegedly violating content in almost all of the 20 cases was overtly political speech. The only exceptions are 2020-004-IG-UA and 2021-013-IG-UA, which involve a breast cancer awareness campaign[20] and discussion of non-medical drugs. The Board has noted in various cases that the ICCPR gives heightened protection to political expressions. It is not clear whether such prominence of political speech in the 20 cases reflects the general

19 The Oversight Board, *Oversight Board Transparency Reports Q4 2020, Q1 & Q2 2021*, October 2021.

20 But of course, the Community Standard that censors of female nipples lies at the core of gender politics, as it reflects the oversexualisation of the female body.

vulnerability of political speech to Meta's content moderation practices, the cases' potential impact on public discourse, or other priorities of the Board.

3 Enforcement errors, misplaced policy, and errors perpetuated through automation

While it is not unexpected that Meta and the Board disagree about the outcome of cases, what is striking about these cases is the frequency at which errors in Meta's content moderation processes are discovered as a result of the Board's review. Of the 20 cases the Board adjudicated on during its first year of operation, 4 of them were referred to the Board by Meta (or Facebook Referral, FBR, cases), and 16 of them were User Appeal (UA) cases. Unsurprisingly, Meta's moderators have given comparatively thorough attention to the FBR cases before referring them to the Board for further guidance. Most of the errors revealed were found in the UA cases. Among the 16 UA cases that the Board handled, Meta reversed its decision in 6 of them after the cases were selected by the Board for review. This represents 38% of the UA cases selected. Moreover, as shown in Table 1 below, most of these cases had been reviewed more than once internally in Meta before the "enforcement errors" were discovered.

Case Number	Type of Violation	Number of "Enforcement Errors" Prior to Reversal	Content Moderation Performed by
2020-004-IG-UA	Adult Nudity and Sexual Activity	1	Automated System (1)
2021-003-FB-UA	Dangerous Individuals and Organisations	1	Human (1)
2021-006-IG-UA	Dangerous Individuals and Organisations	2	Human (2)
2021-009-FB-UA	Dangerous Individuals and Organisations	2	Human (2)
2021-012-FB-UA	Hate Speech	4	Automated System (2) + Human (2)
2021-014-FB-UA	Hate Speech; Violence and Incitement	3	Automated System (1) + Human (2)

Table 1. Decisions that Meta reversed after the Oversight Board selected the cases

The Board's transparency reports revealed that during its first year of operation, Meta actually reversed its original decision in 38 cases after they were shortlisted by the Board.[21] The majority of these reversals concern Hate Speech (47.4%) and Dangerous Individuals and Organisations (31.6%). The Board only proceeded to adjudicate on 6 of them, as tabled above. In all but one instance, the Board agreed with the reversal rather than the original decision. All 6 cases involved restoring content after removal, rather than removing content after Meta decided to leave it up.

21 The Oversight Board, *op. cit.*

These enforcement errors are significant because the erroneously removed content would not be discovered and restored if the Board had not selected these cases. Many of these errors appeared unambiguously to the Board as mistakes that should not have been made. If Meta's moderators had reviewed the content carefully, they would not have made such errors, raising questions about the adequacy of the moderation process. Moreover, in multiple cases, the impact of the erroneous decisions was amplified as they became training data in automated moderation processes (see 2021-006-IG-UA, 2021-007-FB-UA and 2021-012-FB-UA).

The rate of reversal is much higher than the rate at which Meta restores content after removal as indicated in its transparency reports.[22] The rate of reversal is however not the same as error rate, as Board might have selected these UA cases for review precisely because the action taken blatantly contradict Meta's Community Standards. That said, it is still alarming that Meta was not aware of and could not explain how these errors occurred.

The first time such a reversal happened (in 2020-004-IG-UA), Meta claimed that the Board should decline to hear the case, as there was no longer disagreement between the user and the company. The Board refused, arguing that it was empowered to hear the case provided that the disagreement existed when the user exhausted Facebook's internal appeal process (Art. 2, Section 1 of the Charter). This is reasonable because hearing the case could bring impact beyond the content of the case. Once it was decided that the Board could still hear cases after moderation decisions are reversed, it is clear that reversals do not stop enforcement errors from being publicised. Why would Meta want to reverse decisions prior to the Board's review then? One possible motivation is that the reversals allow Meta to focus its rationale on the revised decision, rather than on how the error happened. As the Board notes in 2021-012-FB-UA, "(i)t is unhelpful that in these cases, Meta focuses its rationale entirely on its revised decision, explaining what should have happened to the user's content, while inviting the Board to uphold this as the company's 'ultimate' decision".

Apart from enforcement errors, the Board's queries also led to the discovery of communication errors within Meta's content moderation teams and with platform users. For example, in 2021-012-FB-UA and 2021-014-FB-UA, the users were not informed that their appealed content had been restored, and Meta did not send the notifications until the Board asked for the content of the messages. In 2021-013-IG-UA, the user received a wrong message about their appeal. In 2021-006-IG-UA, for three years until discovered by the Board, an internal guidance on policy exception for Dangerous Individuals and Organisations was misplaced, not shared within the policy team and therefore not applied. This means that content that should have fallen within the exception had been removed for three years with no accountability whatsoever.

3 Interpretive shortcuts and pragmatic deficiency

The decisions published by the Board provide a rare opportunity to examine not only content moderation decisions made by Meta but what went into the decision-making process: what factors were considered, what were not, and how competing considerations were weighed. A recurrent criticism the Board makes about Meta's content moderation practices concerns the deficiency of its contextual analysis. Drawing from relevant linguistic concepts, the analysis presented here breaks down the nature of such pragmatic deficiency by outlining the interpretive shortcuts that its content moderation took. I discuss these shortcuts under the headings of decontextualisation, literalisation, and monomodal orientation. While these shortcuts are conceptually distinct, they are interrelated in practice.

2. Decontextualisation

Decontextualisation refers to the interpretation of a sign or a text in isolation from the context that it is embedded in. Here I will focus on two types of context: discourse context and situational context. Discourse context is the larger text that an utterance[23] is part of. Situational context refers to the time,

22 See https://transparency.fb.com/data/community-standards-enforcement/.

place, and other aspects of the environment in which an utterance takes place, such as relationships among discourse participants and socio-political climate.

First let us consider discourse context, which Meta seems unwilling to engage with in some of the cases examined. In October 2020, a user posted a quote which was incorrectly attributed to Joseph Goebbels, claiming that arguments should appeal to emotions and instincts rather than to intellectuals[24]. The quote further stated that truth does not matter and is subordinate to tactics and psychology. The post was a plain text, written in English, without any accompanying visual representation of Goebbels or Nazism. In a statement submitted to the Board, the user explains that their post was meant to be a political commentary, which draws a comparison between fascism and the presidency of Donald Trump. Comments to the post indicate that the user's friends understood his intention. Meta tells the Board that it keeps an internal list of individuals and organizations that "proclaim a violent mission or are engaged in violence" and removes content that expresses support or praise for these individuals and organisations in order to prevent and disrupt "real-world harm". It has designated the Nazi party as a hate organisation and Joseph Goebbels, the Reich Minister of Propaganda in Nazi Germany, as a dangerous individual. Although the post was flagged for mentioning Goebbels, there was no explicit indication or contextual cue which suggested that the author supported or praised him. According to its submission, Meta treats all content that quotes (regardless of accuracy) a designated dangerous individual as an expression of praise or support for that individual unless the user provides additional context to make their intent explicit[25]. Meta states that they only review the post itself when making a moderation decision, without considering reactions or comments to the post—even though they could provide important clues to intentionality as speakers orient their speech towards their target audience.[26] Since our ability to draw inferences about utterances relies on contextual enrichment, ignoring discourse context will severely limit our ability to understand an utterance.[27] Interestingly, as a response to the Board's decision in this case, Meta updated its policy to more explicitly require "people to clearly indicate their intent" when discussing dangerous individuals and organisations and warns that "if the intent is unclear, we may remove content"[28], which actually increases Meta's discretion in cases where intent is not stated clearly.

In another case, Meta ignored discourse context that would have helped to resolve a critical ambiguity in the post. In 2021-007-FB-UA, Meta removed a Burmese post based on its Hate Speech Community Standard. The violating part translates into English as "Hong Kong people, because the fucking Chinese tortured them, changed their banking to UK and now (the Chinese), they cannot touch them." The question is whether "fucking Chinese" constitutes hate speech, which under Meta's Community Standard refers to content targeting a person or group of people based on their race, ethnicity, or national origin with "profane terms or phrases with the intent to insult". At the crux of the case is

23 An utterance is a unit of speech in context; it is used in contrast with a sentence in formal linguistics. A sentence can be repeated but an utterance cannot, because the context necessarily changes.

24 Case Decision 2020-005-FB-UA, Oversight Board, available at https://oversightboard.com/decision/FB-2RDR-CAVQ/.

25 This is the language used in its Community Standards, which is different from the rules used internally in the company: "We do not allow symbols that represent any of the above organizations or individuals to be shared on our platform without context that condemns or neutrally discusses the content". Available at https://www.facebook.com/communitystandards/dangerous_individuals_organizations. A similar presumption is adopted for Hate Speech as well: "We recognize that people sometimes share content that includes someone else's hate speech to condemn it or raise awareness. In other cases, speech that might otherwise violate our standards can be used self-referentially or in an empowering way. Our policies are designed to allow room for these types of speech, but we require people to clearly indicate their intent. If intention is unclear, we may remove content". Available at https://www.facebook.com/communitystandards/hate_speech.

26 A. HALEVY et al., *Preserving Integrity in Online Social Networks*, in *Proceedings of Facebook AI*, n. ACM, New York, 2020, http://arxiv.org/abs/2009.10311 gives an example where user reaction to a suicide post can be much more telling than the language of the post, for the user's immediate social network often has knowledge of the urgency of the situation.

27 J. H. C. LEUNG, *The Audience Problem in Online Speech Crimes*, in *Journal of International Media & Entertainment Law*, 9, n. 2, 2021, pp. 189–234.

28 See discussion in Case Decision 2021-009-FB-UA.

the lexical ambiguity of the Burmese word "ta-yote" ("Chinese"), which could be used to refer to China as a country and/or Chinese as a people. Four Burmese-speaking content reviewers at Meta found the content to be hate speech. Meta stated that because of difficulties in "determining intent at scale", it considers the phrase "fucking Chinese" as referring to both Chinese people and the Chinese government unless the user provides additional context that suggests otherwise. The Board's analysis suggests that the additional context is right there: the immediate discourse context refers to China's policies in Hong Kong, and the wider post discusses ways of limiting financing to the Myanmar military, following the coup that happened on 1 February 2021. The Board's translators also identified terms commonly used by the Myanmar government and the Chinese embassy to address each other, which are lexical cues in the post that provide further evidence that the Chinese state is the target referent. The Board concludes that the phrase clearly targets the Chinese state rather than Chinese people, and therefore does not constitute hate speech. The intention of the post is to discuss the Chinese government's role in Myanmar, not to attack Chinese people based on their race, ethnicity or national origin. Given that Meta's four content reviewers all found the post to be violating and missed all the discourse contexts that could have resolved the lexical ambiguity, the Board "questions the adequacy of Facebook's internal guidance, resources and training provided to content moderators".

By contrast, the divergence between Meta and the Board in the following two cases can be largely attributed to how they approached situational context. Both were cases that Meta referred to the Board. Case Decision 2020-006-FB-FBR[29] concerns a post that Meta removed for violating its misinformation and imminent harm rule (part of its Community Standard on Violence and Incitement). The post, shared in a public Facebook group related to Covid-19 with 500,000 members, contained a video and an accompanying text in French, which criticized the Agence Nationale de Sécurité du Médicament (the French agency responsible for regulating health products) for not authorizing the combined use of hydroxychloroquine and azithromycin as a cure for Covid-19. The user questioned what the society had to lose by allowing the emergency use of a "harmless drug". Meta argued that the claim that there is a cure for Covid-19 could lead people to ignore health guidance or attempt to self-medicate. The Board overturned Meta's decision and ordered that the content be reinstated, arguing that Meta has failed to demonstrate that the post rises to the level of imminent harm, and that the platform could have chosen a less intrusive intervention (such as labelling the content) than content removal. The misinformation and imminent harm rule also "require[s] additional information and/or context to enforce". Not all misinformation leads to imminent physical harm; context is crucial in assessing risk. According to the experts that the Board consulted, combining the drugs that the user mentioned in their post may be harmful, but these drugs are not available without a prescription in France.[30] Ultimately the Board disagreed with Meta about what context is needed in assessing imminent harm. Both engaged external assistance, though they sought different types of expertise—Meta consulted global health experts and the Board sought expertise in local context.

The case 2020-007-FB-FBR concerns a post in an Indian Muslim group, which contains a meme featuring an image depicting a Turkish television show character holding a sheathed sword. The text overlay in Hindi translates into English as "if the tongue of the kafir starts against the Prophet, then the sword should be taken out of the sheath". The post included hashtags that refer to President Emmanuel Macron of France as the devil and calls for the boycott of French products. Meta initially did not remove the post after two users reported it for hate speech and for violence and incitement. However, a third-party partner flagged it, and Meta's local policy team agreed that the post was potentially threatening. Meta interpreted the post as a veiled threat against "kafirs" (a pejorative term referring to non-believers) and removed it under its Community Standard on Violence and Incitement, but also referred the case to the Oversight Board for guidance. The contexts that Meta was concerned with include religious tensions in India related to the Charlie Hebdo trials in France and to elections that were happening in the Indian state of Bihar. It also noted anti-Muslim sentiment following the Christchurch attack in New Zealand. The Board was not satisfied with how Meta arrived at the implicit meaning of the

29 Oversight Board, case decision 2020-006-FB-FBR, https://oversightboard.com/decision/FB-XWJQBU9A/.

30 The most elaborate reason that the Board gives for deciding that the misinformation does not meet the standard of "imminent" harm is that the alleged cure (unlike other alleged cures such as cold water or bleach) is not readily available to the audience vulnerable to the message. However, the Board immediately and rightly notes that there may well be French speakers outside of France in the public group concerned.

post, however. Despite the visual reference to a sword in the post, the Board considered the call for a boycott of French products a call for non-violent action. Similarly, the Board found that protests in reaction to the French trials were not reported to be violent, and that the Bihar elections were not marked by religiously motivated violence. In other words, Meta's contextual analysis focused on major global events and broad climate, while the Board devoted more attention to scrutinising the immediate discourse context (including the identity of the user and the audience) as well as the relevance of situated contexts.

If we think about some types of contexts as being closer and more immediate to the speech event of interest and others being wider and broader, then discourse context belongs to the former and situational context belongs to the latter. Shuy recommends an approach to contextual interpretation that begins from wider and ends with closer context, like an inverted pyramid.[31] He observes that in police investigations or legal interpretation, words are sometimes taken as "smoking gun" evidence against criminal suspects. Moving systematically from macro to micro contexts helps with disambiguation and improves the accuracy of interpretation.[32] In other words, for our purpose here, Meta's content moderators are understandably confused about wider situational contexts if they do not then narrow the interpretations down by analysing more immediate and more local contexts. It is laudable that Meta consults external experts, but sociocultural and geopolitical expertise needs to be followed up with proper construction of the speech event and its immediate contexts.

2. Literalization

Literalization may be understood as the tendency to focus on the denotation of a word or phrase, at the cost of neglecting non-literal meaning such as indirect and implied meanings, which is often the intended meaning conveyed. The interpretation of non-literal meaning is dependent on context.

An illustrative example is 2021-005-FB-UA, where Meta removed a post containing an adaption of the "two buttons" meme, firstly for violating its Cruel and Insensitive Community Standard and upon appeal for violating its Hate Speech Community Standard. The meme features a cartoon character whose face has been substituted for a Turkish flag, sweating in front of a split screen, with a red button on each side accompanied respectively by the following statements in English: "The Armenian Genocide is a lie" and "The Armenians were terrorists that deserved it". For Meta, the meme could be viewed as either condemning or embracing the two statements featured. While the company did consider whether the content shares hate speech to condemn it or raise awareness of it, which is an exception to hate speech, it concluded that the user did not make their intention clear. The company found the statement "The Armenians were terrorists that deserved it" to be hate speech because it claims that all members of a protected characteristic are criminals. This view ignores the contradictory nature of the statements, which is precisely the basis of the meme's mockery of contemporary Turkey. The exclusive focus on the literal meaning of the statements ignores the effect of their juxtaposition and their visual context. The expectation for users to explicitly state their intent also defies the genre of satire, which sometimes uses words to convey the opposite of their meaning. Meta seems to have decided that humour is not something their content moderation practices cope well with, claiming that "creating a definition for what is perceived to be funny was not operational for Facebook's at-scale enforcement". Although it may be difficult to analyse humour at scale, it is an important form of political expression.

