Comparative Law and Language

2023

Vol.2 No.1

UNIVERSITY OF TRENTO

Comparative Law and Language
Open access six–monthly scientific journal

Published by
Università degli Studi di Trento
via Calepina, 14 - 38122 Trento
ufficioarchivieditoria@unitn.it
www.unitn.it

ISSN 2785-7417

Contents

Volume 2 Number 1 June 2023

Special Issue: Call for Papers - Young Scholars

Editorial I–II

Gender-Neutral Language in Philippine Supreme Court Decisions 1–25
Florian Kim Dayag

From Good Family Father to Reasonable Person. 26–51
A Theoretical Discussion of Durability as an Argument in Favour of Gender-inclusive Legislative Language
Vince Liégeois

Droit comparé vs droit comparé appliqué à la traduction. 52–65
Analyse comparative du point de vue de la traductologie
Jorge Valdenebro Sánchez

The Role of Legal Transfer in Post-Communist Poland. 66-85
The Search for a Metaphor
Michelle Albani

L'Emploi du présent dans le contexte juridique trilingue. 86–104
Une approche contrastive à partir d'un corpus anglais, français et russe
Anton Osminkin

Event

Roundtable for the Semiotics of Law – 105–107
Panel on Comparative Law and Methodology
Francesco Petrosino

Editorial

In his classical novel "Uno, nessuno e centomila" ('One, No One and One Hundred Thousand', 1926),[1] the Italian writer Pirandello develops the metaphysical idea of countless human individual perceptions and the ensuing impossibility to really get to know a person. This very Kantian idea ("Das Ding an sich ist ein Unbekanntes", reality as such, the "thing in itself", always remains unknown to us), springs to mind when reading the contributions in this Issue (1/2023) of the Comparative Law and Language Journal (CLLJ).

Indeed, all the articles by young scholars with different backgrounds have essentially in common that they reflect upon how legal texts establishing rights and duties are perceived by countless subjects in various cultural, linguistic and political settings [2]. Whether we look at the law in its various forms from a comparative, linguistic or legal point of view, the aim is invariably the same: to understand how the legal message is delivered, and how it is perceived in the various components of the (international) community. Bringing different research angles together undoubtedly enhances our understanding of these complex and often extremely subtle processes.

The contributions in this Issue also show the variety of topics which fall within the remit of this interdisciplinary and topical field of research. Indeed, the articles range from gender neutral language, issues of legal translation as well as the use of the present tense in linguistic versions of Treaty texts to the concept of legal paradigm shifts and the ensuing transformation process. The articles take us on a journey from the Philippines to Russia, passing through various European countries and languages.

In particular, in this Issue, two articles investigate gender-neutral language in legal contexts (another illustration of the importance of the perception and effects of legal concepts in society, and a topic already dealt with in the previous Issue (2/2022) as well).[3]

Florian Kim Dayag assesses gender-neutral language in decisions of the Philippine Supreme Court. The author's case-study is particularly relevant as in the Philippines, both Filipino and English have official language status. Yet, whereas Filipino is a predominantly gender-neutral language, English employs gender-specific language. English being the main language used in court proceedings and processes, the legal system has embraced the use of gendered language. The author examines the use of "gendered" language in Philippine case law and the impact of recent guidelines to Supreme Court decisions which were issued in 2022 in that regard.

In a similar vein, Vince Liégeois takes a closer look at the legal concept of a "good family father", present in various legal systems and deriving from the term "*bonus pater familias*" in Roman law. It refers to a standard of care, analogous to that of the reasonable man in English law. The author argues that a too conservative language policy in legislation might lead to legislative language becoming archaic, growing increasingly distant from the language used in other communicative settings, as well as the standard language norm.

[1] L. PIRANDELLO, *Uno, nessuno e centomila*, Foschi (Santarcangelo), 2017.

2 This issue is the result of a call for papers for young scholars. All articles published in this issue have undergone the standard double-blind peer review procedure.

3 See Maria Vittoria Buiatti's article on gender neutral language: A Comparative Overview. CLL vol.1 No. 2 2022, https://doi.org/10.15168/cll.v1i2.2361.

As Prof. Elena Ioriatti aptly pointed out in a previous Editorial, “in the past century comparative law science and language mainly met in the field of legal translation”. Indeed, the translator, when working with legal texts, must carry out a comparative law exercise to be able to propose translational solutions adapted to the context in question. Likewise, to study foreign law, the comparative lawyer must rely on translation, as it allows them to understand foreign concepts and, consequently, to analyse the similarities and differences. Yet, despite the similarities, it is not the same exercise, as is demonstrated by Jorge Valdenebro Sánchez in his contribution.

In an intriguing article which takes a comparative law approach, Michelle Albani discusses the multi-layered and complex transformation process of the Polish property regime in the post-communist era. After the collapse of communism, the Polish legal system was predominantly influenced by both German and French traditions, which makes the case of Poland of particular interest with regard to legal harmonisation in the European Union.

Last but not least, in a contribution that takes a linguistic approach, Anton Osminkin underscores yet another subtle aspect of the interaction between language and law, as he examines the use of the present tense in English, French and Russian, which may lead to different normative outcomes depending on the language used. The basis of this comparative analysis is formed by international agreements, such as the United Nations Charter, the Universal declaration of Human Rights, as well as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, as well as the Treaty on Eurasian Economic Union (of which the original text was drafted in Russian in 2014), the United Nations Framework Convention on Climate Change (drafted in English in 2015) as well as the Treaty on European Union (consolidated version of 2012).

Completing the issue is an interesting and insightful report written by Francesco Petrosino of the panel 'Methodology of Comparative Law' held at the International Roundtable for the Semiotics of Law (Rome, Auditorium Antonianum May 24th-27th, 2023).

Circling back to the idea of the countless aspects of persons and things, it may be argued that the exploration of law and language is a never-ending journey, yet a fascinating one, to which this Journal and this Special Issue consisting of contributions by young scholars in particular endeavour to make a meaningful contribution.

Prof. dr. Stefaan van der Jeught, member of the CLL Editorial Board

Gender-Neutral Language in Philippine Supreme Court Decisions

***Florian Kim Dayag*[1]**

Abstract: The language that courts employ is vital in the development of law and society. In the modern-age of gender consciousness, it is critical to recognize the role that language plays in gender dynamics and to deviate from the use of gender-specific (mostly, masculine) language that further perpetrates inequality and marginalization. In the Philippines, both Filipino and English are recognized as official languages. While Filipino is a predominantly gender-neutral language, English still employs gender-specific language. Yet, English remains to be the principal language used in court proceedings and processes. In so doing, the legal system has, whether consciously or not, embraced the use of gendered language common in the English language. On 15 February 2022, the Philippine Supreme Court promulgated the "Guidelines on the Use of Gender Fair Language in the Judiciary and Gender-Fair Courtroom Etiquette" which seeks to provide a uniform rule with regard to the use of gender-neutral language in court processes and documents. The paper seeks to examine the use of "gendered" language in Philippine case law and the impact, if any, of the Guidelines to Supreme Court decisions after its issuance.

Keywords: Gender-neutral language, Statutory and case law construction, Political correctness.

Summary: 1. The importance of gender-neutral language in law; 2. The languages of the Philippines; 3. Gender-neutrality (or lack thereof) in Supreme Court decisions and issuances; 4. The Supreme Court Guidelines on the use of gender-fair language; 5. Supreme Court decisions post-Guidelines; 6. Conclusion.

> Long afterward, Oedipus, old and blinded, walked the roads. He smelled a familiar smell. It was the Sphinx. Oedipus said, "I want to ask one question. Why didn't I recognize my mother?" "You gave the wrong answer," said the Sphinx. "But that was what made everything possible," said Oedipus. "No," she said. "When I asked, what walks on four legs in the morning, two at noon, and three in the evening, you answered, Man. You didn't say anything about woman." "When you say Man," said Oedipus, "you include women too. Everyone knows that." She said, "That's what you think." – "Myth" by M. Rukeyser (1973)

1. The importance of gender-neutral language in law

Although law is not exactly a pure linguistic endeavour, the relationship between law and language cannot be understated. A recent development in the intersection of law and language is the rejection of gendered language[2] and the use of gender-neutral language in legal writing, with most modern legal

[1] *Senior Lecturer, University of the Philippines, fpdayag@up.edu.ph.*

[2] When referred to in the paper, the term gendered language means language that represents one sex as the norm, gratuitously identifies the sex of a referent, or demeans and trivialized another gender. This definition partly modifies the definition of Professor Fischer. See J. D. FISCHER, *The Supreme Court and Gender Neutral Language: Splitting la Difference*, in *Women's Rights Law Reporter*, vol. 33, No. 2/3, 2012, pp. 218–243. The paper avoids the equation of gendered language with "sexist" language. As pointed out by one author, the "sexist" label "may not be the best way to further the goal of linguistic change" because "[w]hile male-gendered generics may communicate 'subtle sexism,' one should not assume that the writer is 'sexist'". L. M. ROSE, *The Supreme*

writing texts and style manuals recommending its use for a variety of reasons.[3] Gendered language, which is predominantly masculine, can communicate subtle sexism and manifests as a sign of a gender-biased system, especially against women and other minority groups. The language that people use can be perceived as an introspective lens of a person's views and beliefs and a reflection, if not perpetuation, of the society's structure and attitudes.[4] American Judge William B. Hill, Jr. explained:

> Language conveys the norms, values, beliefs, and perceptions that help ensure an ordered social environment and help define the boundaries of acceptable social discourse. Language is defined as the systematic use of words by a people with a shared history or set of traditions.1 When this systematic use of words is gender based to the detriment or exclusion of more than one-half of the population, then surely something is awry. Certainly, it would be intellectually dishonest to pretend of aspirations to include all members of a society as equal participants absent the use of language that eliminates inappropriate gender implications.[5]

Particularly, the use of masculine words minimizes, if not excludes, the importance of women in society and sets up an invisible barrier which hinders their full participation therein. This bias has already been corroborated by empirical evidence, which suggests that masculine pronouns position male as the superior gender and produce a disproportionate number of masculine images in the minds of receivers. Gendered language may also influence the views and attitudes of all genders.[6] In one study, for instance, participants were tasked to concoct a story about a person described by this sentence: "Most people are concerned with appearance. Each person knows when his appearance is unattractive". Majority described the person as male. It was only when the pronoun "his" was replaced by "their" or "his or her" did the stories become gender balanced – revealing that the use of male terms fail to be gender-neutral, even in an explicitly gender-neutral context.[7] Even in non-English languages, studies revealed the same conclusion of male bias.[8] This also opens the discourse on the fixation on binary categorization of gender and how bias towards the dichotomy prejudices persons who do not fall therein. Although the modern history of the struggle for gender neutrality in language commenced with women's rights advocates in the mid-1990s, attention is now expanded to the other classifications that may fall across the gender spectrum.