Another striking case is an even clearer example of counter speech, where hate speech is referenced to resist oppression and discrimination. In 2021-012-FB-UA, a user posted a picture of Indigenous art-

31 R. W. SHUY, *Linguistics and Terrorism Cases*, in M. COULTHARD, A. JOHNSON (eds.), *Routledge Handbook of Forensic Linguistics*, London, 2010, pp. 558–75.

32 From the perspective of Critical Discourse Analysis, Van Dijk (2008) also points out that not all situational contexts have the same value. He suggests understanding context not as any social situation that influences discourse but as how discourse participants subjectively construe such situation. This is to say that the speech event and its immediate contexts should limit the scope of situational contexts that are relevant. T. A. VAN DIJK, *Discourse and Context: A Sociocognitive Approach*, Cambridge, 2008, https://doi.org/10.1017/CBO9780511481499.

work with accompanying text in English. The artwork is a wampum belt, which is a traditional means of documenting history, with shells or beads that depict "the Kamloops story", based on the discovery of unmarked graves at a former residential school for First Nations children in Canada. The title of the artwork is "Kill the Indian/Save the Man". The text also contains the following phrases which correspond to depictions on the belt: "Theft of the Innocent", "Evil posting as Saviours", "Residential School/Concentration Camp", "Waiting for Discovery" and "Bring Our Children Home". The post also explicitly states that "its sole purpose is to bring awareness to this horrific story". Meta's automated systems identified the content as violating its Hate Speech Community Standard and a human reviewer confirmed the violation and removed the post. After the user appealed, a second human reviewer also assessed the content as violating. The phrase that triggered the content removal was "Kill the Indians", which when considered out of context constitutes violent speech targeting people based on a protected characteristic. However, Meta reversed its decision after the Board selected the case for review, acknowledging that its policy permits sharing someone else's hate speech to condemn it or raise awareness. The title of the artwork is an intertextual reference to "kill the Indian in him and save the man", a phrase with a long history in the colonial project of "civilizing" indigenous peoples in North America. It did not help that the two human reviewers Meta assigned to the case are based in the Asia-Pacific region and may not be familiar with the relevant history. "Kill the Indians" would only be read as hate speech if it is read literally and in isolation from context in this case. Moreover, the title of the work was used with quotation marks, which should have given further cues to the reviewer that it is not to be read literally.

We regularly communicate more than what we literally say. An explicit statement of intention could help clarify what might otherwise be an ambiguous message, but it could easily also be used to convey an exact opposite message. Just as one can ridicule an idea by explicitly endorsing it, one can explicitly condemn an idea while actually supporting it. The most common trope of overt untruthfulness is irony[33]. Explicit statements of intention can conflict with context, such as tone of voice, facial expressions and gestures, speaker identity, audience characteristics, and shared knowledge, leading the audience to look for an alternative meaning that is not stated but implicated.

For a marginalized group trying to raise awareness about atrocities committed against them to then be censored for hate speech adds insult to the injury. Even though it is not an explicit policy at Meta to prefer literal meaning over intended meaning, both their automated systems and human reviewers seem to be geared towards literal meaning. Meta's policies also default towards content removal, which we will discuss further in Section 4. As our examples show, such content moderation practices could end up restricting the speech of those they set out to protect.

2. Monomodal orientation

Content moderation decisions may be based on a cue from a singular modality in the content, which becomes the smoking gun evidence for violation, while other modalities are ignored. This monomodal orientation may be related to the limited time and resources that human content modera-

33 Irony is overt untruthfulness used not to deceive others but to implicate meaning reversal. In the framework of Gricean conversation analysis, the speaker flouts the maxim of Quality by expressing something that s/he believes to be false, and prompts the audience to look for an alternative, implicated meaning. M. DYNEL, *Irony, Deception and Humour: Seeking the Truth about Overt and Covert Untruthfulness*, 1st ed., Boston/Berlin, 2018. Other than irony, there are other situations where an explicit statement of intention can misalign with the actual intention and where the maxim of Quality is flouted. While irony contradicts reality, hyperbole or meiosis distorts reality by overstating or understating it. Another example is metaphor, such as "you are the cream in my coffee", where the audience translate metaphorical expressions into literal expressions through world knowledge and pragmatic reasoning. All these rhetorical devices could add poetic and humorous quality to language.

tors were given, and to the limitation on multimodal processing[34] by Meta's automated content moderation.

An illustrative case[35] concerns Meta's removal of a post on Instagram for violating the company's Community Standard on Adult Nudity and Sexual Activity. "Nudity" in the Community Standard is defined to include "…uncovered female nipples[36] except in the context of […] health-related situations (for example, post-mastectomy, breast cancer awareness […])". The post, with a title in Brazilian Portuguese which clearly started that its purpose is to raise awareness about breast cancer, contains eight photographs of breast cancer symptoms with corresponding descriptions (such as "ripples", "clusters", and "wounds"). Five of these photographs included visible and uncovered female nipples. Meta has "a machine learning classifier trained to identify nudity" that promptly detected the nudity in the image. The post was removed despite a policy exception that expressly allows the display of nudity used to "raise awareness about a cause or educational or medical reasons". In a statement submitted to the Board, the user explains that they posted the content as part of the national "Pink October" campaign for breast cancer prevention. Promoting awareness of main signs of breast cancer is useful for early detection and can save lives. Since this purpose squarely falls within Meta's policy exception, how did its content moderation process fail to identify the content as such? According to the Board, Meta's automated systems failed to recognise the words "Breast Cancer" in Brazilian Portuguese ("Câncer de Mama"). News reports abound about how Meta's algorithms may overfit to the English language and struggle to locate contextualized meaning in other languages[37]. Although Meta urges the Board to focus on the outcome of enforcement, not the method, the case clearly raises questions about the use of automation. Meta's engineers have noted that classifiers that work with multiple modalities are prone to overfitting to one of the modalities[38], and in the present case the system might have overfitted to the nude images at the expense of the text. Over-reliance on semantic cues can also generate false positives, as evident in the mass removal of posts (including those from years ago) containing the sarcastic expression "kill me" and related suspension of accounts on Twitter deemed as glorifying self-harm.[39] One visual cue to the purpose of the post in question is the colour pink, in line with "Pink October", an international campaign that raises awareness of breast cancer. Failure in word recognition aside, if Meta's system had the intelligence to connect the colour of the image with real world knowledge, the timing of the post (October 2020), or the likely cooccurrence of similarly themed images at the time, it would have had an additional contextual cue that helps with its interpretation. Facebook's Quarterly Update (2021 Q1) on the Oversight Board[40] denies that its systems failed to identify the keywords; instead, the company explains, the systems are not trained to ignore all content that contains the keywords. While it is true that people could convey the opposite of what they state explicitly, the public has no way of knowing what other contextual cues it takes for their automated systems to recognise

34 Human communication has always been largely multimodal––people combine the use of language with a diverse range of semiotic resources (including gesture, gaze, and posture) in everyday communication. Online communication is no different. A popular form of digital expression––memes––uses a combination of text and static or moving image.

35 Oversight Board, case decision 2020-004-IG-UA, https://oversightboard.com/decision/IG-7THR3SI1/.

36 In its analysis, the Board points out that Meta's differential treatment of male and female nipples raises discrimination concerns, but does not follow up on this issue in its Policy Advisory Statement.

37 Ville de Bitche: *Facebook Mistakenly Removes French Town's Page*, in *BBC News*, 13 April 2021, https://www.bbc.com/news/world-europe-56731027 (reporting that Facebook's algorithm removed the page of the French town Ville de Bitche, confusing it with the English insult); J. Cobian, C. Scurato, and B. V. Castillo (eds.), *Facebook and the Disinformation Targeting Latinx Communities*, in *Colorlines*, 19 March 2021, https://www.colorlines.com/articles/op-ed-facebook-and-disinformation-targeting-latinx-communities (making the case that the Spanish word "parense" was mistranslated by Facebook as "stop" rather than "stand up", which dilutes the violence-inciting potential of a call-to-arms message).

38 A. Halevy et al., *Preserving Integrity in Online Social Networks*, *op. cit.*, pp. 1–32.

39 The Copia Institute, *Detecting Sarcasm Is Not Easy (2018)*, *Case Study Series*, *Trust & Safety Foundation Project* (blog), 29 July 2020, https://www.tsf.foundation/blog/detecting-sarcasm-is-not-easy-2018.

40 Available at https://about.fb.com/wp-content/uploads/2021/07/Facebook-Q1-2021-Quarterly-Update-on-the-Oversight-Board.pdf.

the policy exception. The fact remains that its automated systems erred, and made a kind of error that human content moderators do not make.

It is more resource-intensive to analyse multimodal content than plain text posted on platforms. Another case[41] where multimodality presents interpretive challenges to Meta involves a 17-minute interview with a professor, published by a Punjabi-language online media company. The caption and text accompanying the video described the Hindu nationalist organisation Rashtriya Swayamsevak Sangh (RSS) and India's ruling party Bharatiya Janata Party (BJP) as a threat to Sikhs, a minority religious group in India. The post was removed for violating the Dangerous Individuals and Organisations Community Standard, even though none of the individuals or groups mentioned in the post are designated as "dangerous". The company conceded that the removal was made in error. Meta explains that moderation error was due to the length of the video (17 minutes), the number of speakers (2), the complexity of the content and its claims about various political groups (p. 8). It acknowledges that content reviewers do not always have time to watch videos in full.

Going back to the two-buttons meme case (2022-005-FB-UA) discussed above, Meta focused on the textual statements while ignoring the visual context of the meme. In addition to the visual elements of the meme itself, the user also posted a "thinking face" emoji preceding the meme, which is often used to express sarcasm. All these cues were ignored when Meta identified one of the statements as violating.

In sum, whether it is Meta's automated systems or human moderators, there is a tendency to focus on a single modality when analysing multimodal content. Given the prevalence of multimodality in online communication, the risk here is that the intended meaning will often be missed.

4. Discussion: design and default

Even though they are not design goals, decontextualization, literalization, and monomodal orientation are features rather than bugs in Meta's content moderation practices. These systematic failures appear to be compromises that its content moderation system makes, presumably because the identification of pragmatic features is hard to scale. As Douek suggests, content moderation is all about trade-offs. Platforms have to balance accuracy in decision-making against other competing demands such as efficiency and responsiveness.[42] That said, moderation decisions that are insensitive to context and that fail to identify speaker intention will inevitably appear arbitrary to users.

There are no doubt genuinely difficult cases that Meta deals with on a day-to-day basis, such as those involving poverty of contextual information (such as a history of contact between users offline or on another online platform), serious conflicts of values (such as the challenge in balancing between allowing for a diversity of voices and protecting the safety of users), or complicated situational contexts. However, most of the cases discussed in this paper do not fall into these categories. The cases adjudicated by the Board show that even when available and relevant, context is often excluded from Meta's content analysis.[43] Decontextualization, literalization, and monomodal orientation are interpretive shortcuts adopted to facilitate efficiency and scalability, while information that can help decipher intended meaning is ignored or suppressed. By focusing attention only on part of the context, indeterminacies that could have been resolved with relatively ease are left open.

Sticking to explicitly stated meaning and ignoring contextual factors conveniently accommodate the limits of so-called artificial intelligence (AI)[44], which does not know how to read between the lines. Natural language processing in artificial intelligence relies primarily on semantics (literal and

41 Oversight Board, case decision 2021-003-FB-IA, https://oversightboard.com/decision/FB-H6OZKDS3/.

42 E. DOUEK, *Content Moderation as Systems Thinking*, cit.

43 According to a Washington Post article, Facebook "moderators tasked with reviewing hate speech are not allowed to see key context around a post, such as comments, accompanying photos or a profile picture––information that would help a reviewer understand the intention of the comment". Context is excluded "to protect user privacy". E. DWOSKIN, N. TIKU, H. KELLY, *Facebook to Start Policing Anti-Black Hate Speech More Aggressively than Anti-White Comments, Documents Show*, in *Washington Post*, 3 December 2020, https://www.washingtonpost.com/technology/2020/12/03/facebook-hate-speech/.

pre-contextual meaning) and syntax (grammatical structure).[45] Without pragmatic competence, common sense, and real-world knowledge, it cannot reliably detect irony and sarcasm[46] through pattern matching against a database of violating content. Without sufficient context such as the source of an article (e.g., *The Onion* versus *New York Times*) or the identity of the author, even human beings may be confused about whether posts they see on social media are meant to be satirical or not.

The reality in Meta is that neither human nor machine content moderators could engage in the level of contextualisation work that the Board does. Automated systems have no pragmatic competence. The human moderators at Meta work under pressured conditions[47] and hardly have the time to study the relevant context and deliberate extensively. According to one estimate, content moderators on average have under 150 seconds to make each decision.[48] While timely decision-making is crucial to preventing harmful content from going viral, it is important to understand the nature of the trade-offs.

When an acontextual reading of potentially violating content generates an indeterminate meaning, Meta's policies default towards content removal. This risk-adverse approach could lead to over-censorship, which disproportionately harm minority groups, whose political perspectives receive limited attention in mainstream media. Default towards removal seems to be especially prevalent when hate speech and dangerous individuals and organisations are involved. In the Canadian indigenous artist case (2021-012-FB-UA) discussed above, the Board points out that an internal guidance, called "Known Questions", that Meta issues to its moderators tells them that a clear statement of intent will not always be sufficient to change the meaning of a post that constitutes hate speech. When the user's intent is not clear, moderators are instructed to err on the side of removing content. The interpretation of "Chinese" in the Burmese case (2021-007-FB-UA) is a similar example, where instead of resolving the indeterminacy through discourse context, Meta opted for removal, as reflected in four of its human reviewers' action. The same applies to the mentioning of dangerous individuals and organisations, as demonstrated in the Goebbels case (2020-005-FB-UA), a case involving the mentioning of Kurdistan Workers' Party leader Abdullah Öcalan (2021-006-IG-UA), and a case that involves the mentioning of Al-Qassam Brigades, the military wing of the Palestinian group Hamas (2021-009-FB-UA). In these cases, the designated dangerous individuals and groups were mentioned to satirically comment on current politics, to raise awareness about prison rights, and to republish news. The content was removed in all these cases even though the users did not praise or support the individuals or organisations. These interpretive approaches and method of handling indeterminacies have impact beyond the current case, as case decisions are used in classifier training that is supposed to improve the accuracy of the automated systems. Errors could therefore perpetuate through automation if not discovered and removed.

Meta's content moderation practices are similar to the industry approach to multilingual management in the digital society. Gramling (2020) uses the term supralingualism to describe a structural ide-

44 Which may be understood as "human-developed algorithmic systems that analyse data and develop solutions in specific domains". United Nations General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, , 29 August 2018. Like all existing AI technology, automated detection is based on narrow AI, and will remain so in the foreseeable future.

45 S. RUSSELL, P. NORVIG, *Artificial Intelligence: A Modern Approach*, 2020, pp. 823–878.

46 "State of the art" attempts to apply machine learning in identifying satire rely on semantic rather than pragmatic cues; successful "detection" occurs within a limited set of test items. V. RUBIN et al., *Fake News or Truth? Using Satirical Cues to Detect Potentially Misleading News*, in *Proceedings of the Second Workshop on Computational Approaches to Deception Detection*, San Diego, California: Association for Computational Linguistics, 2016, pp. 7–17, https://doi.org/10.18653/v1/W16-0802 (detecting satire by looking for reference to unexpected entities such as people, location and places in the last line of the article); O. LEVI et al., *Identifying Nuances in Fake News vs. Satire: Using Semantic and Linguistic Cues*, in *Proceedings of the Second Workshop on Natural Language Processing for Internet Freedom: Censorship, Disinformation, and Propaganda*, 2019, pp. 31–35, https://doi.org/10.18653/v1/D19-5004 (distinguishing fake news and satire articles by comparing their semantic and syntactic features).

47 S. T. ROBERTS, *op. cit.*, pp. 1–266.

48 J. KOETSIER, *Report: Facebook Makes 300,000 Content Moderation Mistakes Every Day*, in *Forbes*, 9 June 2020, https://www.forbes.com/sites/johnkoetsier/2020/06/09/300000-facebook-content-moderation-mistakes-daily-report-says/.

ology and an aggressive industrial effort observed in applied research by global commercial enterprises to manage multilingualism in online settings for practical purposes.[49] Driven by a client agenda that is indifferent to nationalism and partisanship, these companies pursue technologies in cross-linguistic information retrieval and machine translation that work with translingually controlled meanings, which are now highly valued commodities, at the expense of other variations of meanings. Literalization and decontextualization are among features of supralingualism that Gramling has identified. Literalization involves preferring literal over non-literal meanings, or as Gramling explains, "[m]odes of meaning-making that rely on silence, implicature, inuendo, and subtlety are … dispreferred as data sources in supralingualism, where explicit propositional content is the primary source of meaning-making potential" (p. 143). In terms of decontextualization, since computational approaches to language understands context in terms of textual proximity and frequency, they tend to ignore the social nature of speech and "lack the depth of genre, aesthetics, pragmatics, and polysemy that inhere in the usage" (ibid). Applying a similar logic, modalities that are easier to process are preferred over other modalities, and a monomodal orientation optimizes content moderation processes by controlling the scope of meaning that is accessed.

5. Conclusion: meeting the shortfalls

As the volume of its content grew, Meta's loose standards in content moderation ("Feel bad? Take it down") hardened into an elaborate set of internal rules around 2009.[50] According to Meta's executives Dave Willner and Jud Hoffman, Meta formulated objective rules to ensure consistency and uniformity. Willner considered the distillation from standards to rules "a form of technical writing". Part of the concern was that human moderators with diverse backgrounds would bring in their cultural values and norms instead of applying Meta's. According to Sasha Rosse, who was involved in training the first content moderation team in Hyderabad:

> I liked to say that our goal was [to have a training system and rules set] so I could go into the deepest of the Amazon, but if I had developed parameters that were clear enough I could teach someone that had no exposure to anything outside of their village how to do this job.[51]

Universality comes at the cost of context, which informs speaker intentionality. An "objective" algorithm that filters by keywords without analysing context cannot tell the difference between a racist post and a post that calls out racial injustice. This is why when a black mother went on Facebook to vent about a white man uttering racist slurs to her children in a supermarket, her post was removed as violating content.[52]

Meta's algorithmic struggle with context impacts its users disproportionately, contrary to the claim that algorithmic detection of violating speech based on objective rules is consistent and unbiased. Algorithms work better in languages that are frequently used, and less well in minority languages. Moreover, Meta allocates unequal resources and prioritises attention to cases based on the urgency to control bad press. Unwarranted censorship experienced by powerful users, such as famous authors, political leaders, and newspaper editors, are often rectified quickly, while the average user's wrongfully removed content may never be reinstated.[53] Until recently, politicians are given a free pass for posting

49 D. GRAMLING, *Supralingualism and the Translatability Industry*, in *Applied Linguistics*, 41, n. 1, 2020, pp. 129–47, https://doi.org/10.1093/applin/amz023.

50 Community Standards are a simplified version of the rules that are publicised to its users. K. KLONICK, *The New Governors: The People, Rules, and Processes Governing Online Speech*, cit., pp. 1631–35.

51 K. KLONICK, *The New Governors: The People, Rules, and Processes Governing Online Speech*, cit., p. 1642.

52 T. JAN, E. DWOSKIN, *A White Man Called Her Kids the N-Word. Facebook Stopped Her from Sharing It*, in *Washington Post*, 31 July 2017, https://www.washingtonpost.com/business/economy/for-facebook-erasing-hate-speech-proves-a-daunting-challenge/2017/07/31/922d9bc6-6e3b-11e7-9c15-177740635e83_story.html.

53 K. KLONICK, *The New Governors: The People, Rules, and Processes Governing Online Speech*, cit., pp. 1654–1655.

violating content because of the "newsworthiness" of their speech.[54] On the other hand, false negatives affecting communities with less political power[55] and those speaking less popular languages[56] are tolerated for much longer. Former Meta employees complain about content moderation rules not being applied equally across geopolitical spaces.[57]

Despite the lack of pragmatic competence in current AI technologies, social media companies perpetuate the myth that AI is now assessing content "holistically" and analysing it "deeply"[58]. Meta's response to the Board's recommendations about enforcement is technochauvinistic[59], promoting the belief that technology is always the solution. For example, after its automated system failed to identify a breast cancer awareness campaign as a policy exception to the Nudity and Sexual Activity standard, Meta launched "keyword-based improvements" and "a new predictive model that will contribute more detail to the original system" [60]. It is impossible for the public to know how these promises of improvement translates into more accurate enforcement. Meta perpetuates a rhetoric of improvement through its software updates and enforcement reports. Given the frequency of "glitches" that occur, it is easy to forget that they have been moderating content based on internal rules for more than a decade now. But the algorithms that are now responsible for most of the content moderation decisions are still perpetually in training. The impact of existing content moderation practices on people's lives today cannot await future technology.

Pragmatic deficiency is routinely normalized, justified as an inevitable trade-off for objectivity, cultural neutrality, scalability, and efficiency. While the system design of content moderation no doubt has to take into account competing considerations, the public do not know how these are weighed against one another. Meta has been known to use the normalization of deviance as a strategy—the idea that a problem has become so accepted that it is no longer seen as problematic. After the personal information of more than half a billion Meta users had been "scraped", a leaked internal memo reveals that a long-term strategy for the company is to "normalize the fact that this activity happens regularly".[61]

Since pragmatic competence, which allows us to draw inferences, identify non-literal meaning, and deduce intent, is something that human possesses but AI does not have, it is tempting to suggest that human review of every post is the solution to the problem. For a company with an annual net income of 39.37 billion US dollars (in 2021)[62], one may say that there is room for more resources to be devoted to content moderation. However, even for Meta, this solution is impractical due to the sheer quantity of content shared on the platform. Some have proposed mandatory human review just for appeal cases. The Board itself has recommended that human content moderator be assigned to appeals on algorithmic decisions, at least for certain types of alleged violations (such as adult nudity, see 2020-004-IG-UA). This is a recommendation that Meta was not willing to accept. In fact, mandatory human

54 A. HEATH, *Facebook to End Special Treatment for Politicians after Trump Ban*, in *The Verge*, 3 June 2021, https://www.theverge.com/2021/6/3/22474738/facebook-ending-political-figure-exemption-moderation-policy.

55 S. STECKLOW, *Why Facebook Is Losing the War on Hate Speech in Myanmar*, in *Reuters*, 15 August 2018, https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/.

56 AVAAZ, *How Facebook Can Flatten the Curve of the Coronavirus Infodemic*, 15 April 2020, pp. 1–21.

57 C. BUNI, S. CHEMALY, *The Secret Rules of the Internet: The Murky History of Moderation, and How It's Shaping the Future of Free Speech*, in *The Verge*, 13 April 2016, https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech.

58 M. SCHROEPFER, *How AI Is Learning to See the Bigger Picture*, in *Facebook Technology* (blog), 19 May 2021, https://tech.fb.com/how-ai-is-learning-to-see-the-bigger-picture/.

59 M. BROUSSARD, *Artificial Unintelligence: How Computers Misunderstand the World*, Cambridge (MA), 2019, pp. 1–200.

60 Meta, *Meta Q2 + Q3 2021 Quarterly Update on the Oversight Board*, November 2021, pp. 1–37, https://about.fb.com/wp-content/uploads/2021/11/Meta-Q2-and-Q3-2021-Quarterly-Update-on-the-Oversight-Board.pdf .

61 S. HALPERN, *Facebook and the Normalization of Deviance*, in *The New Yorker*, 2 May 2021, https://www.newyorker.com/news/daily-comment/facebook-and-the-normalization-of-deviance.

62 Available at https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx .

review will be even harder to achieve for smaller social media platforms and could stifle competition. From the perspective of due process, prioritising human review may also reduce the speed of content moderation, which may also affect perception of fairness. There is a sense in which the decisions made by the Board, which resulted in reinstating a breast cancer awareness post months after the campaign ended or a political post after a conflict subsided, are not useful remedy to the users, because they are not timely enough.

A further constraint is that the Board can only review a miniscule fraction of appeal cases that come before them. Like appeal courts, it arrives at its conclusions through thorough contextual analyses. It urges Meta to pay more attention to context, but also acknowledges the challenge of content moderation at scale, as contextual analysis is labour intensive. Meta could not possibly replicate the Board's approach to case analyses, other than in selected, high-profile cases. The Board's impact is less likely exerted through its leaving up versus taking down decisions, than through the use of soft power—its policy recommendations. By pressuring Meta in its policy recommendations, the Board has had some success in requiring Meta to reveal what would otherwise be opaque processes to its users and in drawing attention to quality assurance issues in content moderation processes.

Although the Board's decisions are binding and have precedential value, unlike courtroom litigation, Meta has little stake in winning or losing cases. There is no penalty for wrongful removal of content. An outcome-based focus is therefore most economical for Meta. Meta has repeatedly urged the Board to focus on outcomes rather than processes, but accountability in processes is clearly critical to ensure the equity of outcomes. The enforcement and communication errors highlighted in Section 3.2 do not inspire confidence in Meta's operational processes, but the Board has faced obstacles in getting to the bottom of these problems. When the Board asked Meta for details that are needed to assess the accuracy of enforcement, such as error rates by individual rules, and by moderators versus automation, Meta turned down the requests on the basis that "the information is not reasonably required for decision-making in accordance with the intent of the Charter" (2021-006-IG-UA). The limited information provided in Meta's transparency reports and its reluctance to share more information with the Board make it difficult to check for and correct any bias in Meta's decision-making processes.

The cases examined in this paper demonstrate the urgency for external oversight on not only Meta's content moderation outcomes but also its processes, such as whether it is following its own rules, whether it is treating different user groups fairly, and whether its content moderation processes achieve a reasonable balance among competing demands. In other words, questions about system design and quality assurance that have impact beyond individual cases. This would be especially important for people and communities who are impacted by speech disseminated on Meta's platforms, but are not platform users themselves. It may be that the pragmatic deficits identified in this paper are necessary trade-offs against other pressing concerns, but the public currently have no way of knowing. Given the positive reputation that it has built, the Board is well positioned to expand its oversight on Meta's content moderation processes. There are inherent limits to thinking about the Board as a Supreme Court rather than as an authority that has general oversight on Meta's decision-making over speech and online safety.[63]

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63 In a similar vein, Douek argues that the focus on correcting erroneous decisions through appeal mechanisms is misplaced. Since content moderation resembles an administrative system more than a legal system, it should strive to have aggregate accountability rather than alignment with rule of law values.

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Looking for Knowledge in Language for Law

Preliminaries for a Knowledge Communication Approach to Comparative Law

Jan Engberg[1]

Abstract: The purpose of this contribution is to present some of the cornerstones of a conceptualisation of legal language that is relevant for a knowledge communication approach to comparative law. Point of departure is the idea of legal language as the language of a discipline that basically reflects the knowledge structures of legal thinking. Following a knowledge communication approach, the author draws upon the characteristics of cognition and human knowledge construction as explanatory tools. From here follows that comparative law (for legal or for translational purposes) is oriented towards comparing the legal knowledge held by experts in different legal settings. The essay presents a small selection of approaches developed for this task and end the deliberations by highlighting three perspectives—law as a function system, law as a national culture, law as the result of interpersonal communication—that the author sees as basic in order to grasp the many facets of legal knowledge relevant for comparative purposes.

Keywords: Legal knowledge, Law as a discipline, Cognition and disciplinary communities, Translation, Multiperspectivist approach.

1. Introduction

As always in any brief linguistic expression like a title, the title of the journal in which this contribution appears (*Comparative Law and Language*) may be interpreted in different ways, depending upon the suggested relations between the elements. In my present text, I want to focus the interest on comparisons of aspects of language and law in their interaction (Comparative Law-and-Language, instead of the also possible Comparative-Law and Language). This means that my focus is upon the idea that law and language are each other's prerequisites: The law must be expressed in language in order to exist in the world—and the language elements used must be selected in order to comply with the expectations of the receivers in order to be understandable in the intended way and let the law come to existence. One way of conceptualizing this idea in the realm of comparative legal studies is to say that my focus is upon comparing the legal knowledge of different jurisdictions as constructed through

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linguistic means. In section 2, I will get back to the concept of knowledge underlying this conceptualisation. Before doing that, however, it is central to state that concerning the relation between language, law, and knowledge my point of departure is one of linguistic constructivism. This approach may be translated into the following assumption: *Meanings in communication and thus the knowledge that participants take away from the communication are constructed by combining existing knowledge about law and about conventional language use with the language chosen in the communication*. Let me offer a few comments to this basic assumption:

- The idea that meaning is constructed by communicative participants in the conversational interaction has as its consequence that understanding is seen as a creative process rather than just being a process of decoding: in a conversation, receivers build up understanding gradually, drawing upon assumptions about the context of the conversation, their own intentions with the conversation and their knowledge base as it exists before the beginning of the conversation.
- The knowledge base that receivers use for the construction of meaning is consequently fluid in the way that it depends upon conversational experience: Each interaction may either support or change the individual communicator's knowledge base. In this way, individual knowledge depends on the interactions in which communicators have participated.
- The knowledge of a discipline like law consists of that knowledge of the members of this discipline, of which they assume that they share it with other members. Their assumptions about sharing knowledge are built upon communicative experiences like university education and conversations with other members of the discipline.
- This means that the conceptual legal knowledge that we want to find when doing comparative work in law is reflected in and simultaneously dependent upon communication.

Legal communication is thus an example of communication that creates legal knowledge especially through communicative interactions involving legal experts. This type of communication may be termed "specialised communication" (German: *Fachsprache*). For studies focusing on the knowledge aspect of such communication, the term Knowledge Communication Approach has been coined and developed.[2] In my contribution, I will discuss some of the elements of the basic constructivist assumption above with point of departure in this approach.

Importantly, the contribution departs from previous work and should function as an overview over the basic pillars of my work on comparative law especially oriented towards the requirements of legal translation. Hence, the different sections depart from previously published work, mainly Engberg (2020)[3] and Engberg (2022)[4]. The structure of this contribution is that section 2 focusses upon the cognitive-pragmatic underpinnings of specialised knowledge and the basics of the Knowledge Communication Approach; section 3 relates these considerations to

[2] For an overview of literature and the characteristics of the knowledge communication approach, *cf*. U. PORUP THOMASEN, *Exploring the Communicative Dimensions of Knowledge-Intensive Innovation : an Ethnographic Insight into the Innovation Culture Initiative of Novo Nordisk*. Department of Business Communication, 2015, pp. 57–117; P. KASTBERG, *Knowledge Communication. Contours of a Research Agenda*, 2019; J. ENGBERG, A. FAGE-BUTLER, P. KASTBERG (eds.), *Perspectives on Knowledge Communication: Concepts and Settings*, 2023.

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[4] J. ENGBERG, *LSP and Transdiscursive Knowledge Communication*, in E. ISAEVA (ed.), *Specialized Knowledge Mediation: Ontological & Metaphorical Modelling*, 2022, pp. 61–77.

comparative legal studies, with special emphasis upon comparative law for translational purposes. Finally, section 4 suggests three perspectives to be used when collecting the knowledge relevant for such comparative legal studies.

2. The Knowledge Communication Approach

2.1. Knowledge and specialisation

The Knowledge Communication approach focuses on the knowledge of experts and the communication of expert knowledge. By this concept, I understand the following:

> The study of knowledge communication aims at investigating the intentional and decision-based communication of specialised knowledge in professional settings (among experts as well as between experts and non-experts) with a focus upon the interplay between knowledge and expertise of individuals, on the one hand, and knowledge as a social phenomenon, on the other, as well as the coping with knowledge asymmetries, i.e., the communicative consequences of differences between individual knowledge in depth as well as breadth.[5]

In this paper, the first-mentioned characteristic of knowledge communication is the central one: Knowledge communication is about how disciplinary knowledge exists as a socially recognised fact (*knowledge as a social phenomenon*), but at the same time is empirically only accessible as the knowledge of individual carriers from the discipline (*knowledge of individuals*). And due to the constructive character of communication for the generation and preservation of the knowledge introduced above, the cognitive and communicative processes of the members of the discipline play a very central role for content and structure of the disciplinary knowledge.

The disciplinary knowledge and the conversational understanding and development of it does not occur in an empty space but is embedded in contexts characterised by domain specialisation. In the sense relevant here, the term "specialisation" indicates a context where experts from a specific field are central participants. Kalverkämper[6] lists the following aspects that are centrally relevant for a pragmatic characterisation of a specialised domain:

> A specialised domain is (a) what is institutionalised as such, (b) from the point of view of social and factual needs is motivated as a unified complex, (c) functions efficiently as an identified field of work, and (d) is accepted through social convention (by whatever groups). (My translation)[7]

Law is an example of such a specialised domain. As law is connected to research and is carried by university education, it is relevant to characterise it not only as professional domain, but actually as a discipline and to talk about legal knowledge as disciplinary knowledge.