The use of gender-neutral language may also provide precision and reduce ambiguity in legal writing. Masculine words "tend to cause inaccurate, misleading, or ambiguous statements, and official policies and guidelines have subsequently condemned their use".[9] One American judge even commented that the indiscriminate use of masculine pronouns can cause confusion, especially in terms of jury

---

Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?, in *Duke Journal of Gender Law & Policy*, vol. 17, 2010, pp. 81–129.

[3] For a detailed discussion of this movement among legal writers in the Unites States, see L.M. ROSE, *The Supreme Court and Gender-Neutral Language*, *op. cit*., pp. 82–92.

[4] L. M. ROSE, *The Supreme Court and Gender-Neutral Language*, *op. cit*., pp. 94–97.

[5] W. B. HILL JR., *A Need For The Use Of Nonsexist Language In The Courts*, in *Washington and Lee Law Review*, vol. 49, iss. 2, 1992, pp. 275–278.

[6] K. M. LAGASSE, *Language, Gender, and Louisiana Law: Removing Gender Bias from the Louisiana Civil Code*, in *Loyola Law Review*, vol. 64, No. 1, 2018, pp. 187–214.

[7] J. MOULTON, G. M. ROBINSON, C. ELIAS, *Sex bias in language use: "Neutral" pronouns that aren't'*, in *American Psychologist*, vol. 33, No. 11, 1978, pp. 1032–1036.

[8] T. REDL, A. SZUBA, P. DE SWART, S. L. FRANK, H. DE HOOP, *The male bias of a generically-intended masculine pronoun: Evidence from eye-tracking and sentence evaluation*, in *Discourse Processes*, vol. 59, No. 10, 2021, pp. 828–845. For a detailed account of prior studies done on the matter, see W.R. TODD-MANCILLAS, *Masculine Generics = Sexist Language: A Review of Literature and Implications for Speech Communications Professionals*, in *Communications Quarterly*, vol. 29, iss. 2, 1981, pp. 107–115. See also J. GASTIL, *Generic pronouns and sexist language: The oxymoronic character of masculine generics*, in *Sex Roles*, vol. 23, 1990, pp. 629–643.

[9] K. M. LAGASSE, *Language, Gender, and Louisiana Law*, *op. cit*., p. 191.

instructions and during oral arguments.[10] In *State v. James*,[11] for instance, an appellate court in New Jersey interpreted the provision on jurors' qualification that reads "[h]e must be a citizen of this state" to mean that only males can be jurors since "men only shall be impanelled by the use of the personal pronouns of the masculine gender 'he' and 'his'". Meanwhile in *Snyder's Estate v. Denit*,[12] the Rhode Island Supreme Court held that the use of masculine pronouns should be construed to include the female gender. The use of masculine pronoun when the party to the case is evidently female may further obscure the text and confuse the reader. Promoting gender-neutral language thus "enables the legal language to be more accurate and clearer for its readers". For example, avoiding masculine pronouns by shortening and dividing sentences into shorter sentences achieves simplicity and reduces verbosity common in legal language.[13] One author also noted that gendered language is distracting to the readers and, quoting two American judges, is often disagreeable and insulting.[14]

Historically, the struggle for a gender-neutral language, particularly in English, can be traced to the 12th century.[15] Then in the 1700s, linguists and grammarians began to prescribe an informal set of rules for language. They recommended masculine as the default gender and proposed the use of "he" to refer to everyone. Some believe that this might have been due to androcentrism or the belief that males, as well as their needs and values, are superior. Prior to this movement, the pronoun "they" had been customarily used as a singular pronoun, which grammarians rejected.[16] The use of masculine language was sporadically questioned for a few decades thereafter, until the wave of women's movement in 1960s gained traction in the United States. Women pushed for a more gender-neutral language and they were partially successful. The use of masculine words in media declined significantly in the 1970s, and the language of judges were also impacted to become more inclusive.[17]

Literature in the Philippines on the subject is almost nil, although a scattering of efforts may be found.[18] As early as the 1990s, the education department had incorporated gender-neutral language in the English language textbooks, albeit inconsistent.[19] In 2005, the civil service commission issued a resolution which encouraged government officials and employees to use non-gendered language in all its official documents, issuances, and communications.[20] The Magna Carta for Women also specified that "[g]ender-sensitive language shall be used at all times".[21] The University of the Philippines Center for Women's and Gender Studies also regularly publishes a primer for use of gender-neutral language.

2. The official languages of the Philippines

[10] S. S. ABRAHAMSON, *Toward a Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias*, in *University of Cincinnati Law Review*, vol. 61, No. 4, 1993, pp. 1209–1222.

[11] (N. J. 1921) 96 N. J. L. 132.

[12] (Md. 1950) 72 A.2d 757.

[13] K. KABBA, *Gender-Neutral Language: An Essential Language Tool to Serve Precision, Clarity and Unambiguity*, in *Commonwealth Law Bulletin*, vol. 37, No. 3, 2011, pp. 427–434.

[14] J. D. FISCHER, *The Supreme Court and Gender Neutral Language: Splitting la Difference*, *op. cit.,* p. 223.

[15] A. MUCCHI-FAINA, *Visible or influential? Language reforms and gender (in)equality*, in *Social Science Information*, vol.44, No. 1, pp. 189–215.

[16] K. M. LAGASSE, *Language, Gender, and Louisiana Law*, *op. cit*, pp. 191–192.

[17] J. D. FISCHER*, Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, in *University of San Francisco Law Review*, vol. 43, 2009, pp. 473–508.

[18] See A. PAUWELS, J. WINTER, *Generic pronouns and gender-inclusive language reform in the English of Singapore and the Philippines*, in *Australian Review of Applied Linguistics*, vol. 27, No. 2, 2004, pp. 50–62, finding that the masculine "he" remains the generic pronoun in the student and published academic writing in the Philippines, although "s/he" forms is slowly emerging as the preferred gender-inclusive alternative.

[19] G. M. JACOBS, Q. Y. ZHUO, P. C. JOCSON, C. W. ONG, M. E. D. AUSTRIA, M. SEVIER, W. TEO, *Asian views on gender-inclusive English*, in Asia-Pacific Human Rights Information Center (eds.), *Human rights education in Asian schools*, Osaka, vol. 4, 2001, pp. 129–148.

[20] Resolution No. 050433, s. 2015.

[21] R.A. no. 9710, 14th Cong. (2nd sess., 2008)

The 1987 Philippine Constitution recognizes Filipino as the Philippine national language,[22] although for purposes of communication and instruction, the official languages are Filipino and English, unless the use of the latter is proscribed by a statute.[23]

The declaration of English as an official language can be traced to the 1935 Philippine Constitution, which was adopted during the waning years of American occupation in the Philippines. Its use as a medium of communication, however, started much earlier during the onset of the American occupation, when the Americans opened a network of public schools in their attempt to "pacify" the Filipinos during the Philippine-American War and forward their policy of "benevolent assimilation". American teachers, more popularly known as Thomasites, named after the army transport USS Thomas, enforced English as the primary medium of instruction across the country. [24] For six hours a day, five days a week, Filipinos were required to use and learn English and those who were caught speaking their native languages were punished.[25] In the first commission report to President McKinley, it was noted that the introduction of the English language was "hailed with delight by the people, who could hardly believe that they were to be encouraged to learn the language of those in authority over them".[26] But, as well-known Filipino historian Renato Constantino framed the American colonial education – "[t]he Filipino has to be educated as a good colonial". The use of English, in particular, "became the wedge that separated the Filipinos from their past" and had the effect of "separate[ing] educated Filipinos from the masses of their countrymen". [27]

The Americans were successful in this aspect of their colonization. By the 1930s, approximately 35% of Filipinos can speak English, a degree of acceptance the Spanish language failed to achieve despite more than 300 years of occupation.[28] English was adopted by the elite to better their chance of migrating to the United States or to seek intellectual affirmation from the West. They were also motivated to communicate with the Americans to further preserve and consolidate their wealth and properties.[29] Even today, writers and scholars prefer the use of English in their works to attend American schools and obtain scholarship opportunities. Attempts to abolish the use of English is not unheard of. At the height of the nationalist activism in the 1970s brought by anti-Marcos movement, the use of native languages by known poets and writers became prominent. After the ouster of Marcos and the subsequent adoption of the 1987 Constitution, the new government attempted to implement a language policy that would increase the use of Filipino as the primary medium of instruction in schools. However, English remains widely used in the Philippines, due to the fact that the Philippines has maintained significant relationship with the United States in terms of trade and industry, and even in international politics and policies.[30] In the 2000 census of the National Statistics Office, among household population of (five) 5 years old and

[22] PHIL. CONST. Art. XIV, par. 6.
[23] PHIL. CONST. Art. XIB, par. 7. No such proscription has been passed up to this day.
[24] V. L. RAFAEL, *The War of Translation: Colonial Education, American English, and Tagalog Slang in the Philippines*, in *The Journal of Asian Studies*, vol. 74, No. 2, 2015, pp. 283–302.
[25] J. J. SMOLICZ, *National Language Policy in the Philippines: A Comparative Study of the Education Status of "Colonial" and Indigenous Languages with Special Reference to Minority Tongues*, in *Southeast Asian Journal of Social Science*, vol. 12, No. 2, 1984, pp. 51–67.
[26] Excerpt from E. S. YULE, *The English Language in the Philippines*, in *American Speech*, vol. 1, No. 2, 1925, pp. 111–120.
[27] R. Constantino, *The Miseducation of the Filipino*, in *The Journal of Contemporary Asia*, vol. 1, No. 1, 1970, pp. 20–36.
[28] V. L. RAFAEL, *The War of Translation: Colonial Education, American English, and Tagalog Slang in the Philippines*, op. cit., pp. 284–285. It can, however, be claimed that the failure of the Spanish language to spread in the country was intentional on the part of the Spaniards. By ensuring that the different Philippine groups did not speak the same language, the possibility to revolt against the Spaniards could be minimized. Limiting the language to be spoken by the elites also solidified the already wide divide among the Filipinos during the occupation.
[29] T. R. F TUPAS, *Bourdieu, Historical Forgetting, and the Problem of English in the Philippines*, in *Philippine Studies*, vol. 56, No. 1, 2008, pp. 47–67.
[30] R. K. LAUREL, *"Pinoy" English: Language, Imagination, and Philippine Literature*, in *Philippine Studies*, vol. 53, No. 4, 2005, pp. 532–562.

over, 63.71% of them can speak English.[31] Based on the current English Proficiency Index published by the international company Education First, the Philippines ranks 22nd out of 111 countries in English proficiency, with its score 578 categorized as "high".[32]