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[5] J. ENGBERG, *Conceptualising Corporate Criminal Liability: Legal Linguistics and the Combination of Descriptive Lenses*, in G. TESSUTO, V. K. BHATIA, G. GARZONE, R. SALVI, C. WILLIAMS (eds.), *Constructing Legal Discourses and Social Practices: Issues and Perspectives*, 2016, p. 37.

[6] *cf.* H. KALVERKÄMPER, *Fach und Fachwissen*, in L. HOFFMANN, H. KALVERKÄMPER, H.E. WIEGAND (eds.), *Fachsprachen. Ein internationales Handbuch zur Fachsprachenforschung und Terminologiewissenschaft*, Berlin, 1998, p. 8.

[7] Original formulation: *Fach ist, was (a) als solches institutionalisiert ist, (b) von der (sozialen und sachlichen) Bedarfslage her sich als ganzheitlicher Komplex motiviert und (c) als identifizierbares Arbeitsfeld mit Effizienz funktioniert und (d) durch soziale Konvention (von welchen Gruppen auch immer) akzeptiert ist*.

Disciplinary knowledge is academically based knowledge connected to institutionalized settings (universities) and to "an identified field of work" (cf. definition above). Disciplinary knowledge is characterized along the lines of different disciplinary epistemologies, describing phenomena that may be the focus of several disciplines but in a specific way in accordance with the pragmatic needs of the discipline.[8] According to the quotation above, disciplines as specialised domains may be seen as social constructions that are upheld both from the outside and the inside through communication and ensuing acceptance of the existence and content of the domain or discipline.

This constructed and constructing character of disciplines is perfectly in accordance with the idea that the shape of a discipline's knowledge is based upon the communicative exchange between individual experts. Individuals learn from speaking to other experts about what is the accepted knowledge of the discipline, in educational as well as in professional settings. However, this accepted knowledge changes over time. An important source for this kind of change are communicative exchanges in which experts with new insights convince other experts from the discipline of the power of these insights. Hence, knowledge exchange between experts is the bread and butter of creating and upholding a discipline—and also one of the reasons why the process of understanding in conversation cannot be seen as a mere decoding process.

For the purposes of the central topic in this contribution, comparative legal studies, what I have said so far about the characteristics of disciplinary knowledge means that what we are interested in accessing is the knowledge constructed, shared and communicatively upheld in two different, but related specialised domains: The legal domain of two different jurisdictions, be they regional, national or multi- or supranational. Before diving deeper into what this means for approaches to comparative law, however, a short excursion into the basic human machinery underlying the emergence and acceptance of domains and disciplines and the knowledge connected to them is relevant.

2.2. Cognition and Culture – The basic machinery behind disciplinary knowledge

We have seen above that a discipline is constituted by a group of people that, based on their shared knowledge belonging to a specific expertise, see themselves as belonging to the same discipline and are accepted as such from outside. In other words, expertise and its constituting knowledge are characteristics of a disciplinary culture. By "culture", I mean a conglomerate of accepted ways of interacting, in which specific, generally accepted symbols function as indicators of the group constituting the culture. In this way, communicating expertise constitutes the disciplinary culture. Knowing that you as an expert belong to a specific disciplinary culture presupposes specific cognitive abilities and ways of thinking about the world that seem to be special for humans. Central in this context is the ability to achieve interpersonal understanding in considerable depth. The cognitive psychologist Michael Tomasello has suggested that the emergence of *shared intentionality* in human evolution is central in this context. It can be seen as the motor behind developing the kind of highly complex collaboration and communication that characterize modern humans and distinguishes them from higher primates.[9]

The ability of modern humans to share intentionality means that we are able to adopt the perspective of others, adjust to it and thus consciously have joint attention on things and concepts in our situational context, as well as pursue the same goals in a coordinated way. The relevant type of shared intentionality that functions as the basis of culture and thus of experts' disciplines is what Tomasello calls *collective intentionality*. For a culture to emerge, it is

[8] *cf.* C. PENNAROLA, *From knowledge to empowerment: The epistemologies of ESP*, in *International Journal of Language Studies*, *13*, 2019, p. 9; K. ADAMZIK, *Fachsprachen. Die Konstruktion von Welten*, Tübingen, 2018.

[9] *cf.* M. TOMASELLO, *Origins of Human Communication*, Cambridge, 2008; M. TOMASELLO, *A natural history of human thinking*, Cambridge, 2014.

necessary that the members of the culture share the perception that a larger group exists to which "we" (the individual and others of the same kind) belong.[10]

Collective intentionality is characterized by three basic aspects:

> Modern human individuals came to imagine the world in order to manipulate it in thought via *"objective" representations* (anyone's perspective), *reflective inferences connected by reason*s (compelling to anyone), and *normative self-governance* so as to coordinate with the group's (anyone's) normative expectations. (emphasis added)[11]

This personal view of oneself as part of a larger "we" is a social phenomenon. We know (or at least presume) that what we know is not just our own insight, but that anyone else from our "we" would know the same.

This is the basic machinery underlying the emergence of cultures—and of disciplines, which are examples of knowledge-based, i.e., epistemic cultures. Collective intentionality is an apparently hard-wired part of human cognition that automatically makes us aware of specialized disciplinary contexts and of the shared knowledge connected to and constituting the epistemic culture. Comparative law is about accessing these disciplinary cultures, finding relevant objects to compare and assessing the knowledge shared by the members of the discipline. An important consequence of that is that we need to get access to the thinking inside the culture, which means joining or at least observing from the outside the disciplinary conversation, that constructs, develops and upholds the shared knowledge. This is naturally a challenging task. But the sunny side of it is that all humans are cognitively hard-wired for collective intentionality and thus may access new epistemic cultures—as long as we accept that our own shared knowledge must not be the basis of the thinking of other epistemic cultures.

3. Legal knowledge, comparative legal studies, and legal translation

Comparative law and legal translation are closely related activities—they work across the barriers of languages and legal systems, they intend to create bridges enabling users to see relations between different legal and linguistic settings and understand the unfamiliar, and they rely upon each other in their activities. Despite the fact that the focus of performers of comparative law and of legal translators are somewhat different, there is enough overlap concerning focus, methods, and basic assumptions for them to be directly comparable and to learn from each other.[12]

Central for the argumentation in this contribution is the comparability of comparative law and legal translation and the ensuing consequence of being fruitful fields for each other for gaining new insights: Comparative legal studies can only be carried out with access to legal sources from different legal systems—which will often be phrased in different languages. If the expert does not know all the languages involved, as is not uncommon, especially if more than two systems are involved in the comparison, it is necessary to translate. Even when only two systems are involved, a certain amount of translation will still be necessary in order to be able to compare the meanings of texts from different systems. Hence, it is important that comparatists are aware of the concept of translation applied by the concrete translator in order to be able to assess overlaps and differences between the studied concepts from different systems. On the other hand, when doing legal translation, a prerequisite when intending to create good translations of legal texts is to have sufficient knowledge about the legal systems behind the

[10] M. TOMASELLO, *A natural history of human thinking*, *op. cit*., p. 123.

[11] M. TOMASELLO, *A natural history of human thinking*, *op.cit*., p. 1.

[12] J. HUSA, *A New Introduction to Comparative Law*, Oxford / Portland, Oregon, 2015, pp. 125–127.

source and target texts and also specific comparative knowledge about significant differences. For this, methods and results from comparative legal studies as reflected not only in the academic legal studies themselves, but also in legal dictionaries, terminological databases and similar sources are central to reaching a relevant result.

The links between the two activities or disciplines as well as their respective characteristics mean that they both fall under the basic concepts of the Knowledge Communication Approach presented above. Activities in both disciplines involve experts on the sender side and usually also on the receiver side of the communication, working within their field of expertise: experts of comparative legal studies communicate their analyses for other experts, be it in academic or administrative settings of legal drafting; legal translation experts communicate the meaning of a source legal text, often to expert receivers in the target text culture. As we saw above, the Knowledge Communication Approach presupposes that communication of knowledge takes place between individuals based upon knowledge as a social, i.e., shared phenomenon. This means that individuals draw upon personal knowledge they presume to be shared when understanding one another. A prerequisite for both disciplines, in order to reach valid and useful results, is a relevant level of comparative knowledge in order to assume what knowledge may be shared. Secondly, knowledge of individuals may be and typically is different among the individuals. Hence, communicating knowledge presupposes some insights into the relevant differences in individual knowledge between communicators in order to cope with knowledge asymmetries.[13] As a consequence of conceptualising comparative law and legal translation as instances of knowledge communication, the communicative activities of both disciplines must be seen as having to target the specific conditions of (types of) individuals seen as the intended receivers of the translation or the comparative legal study. For the existing knowledge base governs the possible understanding. When making a comparative legal study, therefore, the reporter must take into account the purposes of the concrete targeted receivers as well as their knowledge background. The same applies to legal translations.

The following definition sums up the traditional legal approach to comparative law in the form of a blueprint:

> It is possible on the general level to present a blueprint definition and say that comparative research of law aims at lining up different legal systems in order to generate information. Comparative law is aimed at the legal systems of different States (or State-like formations) or their segments that are significant for research problems.[14]

Important is here that comparative law is presented as focusing upon problems of legal research. This focus governs the object investigated by comparative legal research as well as the chosen methodology.

Similarly, legal translation, and especially the translation of legal concepts, may be defined in the following way:

> Translating terms in legal documents consists in strategically choosing *relevant parts* of the complex conceptual knowledge represented in the source text in order to present the aspects exactly *relevant* for this text in the target text situation in order to enable a receiver to *construct the intended cognitive structure*. (my emphasis)

[13] *cf.* J. ENGBERG, *Conceptualising Corporate Criminal Liability: Legal Linguistics and the Combination of Descriptive Lenses*, cit., p. 37.

[14] J. HUSA, *A New Introduction to Comparative Law*, *op. cit.*, p. 19.

In this definition, I have highlighted the words that indicate a focus in legal translation on choosing aspects relevant in source as well as target situations with the aim of enabling the target text receiver to construct the intended meaning und thus gain the intended knowledge about concepts in the source text situation. Hence, both comparative legal studies and legal translation work are shaped and differentiated according to their different foci and objects – but still have a considerable amount of shared interest.

Concerning the object, "[c]omparative law aims at general legal knowledge that is not State-specific in nature as in national legal research".[15] Hence, much work has been directed into describing legal families.[16] Apart from this type of macro-comparisons, legally oriented comparative legal studies may also have the form of micro-comparisons, taking legal rules, individual legal concepts, or legal institutions as their object.[17] Micro-comparisons are the ones most relevant for translational purposes. For these, comparative law has developed the method of problem functionalism. This term means that comparative researchers are interested in describing the (legal) problem that is to be solved by, e.g., a (new) legal rule and then investigate how the same problem is solved in a different legal system.[18] The comparative legal researcher gains insights into similarities and differences between rules, concepts, or institutions of different legal systems by way of a problem-oriented common description.

This approach is often used in connection with legal translation in traditional terminology work.[19] However, as I have argued in previous work[20], the focus upon the underlying legal problem and its solution that is typical of traditional comparative legal studies will not always cover the needs of legal translators. The problem is that this focus tends to restrict the view of the researcher to normative and legalistic issues of drafting in order to achieve specific normative goals. Translators may typically not restrict themselves to such normative aspects but have to include also other aspects related for instance to differences in cultural traditions between the source and target context, in order to produce a relevant target text. This means that more conceptually oriented approaches with a possibility of focusing on other dimensions of a concept rather than on the functional problem solving are more promising.[21] Such approaches have been developed in the field of cultural sociology in a wide sense interested in the sociological construction of law and its symbolic and performative representation.[22] Even more to the point, some transfer- and understanding-related approaches have been developed:

- Meyer[23] has developed a method for enabling readers from one culture to read and understand legal texts from a foreign culture in accordance with the cultural characteristics of this foreign culture. The approach is based upon a performative view of culture, studying the actual co-creation of cultural symbols in foreign-culture texts.
- Monjean-Decaudin and Popineau-Lauvray[24] suggest a concept-based method for transferring legal meaning in translation which applies the method of *inflexion de signifié*

[15] J. HUSA, *A New Introduction to Comparative Law*, *op. cit.*, p. 21.

[16] As a central example, *cf.* K. ZWEIGERT, H. KÖTZ, *Einführung in die Rechtsvergleichung*, Tübingen, 1996.

[17] J. HUSA, *A New Introduction to Comparative Law*, *op. cit.*, p. 101.

[18] J. HUSA, *A New Introduction to Comparative Law*, *op. cit.*, p. 124.

[19] *cf.*, *e.g.*, P. SANDRINI, *Comparative Analysis of Legal Terms: Equivalence Revisited*, in C. GALINSKI, K. D. SCHMITZ (eds.), TKE 96, Frankfurt am Main, 1996, pp. 342–350.

[20] J. ENGBERG, *Comparative law for translation: The key to successful mediation between legal systems*, in A. BORJA ALBI, F. PRIETO RAMOS (eds.), *Legal Translation in Context: Professional Issues and Prospects*, 2013, pp. 9–25.

[21] O. BRAND, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, in *Brooklyn Journal of International Law*, *32*(2), 2007, pp. 405–466.

[22] *cf.*, as an example, W. GEPHART, *Recht als Kultur. Zur kultursoziologischen Analyse des Rechts*, Frankfurt am Main, 2006.

[23] A. MEYER, *On the Integration of Culture into Comparative Law*, in G. TESSUTO, R. SALVI (eds.), *Language and Law in Social Practice Research*, 2015, pp. 268–289.

as a tool for translators. Basically, the idea is that the translator broadly assesses the meaning of the ST concept and of potentially relevant TT concepts and then formulates goals for the intended relations between source and target concept which helps create a bridge for target culture readers to approach source culture concepts.

- Bestué[25] proposes to apply a so-called translation-oriented terminological entry for storing and structuring the results of comparative studies of centrally relevant legal concepts. The idea is to collect in a broad way information with potential relevance from many perspectives, including possible and non-preferred translations, definitions, textual context as well as features from the disciplinary knowledge. On this basis, the translator is then supposed to make decisions specifically relevant for the situation at hand, based upon comparative insights.

With inspiration from many such approaches, I have in previous work suggested a three-perspective lens with relevance for translators, which takes into account the actual multi-facetted character of legal concepts as part of legal knowledge[26], which I will present in the following section. The widening of scope is certainly relevant for the purposes of legal translation. I propose it here, because I think it would also be a relevant approach for comparative legal studies, because such studies are also instances of expert knowledge communication and thus may gain from including more conceptual aspects.[27]

4. Perspectives as tools for accessing legal knowledge

I propose to describe legal concepts from the following three perspectives:

- The perspective of law as a functional and epistemic system, focusing upon the influence of general legal thinking upon the structure of the concepts (focus: similarities, commensurability).
- The perspective of national legal cultures, focusing upon characteristics of national legal concepts and upon the influence from aspects of the national culture and the general context governing a culturally adequate understanding (focus: differences, rather incommensurability).
- The perspective of law as the result of interpersonal knowledge communication, focusing upon the importance of language use upon meaning and variation of the concept, based upon corpus studies (focus: similarities and differences, symbols, reflections of context)

When using a three-sided lens like the one suggested here, we look at legal concepts as they are actually performed[28], i.e., at how terms are actually used in communication in ST and TT situations and what this reveals about different dimensions of the meaning of the concept. The

[24] S. MONJEAN-DECAUDIN, J. POPINEAU-LAUVRAY, *How to Apply Comparative Law to Legal Translation: a New Juritraductological Appraoch to the Translation of Legal Texts*, in L. BIEL, J. ENGBERG., M. R. MARTÍN RUANO, V. SOSONI (eds.), *Research Methods in Legal Translation and Interpreting: Crossing Methodological Boundaries*, London, 2019, pp. 115–129.

[25] C. BESTUÉ, *A Matter of Justice: Integrating Comparative Law Methods into the Decision Making Process in Legal Translation*, in L. BIEL, J. ENGBERG, M. R. MARTÍN RUANO, V. SOSONI (eds.), *Research Methods in Legal Translation and Interpreting: Crossing Methodological Boundaries*, London , 2019, pp. 130–147.

[26] J. ENGBERG, *Developing an Integrative Approach for Accessing Comparative Legal Knowledge for Translation*, in *Llengua i Dret*, 68, 2017, pp. 5–18, doi:http://dx.doi.org/10.2436/rld.i68.2017.3014; J. ENGBERG, *Comparative Law for Legal Translation: Through Multiple Perspectives to Multidimensional Knowledge*, cit., pp. 270–279.

[27] Compare also A. KOCBEK, *Legal Terminology at Arm's Length - the Multiple Dimensions of Legal Terms*, in *Linguistica*, 53(2), 2013, p. 35.

[28] A. MEYER, *On the Integration of Culture into Comparative Law*, *op.cit*, pp. 271–273.

results from looking at concepts from the three different perspectives can be stored in rich translation-independent records.[29] Subsequently, translators carrying out their knowledge-oriented communicative task "inflect" their understanding of the source concept and the intended relation between source and target formulation[30] based on the recorded aspects in order to create a bridge through which the TT reader may have access to the relevant aspects of the ST concept.[31]

The multiperspectivist approach to generating knowledge covers different approaches to comparative legal studies and thus enables comparatists and legal translators alike to take advantage of a wealth of different sources of relevant information in a structured way. In other work[32], I have proposed frames from Frame Semantics[33] as a relevant instrument for collecting and structuring the knowledge accessed in comparative studies of law from the multiperspectivist lens. In order to avoid overstretching the focus of this contribution, however, I will here limit myself to presenting the three perspectives suggested above.

4.1. Perspective of law as a functional and epistemic system

This is the perspective underlying the method of problem functionalism used for micro-comparisons described above. In comparative legal studies from this perspective, the researcher gains insights into similarities and differences between rules, concepts, or institutions of different legal systems, generally with more focus on similarities than on differences. Comparatists focus on structuring central legal knowledge on concepts that they gather from the study of legal textbooks and similar discipline-internal sources according to hierarchical relations in so-called conceptual systems. As indicated before, focus tends to be on normative aspects of the concepts. One common characteristic of comparative studies under this perspective is that they are based upon the idea of legal concepts as parts of a functional system (in the terms of Luhmann 1984)[34] or an epistemic system (in the terms of Knorr-Cetina 1999)[35], which are not limited by the boundaries of national legal systems but expand across such systems. So, the legal discipline is seen as an overarching epistemic culture, which may have different subcultures related to different jurisdictions. However, the members of different subcultures share enough collective intention (in the sense presented in section 2.2. above) to be able to understand the foreign legal systems. This also means that they rely upon a basic concept of cultural characteristics as at least potentially universal.[36] This basic assumption is the main reason why studies carried out from this perspective tend to focus upon similarities and compatibility, but naturally also look for differences.

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[29] C. BESTUÉ, *A Matter of Justice: Integrating Comparative Law Methods into the Decision Making Process in Legal Translation*, *op. cit*, pp. 138–141.

[30] S. MONJEAN-DECAUDIN, J. POPINEAU-LAUVRAY, *How to Apply Comparative Law to Legal Translation: a New Juritraductological Appraoch to the Translation of Legal Texts*, *op.cit.*, pp. 126–128.

[31] J. ENGBERG, *Legal Translation as Communication of Knowledge: On the Creation of Bridges*, in *Parallèles*, 33(1), pp. 6–17.

[32] Especially J. ENGBERG, Methodological Aspects of the Dynamic Character of Legal Terms, in *Fachsprache*, 31(3-4), 2009, pp. 126–138; J. ENGBERG, *Comparative Law and Legal Translation as Partners in Knowledge Communication: Frames as a Descriptive Instrument*, in F. PRIETO RAMOS (ed.), *Institutional Translation for International Governance: Enhancing Quality in Multilingual Legal Communication*, London, 2018, pp. 37–48.

[33] *cf*., e.g., D. BUSSE, *Frame-Semantik. Ein Kompendium*, Berlin, 2012; C. J. FILLMORE, *Frame Semantics*, in THE LINGUISTIC SOCIETY OF KOREA (ed.), *Linguistics in the Morning Calm*, Seoul, 1982, pp. 111–137; A. ZIEM, *Frames of Understanding in Text and Discourse*, Amsterdam/ Philadelphia, 2014.

[34] N. LUHMANN, *Soziale Systeme : Grundriss einer Allgemeinen Theorie*, Frankfurt am Main, 1984.

[35] K. KNORR-CETINA, *Epistemic Cultures: How the Sciences Make Knowledge*, Cambridge, 1999.

[36] R. J. EVANOFF, *Universalist, Relativist, and Constructivist Approaches to Intercultural Ethics*, in *International Journal of Intercultural Relations*, 28, 2004, pp. 441–444.

4.2. Perspective of national legal cultures

In current comparative law, the approach of problem functionalism is very powerful, among other things probably because it relies upon a universality-oriented conception, which is very welcoming to comparisons and to seeing similarities. However, there is another strong research field in comparative legal studies taking a different stance. Their take on cultural characteristics is relativist rather than universalist.[37] Researchers working under the perspective of national legal cultures emphasize the importance of the unique socio-cultural context of each nation and the ensuing conceptual differences. Work carried out from the perspective of seeing law as a functional and epistemic system, on the other hand, focuses upon overarching characteristics of socio-legal functionality. According to Hendry, the two strands are so different in their basic views that it would be relevant to talk about two different research fields, i.e., universalistic and functional Comparative Law vs. context-oriented Comparative Legal Studies.[38]

A central figure in Comparative Legal Studies is Pierre Legrand. His position on the context-dependence of legal meaning may be seen in the following quote:

> The meanings that the interpreter brings to the act of interpretation were internalized by him as he was thrown into a tradition (linguistic, legal, and otherwise) that constituted him as the individual he is (and as a member of the tradition). The basic point is that the individual's sphere of understanding is, in important ways, inherited and that it arises irrespective of any subjective preferences.[39]

Within the discipline of studying law comparatively, the differences between the principal assumptions of the two research fields are so deep that it is difficult to position oneself as a researcher between the two. Lawyers working as comparatists must take a stance on what group they belong to. However, the question is whether the results found in studies carried out from the two different perspectives actually have to exclude each other. Especially for translators, I would think, this is not the case, as translators have the advantage that they may be eclectic concerning the sources of the disciplinary knowledge they need in order to create a relevant knowledge base: Translators need to build conceptual knowledge sufficient for them to understand source and target text relevantly; if work from a research field helps achieve this goal, it is useful—no matter whether the assumption of the researcher on cultural characteristics is universalist or relativist. Focus will tend to be on differences in such work, but knowledge about differences is equally interesting for translators as knowledge about similarities. And I would venture the heretical guess that this could also be the case in other types of legal comparison, too.

4.3. Perspective of law as the result of interpersonal knowledge communication

The two perspectives described in 4.1 and 4.2 work "outside-in" in their analysis in the way that they start either in overarching functional epistemic systems or in a national cultural context and then work their way into demonstrating reflections of the context into the conceptual world. The last perspective to be treated here distinguishes itself from these approaches by using an

[37] R. J. EVANOFF, *Universalist, Relativist, and Constructivist Approaches to Intercultural Ethics*, *op. cit*., pp. 444–449.

[38] J. HENDRY, *Legal Comparison and the (im)Possibility of Legal Translation*, in S. GLANERT (ed.), *Comparative Law - Engaging Translation*, London, New York, 2014, p. 88.

[39] P. LEGRAND, *Word/World (of Primordial Issues for Comparative Legal Studies)*, in H. PETERSEN, A. L. KJÆR, H. KRUNKE, M. R. MADSEN (eds.), *Paradoxes of European Legal Integration*, Aldershot, 2008, p. 220.

"inside-out" direction in the analysis. This is the equivalent of a constructivist approach to (the emergence of) cultural characteristics.[40] In this perspective, the dimensions and characteristics are found by looking at legal communication and following the constructive meaning-making process represented here, preferably in actual dialogues, or in staged dialogues in the form of argumentative presentations about the pros and cons of different descriptions of the same concepts.

Methodologically speaking, investigations of this type may be carried out from a quantitative as well as a qualitative point of departure. Quantitative approaches like, e.g., studies by Goźdź-Roszkowski and Pontrandolfo[41] look for formulation patterns in large corpora of different types of legal texts. The result of such studies is insights into collocational tendencies, i.e., into what words occur together more often than others. These insights are relevant on their own when writing texts in the form of so-called phraseology, i.e., knowledge about what words to use together so that texts comply with conventions of the legal cultures. Additional to the context of writing, collocational patterns may render information about conceptual structures, as the pattern may tell us something about the hierarchical structure of a concept. Comparing collocational patterns from different legal cultures may reveal similarities and differences in the shared knowledge bases of individuals from these legal cultures. Qualitative approaches in this context are less frequent, but the approach of Meyer[42] presented above in section 3 is a case in point. The idea here is again to draw upon different instances of communication about the legal concepts in focus. But instead of relying upon quantitative methods to find differences and similarities, Meyer suggests a number of principles to be applied in order to sharpen the eyes of investigators for potential differences and similarities.

5. Concluding remarks

With the presentation of three different perspectives, I have reached the end of my argumentative journey towards a multiperspectivist lens with relevance for comparative legal studies departing from a knowledge communication point of view. The basic tenet is that comparative legal studies are interested in comparing the shared knowledge of members of one legal culture with the shared knowledge of members of another legal culture. Because this is so, we should take seriously the actual breadth of such knowledge. On the one hand, it spans universalist as well as relativist components, making at least potentially relevant even results from opposing points of view inside the same legal culture. On the other hand, it is reflected in any kind of communicative interaction on the concepts to be investigated, as long as the interaction is carried out by experts belonging to the culture. Hence, because of the complexity of the knowledge to be assessed and built up in order to understand texts relevantly a multiperspectivist approach to comparative legal studies is highly useful, if we want to grasp the legal concepts in their actual complexity.

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Words Travel Worlds: Language in the EU Internal Market, Linguistic Diversity and the National Identity of the Member States

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Abstract: The case law overview of the decisions of Court of Justice of the European Union underlines the role language and national constitutional identity play in the free movement rights of persons. While the Treaties adhere to respect for cultural and linguistic diversity (Art. 165(1) TFEU), at the same time protection of the own language may cause restrictions on free movement rights and on the idea, which stands behind the internal Market and EU citizenship rights. The author will map how these rights interact and interplay on the border of the EU and the national competences and interests. The contribution will focus on the role that language has with regard to the free movement of persons, whether economically active or not. What role does language play in the European free movement and how should cultural diversity and national constitutional identity be balanced with language barriers is the key question of the analysis.

Keywords: EU citizenship, Language, Internal market, Linguistic diversity, National identity.

1. Introduction

"Language is wine upon the lips" Virginia Woolf wrote in "Jacob's room" (1922). Language is important for the access to the law, to healthcare, to the identity of citizens. Language is something we share with other human beings; it creates identity and sense of belonging. It might be compared with wine, it is also a precondition for the full development of citizenship, in the sense of membership of a community. Language might therefore be compared to water, as a basic need for individuals. For the free movement of persons in the European Union language can be a barrier as well as an opportunity to share ideas, to meet new people and travel the European Union. Crossing a border often means also crossing a language border. Or in some situations, individuals do not move but find themselves part of a minority language within their own country. As diverse as wines can be, the languages of the European Union are diverse and while diversity needs to be respected the Union strives also for unity and abolishing of borders between persons in the EU. In this contribution we will focus on the role language has with regard to the free movement of persons, whether economically active or not. What

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role does language play in the European free movement and how should cultural diversity and national constitutional identity be balanced with language barriers? We will discuss the EU policy on language and culture (par. 2), the case law of the Court of Justice (par. 3), the balance between free movement and constitutional national identity (par. 4) and we conclude the paper with our observations (par. 5). The main question is how the national identity (Art. 4 (2) TEU) is balanced with the free movement rights of EU citizens in the context of language.

2. *Cultural and language diversity in the EU*

The European Union's (EU) motto is "United in diversity", referring to the EU's ambition for peace and prosperity, while at the same time being enriched by the Member States' different cultures, languages and traditions.[3] The linguistic diversity is part of the European identity and due to the focus on migration, the diversity of languages is growing.[4] Since free movement of persons is one of the fundamental freedoms in the EU, migration within the Union by EU citizens is promoted by EU policy. Therefore, also languages cross the internal borders. The EU now includes 24 official languages[5], with Irish as the most recent official status.[6] Language is importantly connected to education, to identity and to state competences. The field of education is also important for the language competences of the EU and the Member States. Art. 165(2) of the Treaty on the Functioning of the European Union (TFEU) provides that 'Union action shall be aimed at developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States', while fully respecting cultural and linguistic diversity (Art. 165(1) TFEU). The EU has a supporting competence with regard to education, meaning that the EU contributes to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action. The Erasmus+-Program is an example of the exercise of this competence. Education, can, however, not be harmonised by the European Union (Art. 165(4) TFEU). These Treaty provisions show that linguistic diversity is a value worth preserving at the EU level and at the level of the Member States, while the vertical division of competences between EU and its' Member States is at the same time sensitive in this area. This interaction between EU competences and Member States competences is also visible in the linguistic policies. The Member States can still coordinate by the "open method of coordination" (OMC)[7] their policies with regards to multilingualism and their policies to enhance the effectiveness of language teaching in schools.[8]

The European Commission used the OMC method when it announced its' aim to work together with Member States to ensure that citizens should speak two languages other than their mother tongue.[9] This aim falls under the creation of the European Education Area by 2025. This EEA should enhance

[3] Art. 3(3) TEU, see *EU motto*, https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en.

[4] B. DE WITTE, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?* In R. CRAUFURD SMITH (ed.), *Culture and European Union law*, 2004, p. 211.

[5] Consolidated text: Regulation No 1 determining the languages to be used by the European Economic Community.

[6] R. PHILLIPSON, *Myths and Realities of European Union Language Policy*, in *World Englishers*, 2017.

[7] E: we kunnen eventueel in de voetnoot zetten: Presidency Conclusions, Lisbon European Council, 23 and 24 Mar. 20000, par. 37. OMC involves: fixing guidelines for the Union, establishing quantitative and qualitative indicators and benchmarks as means of comparing best practice, translating these European guidelines into national and regional policies by setting specific targets, and periodic monitoring evaluation and peer review organised as "mutual learning processes".

[8] Council Conclusions on multilingualism and the development of language competences, 2014.

[9] European Commission, *European Education Area, About Multilingualism*, https://education.ec.europa.eu/focus-topics/improving-quality/about/about-multilingualism-policy.

the cooperation between Member States and stakeholders, so that EU citizens could benefit better from education and trainings.[10]

Multilingualism was not expressly mentioned as a fundamental value of the EU, but respect for linguistic diversity has become one of the fundamental principles of European integration. The multilingualism policy aims to protect Europe's rich linguistic diversity, concretised in the Charter of Fundamental Rights, as Art. 21 of the Charter prohibits discrimination on grounds of language. In other provisions linguistic protection is visible as well. Art. 22 of the Charter, for instance, creates an obligation for the EU to respect linguistic diversity. According to Art. 41 of the Charter every person has the right to communicate with the institutions of the Union in one of the official languages of the European Union.

The nature of the EU as a multilingualist Union is something to celebrate, but it also has a downside, since it can constitute an obstacle to the full enjoyment of the freedom of movement.[4] There are at least three issues of conflict to be determined. First, linguistic barriers can be determined in the context of the exercise of free movement rights by EU citizens. From a traditional industrial economy, a shift to a knowledge economy took place.[11] The ability to work in another language is been seen as a strength for workers. Therefore, companies require workers to have these second language skills.[12] Second, linguistic minority groups form part of the multitude of languages in the European Union. In the Member States language minority groups need language recognition and protection. The European Union includes more than a hundred minority linguistic communities.[13] The exercise of free movement can be hindered by the protection of minority linguistic groups. At the same time minority rights are sometimes set aside to the protection of the official language of the Member States. Lastly, we see a line of case law on languages, free movement and the spelling of names. It is up to the Member States to regulate the use of nobility titles and the construction of names, but while doing so they need to respect EU law principles. How a name is spelled or pronounced is impacted by the linguistic rules the Member States have. In that case law the Court of Justice focusses on the serious inconveniences for EU citizens, who are exercising free movement rights, as a consequence for spelling requirements and identity issue. How a name is spelled is key to the identification of an individual, and consequently is impacts the private and family life of EU citizens. Hence, the recognition of how a name is spelled is essential for both the national identity of a Member State and of EU citizens, while at the same time it is essential for the free movement rights of EU citizens.[14]

The EU legislature and the Court of Justice of the European Union (ECJ or Court) have a cautious, diplomatic, and pragmatic approach towards national language regimes.[15] This is because language belongs to a sensitive area of law, in light of the division of competences and sovereignty of Member States. However, Member States are not free to protect their language if this impedes the internal market and free movement rights of EU citizens.[8] This holds true for the internal market as a whole, including the free movement of goods, services and capital. In this paper, we will focus on the free movement of persons, either economically active or not economically active.[16] To achieve the fundamental EU aim of the establishment of the internal market, the removal of measures that hinder

[10] European Commission, *The European Pillar of Social Rights in 20 Principles*, https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

[11] V. DOVALTL, *Language as an Impediment to Mobility in Europe (an Analysis of Legal Discourse)*, in P. STUDER, I. WERLEN (eds.), *Linguistic Diversity in Europe*, Berlin, 2014.