The adoption of Filipino as an official language in communication is more nuanced. When the Americans occupied the Philippines, renowned Philippine ethnologist H. Otley Beyer estimated that there were 87 languages spoken by 47 groups in the Philippines[33] but there was no national *lingua franca*. Eight of the languages were classified as major: *Tagalog*, *Ilokano*, *Bikol*, *Pampangan*, *Pangasinense*, *Cebuano*, *Hiligaynon*, and *Waray*. While there exists a degree of mutual intelligibility or shared commonalities among many Philippine languages, "not one can be fully understood by more than 50% of the total population".[34]

Attempts to recognize any Philippine languages as modes of instruction during the American occupation, although existent, were futile and their use was a perceived threat to the use of English. [35] In 1934, an initiative to include a provision on a national language in the drafting of a new constitution was welcomed, but the discussion as to which of the many Philippine languages would be the basis thereof was another story. Legislators pushed for *Tagalog* to be used as the basis for a national *lingua franca* because it was widely circulated and the language of Manila, the capital city and then center of trade,[36] but the attempt failed amidst strong opposition from other groups. Due to these differences, the ratified 1935 Constitution only had a broad clause that required the Congress to take steps toward the development and adoption of a national language based on one of the existing Philippine languages.[37] The National Language Institute was created a year later to study Philippine languages for the purpose of evolving and adopting a national *lingua franca*.[38] In 1937, the Institute recommended the use of *Tagalog* as the foundation thereof. President Quezon then signed an executive order which approved the adoption of *Tagalog* as the basis of the national language.[39] The use of *Tagalog* was solidified during the brief Japanese occupation. Ardent to the rejection of English as a mode of communication, the Japanese recognized *Tagalog* as the national *lingua franca*, and not just the basis thereof.[40] As a result, despite prior resistance, non-native *Tagalog* speakers became more keen to its use, particularly because they feared the repercussion of using English or other languages, mixed with the ideal that a solitary language could unite Filipinos against the Japanese. Even after the Japanese left, *Tagalog* has "imperceptively be[come] the *lingua franca* of the common masses".[41] In 1959, the Department of Education declared that the national *lingua franca* shall be called Pilipino, not *Tagalog*, so as not to ostracize speakers of other Philippine languages.[42]

The search for a national *lingua franca*, however, persisted during the writing of the 1973 Constitution, with one linguist noting that the hostility towards a *Tagalog*-based national language was "so fierce that there was even the danger that a foreign language like English might be adopted as the Philippine national language".[43] Thus, the 1973 Constitution merely declared that the Congress "shall

---

[31] *Educational Characteristics of the Filipinos*, National Statistics Office (March 18, 2005), https://web.archive.org/web/20131226001517/http://www.census.gov.ph/old/data/sectordata/sr05153tx.html

[32] Philippines, Education First, https://www.ef.com/wwen/epi/regions/asia/philippines/.

[33] E. S. YULE, *The English Language in the Philippines*, op. cit., fn 1.

[34] N. ASUNCION-LANDE, *Multilingualism, Politics, and "Filipinism"*, in *Asian Survey*, vol. 11, No. 7, 1971, pp. 677–692.

[35] For a detailed account of the movement during the American occupation, see M. T. T. P. TINIO, *The Triumph of Tagalog and the Dominance of the Discourse on English: Language Politics in the Philippines during the American Colonial Period* (May 18, 2009) (Ph.D. dissertation, National University of Singapore).

[36] C. J. PAZ, *The nationalization of a language: Filipino*, in *The Fourth International Symposium on Language and Linguistics*, 1996, pp. 2052–2059.

[37] PHIL. CONST. (1935) Art. XIV, par. 3.

[38] C. A. No. 184 (1936), pars. 1–5.

[39] E. O. No. 134 (1937).

[40] PHIL. CONST. (1943) Art. IX, par. 2.

[41] N. ASUNCION-LANDE, *Multilingualism, Politics, and "Filipinism"*, *op. cit.*, 684–685.

[42] *Kautusang Pangkagawaran blg.* 7, s. 1959.

[43] J. J. SMOLICZ, *National Language Policy in the Philippines*, *op. cit.*, p. 54.

take steps towards the development and formal adoption of a common national language to be known as Filipino", which shall be the one of the two official languages, the other being English.[44] The change from Pilipino to Filipino (the letter "F" is present in the alphabets of other major Philippine languages but is absent in *Tagalog*) was meant to symbolize other Philippine languages and emphasize that the national *lingua franca* was a product of their amalgamation,[45] although many raised concerns that, at its core, the envisioned national *lingua franca* still relied on *Tagalog*. The debate continued during the deliberations of the 1987 Constitution, although there was no longer any concern with the use of the term Filipino for the national *lingua franca*. It was also emphasized that while Pilipino was largely based on *Tagalog*, Filipino would be "based on language usage, similarities and peculiarities of different Philippine ethnic groups".[46] The drafters, however, recognized that while Filipino would not be limited to the syntax and vocabulary of *Tagalog* and would incorporate other Philippine languages, inevitably, the starting point would still be *Tagalog* because it "has already been developed in the past as an evolving national language".[47] As Commissioner Gaston explained:

> One can see that the similarities between Filipino and Tagalog are greater than the similarities between Filipino and, say, Cebuano or Hiligaynon. But this does not necessarily mean that the language which is continuing to be developed will not assimilate more words from other Philippine languages.[48]

To ensure the integration of other languages and address the concerns of non-*Tagalog* native speakers in the convention, the final provision on national *lingua franca* in the 1987 Constitution adds that Filipino "shall be further developed and enriched on the basis of existing Philippine and other languages".[49]

3. Gender-neutrality in Philippine Supreme Court decisions and issuances

The language that judges use is as important as the substance of their decisions. Their opinions are read not just by the litigants, but may be accessed by the public as well, and they provide a structure that may influence the manner lawyers and students of law write their pleadings and papers.[50] Perhaps no language in Philippine law is more important than that used by the justices of the Supreme Court. Only the decisions of the Supreme Court have *stare decisis* effect and become law of the land. Regrettably, a quick review of its decision in the past century would reveal an ambivalence, if not indifference, towards the use of gender-neutral language.

A good starting point in the analysis is the almost exclusive use of English by the Supreme Court. Decisions, resolutions, and other issuances of the Supreme Court have customarily been issued in English. As of today, there have been less than five promulgated decisions of the Supreme Court in Filipino, with no such decision in the past two decades.[51] This is unfortunate because Filipino is predominantly gender neutral. All pronouns are not gender-based. Instead of "he" or "she", the term "*sila*" is used; "*sa kaniya*", instead of "his" or "hers". This is present in other Philippine languages as well. In *Ilocano*, for both genders, the third person pronoun is "*isuna*" or "*na*"; possessive pronoun is "*kanyana*". While Filipino has words for gender, nouns are mostly genderless. In English, a "spouse" may be a "husband" or a "wife", but in Filipino either gender is called "*asawa*" or metaphorically "*kabiyak*"; a "sibling" may be a "sister" or a "brother", in Filipino just "*kapatid*"; "grandchild", "granddaughter", and "grandson" are all "*apo*". Gendered Filipino nouns are commonly those

[44] PHIL. CONST. (1973) Art. XV, par. 3.
[45] Record Of The Constitutional Commission, vol. 4, p. 153.
[46] Record Of The Constitutional Commission, vol. 4, p. 152.
[47] Record Of The Constitutional Commission, vol. 4, p. 153.
[48] Record Of The Constitutional Commission, vol. 4, p. 156.
[49] PHIL. CONST. Art. XIV, par. 6.
[50] L. M. ROSE, *The Supreme Court and Gender-Neutral Language*, *op. cit.*, pp. 99–100.
[51] Draculan v. Donato (1978) G. R. No. L-44079; People v. Barranca (1989) G. R. No. 78269; People v. Vinuya (1999) G. R. No. 125925.

"borrowed" from other languages. For example, the *Tagalog* word for "teacher" is "*guro*", but for *Ilocano* and *Cebuano*, the term "*maestro*" and "*maestra*", borrowed from the Spanish, is more commonly used - all of which are acceptable words in Filipino. The influence of Spanish in Philippine languages is evident even today, with common words originating from Spanish words with grammatical gender, such as "*lamesa*", for table, from the feminine Spanish noun "*la mesa*". The tendency for words ending in "a" to be feminine while those ending in "o" to be masculine was also transplanted from Spanish vocabulary. Lawyers are "*manananggol*" although the terms "*abogado*" and "*abogada*", to refer to a male and female lawyer, respectively, are also acceptable. Even loaned words from English tend to follow this rule. A "doctor" is "*manggagamot*", but "*doktor*" is more commonly used nowadays. When referring to a female doctor, the suffix "a" is often attached to feminize the word into "*doktora*".

English, on the other hand, is a language that is naturally gendered.[52] It utilizes gendered third person pronouns, which one author termed as "the pronoun problem".[53] Gender bias also appears in nouns. Although no gender is assigned to nouns unlike some European languages, masculine nouns are sometime used in a pseudo-generic sense and thus "sets up masculine as the norm".[54] For instance, the word "man" and words ending in "-man" are commonly used to subsume humankind. Gendered titles and gender-marked terminologies also make unnecessary differentiation between males and females, which tend to trivialize females.[55] "Mr." is used for the former, but for the latter, the title depends on one's civil status ("Ms." for an unmarried woman, "Mrs." for married). A waiter is just called "waiter" if he is male, but if she is female she is usually referred as a "waitress". Consequently, since English has traditionally become the language of the courts, the problem with its gendered vocabulary is carried to court documents. Preference for masculine nouns (e.g., mankind, layman, man-made) and pronouns (e.g., he, his) have been prominent in Supreme Court decisions. In *Recuerdo v. People*, for instance, the accused charged with *estafa* for issuing checks that were subsequently dishonoured was evidently female based on the facts narrated. When analysing the case, however, the Supreme Court reverted to pseudo-generic masculine pronouns to decide the case, to wit, among others:

> Good faith is a defense to a charge of Estafa by postdating a check. This may be manifested by the accused's offering to make arrangements with his creditor as to the manner of payment or, as in the present case, averring that his placing his signature on the questioned checks was purely a result of his gullibility and inadvertence, with the unfortunate result that he himself became a victim of the trickery and manipulations of accused-at-large.

In some remarkable instances, even the Supreme Court's choice of words has been questionable. For example, in the 1993 murder case of *People v. Danque*,[56] when describing the failure of a witness, the wife of the victim, to call for help and assist her husband, the Supreme Court had this to say:

> [S]urvival was and still remains the first law of man. [The witness] has reason to fear for her safety. She belongs to the weaker sex and any effort on her part to help [the victim] would amount to nothing but raw and reckless courage.