[12] B. DE WITTE, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?*, *op. cit.*, p. 211.

[13] S. VAN DER JEUGHT, *EU Language Law*, Groningen, 2015, p. 94.

[14] A. MICKONYTÉ, *The Right to a Name Versus National Identity in the Context of EU Law: The Case of Lithuania*, in *Review of Central and Eastern European Law*, 2017.

[15] Opinion of Advocate-General Emiliou of 8 March 2022 in the Boriss Cilevičs case, C-391/20, ECLI:EU:C:2022:638.

economic freedoms is needed. According to Art. 4(2) TEU, the *Union* shall respect Member States' national identities, "inherent in their *fundamental* structures, political and constitutional, inclusive of regional and local self-government". This national identity clause has been used as a justification for language policies that hindered free movement rights, which we discuss below.

Art. 4 (2) TEU is dual in nature; Member States may invoke their national identity as a derogation to free movement rights. At the same time the EU legislature has to take into account the national identity of the Member States in its actions and while adopting legislation. EU acts could be challenged by relying on national identity, as a violation of Art. 4 (2) TEU. The European institutions are under the obligation to interpret and apply EU acts in accordance with the national identity.[17]

When the article was first established in the Treaty of Maastricht it provided that "the Union shall respect the national identities of the Member States".[18] After Lisbon Art. 4(2) TEU has been amended. It seems to have a broader scope, referring to the *fundamental,* constitutional and political structures of the Member States.[19] Part of the national identity is the linguistic identity and culture of a Member State. The wording of Art. 4 (2) TEU shows that this article may only be invoked by the Member States regarding *fundamental* or core elements of the national identity. Art. 4(2) TEU remains broad and somewhat abstract. It does not grant the Member States the absolute right to derogate form EU law, it is more a balancing provision.[20] As such the national identity remains undefined in the case law of the Court of Justice, the Court did not (yet) elaborate on the concept. The national identity clause goes hand in hand with the EU constitutional identity, which includes the core values in Art. 2 TEU and Art. 3 TEU.[21]

3. Language in the case law of the Court of Justice

We will discuss in this section the development of language in the free movement of persons in the case law of the Court of Justice. While, as will be seen, language is being framed by the Court in the context of national identity of Member States, the concept of what constitutional identity is, is still not clearly defined. This creates room for the Court to allow Member States' protectional measures, but the limits of such grounds are difficult to set. While national identity as a concept exists in EU Treaty law, the case law on national identity is limited, it seems that the Court is hesitant to use the concept.[22]

The first case in which language protection was balanced with the aim of the internal market freedom to move and work in another Member States is the case of *Groener.*[23] The case revealed how language requirements could lead to indirect discrimination and could violate the free movement of workers (Art. 45 TFEU and Regulation 492/11). Such indirect discrimination may be justified with a

[16] See on the free movement of goods and language requirements: S. VAN DER JEUGHT, *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*, in *Comparative Law and Language*, vol. 1, 2022.

[17] G. DI FREDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards* in *European Public Law*, 2019, p. 365.

[18] Art. 6 (3) TEU.

[19] H. VAN EIJKEN, *Case note: Case C-319/09 Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v. Vilniaus Miesto Savivaldybės Administracija and Others, Judgment of the Court (Second Chamber) of 12 May 2011*, in *Common Market Law Review*, 2012, p. 820.

[20] Opinion of Advocate-General Emiliou of 8 March 2022 in the Boriss Cilevičs case, *op. cit*.

[21] L. F. M. BESSELINK, *National and Constitutional Identity before and after Lisbon*, in *Utrecht Law Review*, 2010.

[22] E. GLOOTS, *National Identity*, in *EU Law*, Oxford, 2015.

[23] ECJ, judgment of 28 November 1989, Groener v. Minister for Education, case 379/87, ECR 3967.

legitimate aim if it is proportional and necessary.[24] In turn the proportionality and non-discrimination limits the discretion of Member States to promote their language.[25] Regulation 492/11 on the free movement of workers explicitly provides that 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'.[26] In *Groener* this provision was invoked, successfully, by the Irish authorities (as discussed hereafter). By that case law the constitutional identity of Member States was invoked as a ground for justification of free movement, thereby creating language as a barrier to free movement—in some cases. In this case law the different forms of protection are visible and collide: the protection of one own language at the one hand and protection of citizens who should be able to exercise their free movement rights on the other.

3.1. Language as a shield: protection of own language in the context of the free movement of persons

The case of *Groener* concerned a Dutch art teacher who was refused a permanent appointment at a design college in Ireland (Dublin). Her request was refused, because she did not hold a certificate of proficiency in the Irish language (The *Ceard-Teasta Gaeilge)*. An exemption for the language requirement could have been made by the minister for candidates from outside Ireland, but only if there are no other fully qualified candidates for the position, which was not the case.[27] However, Groener did not need to use Irish when she would be teaching art. Notably, the Court of Justice did not check whether the requirement was needed by the nature of the position but rather focussed on the question of whether the language requirement could be justified. As the Irish government argued this language requirement is part of its national policy to promote the use of the Irish language as a means of expressing national identity and culture.[28] For the implementation of such policy, education is important, as the Court recognised, therefore, the language requirement was compatible with Art. 3 (1) Regulation 1612/68, provided that the level of knowledge required was not disproportionate in relation to the objective pursued.[29] The Court did rule that according to the principle of non-discrimination the Member States may not demand that the knowledge of the language is acquired on territory of the Member State at stake.[30] The Court of Justice clearly stated that language requirements may be requested, in order to protect the language of a Member State. The Court referred in that regard to the official first language of the Member State. In that context, the Court held that "it is not unreasonable to require them to have some knowledge of the first national language", "provided that the level of knowledge required is not disproportionate in relation to the objective pursued".[31] The Court considers that the role of teachers in education and language is essential, especially with regard to language regimes. It was also important that Irish Gaelic was the national and first official language in Ireland, the Court added. It seems therefore that the national identity could only be invoked because it concerned a profession that was connected well to language regimes and that it concerned the official first language. The judgment is important as it balances free movement and protection of language. It is clear that the Court tried to strike a fair balance, in order to protect free movement and abolish

[24] ECJ, judgment of 22 October 2014, Blanco and Fabretti v. Agenzia delle Entrate, joined cases C-344 and 367/13 EU:C:2014:2311.

[25] ECJ, judgment of 22 December 2010, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, case C-208/09, ECLI:EU:C:2010:806, par. 90.

[26] C. BARNARD, *The Substantive Law of the EU, the Four Freedoms*, Oxford, 2019, p. 241.

[27] ECJ, Groener judgment, *op. cit*., par. 6.

[28] ECJ, Groener judgment, *op. cit*., pars. 18–19.

[29] ECJ, Groener judgment, *op. cit*., par. 21.

[30] ECJ, Groener judgment, *op. cit*., par. 23.

[31] ECJ, Groener judgment, *op. cit*., pars. 20–21.

discrimination, while at the same time giving Member States some room to have protectionary measures.

The Court dealt with a restriction of the freedom of establishment on the basis of language requirements in the private sector in the *Haim II* case. An Italian national, Mr. Haim, had a diploma in dentistry, which was recognised in Belgium as equivalent to "*the diplôme legal Belge de licencié en science dentaire"*. He wanted to work on a social security scheme in Germany, but the German rules of admittance to such a scheme require a non-national to have sufficient knowledge of the national language before he is allowed to qualify as a dental practitioner under a social security scheme. According to the Court, the reliability of the communication between the dental practitioner and the patient can constitute an overriding reason of general interest as long as the requirement is proportional to the aim pursued.[32] Appropriate knowledge of the language of the Member State is needed for dialogues with patients, compliance with rules of professional conduct and the relevant dentistry law in the Member State of establishment. The Court considered that "it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language".[33] In this approach the Court also includes consumer (or patient) protection together the free movement and the language interests.[34] Moreover, the Court seems to protect also the interest of those migrants who speak a different language in another Member States. Hence, even though the case was a free movement, the *obiter dicta* embrace also multilingual and multicultural aspects.

The case of *Angonese*[35] concerned free movement of workers, as was the case in *Groener*. The Court of Justice confirmed the national competence of the Member States to conduct their own language policy. The case concerned an Italian bank, which recruited only persons with a certificate of bilingualism (German and Italian) which was issued in Bolzano. Angonese, an Italian national, was not admitted by the bank to the competition, even though he submitted other evidence of his linguistic knowledge. According to the Court this requirement violated Art. 45 TFEU, since the measure did not comply with the principle of proportionality. The Court stressed that "even though requiring an applicant for a post to have a certain level of linguistic knowledge may be legitimate and possession of a diploma such as a certificate may constitute a criterion for assessing that knowledge, the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view".[36] Hence, even though the Court accepted the linguistic knowledge requirement, the principle of proportionality demands that it should be possible to submit other proof of the language knowledge.

The cases discussed above have a public character, in the sense that it is the government deciding which language is used by its institutions. In addition to that line of case law, the case of *Las*[37] concerns the private relationship between individuals and language requirements. In that case the Court did not accept the protection of one of the official national languages of Belgium as a justification ground, because of the principle of proportionality.[38] The case concerned a Flemish decree that required all cross-border employment contracts between an employee and an employer to be drafted in Dutch. Non-compliance with the decree meant nullity of the contract. Belgium argued that the decree

[32] ECJ, judgment of 4 July 2000, Haim II, ECLI:EU:C:2000:357, pars. 59–60.

[33] ECJ, Haim II judgment, *op. cit*., par. 60.

[34] I. URRUTIA, *Approach of the European Court of Justice on Accommodation of the European Language Diversity in the Internal Market: Overcoming Language Barriers or Fostering Linguistic Diversity?*, in *Columbia Journal of European Law*, 2012, p. 258.

[35] ECJ, judgment of 6 June 2000, Angonese, case C-281/98, ECR I–4139.

[36] ECJ, Angonese judgment, *op. cit*, par. 44.

[37] ECJ, judgment of 16 April 2014, Las v. PSA Antwerp, case C–202/11, ECLI:EU:C:2013:239.

[38] ECJ, Las judgment, *op. cit*., par. 24.

aimed to protect an official national language, protect employees and ensure effective supervision by the national authorities.[39] However, these justification grounds did not meet the proportionality requirements and were therefore contrary to EU law.[40] Furthermore, parties in a cross-border contract do not necessarily have knowledge of the official language(s) of a Member State. In this case, the employer was a Singaporean national with no knowledge of the Dutch language.[41] Therefore, in order to ensure the establishment of free and informed consent between the parties, they must be able to draft their contract in a language other than the official language of that Member State.[42] The Court held that, in principle Member States may justify such measures because of the protection of their language and that of workers but prohibiting an alternative translation of all parties understanding that language is, according to the Court, not proportional. The fact that the contract would be void seems a strict sanction, in relation to the aim of protecting the Dutch language. The Court explicitly referred to diversity of languages and national identity in its' judgement, stating: "the Union must respect its rich cultural and linguistic diversity. In accordance with Art. 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States".[43]

This case diverges from the other judgments, since Dutch is an official language that is not common to the entire territory of Belgium, but only of its constituent parts, Flanders. Moreover, as observed above, the measure was applicable in a civil procedure and did not concern state authorities. The decree at stake had a regional nature as it was adopted by the Flemish authority. The Advocate General in his opinion argued that the protection of an "official language, whether national or regional, is an objective of general interest which the Court has accepted as a legitimate justification for adopting a policy for the protection and promotion of a language".[44] The Court confirmed this line of case law again, as the Advocate-General suggested. The Court also recognized the "social protection of employees" and the "facilitation of the related administrative controls" as overriding interest, which might be invoked by the Member States.[45]

In the recent case *Boriss Cilevičs* the question was whether Latvian legislation institutions of higher education offering courses only in the official national language was allowed in the internal market. The Court ruled that the Latvian legislation makes it less attractive and more difficult for higher institutions based in other Member States to exercise the freedom of establishment as guaranteed by Art. 49 TFEU. When exercising the national competence regarding education, Latvia must comply with the free movement provisions. In principle, the objective of promoting and encouraging the use of one of the official languages of a Member States, can constitute an overriding reason. Interestingly, the Court leaves the final decision to the Latvian constitutional court as it provides the elements of interpretation that may be useful for them to carry out that analysis. When assessing the suitability of the measure, the Court mentions that two private higher education institutions have a special status as their operation is governed by special laws. This means that since the provided legislation does not apply to them, their education can be in another official EU language. It follows that this derogation arrangement can also apply to any other institution in a similar situation. In the view of the Court, the exceptions do not hinder attainment of the objective and the implementation is consistent. Without the exceptions, the legislation would exceed what is necessary and proportionate for attaining the objective of promotion and defence of that language. The Court does not leave a broad discretion for the national

[39] ECJ, Las judgment, *op. cit.*, par. 24.

[40] ECJ, Las judgment, *op. cit.*, par. 33.

[41] See on this case also M. Finck, *Case Comment: Las v PSA Antwerp NV (C–202/11)*, 2014, https://eutopialaw.wordpress.com/2013/04/29/case-comment-las-v-psa-antwerp-nv-c-20211/.

[42] ECJ, Las judgment, *op. cit.*, par. 31.

[43] ECJ, Las judgment, *op. cit.*, par. 26.

[44] Opinion Advocate-General Jääskinnen of 12 July 2012 in the Las case, C–391/20, ECLI:EU:C:2012:456, par. 55.

[45] ECJ, Las judgment, pars. 27–30.

court to decide on the assessment of the proportionality test. It shows that on the one hand the Court is lenient in the sense that constitutional identity and protection and promotion of an official language is accepted, while on the other hand, the Court is strict in watching whether the measure at stake is proportional. Similar case law is seen in the field of EU citizenship and the revocation of nationality, which is also a very sensitive area of law to operate for the Court.[46]

Interestingly, Advocate General Emiliou in his opinion in this case that monolingualism de facto imposed in a Member State, is not the diversity and richness the EU desires to promote in an "ever closer union" among the peoples of Europe. However, the focus of the Court is on the rights and freedoms mentioned in the referred questions. It is remarkable that the Court does not discuss the position of the Russian speaking linguistic minority in this case. While this is very sensitive for various reasons, the rights of minority groups are at stake as well. The Advocate-General did go into that matter and argued that national courts might be less in favour of providing protection to individuals from a minority language group. We will discuss this hereafter as well.

3.2. Protection of minority languages

The *Bickel and Franz and Grauel Rüffer* case show that the prohibition of discrimination on the basis of Art. 18(1) and 21 TFEU can have an indirect impact on linguistic laws and policies of the Member States.[47] Non-discrimination on the grounds of language is prohibited by Art. 21 of the Charter. However, the scope of this provision is limited to EU institutions and bodies and to the Member States only when they are implementing Union law.[48] Art. 18 (1) TFEU provides the general prohibition on the grounds of nationality. As seen in the *Bickel and Franz*[49] case, this provision may have an indirect impact on the linguistic laws and policies of the Member States. Even more, this case showed that European integration is not solely economic.

According to a presidential decree the authorities in Bolzano, had to use the language of the citizens of Bolzano concerned. The decree aimed to protect the minority of German-speaking citizens in this province by allowing them to use German with the judicial and administrative authorities. Mr Bickel, an Austrian lorry driver, and Mr Franz, a German tourist, were prosecuted for criminal offenses in Bolzano. They requested to conduct the criminal proceedings in German, however, only German-speaking residents of Bolzano could invoke these provisions. German-speaking nationals of other Member States are at a clear disadvantage.

First of all, the Court had to consider whether the choice of language in criminal proceedings falls within the scope of the Treaty and whether therefore Art. 18 TFEU would apply. The Court held that this is the case. Every citizen of the Union that exercises its right to move and reside freely in another Member State, based on Art. 21 TFEU.[50] When EU citizens exercise their free movement rights, they may not be treated differently than nationals of the host state with regard to the use of language in criminal proceedings.[51]

The Italian rules discriminated non-residents, and therefore the rule concerned indirect discrimination, which has to be justified by the Member State.[52] According to the Court of Justice, the

[46] ECJ, judgment of 12 March 2019, M.G. Tjebbes and Others v Minister van Buitenlandse Zaken, ECLI:EU:C:2019:189.