Also, in the 1994 case of *People v. Salinas*,[57] the Supreme Court used unnecessary metaphors to describe the crime of attempted rape:

> Partial penile penetration is as serious as full penetration; the rape is deemed consummated in either case. In a manner of speaking, bombardment of the

[52] European Parliament, *Gender-Neutral Language in the European Parliament*, 2015.
[53] B.R. BURLINGAME, *Reaction and Distraction: The Pronoun Problem in Legal Persuasion*, in *Scribes Journal of Legal Writing*, vol. 1, 1990, pp. 87–110.
[54] J. D. FISCHER, *The Supreme Court and Gender Neutral Language: Splitting la Difference*, *op. cit*., p. 220.
[55] J. D. FISCHER, *The Supreme Court and Gender Neutral Language: Splitting la Difference*, *op. cit*., pp. 220–221.
[56] (1993) G. R. No. 107978.
[57] (1994) 302 Phil 305.

> drawbridge is invasion enough even if the troops do not succeed in entering the castle.

One can argue that the gender-based language used by the courts is influenced by the language of statutory laws, something beyond its control and supervision. Even the English version of the 1987 Philippine Constitution, with all its provision on equality and women's rights, repeatedly employs the use of the gender-based terms "man" and "he" to denote all Filipinos. For example, the head of the various constitutional bodies are called "Chairman,"[58] while Art. XVI refers to "officers and men of the regular force of the armed forces."[59] Art. VII, Section 2, states that "[n]o person may be elected President unless he is a natural-born citizen,"[60] even though the President at the time the Constitution was adopted was female. In fact, the pronouns "she" or "her" does not appear anywhere in the Constitution, while "he" and "him" appear 44 times. The preference towards the use of singular nouns which are then followed by the masculine pronoun "he" is evident, even though collective nouns could have been used instead. To illustrate, the section on the rights of persons under custody reads:

> Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.[61]

Without reducing the impact of the right, gender-biased language could have been avoided by the consistent use of collective nouns and the pronoun "they", which is used in some parts of the Constitution but not as often as "he". Thus:

> Persons under investigation for the commission of an offense shall have the right to be informed of their right to remain silent and to have competent and independent counsel preferably of their own choice. If they cannot afford the services of counsel, they must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.[62]

Statutes, which are written in English, equally augment the use of gendered language in Supreme Court decisions, especially for statutes promulgated in the 1900s. For instance, the New Civil Code, which was enacted in 1949, remains to be the chief statute governing civil law in the Philippines. Majority of its provisions remain unaltered up to this date, carrying over the gender-based language commonly used during the period. In contracts law, the "diligence of a good father" remains to be the benchmark when analysing ordinary care or diligence;[63] the "commerce of men" in evaluating propriety of an object.[64] Masculine pronouns are also used predominantly in the New Civil Code similar to the 1930 Revised Penal Code although the latter significantly uses the gender-neutral noun "person" in its provisions. Questionably, the Revised Penal Code defines adultery as the sexual intercourse of a married woman with "a man not her husband" but in concubinage, the term "mistress" is used instead of "a woman not his wife".[65]

[58] PHIL. CONST. Art. IX, par. 3.
[59] PHIL. CONST. Art. XVI, par. 5(6).
[60] PHIL. CONST. Art. VII, par. 2.
[61] PHIL. CONST. Art. III, par. 12(1).
[62] The use of plural nouns followed by the gender-neutral pronouns is not distinct in the Constitution. Some provisions employ them. See, e.g., PHIL. CONST. Art. III, par. 12(1), which reads "[a]ll persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies."
[63] R. A. No. 386, Art. 1163.
[64] R. A. No. 386, Art. 1347.
[65] Act No. 3815, Arts. 333-334.

More recent statutes have significantly deviated from the use of gender-based language. In the Anti-Terrorism Act of 2020, "he/she" and "his/her" are predominantly employed.[66] The Foundling Recognition and Protection Act exclusively uses gender-neutral nouns such as "person" and "parent" and avoided the use of gendered pronouns. However, it may be argued that the use of gender-neutral language has been inconsistent so far. The Social Security Act of 2018 intermingles the use of gender-based and gender-neutral pronouns, with some provisions using "he or she"[67] although the masculine pronouns "he" and "his" remain predominant throughout.[68] The 2013 amendments to the Insurance Code and the Revised Corporation Code of 2019 fare even worse, with the gender-neutral "he or she" only used once while masculine pronouns were used regularly; the use of masculine nouns like "prudent man" in the former[69] and "chairman" in the latter.[70] A study of the 1997 Tax Code revealed more than one third of its provisions used gendered language.[71] Even after its amendment in 2017, the gendered language remained.[72]

But then, the use of gendered language in statues cannot be used as a scapegoat to justify their use in court processes and documents. The Philippine legal system has both civil law and common law traditions, with the degree of influence varying depending on the area of law.[73] The doctrine of precedent or *stare decisis* is so engrained in the legal system that it is not uncommon for lawyers to rely heavily on case law instead of statutory law when submitting documents to the courts. Thus, while statutory law may have some influence in the language used by and in the courts, the Supreme Court has equal opportunity to shape the language of the law in the Philippines – which it has attempted to do in the past years. For example, courts have always utilized the "*barrio* lass" or "Maria Clara"[74] doctrine in rape cases. The doctrine presumes and describes Filipino women as demure and reserved and incapable of "concoct[ing] a story of defloration".[75] The doctrine has been criticized for its dependence on stereotypes and idealizing the victims of rape. The Supreme Court, however, has started to deviate from over-reliance on the "Maria Clara" doctrine, calling for the need to weed out gender bias and cultural misconceptions in assessing testimonies of rape victims.[76] In *People v. Vibar*,[77] for instance, the analysis was instead focused on determining whether the victim's testimony was "straightforward and categorical". The Supreme Court has also recently amended majority of the Rules of Court to accommodate gender neutrality. Several portions of the Rules, however, are still unamended and the use of gendered language (use of masculine pronouns; use of unnecessary gender-based identifier, e.g., executrix, administratrix) still remains.

The most recent of these attempts to adopt a more gender-neutral language in court processes and documents is the issuance of the Guidelines on the Use of Gender Fair Language in the Judiciary and Gender-Fair Courtroom Etiquette.[78]

---

[66] R. A. No. 11479, 18th Cong. (1st sess., 2019), *e.g.*, pars. 12, 15, 17, 19–20, although in three sections, the masculine pronoun "his" was used.
[67] R. A. No. 11199, 17th Cong. (3rd sess., 2018), *e.g.*, par. 3.
[68] R. A. No. 11199, 17th Cong. (3rd sess., 2018), *e.g.*, pars. 6, 9, 11–14.
[69] R. A. No. 10607, 15th Cong. (3rd sess., 2012), par. 141.
[70] R. A. No. 11232, 17th Cong. (3rd sess., 2018), par. 53.
[71] J. P. TIBUBOS, *Gender Bias in the National Internal Revenue Code of 1997*, in *NTRC Tax Research Journal*, vol. XXVII.3, 2015, pp. 1–16.
[72] R. A. No. 10963, 17th Cong. (2nd sess., 2017).
[73] S. T. CARLOTA, *The three most important features of the Philippine legal system that others should understand*, paper presented at the Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World, Milan, Italy (2010, May 20–22).
[74] Maria Clara is a character in the novel Noli Me Tangere (Touch Me Not) of the Philippine National Hero Jose Rizal and has been perceived as the embodiment of the "ideal" Filipino woman. See C. S. HAU, *The Afterlives of María Clara*, in *Humanities Diliman*, vol. 18, iss. 1, 2021, pp. 118–161.
[75] People v. Fenderico, (2003) G. R. No. 146956.
[76] People v. Amarela, (2018) G. R. No. 225642–43.
[77] (2018) G. R. No. 215790.
[78] (2022) A. M. 21-11-25-SC.

4. The Supreme Court Guidelines on the use of gender-fair language

Taking off from the passage of the Philippine Safe Spaces Act in 2018,[79] the Supreme Court Committee on Gender Responsiveness in the Judiciary proposed the drafting of specific rules on the use of gender-neutral language in court documents and proceedings. On 15 February 2022, the *Guidelines* were officially released by the Supreme Court. On the premise that "courts cannot and should not perpetuate gender stereotypes, which rest on unfounded generalizations regarding the characteristics and roles of binary and non-binary genders", the *Guidelines* emphasized the "need to recognize the importance of transforming language from traditional usage to a more liberating one, that which is gender-sensitive".[80] The *Guidelines* provided five general parameters to achieve this purpose.

First, language that excludes or renders invisible persons of different gender or sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) must be eliminated. This includes the use of generic masculine nouns and pronouns and replacing them with gender-neutral mass nouns and pronouns or by including feminine nouns and pronouns in the statement through pairing. Masculinization of professions, occupations, and societal roles was also criticized (e.g., "chairman", "businessman"). Similarly, the use of the term "man" to subsume all humanity (e.g., "mankind") was especially scrutinized, with the *Guidelines* opting for more general (e.g., "humanity") or inclusive terms (e.g., "men and women"). Take for instance, the United States Declaration of Independence as paraphrased in *Estrada v. Escritor*:[81]

> It was difficult to justify inequality in religious treatment by a new nation that severed its political bonds with the English crown which violated the self-evident truth that all men are created equal.

The last phrase, according to the *Guidelines*, should instead be written as "all men and women are created equal".

Second, the *Guidelines* excludes language that trivializes or diminishes the stature of persons of another gender or with different SOGIESC. This includes rejecting diminutive feminine suffixes (e.g., -ess, -ette, -trix, -ienne), sex-linked modifiers (e.g., "lady doctor"), gender-linked modifiers (e.g., "gay entertainer, "lesbian lover"), and outdated honorifics and forms of address (e.g., "Dra." for female doctors, "Mrs." when the marital status of a woman is irrelevant)

Third, language that disparages or marginalizes persons of another gender or with different SOGIESC must be avoided. Examples noted in the *Guidelines* are the improper words used in *People v. Acob*[82] to describe a female witness:

> It is obvious that [the female witness'] curiosity and inquisitiveness as to what was happening […] overcame the natural timidity of the woman.

Instead, the *Guidelines* prescribe the use non-oppressive and modern terms (e.g., "unmarried" instead of "spinster", "woman" instead of unnecessary metaphors such as "person of weaker sex"). Words and phrases which perpetrate gender stereotypes are to be avoided, especially those that unjustly ascribe a characteristic or occupation as only pertaining to a particular sex or demonstrable only by a certain sex (e.g. "sportsmanship", where "fair play" may be used instead; "gentleman's agreement" where simple "verbal agreement" would suffice). There must also be a conscientious use of language and terms which

[79] R. A. No. 11313, 17th Cong. (3rd Sess. 2018).
[80] (2022) A. M. 21-11-25-SC, p. 2.
[81] (2003) A. M. No. P-02-1651.
[82] (1995) G. R. No. L-114382.

recognize the diverse spectrum of SOGIESC. For instance, the phrase "the 'straight' and the 'gays'" used in *Ang Ladlad v. Commission on Elections*[83] should be replaced with "all sexual orientations".