[47] ECJ, judgment of 24 November 1998, Bickel and Franz, case C–274/96, ECR 7637.

[48] Art. 51 EU Charter of Fundamental Rights.

[49] ECJ, Bickel and Franz judgment, *op. cit*.

[50] ECJ, judgment of 2 February 1989, Cowan, case C–186/87, ECLI:EU:C:1989:47.

[51] ECJ, Bickel and Franz judgment, *op. cit*., par. 26.

[52] ECJ, Bickel and Franz judgment, par. 27; ECJ, judgment of 15 January 1998, case C–15/96, Kalliope Schoning-Kougebetopoulou v. Freie und Hansestadt Hamburg, ECR I-47, par. 21.

protection of an ethno-cultural minority can constitute a legitimate aim. The proportionality test, however, was not fulfilled. In this case the Court stated that "Protection of cultural minority residing in the province in question does not constitute a valid justification in this context. Of course, the protection of such a minority may constitute a legitimate aim. It does not appear, however, from the documents before the Court that that aim would be undermined if the rules in issue were extended to cover German- speaking nationals of other Member States exercising their right to freedom of movement".[53] The Court recognises the protection of minority groups, but at the same time focuses on free movement and non-discrimination. If protection of minority language is possible while ensuring access to other—non-residents in this case—the less restrictive measure should be adopted.

The case of *Rüffer* concerned civil proceedings, also in the province of Bolzano, Italian citizens were only allowed to use German in the civil court, when they were residing in Bolzano.[54] The Court confirmed that in civil proceedings the *Bickel and Franz* judgment also applies.[55] It follows that all EU citizens are entitled to rely on linguistic provisions in all judicial proceedings.[56] Because German-speaking citizens should not be discriminated against because of their place of residence.[57] The Court rejected the Italian statement that greater use of the language rules would lead to more costs since aims of a purely economic nature cannot constitute pressing reasons of public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.[58] The case confirmed the way the Court in *Bickel and Franz* reasoned that the language in criminal proceedings would fall under EU law, because of the application of Art. 18 and 21 TFEU. In a free movement situation, and when language rights are granted to own nationals who are residing, such language rights should not be rejected for those EU citizens who have exercised their free movement rights.[59]

3.3. Regulation of names in the member states and European citizenship

The use of nobility titles and the construction of names are significantly connected to language regimes. These national rules on names or titles in relation to free movement, protection of constitutional identity, equal treatment and Union citizenship were ruled by the Courts in the cases *Konstantinidis*[60], *Garcia-Avello*[61], *Grunkin and Paul*[62], *Sayn-Wittgenstein*[63] *and Runevič-Vardyn*[64] are of importance. In these rulings, the Court uses the so-called "serious inconvenience" test to determine whether a national rule on the regulation of names restricts free movement of Union citizens.[65] These cases occur in the context of free movement too, but they have a particular angle, since the Court approaches it in terms of serious inconveniences, rather than a restriction to free movement.

[53] ECJ, Bickel and Franz judgment, *op. cit.*, par. 29.

[54] ECJ, judgment of 27 March 2014, Grauel Rüffer, case C-322/13, ECLI:EU:C:2014:189, pars. 7–8.

[55] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 19.

[56] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 20.

[57] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 21.

[58] ECJ, Grauel Rüffer judgment, *op. cit.*, par. 25; ECJ, judgment of 17 March 2005, Kranemann, case C–109/04, ECLI:EU:C:2005:187, par. 34.

[59] See on this case also S. PEERS, *Minority languages and court proceedings: the possibilities and limits of EU law*, http://eulawanalysis.blogspot.com/2014/03/minority-languages-and-court.html.

[60] ECJ, judgment of 30 March 1993, Konstantinidis, case C–168/91, ECR I–1191.

[61] ECJ, judgment of 2 October 2002, Garcia Avello v Belgium, case C–148/02, ECLI:EU:C:2003:539.

[62] ECJ, judgment of 14 October 2008, Grunkin and Paul, case C–353/06, ECLI:EU:C:2008:559.

[63] ECJ, judgment of 20 December 2010, Sayn-Wittgenstein v Landeshauptmann von Wien, case C–208/09, ECLI:EU:C:2010:806.

[64] ECJ, judgment of 12 May 2011, Malgožata Runevič-Vardyn, case C–319/09, ECLI:EU:C:2011:291.

[65] See on this test also A. YONG, *The Rise and Decline of Fundamental Rights in EU Citizenship*, London, 2019, pp. 97–100.

The way Member States regulate the spelling of names was impacted by the Court for the first time in Konstantinidis. Christos Konstantinidis, Greek masseur and assistant hydrotherapist residing in Germany. He stated that the transliteration by the local Registry Office of his name Χρήστος Κωνσταντινίδης to "Christos Konstadinidis" was hindering his business and social relations, since the formulation was distorting the pronunciation. Therefore, he requested to respell his name as "Konstantinidis". In the German marriage register his name was was transliterated as "Hréstos Kónstantinidés" according to the Convention on the Representation of Names and Surnames in Registers of Civil Status. His birth certificate was transliterated accordingly. Remarkably, Advocate General Jacobs stepped away from a purely economic approach and created room for the human rights aspect of a name.[66] He stated, "Community law does not regard the migrant worker (or the self-employed migrant) purely as an economic agent and a factor of production (…); it regards him as a human being who is entitled to live in another Member State 'in freedom and dignity'". The Advocate General observed several human rights instruments and the constitutions of the Member States. This led to the conclusion that there is a principle that a State must respect not only the physical well-being of the individual, but also his dignity, moral integrity, and sense of personal identity. He concluded that there is no doubt that a Member State violates these "moral rights" when it obliges an individual to abandon or modify his name. Such violation of a fundamental right can only by a fundamental and urgent reason.

The Court did not follow the reasoning of the Advocate General as it relied on an economic approach. The provision of the right of establishment constitutes one of the fundamental legal provisions of the Community (Art. 52 EEC, now Art. 43 TFEU). Accordingly, the Court continued that "By prohibiting any discrimination on grounds of nationality resulting from national laws, regulations or practices, that article seeks to ensure that, as regards the right of establishment, a Member State accords to nationals of other Member States the same treatment as it accords to its own nationals".[67] Transcription rules are incompatible with the right of establishment if their application causes a national of another Member State such a degree of inconvenience that it would interfere with his freedom to exercise the right of establishment. This could be the risk that potential clients confuse him with other persons.[68]

In *Garcia-Avello* the Court stated for the first time that there was a connection between national laws on names and the right of free movement and residence as resulting from EU citizenship. According to national law, it was not possible for the Garcia Avello children with dual nationality, to register their two surnames in Belgium. The Court ruled that a Member State cannot simply apply its national law on persons with dual nationality, Spanish and Belgian in this case. The discrepancy in surnames would create serious inconveniences on professional and private levels for the individuals concerned and restrict the right of free movement of persons. The Court's approach was economic as no direct link to the protection of human rights principles was made.

In the case of *Grunkin and Paul*[69], the double surname of the son of two German nationals living in Denmark was under debate. While according to Danish law it was possible to grant such a double name, this was not accepted by the German registry office. The office refused to recognise the surname given to him in Denmark, because granting a double name was not in accordance with German law. The Court found the refusal incompatible with Art. 21 TFEU, since it would create a "serious

[66] Opinion of Advocate-General Jacobs of 9 December 1992 in the Konstantinidis case, C–168/91, ECR I–1993.

[67] ECJ, Konstantinidis, *op.cit*., pars. 12–14.

[68] ECJ, Konstantinidis, *op.cit*., pars. 15–16.

[69] ECJ, Grunkin and Paul judgement. Already in 2005, the Stadt Niebüll referred questions on this particular case, but those preliminary questions were not answered, since the reference was declared inadmissible, because the Stadt Niebüll was not a judicial body in the sense of Art. 267 TFEU, see ECJ, judgment of 27 April 2006, Standesamt Stadt Niebüll, case–C–96/04, E.C.R. I–03561.

inconvenience" to the son, who at that time was already 10 years old. The Court refers to the possible confusion of identity, especially to official documents, which would have different surnames.

The Court directly mentioned Art. 4(2) TEU in *Sayn-Wittgenstein*.[70] That case concerned the recognition of a noble title (Fürstin), which was granted to Sayn-Wittgenstein according to German rules. However according to Austrian law on abolishing noble titles and a ruling of the constitutional court, the title could not be accepted in Austria. This meant that the free movement was hindered, since Sayn-Wittgenstein exercised services in Germany in luxury estate sale. While the case does not concern language as such, it does show how identity and spelling of names could conflict with the exercise of free movement. The Court of Justice ruled that Art. 7 and 8 of the European Convention of Human Rights (ECHR) protect the identity and private life of individuals and that a name is a fundamental element of that. This ruling reveals that the Court also included human rights, explicitly referring to the ECHR, and does not only has an economic approach. The Court acknowledges the fact that the Austrian measure would fall under a legitimate aim to restrict free movement rights, with reference to Art. 4(2) TEU, it also held that the measure was not in violation of proportionality. Hence, it ruled that "By refusing to recognise the noble elements of a name such as that of the applicant in the main proceedings, the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them".[71]

In the case of *Runevič-Vardyn* the Court ruled that "the objective pursued by national rules (…) designed to protect the official national language by imposing the rules which govern the spelling of that language, constitutes, in principle, a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Art. 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law".[72] The Court is hesitant concerning the position and protection of linguistic minorities in this case. The Member State has the competence to regulate the entries of its nationals in official identities. Significantly in this case the Member State could rely on a linguistic justification, which protected the official language. At the same time the linguistic minority rights of the minority group was not addressed.[73] In a similar vein the Court did not address the same question on minority groups and language in the more recent case *Boriss Cilevičs*. While the Court chose to rule the case on the basis of free movement, the question is how the fundamental rights of minority groups are protected. Especially since the Advocate-general, in that case, did explicitly address minority rights.

4. A balancing act: where free movement and language meet

We have seen the different challenges that occur when EU citizenship, and especially free movement, meets language requirements or obstacles. While protecting a language can be beneficial from a language perspective, free movement creates exchange of culture and languages as well. Especially in border regions, such as Bolzano (Italy), but also Limburg (the Netherlands), languages and borders are part of the daily life of EU citizens. A language can be perceived in that way—sometimes—as a border.

[70] ECJ, Sayn-Wittgenstein, par. 92. Previously the Court referred to national identity in the ECJ judgment of 2 July 1996, Commission v. Luxembourg, case C–473/93, E.C.R. I–03207, par. 35.

[71] ECJ, Sayn-Wittgenstein, *op. cit.*, par. 93.

[72] ECJ, Runevič-Vardyn, *op. cit.*, par. 87.

[73] H. VAN EIJKEN, *Case Note: Case C–319/09 Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v. Vilniaus Miesto Savivaldybės Administracija and Others, Judgment of the Court (Second Chamber) of 12 May 2011*, cit., pp. 809–826.

In the European Union cultural diversity and constitutional identity are part of the primary values of the European Union, while at the same time free movement of EU citizens is endorsed by the Treaties and secondary legislation. How can these two values be balanced? And who decides on what belongs to the national identity of Member States?

The Member States often base their linguistic rules on the need to protect cultural diversity or national identity. Between these conflicting rights and values, an ongoing balance is needed in the multilingual and multicultural context of the EU. The question is how to reconcile the value of linguistic diversity within the European Union and the national constitutional identity, also in connection with human rights protection. Under this question, it is vital to recognize the difficulty for minority groups and minority groups and languages. Whereas in certain groups knowledge of language is a difficulty, access to rights, including the right to free movement, but also political rights and the right to education are an immense obstacle.

The national identity as a shield to protect one language from free movement, in a way, is still not clarified. National identity, is, as Advocate General in the case of *Boriss Cilevičs*, points out, a matter for national deliberations and should be examined by a national court. At the same time, constitutional identity should be about the core values of a Member States,[74] to which language belongs. The Court maneuvers between the national identity and the free movement cautiously, trying to grant discretion to national courts, while at the same time seeking to protect free movement. In *Runevič-Vardyn*, in *Las*, as well as in *Boriss Cilevičs* the protection of the official language was the reason for the Member States to invoke national identity as a legitimate aim to restrict free movement.[75] It is interesting to see that the Court in *Las* is much more hands-on to fill in proportionality than in *Runevič-Vardyn* and *Boriss Cilevičs*. The tension between the protection of the Member States' official language could be an obstacle to minority rights, as it might exclude persons to have access to the legal system or the identity in case of spelling of names. This tension is still unsolved and should be reconciled with the value of linguistic diversity.[76]

Looking at the case law of the Court it is clear that the EU national linguistic requirements, such as language skills or a different name regulation, are restrictions to the exercise of the free movement rights, which need to be justified. Language protection or promotion is invoked by the Member States as legitimate aim to protect the fundamental right of language, linguistic rules are in that sense framed as a public interest and fundamental right.[77] Language is at the crossroad of—sometimes—opposing values and interests. To find a balance, the Court uses its traditional reasoning scheme of restriction, justification, and proportionality.[78] It seems, however, that fundamental rights are not that explicitly present in the case law. The Court balanced free movement with national fundamental interests, as it does usually in free movement cases. We have seen that fundamental rights are sometimes explicitly mentioned, but in other cases the Court is reluctant to take a human rights approach to linguistic diversity.

5. Conclusion

[74] G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, p. 365.

[75] G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, *op. cit*., p. 395.

[76] O. DUBOS, V. GUSET, *European Law and Regional and Minority Languages*, in F. IPPOLITO, S. IGLESIAS SÁNCHEZ (eds.), *Protecting Vulnerable Groups: The European Human Rights Framework*, Oxford, 2015, p. 128.

[77] E. PULICE, *EU Multilingualism and Rivalries of Rights: from Barriers to Plurilingualism*, in S. DE VRIES, E. IORIATTI, P. GUARDA, E. PULICE (eds.), *EU Citizens' Economic Rights in Action*, Cheltenham, 2018, p. 262.

[78] S. VAN DER JEUGHT, *EU Language Law*, cit., p. 265.

While each wine has its' own flavour and wine-making process, also languages consist of different ingredients and may have a different background, while also having some common grounds—if one view letters as the grapes for instance. Language is much connected with identity, and culture and is also a precondition for citizens' participation in society, either national or European.

Since language is a precondition for participation it also may create a gap between EU citizens. The fundamental idea behind the free movement of EU citizens is also the exchange of views and to creation a space where citizens can use opportunities within the European Union. The right to vote for municipal elections (Art. 22 TFEU) is just an example of cross-border integration opportunities. Cross-border movement stimulates the exchange of culture, language, and views and creates a dialogue between different EU citizens. As was stated back in 1979 in the Tindemans report "The proposals for bringing Europe nearer to the citizen are directly in line with the deep-seated motivations behind the construction of Europe. They give it its social and human dimensions. They attempt to restore to us at the Union level that element of protection and control of our society which is progressively slipping from the grasp of State authority due to the nature of the problems and the internationalization of social life. They are essential to the success of our undertaking: the fact that our countries have a common destiny is not enough. This fact must also be seen to exist".[79] About the case law on language and the internal market we have seen how language protection may be used as a legitimate aim to restrict free movement, taking into account the proportionality of the rule. A hardcore language requirement will therefore probably not be accepted, because that would constitute indirect discrimination on grounds of nationality. However, the Court takes national protection of the official languages seriously, albeit it is framed as a free movement restriction rather than a fundamental right *an sich*. Linguistic diversity or protection of a language is not an absolute right, but it is weighed in light of the freedoms of the internal market.

If we analyse the Court's case law, it becomes clear how language and identity are intertwined. The fact that the spelling of a name may be different in another Member State than in the Member State of nationality may constitute "serious inconveniences" for EU citizens to travel to the other Member States and to identify themselves. At the same time, the Court is lenient toward the Member States if national constitutional provisions are invoked as a legitimate aim. The Court seeks a balance between respect for cultural-linguistic diversity and free movement rights. As seen in *Konstantinidis*, *Garcia Avello* and *Grunkin-Paul* the Court's approach to the "serious inconvenience test" was at first very economic. This was in line with the economic arguments and the alleged infringed articles the parties invoked. The moral rights of individuals were already recognized by AG Jääskinnen in his opinion in *Konstantinidis*. The Court made room for human rights in its approach in *Sayn-Wittgenstein* and *Runevič-Vardyn*, as it pointed out that a person's name is a constituent element of his identity and private life. In *Runevič-Vardyn*, the Court interpreted Art. 22 of the Charter and 3(3) TEU in favour of the official state language. By doing so, the approach of the Court is more reasonably balanced between the protection of linguistic diversity and the free movement of persons. Hence, in the case law of the Court of Justice, we see how the case law regarding language started from a more economic perspective, which changed after Lisbon in a more protectional approach since at the Treaty of Lisbon Art. 4(2) TEU was introduced. In some cases, we see a more human rights approach of the Court, albeit still within the free movement context.[80] However if we consider the case law of the Court overall it is clear that free movement as a fundamental freedom is the approach of the Court rather than a fundamental rights approach. We see therefore the importance of the market-approach in these cases very strongly.