Fourth, any language that fosters "unequal gender relations" is proscribed. This involves words and phrases that lack "parallelism" or statements which unnecessarily call attention to a person's sex. "Parallelism" requires the use of terms pertaining to one gender with the directly corresponding term of the opposite gender. For example, when referring to a married couple, the term "husband and wife" should be used instead of "man and wife". The use of terms which call the attention to a person's sex should also be avoided when the reference thereto is not relevant to the statement.

Finally, when quoting statements that do not comply with the previous parameters, the *Guidelines* recommended paraphrasing the statement instead to avoid gender-based statements used in the original material or adding "sic" right after the direct quotation to point out the error in the use of gendered language.

The *Guidelines* also provided rules on court-room etiquette and against the use of gendered language in trial proceedings, such as addressing all lawyers neutrally as "counsel" or "attorney" instead of the often-used "lady lawyer"; refraining from referring to a litigant's or witness' gender when addressing them, such as "Madam Witness" or "Mister Plaintiff." Remarks that perpetuate gender stereotypes, such as "ladies first" or comments that a lawyer is more organized just because she is a woman, or draw unwanted attention to one's gender, such as calling attention to one's pregnancy, were also proscribed. The *Guidelines* further clarified that the rules do not apply to judges and court personnel alone but to litigants and their counsels as well. Although the *Guidelines* did not have any penal clause, non-observance may be related to violations of the codes of conduct for judges and lawyers, which require them to be aware of diversity in society and differences[84] and to refrain from using language which is abusive, offensive, or otherwise improper.[85]

After its issuance, the *Guidelines* was received positively by stakeholders in the promotion of gender equality in the Philippines. The Philippine Commission on Human Rights described the *Guidelines* as "a concrete step in eliminating gender-based discrimination in the judiciary" and commended the Supreme Court for "endeavor[ing] to become gender responsive and sensitive in language and courtroom etiquette".[86]

5. Supreme Court decisions post-Guidelines

After the *Guidelines* was published by the Supreme Court and until 14 February 2023, there had been more than 200 promulgated decisions published in its website.[87] While all of these decisions are evaluated, the analysis does not attempt to provide a statistical analysis considering the relatively short time frame and small number of cases, especially for newly appointed Justices. Instead, the analysis would focus on specific and apparent use of gender-neutral writing techniques and language under the *Guidelines*. Similar to the parameters used by Professor Rose in her analysis of the opinions of the Supreme Court of the United States, the paper will look at three major factors: "1) the generic use of gender-specific pronouns; 2) the use of gendered nouns to describe an occupation or title that could be occupied by a man or a woman; and 3) the use of gender-neutral techniques, both obvious and subtle, to avoid both 1 and 2."[88] However, unlike Professor Rose's approach, the paper will also look at

[83] (2010) G. R. No. 190582.

[84] Code of Judicial Conduct, Canon 5, pars. 1, 5.

[85] Code of Professional Responsibility, Rules 8.01, 11.03.

[86] Commission on Human Rights, *Statement of CHR Spokesperson, Atty Jacqueline Ann de Guia, lauding the Supreme Court's issuance of guidelines on gender-fair practices in the judiciary* (March 4, 2002) https://chr.gov.ph/statement-of-chr-spokesperson-atty-jacqueline-ann-de-guia-lauding-the-supreme-courts-issuance-of-guidelines-on-gender-fair-practices-in-the-judiciary/

[87] Promulgated decisions which are not yet published are not included in the analysis. *Per curiam* opinions and separate opinions in a case are also excluded.

[88] L. M. ROSE, *The Supreme Court and Gender-Neutral Language*, *op. cit.*, p. 101.

gendered or gender-neutral language that were part of a direct quotation from another source, considering that the *Guidelines* specifically provide standards for how to treat or correct them.

Chief Justice Alexander G. Gesmundo

The 27th Chief Justice, Justice Gesmundo started his law career as a trial attorney in the Office of the Solicitor General. He rose from the ranks to become an Associate Solicitor General before he was appointed as Justice of Sandiganbayan, a special graft court. He served therein for more than ten years prior to his appointment to the Supreme Court in 2017. In 2021, he was appointed Chief Justice.[89]

The Chief Justice frequently used a variety of gender-neutral writing techniques, including the use of paired pronouns (referring to a generic "person",[90] "poseur buyer",[91] "public officer",[92] "accused",[93] "seafarer",[94] "co-owner", "vendee", and "registered owner"[95]) and pluralizing the noun (such as "seafarers"[96]). He also avoided the use of a pronoun by just repeating the noun within the same sentence or paragraph.[97] For example, in *People v. Maglinas*:[98]

> The elements of murder are as follows: (a) that a person was killed; (b) that the accused killed that person; (c) that the killing was attended by any of the qualifying circumstances mentioned in Art. 248 of the RPC; and (d) that the killing is not parricide or infanticide.

The Chief Justice also used gender-neutral titles, such as "police officer"[99] and "Dr.", regardless of gender of the subject.[100] He had, however, used gendered terms, such as "chairman",[101] even when the subject is female, and "prudent man",[102] and masculine pronouns, when referring to a generic "accused",[103] "witness", and "party".[104]

Justice Marvic Mario Victor F. Leonen

Justice Leonen is the only Justice that came from the academe. He became the dean of the University of the Philippines College of Law in 2008 and was the government's chief negotiator with the Moro Islamic Liberation Font. He is presently the longest serving Justice of the Supreme Court, having been appointed in 2012.[105]

Justice Leonen is one of the most consistent users of gender-neutral writing techniques among the Supreme Court Justices. He primarily used two techniques. First is the pluralization of nouns (e.g., employees",[106] "parties",[107] and "applicants"[108]) and pronouns. For example, instead of "best interest of

[89] Chief Justice Alexander G. Gesmundo, Supreme Court, https://sc.judiciary.gov.ph/375/.
[90] People v. Maglinas (2022) G. R. No. 255496.
[91] People v. Taglucop (2022) G. R. No. 243577.
[92] People v. Gelacio (2022) G. R. No. 250951 and 250958.
[93] People v. Maglinas, *op. cit*.
[94] Ledesma v. C. F. Sharp Crew Management, Inc. (2022) G. R. No. 241067.
[95] Valenzuel v. Sps. Pabilani (2022) G. R. No. 241330.
[96] Ledesma v. C. F. Sharp Crew Management, Inc., *op. cit*.
[97] People v. Taglucop, *op. cit*.; People v. Gelacio, *op. cit*.
[98] People v. Maglinas, *op. cit.*
[99] People v. Tagluco, *op. cit.*
[100] Benhur Shipping Corporation v. Riego (2022) G. R. No. 229179; Ledesma v. C. F. Sharp Crew Management, *op. cit.*
[101] People v. Taglucop, *op. cit.*
[102] Valenzuel v. Sps. Pabilani, *op. cit.*
[103] People v. Taglucop, *op. cit*.
[104] Chico v. Ciudadano (2022) G. R. No. 249815.
[105] Justice Marvic Mario Victor F. Leonen, Supreme Court, https://sc.judiciary.gov.ph/367/.
[106] Cabug-Os v. Espina (2022) G. R. No. 228719.
[107] Abines v. Duque III (2022) G. R. No. 235891.
[108] Heirs of Punongbayan v. St. Peter's College, Inc. (2022) G. R. No. 238762.

the child", he preferred the term "best interest of the children".[109] He was also the most regular user of plural pronouns even when the subject is a generic singular noun, such as when referring to a "party",[110] "aggrieved party" or "party aggrieved", [111] "claimant", [112] "accused", [113] "applicant", [114] the "Ombudsman",[115] and the "Secretary of Labor".[116] When faced with quotations that used masculine pronouns, he replaced them with plural pronouns instead (e.g., "[they]", "[them]"), as opposed to the common technique of just adding feminine pronouns(e.g., "[or she]", "[or her]").[117] For example, in *Montero v. Ombudsman*,[118] an administrative case against a town mayor, he changed the quoted case law's use of " his" to "they" even when the subject referred to was "an official or fiduciary officer":

> "Corruption as an element of grave misconduct consists in the act of an official or fiduciary officer who unlawfully and wrongfully uses [their] station or character to [personally] procure some benefit . . . of for another person, contrary to duty and rights of other."
>
> Meanwhile, flagrant disregard of established rules has been characterized as the "propensity to ignore the rules as clearly manifested by [their] actions."

Although not as often, Justice Leonen had used paired pronouns as well, such as when referring to a "person", and added feminine pronouns like "[or her]" when quoting case law to modify the use of masculine language.[119] He also used gender-neutral titles, such as "chair",[120] "police officer",[121] "businessperson",[122] and "administrator".[123] In one case, he changed the term "thoughtless men" which was used in a prior case law to "thoughtless individuals".[124] In a few cases, however, he had used masculine pronouns.[125] In one case, masculine pronoun was used to refer to a generic "public officer" even when the party involved was female.[126]

The second writing technique that Justice Leonen often used is the repeating of nouns instead of using a pronoun.[127] For example, in *International Exchange Bank v. Lee*,[128] he repeated "plaintiff" in the same sentence:

> A demurrer to evidence is governed by Rule 33, Section l of the Rules of Civil Procedure. In filing it, a party questions the sufficiency of the evidence presented

[109] Yap v. Yap (2022) G.R. No. 222259.
[110] Montero v. Ombudsman (2022) G. R. No. 239827; Chingkoe v. Sandiganbayan (2022) G. R. No. 232029-40/G. R. No. 234975-84.
[111] Bases Conversion and Development Authority v. Callangan (2022) G. R. No. 241168.
[112] Fegarido v. Alcantara (2022) G. R. No. 240066.
[113] People v. Dela Concepcion (2022) G. R. No. 251876.
[114] Ho Ching Yi v. Republic (2022) G. R. No. 227600.
[115] Montero v. Ombudsman, *op. cit.*
[116] Asian Institute of Management Faculty Association v. Asian Institute of Management (2022) G. R. No. 197089/G. R. No. 207971.
[117] Chingkoe v. Sandiganbayan, op. cit.; Abines v. Duque III (2022) G. R. No. 235891; Asian Institute of Management Faculty Association v. Asian Institute of Management, op. cit.; Fegarido v. Alcantara, *op. cit*; Light Rail Transit Authority v. Bureau of Internal Revenue (2022) G. R. No. 231238.
[118] Montero v. Ombudsman, *op. cit.*
[119] Heirs of Punongbayan v. St. Peter's College, Inc., *op. cit*.
[120] Anti-Trapo Movement of the Philippines v. Land Transportation Office (2022) G. R. No. 231540.
[121] Pagal v. People (2022) G. R. No. 251894.
[122] Sio v. People (2022) G. R. No. 224935.
[123] Heirs of Punongbayan v. St. Peter's College, Inc., *op. cit*.
[124] Montero v. Ombudsman, *op. cit*.
[125] Caballero v. Vikings Commissary (2022) G. R. No. 238859; Bases Conversion and Development Authority v. Callangan, *op. cit.*
[126] Lluch-Cruz v. Ong (2022) G. R. No. 219986-87.
[127] Pagal v. People, *op. cit.*; Amoroso v. Vantage Drilling International (2022) G. R. No. 238477.
[128] (2022) G. R. No. 243163.

> by the plaintiff on the ground that the plaintiff failed to show a right to the relief it asks for.

While in *Heirs of Punongbayan v. St. Peter's College*,[129] the word "applicant" was used several times in the same paragraph:

> The Rules of Civil Procedure, prior to its amendment, require that motions affecting the rights of adverse parties shall be in the form of a written motion and set for hearing by the applicant. Courts shall not act upon these motions unless the applicant presents proof of service of written motion and notice of hearing.

Justice Alfredo Benjamin S. Caguioa

Justice Caguioa was a private lawyer before joining the administration of former President B. Aquino as the Justice Secretary and chief presidential legal counsel and then as a member of the Supreme Court in 2016. He has the longest experience in private practice among the Justices.[130]

When it comes to the use of paired pronouns when referring to the generic "accused" in criminal cases, Justice Caguioa was very consistent.[131] He also added "[or her]" or "[or herself]" to neutralize the use of masculine pronoun in quoted case law;[132] although such technique was inconsistently used in block quotations.[133] Aside from "accused", he also used paired pronouns to refer to a generic "employee",[134] individual",[135] "judge",[136] "registered owner",[137] and "co-owner".[138] He had, however, used the occupation titles "media man" and "watchmen" in two decisions, although the use of non-gendered titles was more common in his decisions.[139]

Notably, Justice Caguioa penned the decision in *Espejon v. Judge Lorredo*,[140] an administrative case which punished a trial court judge who made inappropriate remarks relative to the party's sexual orientation and used the term "homosexual pervert". The decision was crafted in a gender-neutral manner, with Justice Caguioa writing the penultimate part as follows:

> … the Court has already made a recognition of the fact that, through the years, homosexual conduct, and perhaps homosexuals themselves, have borne the brunt of societal disapproval. The Court is cognizant that they have suffered enough marginalization and discrimination within our society. It is not difficult to imagine the reasons behind this censure - religious beliefs, convictions about the preservation of marriage, family, and procreation, even dislike or distrust of members of the LGBTQIA+ community themselves and their perceived lifestyle. Inasmuch, however, that these so-called "generally accepted public morals" have not been convincingly transplanted into the realm of our law, there should be no reason for judges to add to the burdens of members of the LGBTQIA + community through the swift hand of judicial review, or to effectively lend a hand

[129] *Op. cit*.
[130] Justice Alfredo Benjamin S. Caguioa, Supreme Court, https://sc.judiciary.gov.ph/371/.
[131] Villamor v. People (2022) G. R. No. 243811; People v. Montierro (2022) G. R. No. 254564/G. R. No. 254974/A. M. No. 21-07-16-SC/A. M. No. 18-03-16-SC; People v. XXX (2022) G. R. No. 231386; Lorenzo v. Sandiganbayan (2022) G. R. nos. 242506-10/G.R. No. 242590-94.
[132] People v. XXX, *op.cit*.
[133] People v. Montierro, *op.cit*.; Pacuribot v. Sandiganbayan (2022) G. R. No. 247414-18.
[134] Musahamat Workers Labor Union-1-Alu v. Musahamat Farms, Inc. Farm 1 (2022) G. R. No. 240184.
[135] Spouses Bangug v. Spouses Adolfo (2022) G. R. No. 259061.
[136] Tan v. People (2022) G. R. No. 242866.
[137] Du v. Oritle (2022) G. R. No. 255934.
[138] Spouses Bangug v. Spouses Adolfo (2022) G. R. No. 259061.
[139] Villamor v. People, *op. cit*.; Musahamat Workers Labor Union-1-Alu v. Musahamat Farms, Inc. Farm 1, *op.cit.*
[140] (2022) A. M. No. MTJ-22-007.

> in perpetuating the discrimination they face, whether that effort is self-evident or thinly veiled under claims of religious beliefs or freedom of expression.

Justice Ramon Paul Hernando

Justice Hernando is one of the Justices of the Supreme Court who spent their entire career in government service. He worked in the senate under Senator Paras, in the judiciary under then Justice Regalado, and then in the executive department as a prosecutor. He re-joined the judiciary as a trial court judge and then a Justice of the appellate court before joining the Supreme Court in 2018.[141]

Justice Hernando's writing style showed willingness, if not readiness, for the *Guidelines*. Although he still used and quoted excerpts which used masculine pronouns, paired pronouns were likewise used to refer to a generic "employee" [142] "employer", [143] "seafarer", [144] "party", [145] and "plaintiff". [146] Meanwhile, he exclusively used paired pronouns when referring to a generic "violator", "public officer",[147] "entrustor",[148] "holder", "purchaser", "purchaser in good faith", "buyer in bad faith",[149] "co-owner",[150] and "local chief executive".[151] On the other end, only masculine pronouns were used to refer to a generic "person",[152] "offender,"[153] "defendant",[154] "seller",[155] "donor",[156] "spouse",[157] worker", [158] "third party possessor",[159] and "building official".[160] Plural nouns and pronouns were also used several times, referring to "parties", "plaintiffs",[161] "beneficiaries",[162] "purchasers",[163] and "litigants".[164]

[141] Justice Ramon Paul L. Hernando, Supreme Court, https://sc.judiciary.gov.ph/379/.
[142] Cornworld Breeding Systems Corporation v. Court of Appeals (2022) G.R. No. 204075, cf. use of masculine pronouns in Colegio San Agustin-Bacolod v. Montaño (2022) G.R. no. 212333; Systems and Plan Integrator and Development Corporation v. Ballesteros (2022) G. R. No. 217119.
[143] G & S Transport Corporation v. Medina (2022) G.R. No. 243768.
[144] Career Philippines Shipmanagement Inc. v. Garcia (2022) G. R. No. 230352, cf. use of masculine pronouns in Philippine Transmarine Carriers, Inc. v. Tena-E (2022) G. R. No. 234365; C. F. Sharp Crew Management, Inc. v. Daganato (2022) G. R. No. 243399; Marlow Navigation Phils. v. Heirs of Beato (2022) G. R. No. 233897.
[145] Cabilao v. Tampan (2022) G. R. No. 209702; Chan v. People (2022) G. R. No. 238304, cf. use of masculine pronouns in Gacad v. Corpuz (2022) G. R. No. 216107; Ante v. University of the Philippines Student Disciplinary Tribunal (2022) G. R. No. 227911.
[146] Heirs of Marquez v. Heirs of Hernandez (2022) G. R. No. 236826, cf. use of masculine pronoun in Palajos v. Abad (2022) G. R. No. 205832.
[147] Chan v. People, *op. cit.*
[148] Chua v. Secretary of Justice (2022) G. R. No. 214960.
[149] Heirs of Gonzales v. Spouses Basas (2022) G. R. No. 206847.
[150] Heirs of Marquez v. Heirs of Hernandez (2022) G. R. No. 236826; Reyes v. Sps. Garcia (2022) G. R. No. 225159.
[151] Gatchalian v. Urrutia (2022) G. R. No. 223595.
[152] Chan v. People, *op. cit*.; People v. Enojo (2022) G. R. No. 252258.
[153] People v. Mondejar (2022) G. R. No. 245931-32.
[154] Technology Resource Center v. Heirs of Alvarez (2022) G. R. No. 214410; Aljem's Credit Investors Corporation v. Spouses Bautista (2022) G. R. No. 215175.
[155] Heirs of Gonzales v. Spouses Basas, *op. cit.*
[156] Estate of Rodriguez v. Republic (2022) G. R. No. 214590.
[157] Carullo-Padua v. Padua (2022) G. R. No. 208258.
[158] Reyes v. Rural Bank of San Rafael (Bulacan) Inc. (2022) G. R. No. 230597.
[159] Philippine National Bank v. Fontanoza (2022) G. R. No. 213673.
[160] Bernardez v. The City Government of Baguio (2022) G. R. No. 197559.
[161] Villafuerte v. Securities and Exchange Commission (2022) G. R. No. 208379; Boongaling v. Banco San Juan (2022) G. R. No. 214259.
[162] Heirs of De Lara v. Rural Bank of Jaen, Inc. (2022) G. R. No. 212012.
[163] Heirs of Gonzales v. Spouses Basas, *op. cit.*
[164] Ante v. University of the Philippines Student Disciplinary Tribunal, *op. cit*.

Justice Hernando also regularly used the technique of repeating the noun or using alternative nouns in the same sentence or paragraph to avoid the use of pronouns,[165] such as "employee",[166] "plaintiff",[167] "offender"[168] "accused",[169] and "seafarer".[170] In *Heirs of Eñano v. San Pedro Cineplex Properties*,[171] for example:

> We uphold the well-entrenched principle that every co-owner may institute a suit to protect the rights over the co-owned property for the benefit of all other co-owners without the latter being impleaded as co-plaintiffs in the case. Yet when a co-owner repudiates the co-ownership and claims one's rights over the co-owned property without regard to the co-ownership, the need to implead the other co-owners to the suit becomes significant.