[79] Tindemans report, 1975, https://www.cvce.eu/content/publication/1997/10/13/284c9784-9bd2-472b-b704-ba4bb1f3122d/publishable_en.pdf.

[80] See also E. MEYERMANS SPELMANS, *The Balance between Linguistic Diversity, in the EU and Free Movement of Persons*. A thesis submitted in partial fulfilment of the requirements for the degree of LL.M. at Utrecht University, Master Track: European Law, July 2022.

Important is that the interest of the Member States to protect their own language does not interfere too much with the diversity of languages. As the Advocate-General stated "It is not in the interest of the Member States, nor of the European Union, to create monolingual (or bi- or trilingual) 'islands' within the European Union".[81]

Language can enable citizens to participate, even in a foreign EU Member State in politics, criminal proceedings, and administrative procedures. However, Member States may have good reasons to protect their language and therefore set language requirements. Important to note is that the exchange of culture also enhanced diversity and the exchange of culture. It is the balance that counts.

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[81] Opinion of Advocate-General Emiliou of 8 March 2022 in the *Boriss Cilevičs case*, *op. cit.*

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Literature Review on Comparative Law and Legal Language

Caterina Bergomi[1]

In a world more and more globalised comparative law is achieving a central role under different aspects, such as: methods, legal language, EU law and legal education. It is well known that comparative law has relations with many disciplines, several scholars addressed the issue of interdisciplinarity and new perspectives for comparative law.
In comparative legal studies, language and translation play a critical role that has long been acknowledged by the scientific community. Consequently, the study of legal translation in all its forms and the essential significance of language in comparative legal studies are now well-established disciplines of study.
This contribution is a review of comparative law and legal language literature and publications. Due to the increasing interest to the subject of law and language it is possible to find many contributions, the following are only some suggestions on, this review makes no claim to be comprehensive, but rather to recommend some useful and interesting readings.

1. A first encounter with comparative law and language

This first section is devoted to a few general comparative works, which cover subjects like the origins and development of comparative law, the methods of legal comparison, and the issues addressed in comparative law. The sections of these volumes that discuss language and law or legal translation will receive extra attention.

One of the first articles that reflect on the connection between comparative law and language—with a special eye to legal translation—is the one by R. Sacco "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)".

A collection of essays in the book "The Cambridge Companion to Comparative Law", edited by M. Bussani and U. Mattei, aims to give the reader a basic understanding of the dynamic relationship between the law and its cultural, political, and socioeconomic context. The chapter "Comparative Law and Language" by B. Pozzo is particularly noteworthy in this edition.

An overview of general aspects of comparative law (in particular the relation with other disciplines, such as legal translation, and the aims comparative law) and its methods is given by U. Kischel in "Comparative Law". Especially chapter 3 is dedicated to "the comparative method" and analyses the different approaches (functional method and the alternatives) aiming at developing a contextual comparison approach. In the second part of the book the Author analyses the different legal families and their contexts. The article by O. Moreteau "The Words of Comparative Law" starts with a reflection on the words of the law, then analyses the corpus of comparative law and the words of comparativists from a pluralistic perspective and the process as a basic element of cognition.

"The Oxford Handbook of Comparative Law", edited by M. Reimann and R. Zimmermann, offers some essays that are devoted to the different approaches to comparative law and the increase of interdisciplinary research in this area, such as the one by M. Siems "New Directions in Comparative Law". In this contribution the author suggests that comparative law has broadened not only its methodological toolbox but also its substantive perspective since it turns its attention to new topics and to interdisciplinarity, due to many new interactions not only between governments but also, for instance, between courts or other public bodies. On the relation between comparative law and language see the chapter by Vivian Grosswald-Curran "Comparative Law and Language".

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In his article "Comparative Law and Method and the Method of Comparative Law" J. Hage focuses on comparative law and its justificatory function within legal research and on the method of comparative law.

The recently released book "Comparative methods in law, humanities, and social sciences", edited by M. Adams and M. Van Hoecke, presents reflections from numerous academics on comparative research, the connection between comparative legal research and the humanities and social sciences, and how it can be enriched through those other disciplines, such as legal history (see the chapter by G. Samuel), comparative sociology (see the chapter by J.-P. Dalloz), and comparative literature (see A. Nicholls' chapter). Language-related concerns are covered in the 12th chapter by M. Van Hoecke "Comparing across societies and disciplines".

To have an idea of the attractiveness of comparative law and of the many fields of research of scholars we recall the "General Reports of the XXth General Congress of the International Academy of Comparative Law/Rapports Généraux du XXème Congrès Général de l'Académie Internationale de Droit Comparé". The book offers 26 general reports from which diversity is unquestionably the essential ingredient for the Academy's smooth operation and, ultimately, good work.

2. Comparative law and legal language: legal translation, legal drafting and legal interpretation

The second paragraph proposes some readings on the relationship between comparative law and the usage of legal terminology and the sophistication of the legal language.

This section focuses on books and articles on subjects related to legal translation, multilingualism as a distinctive feature of the European legal order, with a particular focus on publications on the Court of Justice, and as a factor influencing EU legal concepts.

Regarding language and law, it is worth mentioning the series of books edited by Barbara Pozzo, which since 2005 has offered insights into the subject and the research conducted by the Interuniversity Centre for Research in Comparative Law. Among others, we would like to mention the book published in English "Ordinary Language and Legal Language", on legal language and its increasingly central role.

Focused on the functions of legal language and on the origin and progress of national legal languages see Heikki E. S. Mattila, "Comparative Legal Linguistics: Language of Law, Latin and Modern Lingua Francas".

"Law and Language. Current legal Issues. Volume 15" by M. Freeman and F. Smith on behalf of the Faculty of Laws, University College London presents several literary works and considers the relationship between language and the law in different contexts, such as criminal law, contract law, family law, and human rights. The book covers a wide range of subjects, including interpreting issues, difficulties with legal translation, and nonverbal communication.

On the complexity of legal languages and on the problems of understanding we recommend reading the work by J. Husa "Understanding Legal Languages—Linguistic Concerns of the Comparative Lawyer", originally published in "The Role of Legal Translation in Legal Harmonization". By the same author we also recall "Translating Legal Language and Comparative Law" where Husa emphasises how legal translation and legal interpretation inextricably linked, despite differences. Through the example of the development of contract law the author suggests an interactive cooperation between jurists and translators.

The book edited by S. Šarčević "Language and Culture: in EU Law. Multidisciplinary perspectives" brings together contributions and expertise by jurists and linguists who offer different perspectives on the role of language and culture in the dynamic development of the law of the

European Union. The book by S. Šarčević "New Approaches to Legal Translation", which is less recent but of considerable interest, is one of the first attempts to give a thorough analysis of legal translation through an interdisciplinary study of law and translation theory. The theoretical and practical sides of the topic are covered in the book, and legal translation is examined as a form of communication within the legal system.

In "The Oxford Handbook of language and Law", edited by P. M. Tiersma and L. M. Solan, linguists and lawyers collaborate to address linguistic challenges that arise in various legal systems and the multilingual world. Part III, "Multilingualism and Translation", which includes contributions by J. Engberg on "Word Meaning and the Problem of a Globalized Legal Order", K. McAuliffe on "Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ", and C. J. W. Baaij on "Fifty Year of Multilingual Interpretation in the European Union", is of particular interest in the context of this literature review.

Published very recently "Comparative Perspectives on Law and Language" edited by A. Parise and O. Moréteau inviting readers to gain a deeper understanding of the complex relationships between law and language, this volume presents a wide range of comparative viewpoints that will be useful to both linguists and jurists. It encourages interdisciplinary cooperation while concentrating on the importance of language in creating laws, resolving legal disputes, and understanding the law. This collection of essays on law and language illustrates a range of doctrinal perspectives, from the conventional to the newly developed, and includes case studies and empirical exercises.

It is noteworthy that M. Derlén's chapter "Multilingualism and Legal Integration in Europe" in the book *"Dynamics and Terminology: an Interdisciplinary Perspective on Monolingual and Multilingual Culture-Bound Communication"* provides an analysis of the meaning of integration through multilingualism on both the horizontal and vertical dimensions.

A broader analysis focusing on languages regulation and an interdisciplinary approach could be read in two operas: "Eu Language and Law" by S. Van der Jeught and "Multilingual law. A Framework of Understanding" by C.D. Robertson. The volume by Robertson is divided into eight parts each analysing a specific aspect of the connection between law and language giving an overview of what is multilingual law.

On the role of comparative analysis in legal translation "Developing an Integrative Approach for Accessing Comparative Legal Knowledge for Translation", by J. Engberg, on a multi-faceted approach to comparative law significant to translation.

K. Hasegawa's chapter "The Fabric of Normative Translation in Law" in "A Cosmopolitan Jurisprudence. Essays in Memory of H. Patrick Glenn" is focused on the role of normative translation in the mixing of different legal resources to establish legal practice. Recognizing the complexity and globalisation of law, K. Hasegawa proposes that normative translation, both "external and internal", as he defines it, could be a driving force and a framework for legal transformation.

On the role of language in the comparison and interpretation of concepts, but also in the development and harmonization of the law an interesting contribution is "Multilingualism and the Harmonization of European Private Law: Problems and Perspectives" by B. Pozzo; "Same Words, Different Meanings" by S. Ferreri.

An examination of the hybridity of translator-mediated EU legal culture is available in the chapter "EU Legal Culture and Translation in the Era of Globalisation: the Hybridisation of Eu Terminology on the Example of Competition Law". The terminology of EU competition law is presented as an example of EU hybridity because it demonstrates that concepts and ideas travel throughout Europe and that EU terminology is the result of Europeanisation of law achieved through the convergence and the harmonisation of national laws, but it is also heavily influenced by socio-political and historical factors. The article also emphasises the repercussions of this terminological and conceptual hybridity.

A recent essay published by E. Ioriatti "Comparative Law and EU Legal Language: Towards a European Restatement?" gives a brief description of the state of art of the study on EU legal language and suggests an interdisciplinary perspective combining comparative law and semiotics. The article suggests an interdisciplinary approach to EU law and to European autonomous concepts, using comparative law and semiotics. The contribution underlines that the interrelation between EU legislation and the normative forces grounding the practices of law in Europe are giving rise to common contexts of meanings in the European legal setting.

A point of reference on EU legislative drafting, legislative multilingualism and the adoption of the methodological tools of modern comparative law is the article by A. Gambaro "Legislative Multilingualism and Comparative Law: a European Perspective". The book by C. Baaij "Legal Integration and Language Diversity. Rethinking Translation in EU Law Making" examines the difficulties of interpreting EU law uniformly from the perspective of translation in order to achieve proposals.

"The Ashgate Handbook of Legal Translation", edited by L. Cheng, K. K. Sin and A. Wagner provides several studies in legal translation divided into two parts: a theoretical and a practical one. Our attention focused on a number of contributions, in particular in the first part "Lost in Translation? Linguistic Diversity and Elusive Quest for Plain Meaning in the Law" by J. Ainsworth. Of the second one we recall two contributions: "EU Legislative Text and Translation" by C. Robertson and "Phraseology in Legal Translation: A Corpus-Based Analysis of Textual Mapping in EU Law" by Ł. Biel. The volume by edited L. Biel and H. J. Kockaert, "Benjamins Handbook of Legal Terminology" is being published soon.

The book "Language and Law: The Role of Language and Translation in EU Competition Law" edited by S. Marino, Ł. Biel, M.a Bajčić, and V. Sosoni gives a broad overview of EU competition legislation, with a focus on important developments in Italy, Spain, Greece, Poland, and Croatia, as well as a detailed examination of the role of language, translation, and multilingualism in its application and interpretation. We draw our attention in particular to the chapters "Legal Languages in Contact: EU Legislative Drafting and Its Consequences for Judicial Interpretation" by A. Doczekalska and "A Mutual Learning Exercise in Terminology and Multilingual Law", by M. Bajčić and A. Martinović.

"Legal Certainty in Multilingual EU law. Language, Discourse and Reasoning at the European Court of Justice" by E. Paunio is focused on the effect of multilingualism on the judicial reasoning of the Court of Justice of the European Union. The chapter by E. Paunio "Legal Certainty in the Context of Multilingualism", in "The Shifting of Legal Certainty in Comparative and Transnational Law" edited by M. Fenwick, M. Siems and S. Wrbka, designes the use of linguistic comparison by the European courts, in particular the Court of Justice of the European Union, in the developing of the principle of legal certainty and on the importance of the legal reasoning. In the chapter "Multilingualism and the European Court of Justice: Challenges, Reforms and the Position of English after Brexit" M. Derlén discusses some challenges: the necessity of a reform of the multilingual system and the new future role of English.

The monograph "Shallow Equality and Symbolic Jurisprudence in Multilingual Legal Orders" by J. H. C. Leung (New York: Oxford University Press, 2019) describes the various forms of modern multilingualism and serves as a guide to contemporary practise of the methods by which states carry out language policy.

A unique approach is at the basis of the book by P. Phoa "EU Law as a Creative Process: A Hermeneutic Approach for the EU Internal Market and Fundamental Rights Protection". This book presents the judicial work of the Court as an intellectual, cultural, and literary endeavour, encouraging the reader to view the field of EU law as a creative process.

By combining the work of French philosopher Paul Ricoeur with that of American *"law and literature"* scholar James Boyd White, the author creates an original hermeneutic methodology to analyse the Court's textual performance that strikes a good balance between theoretical reflections and real-world judicial examples.

In the article "Towards Peace in Europe: on Legal Linguistics, Prosperity and European Identity—the European Reference Language System for the European Union", by C. Luttermann and K. Luttermann, the authors through the analysis of three main critical areas propose a new language regime, the so-called "European Reference Language System" (Das Europäische Referenzsprachensystem). In the same journal issue and on the same subject see also the review by J. Engberg of the book "Claus Luttermann/Karin Luttermann (2020): Sprachenrecht für die Europäische Union. Wohlstand, Referenzsprachensystem und Rechtslinguistik".

It is worth mentioning the paper by V. Jacometti "The Challenges of Legal Translation in Multilingual Contexts" focused on the features of multilingual legal drafting, such as legal basis, criteria and methods, within national legal systems, international and supranational organisations.

The issue of linguistic comparison by the Court of Justice and of the principle of equal authenticity, also in connection with the extension of the official languages over the years, are specifically addressed in the article by M. Bajčić "Linguistic Comparison within CJEU's Decision-Making: A Debunking Exercise".

3. Comparative law and language in legal education

This last short section gives an insight of the role of comparative law and language in legal education.

In his article "Comparative Law in Legal Education—Building a Legal Mind for a Transnational World" J. Husa underlines the connection and the pedagogical importance of the study of comparative law and language, even if not delving into the subject. Another interesting book is "The Internationalisation of Legal Education", C. Jamin, W. van Caenegem (eds.), Ius Comparatum—Global Studies in Comparative Law.

It is worth mentioning "Comparative Law and Multicultural Legal Classes: Challenge or Opportunity?" edited by C. Varga provides a wide investigation on legal education in multicultural classes, especially nine countries on three continents, combining academic perspectives and educational insights from several scholars in the field of comparative law. Devoted to the Italian experience we find the chapter by S. Ferreri "Comparative Law and Multicultural Legal Classes in Italy: Challenge or Opportunity?", which is focused on the growing challenges of law teaching in increasingly culturally different classes and on how to address the problems that may arise.

Finally, we also recall the recent volume edited by N. Etcheverry Estrázulas, "Bilingual Study and Research—The Need and the Challenges", Ius comparatum series, General report to the 20th General Congress of the International Academy of Comparative Law (Fukuoka, 2018), (ChamSpringer, 2022). Keeping the focus on Italy, of this volume it is worth of interest the conference paper by E. Ioriatti "Bilingual Legal Education in Italy: Translating Languages into Teaching Methods". The contribution describes the situation of legal education in Italy from the point of view of the language of instruction. The acquisition of legal terminology expressed in the national language is still an essential part of legal education, predominantly theoretical. For this reason, law in Italy is still mainly taught in Italian, even in the bilingual or multilingual territories of Italy. The text highlights, however, how the role of foreign languages—especially English—is rapidly increasing and how the use of languages other than Italian in legal education is being transformed into new teaching methodologies.