As to the use of non-gendered title, Justice Hernando used "Dr." regardless of gender,[172] "seafarer",[173] and "police officers".[174] He had, however, used the terms "housewife"[175] instead of homemaker; "reasonably prudent man"[176] instead of person. In two estate cases involving female executors, he used executor in one[177] and executrix in the other.[178]

Justice Amy C. Lazaro-Javier

Justice Lazaro-Javier, one of the only two female Supreme Court justices, served for more than twenty years in the Office of the Solicitor General before her appointment to the Court of Appeals and then to the Supreme Court in 2019. Holding a degree in education, she also taught in various schools in the country.[179]

Justice Lazaro-Javier headed the committee which drafted the *Guidelines*, so it is not surprising that her decisions were predominantly gender-neutral. She was fairly consistent with the use of generic titles and occupations (e.g., "police officer",[180] "doctor",[181] "seafarer",[182] and "chairperson"[183]) and paired and plural pronouns (when referring to a generic "accused",[184] "buyer", "seller",[185] "employer",[186] and "nuisance candidate"[187]). She also employed the technique of repeating a noun within the same

[165] Chua v. Secretary of Justice, *op. cit*.
[166] Colegio San Agustin-Bacolod v. Montaño, *op. cit.*
[167] Palajos v. Abad, *op. cit.*
[168] People v. Enojo, *op. cit.*
[169] People v. Liwanag (2022) G. R. No. 232245.
[170] Career Philippines Shipmanagement Inc. v. Garcia, *op. cit*.
[171] Heirs of Eñano v. San Pedro Cineplex Properties, Inc. (2022) G. R. No. 236619.
[172] Colegio San Agustin-Bacolod v. Montaño, *op. cit*.; Pugoy-Solidum v. Republic (2022) G. R. No. 213954
[173] Paglinawan v. DOHLE Philman Agency, Inc. (2022) G. R. No. 230735; Career Philippines Shipmanagement Inc. v. Garcia, *op. cit*.
[174] CICL, XXX v. People (2022) G. R. No. 230964.
[175] People v. Liwanag, *op. cit.*
[176] Maitim v. Aguila (2022) G. R. No. 218344.
[177] Brual v. Contreras (2022) G. R. No. 205451.
[178] Mega Fishing Corporation v. Estate of Gonzales (2022) G. R. No. 214781.
[179] Justice Amy C. Lazaro-Javier, Supreme Court, https://sc.judiciary.gov.ph/2014/.
[180] Garma v. People (2022) G. R. No. 248317; Ferrer v. People (2022) G. R. No. 223042/G.R. No. 223769.
[181] Celestino v. Belchem Philippines, Inc. (2022) G. R. No. 246929; People v. BBB (2022) G. R. No. 252507.
[182] Celestino v. Belchem Philippines, Inc., *op. cit*.
[183] People v. Crisologo (2022) G. R. No. 253327. Even if under the statutory basis, "chairman" was used.
[184] Ferrer v. People, *op cit*.
[185] Spouses Tan v. Vallejo (2022) A. C. No. 11219; Dala v. Auticio (2022) G. R. No. 205672.
[186] Agapito v. Aeroplus Multi-Services, Inc. (2022) G. R. No. 248304.
[187] Marquez v. Commission on Elections (2022) G. R. No. 258435.

sentence.[188] For example, in *Garma v. People*, [189] a criminal case for grave threats against a male person, she spoke generally and used plural pronoun or repeated the noun:

> The mens rea is that the accused intends that the recipient of their words to feel intimidated by their words or that the accused intended the words to be taken seriously.
>
> Where doubt exists that hinges on the guilt or innocence of the accused, the Court is compelled to acquit and uphold the constitutional presumption of innocence in favor of the accused.

Justice Lazaro-Javier also neutralized legal terms which usually carry masculine connotations. In the same case of *Garma*, she used "reasonable person" instead of "reasonable man"; in *People v. Crisologo*,[190] she changed "thoughtless man" to "thoughtless person".

Sporadically, Justice Lazaro Javier used masculine pronouns (referring to a generic "employee"[191] and "complainant"[192]) and failed to correct gendered words in block quoted materials.[193] In one case, she also used the term "GRO" to refer to a sex worker, a term that could be argued as outdated and derogatory, considering that she used "dancer" in most parts of the decision.[194]

Justice Henri Jean Paul B. Inting

Justice Inting has worked in executive (Bureau of Lands, National Housing Authority) and judicial departments (staff assistant of an appellant court judge) before his appointment as a trial court judge in 1998. He is a career judge, having served as a trial court judge in the first and second level courts, then as a Justice in the appellate court before his appointment to the highest court in 2019.[195]

Generally, Justice Inting's decisions are in consonance with the *Guidelines*. For example, when enumerating elements of a crime or an administrative offense, he would simply repeat the term "accused",[196] "respondent"[197] or "public officer"[198] in every elements instead of using pronouns, except for very few circumstances where masculine pronouns were used.[199] But when referring to the "victim" or the "offended party", the result is a mixed bag – with some decisions using masculine pronouns[200] while others used paired pronouns.[201] When the elements are directly quoted from previous case law, he also added "[or her]" when only masculine pronouns were used in the quoted case.[202] Even outside criminal cases, adding pronoun to neutralize quoted rules was a common technique used by Justice Inting,[203] although block quoted excerpts were sometimes missed.[204]

---

[188] People v. BBB, *op. cit*.
[189] *Op. cit.*
[190] *Op. cit.*
[191] Agapito v. Aeroplus Milti-Services, Inc., *op. cit.*
[192] Marquez v. Commission on Elections, *op. cit.*
[193] Ta-Ala v. People (2022) G. R. No. 254800.
[194] Ferrer v. People (2022) G. R. No. 223042/G. R. No. 223769.
[195] Justice Henri Jean Paul B. Inting, Supreme Court, https://sc.judiciary.gov.ph/3969/.
[196] People v. Wu Jian Cai (2022) G. R. No. 253186; People v. Conde (2022) G. R. No. 254251; Cañaveras v. Gamboa-Delos Santos (2022) G. R. No. 241348.
[197] Chen v. Field Investigation Bureau (2022) G. R. No. 247916.
[198] Soriano v. People (2022) G. R. No. 238282; Chen v. Field Investigation Bureau (2022) G. R. No. 247916; People v. Adana (2022) G. R. No. 250445.
[199] People v. Ciudadano (2022) G. R. No. 248182; People v. Resurreccion (2022) G. R. No. 248456.
[200] People v. Angeles (2022) G. R. No. 254747.
[201] Gumawid v. People (2022) G. R. No. 248311; People v. Resurreccion, *op. cit.*
[202] People v. Adana, *op. cit*.; People v. Conde (2022) G. R. No. 254251.
[203] Carandang v. Ramirez, Jr. (2022) A. C. No. 13343.
[204] Philippine National Bank v. Sps. Caguimbal (2022) G. R. No. 248821; Navarette v. Ventis Maritime Corporation (2022) G. R. No. 246871.

In labor cases, Justice Inting often used paired pronouns like "he/she" to refer to an "employee" or simply pluralized the term,[205] with masculine pronoun only used once in the several labor decisions that he penned.[206] For the employer, on the other hand, the pronoun "it" was commonly used.[207] In annulment of marriage case, he used terms that comply with the *Guidelines*, such as "spouses", "husband and wife",[208] and "married man and woman"[209] instead of "man and wife"; "Filipino citizen"[210] instead of Filipina. He also used paired pronouns to refer to a "spouse" or a "party" in the case.[211]

Justice Inting also used a lot of paired pronouns, which were, for example, used to refer to a "lawyer"[212] and a "seafarer".[213] Generic titles were commonly used as well, even when referring to a woman, such as "Dr.",[214] "manager",[215] and "chairperson".[216] On the other end of the spectrum, some gendered terms Justice Inting used include: "warehouseman",[217] "manning agency",[218] "waitress",[219] and "administratrix/executrix."[220]

Justice Rodil V. Zalameda

Justice Zalameda started his career as a clerk in a trial court before engaging in private practice and then entering the prosecutor service. After more than a decade in the service, he joined the judiciary as a Justice of the Court of Appeals and then a member of the Supreme Court in 2019.[221]

Justice Zalameda used masculine pronouns in doctrinal statements, such as when referring to an "accused", "person",[222] "landowner",[223] "corporate officer", and "party".[224] In one case, he used the title "Mr." even if the civil status of the party is relevant.[225] He also used words with "man" to refer to a generic occupation or to subsume humanity, such as "chairman", "workmen",[226] and "mankind".[227] In *Buenafe v. Commission on Elections*,[228] for example, citing an earlier case on the definition of moral turpitude, he wrote:

> We cited U.S. cases defining moral turpitude to pertain to an act of baseness, vileness, or depravity in the private and social duties that a man owes his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man or conduct contrary to justice, honesty, modesty, or good morals.

[205] Cambil v. Kabalikat Para Maunlad na Buhay, Inc. (2022) G. R. No. 245938; Adstratworld Holdings v. Magallones (2022) G. R. No. 233679.
[206] Guinto v. Sto. Niño Lang-Zeny Consignee (2022) G. R. No. 250987.
[207] Simon v. The Results Companies (2022) G. R. No. 249351-52.
[208] Egmalis-Ke-Eg v. Republic (2022) G. R. No. 249178.
[209] Galit-Inoy v. Inoy (2022) A. M. No. P-22-051.
[210] Republic v. Bayog-Saito (2022) G. R. No. 247297.
[211] Baldovino-Torres v. Torres (2022) G. R. No. 248675; Republic v. Bayog-Saito, *op. cit.*
[212] Heirs of Spouses Reyes v. Brillantes (2022) A. C. No. 9594.
[213] Navarette v. Ventis Maritime Corporation, *op. cit.*
[214] Alberto v. Alberto (2022) G. R. No. 236827.
[215] Guinto v. Sto. Niño Lang-Zeny Consignee, *op. cit.*
[216] Fua, Jr. v. People (2022) G. R. No. 237815.
[217] Guinto v. Sto. Niño Lang-Zeny Consignee, *op. cit.*
[218] Navarette v. Ventis Maritime Corporation, *op. cit.*
[219] Egmalis-Ke-Eg v. Republic, *op. cit.*
[220] Tirol v. Tayengco-Lopingco (2022) G. R. No. 211017.
[221] Justice Rodil V. Zalameda, Supreme Court, https://sc.judiciary.gov.ph/5650/.
[222] People v. Arnado (2022) G. R. No. 250100-02.
[223] Department of Agrarian Reform v. Itliong (2022) G. R. No. 235086.
[224] Fernandez v. People (2022) G. R. No. 249606.
[225] IEMOP v. Energy Regulatory Commission (2022) G. R. No. 254440.
[226] Oceanmarine Resources Corporation v. Nedic (2022) G. R. No. 236263.
[227] Maestrado v. People (2022) G. R. No. 253629.
[228] Buenafe v. Commission on Elections (2022) G. R. No. 260374/G.R. No. 260426.

However, albeit still inconsistent, Justice Zalameda's decisions showed signs of compliance with the *Guidelines*. In some cases, he avoided gendered words by pluralizing the noun (e.g., "government officials", "officers",[229] "police authorities"[230], and "landowners"[231]), using paired pronouns (referring to a "president", "candidate", "any person",[232] "accused", "person under investigation",[233] and "Filipino"[234]) or repeating the noun instead of using a singular pronoun (e.g., "person" and then followed by "said person"[235]). In the same case where he used the term "workmen", the generic "worker" was also used. In *Department of Agrarian Reform v. Itliong*,[236] he used paired pronouns to refer to a "child" and even corrected a direct quotation from a previous case to include a feminine pronoun.[237] In *Heirs of Aniolina v. Bravante*,[238] he changed the wording of a previous rule which used the gendered "men" and neutralized it as follows:

> Necessitous [individuals] are not, truly speaking, free [persons]; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.

Justice Mario V. Lopez

Justice Lopez, the only Justice who had a stint in the Office of the Ombudsman, served as a Court of Appeals Justice before his appointment to the Supreme Court in 2019. He also served as professor and lecturer in various law schools.[239]

As the known leading Justice in criminal law, Justice Lopez's decisions in criminal cases were generally conscious with the use of gendered language. When referring to the "accused", he often used plural pronouns[240] or avoided the use of pronoun by simply repeating "accused", especially when enumerating elements of a particular crime or concept;[241] although in two cases he exclusively used masculine pronouns to refer to a generic "offender"[242] and "accused".[243] Meanwhile, paired pronouns were used to refer to a generic "private complainant".[244] He was even more consistent in family law cases, using generic terms such as "husband and wife"[245] and paired pronouns when referring to a "spouse";[246] and in labor law cases, where non-gendered terms like "seafarer" and "mess person" were used together with paired pronouns or were simply repeated within the same sentence or paragraph.[247]

---

[229] Development Bank of the Philippines v. Commission on Audit (2022) G. R. No. 210965, 217623; Abrigo v. Commission on Audit (2022) G. R. No. 253117.
[230] People v. Esperidion (2022) G. R. No. 239480.
[231] Department of Agrarian Reform v. Itliong, *op. cit.*
[232] Buenafe v. Commission on Elections, *op. cit.*
[233] People v. Esperidion, *op. cit.*
[234] Basa-Egami v. Bersales (2022) G. R. No. 249410.
[235] Mendoza v. People (2022) G. R. No. 248350.
[236] Department of Agrarian Reform v. Itliong, *op. cit.*
[237] See also, Oceanmarine Resources Corporation v. Nedic, *op. cit.*
[238] Heirs of Aniolina v. Bravante (2022) G. R. No. 244422.
[239] Justice Mario v. Lopez, Supreme Court, https://sc.judiciary.gov.ph/9145/.
[240] Abuyo v. People (2022) G. R. No. 250495; Turalba v. People (2022) G. R. No. 216453
[241] Austria v. AAA (2022) G. R. No. 205275.
[242] People v. Begino (2022) G. R. No. 251150.
[243] Turalba v. People, *op. cit.*
[244] Austria v. AAA, *op. cit*.
[245] Alexander v. Spouses Escalona (2022) G. R. No. 256141.
[246] Dedicatoria v. Dedicatoria (2022) G. R. No. 250618; Chingkoe v. Chingkoe (2022) G. R. No. 244076.
[247] Skanfil Maritime Services, Inc. v. Centeno (2022) G. R. No. 227655; Junio v. Pacific Ocean Manning, Inc. (2022) G. R. No. 220657.

Although masculine pronouns were sometime used, such as when referring to a generic "judge"[248] or in block quoted excerpts,[249] gender-neutral writing in Justice Lopez's decisions was still more prominent.

Justice Samuel H. Gaerlan

Justice Gaerlan shortly engaged in private practice before joining the Public Attorney's Office, an agency which provides indigent litigants with free legal assistance. He was then appointed as a first level trial court judge and climbed the career ladder until his appointment to the Supreme Court in 2020.[250]

Justice Gaerlan's decisions were usually gendered, although several gender-neutral writing techniques have been prominently used. He had used masculine pronouns for the following terms, but also used paired pronouns in some instances: "lawyer", [251] "commissioner", [252] "accused", [253] "offender",[254] and "public officer".[255] He also alternated between the use of masculine pronoun, paired pronouns, and pluralized nouns and pronouns when referring to "candidate"[256] and an "employee".[257] For the following terms, however, he was consistent with the use of paired pronouns and avoided masculine pronouns: "person",[258] "applicant",[259] and "declarant".[260] Further, he seldomly changed block quoted excerpts from case law. In one case, he did not transform the term "layman".[261] He also used the following gendered terms in his decisions: "laundrywoman"[262] and "manning agency"[263] In some cases, however, he added "[or her]" to pair with the use of masculine pronoun of the quoted text[264] and used gender-neutral titles, such as "chairperson"[265] and "police officers".[266]

A gender-neutral writing technique that Justice Gaerlan employed often and well is the repetition of the noun or some other non-pronoun alternative (e.g., "one's desire") to avoid the use of pronouns.[267] For example, in *People v. Cerezo*:[268]

> … to constitute bad faith or manifest partiality, it must be proven that the accused acted with malicious motive or fraudulent intent. It is not enough that the accused violated a law, committed mistakes or was negligent in his or her duties. There must be a clear showing that the accused was spurred by a corrupt motive or a deliberate intent to do wrong or to cause damage.

Justice Ricardo R. Rosario

---

[248] Chevron Holdings, Inc. v. Commissioner of Internal Revenue (2022) G. R. No. 215159.
[249] Abella v. Commission on Audit (2022) G. R. No. 238940.
[250] Justice Samuel H. Gaerlan, Supreme Court, https://sc.judiciary.gov.ph/9770/.
[251] Calisay v. Espalana (2022) A. C. No. 10709; Mangayan v. Robielos (2022) A. C. No. 11520.
[252] Republic v. Robiegie Corporation (2022) G. R. No. 260261.
[253] People v. Pimentel (2022) G. R. No. 251587-88; Malones v. Sandiganbayan (2022) G. R. No. 226887-88; People v. Cerezo (2022) G. R. No. 252173.
[254] People v. Pimentel, *op. cit*.; Cheng v. People (20222) G. R. No. 207373.
[255] People v. Pimentel, *op. cit*.; Valderas v. Sulse (2022) G. R. No. 205659.
[256] Amad v. Commission on Elections (2022) G. R. No. 258448.
[257] Hamid v. Gervasio Security and Investigation Agency, Inc. (2022) G. R. No. 230968; Valderas v. Sulse, *op. cit.*
[258] Alarilla v. Lorenzo (2022) G. R. No. 240124.
[259] Republic v. Buenaventura (2022) G. R. No. 198629.
[260] Office of the Ombudsman v. Rodas (2022) G. R. No. 225669.
[261] People v. Ramoy (2022) G.R. No. 212738; Philippine National Bank v. Tad-Y (2022) G. R. No. 214588.
[262] People v. XXX (2022) G. R. No. 218087.
[263] Crown Shipping Services v. Cervas (2022) G. R. No. 214290.
[264] ABS-CBN Corporation v. Magno (2022) G .R. No. 203876; Office of the Ombudsman v. Rodas, *op. cit.*
[265] Torres v. Salamanca-Guzman (2022) G. R. No. 231508; People v. Pimentel, *op. cit*.
[266] Valderas v. Sulse, *op. cit.*
[267] Hamid v. Gervasio Security and Investigation Agency, Inc., op. cit.; Torres v. Salamanca-Guzman, *op. cit*.; Cheng v. People, *op. cit*.; Bollozos v. Heirs of Vda. De Aguilar (2022) G. R. No. 194310.
[268] People v. Cerezo, *op. cit*.

Justice Rosario had significant experience in criminal prosecution, having had prior experience as a legal officer of the National Bureau of Investigation and then as a prosecutor. He is also a career judge, having spent 23 years in the judiciary prior to his appointment to the Supreme Court in 2020.[269]

Like most Justices, Justice Rosario's decisions adopted several gender-neutral writing techniques but was still inconsistent in some respect. In *Gana-Carait v. Commission on Elections*,[270] he used paired pronouns to refer to a "child" and even added "[or her]" to a quoted rule which only uses "his".[271] He also combined these techniques together with others, such as repeating the noun within the same paragraph or using other alternatives to using pronouns:

> It is a status determination process which may result in the recognition of the refugee status of an applicant, thus enabling such person to enjoy and exercise rights and privileges accorded by the 1951 Refugee Convention, the most enduring of which is naturalization.
>
> Meanwhile, the applicant must provide accurate, full, and credible account or proof in support of his or her claim. The applicant must also submit relevant evidence reasonably available.[272]

Justice Rosario also employed gender neutral terms for professions or occupations, such as "fisherfolks"[273] and "director".[274] He has, however, used masculine pronouns (usually to refer to a generic "accused"[275]) or failed to modify their use in quoted rules or case law.[276] In *People v. Asuncion*,[277] for example, he failed to improve on a block quoted rule which used the term "thoughtless men" and used masculine pronoun to refer to a generic "public official".

Justice Jhosep Y. Lopez

Justice Lopez, who was appointed in 2021, is the only Supreme Court Justice with experience in politics. He served as a city councilor of Manila for 11 years before he became a prosecutor. He was then appointed to the Court of Appeals and served for almost a decade before his appointment to the Supreme Court in 2021.[278]

Justice Lopez's language in his decisions was mostly gender neutral. He skirted the use of gendered "man" or "he" by preferring plural nouns (e.g., witnesses, victims[279]) or neutral words (e.g., "persons", "people"[280]), and then followed by a plural pronoun. In *People v. Jumarang*,[281] he even corrected a quoted line from a previous case – changing "prudent man" to "prudent person". When quoting previous statements made by the Supreme Court, he corrected gendered language by adding "[or she]" to "he" or even completely replacing "he" with "[they]".[282] He also did not shy away from using "they" when referring to singular nouns. In *People v. Haiyun*, [283] for example, he made the following corrections in bracket:

---

[269] Justice Ricardo R. Rosario, Supreme Court, https://sc.judiciary.gov.ph/14038/.
[270] Gana-Carait v. Commission on Elections (2022) G. R. No. 257453. See also
[271] See also Republic v. Villao (2022) G. R. No. 216723, on Justice Rosario's use of "[or her]".
[272] Sabir v. Department of Justice-Refugees and Stateless Persons Protection Unit (2002) G. R. No. 249387.
[273] Go v. People (2022) G. R. No. 249563.
[274] Fernandez v. Maaliw (2022) G. R. No. 248852.
[275] People v. Ricketts (2022) G. R. No. 250867.
[276] Sabir v. Department of Justice-Refugees and Stateless Persons Protection Unit (2002) G. R. No. 249387; Popiano v. Gappi (2022) A. C. No. 13118.
[277] People v. Asuncion (2022) G. R. No. 250366 and 250388-98.
[278] Justice Jhosep Y. Lopez, Supreme Court, https://sc.judiciary.gov.ph/16794/.
[279] People v. Boringot (2022) G. R. No. 245544.
[280] Lerias v. Ombudsman (2022) G. R. No. 241776.
[281] (2022) G. R. No. 250306.
[282] Mabalo v. Heirs of Mabuyo (2022) G. R. No. 238468.
[283] People v. Haiyun, (2022) G. R. No. 242889.

> … the law enforcement officer in search of the evidence has a prior justification for an intrusion or is in a position from which [they] can view a particular area … it is immediately apparent to the officer that the item [they observe] may be evidence of a crime, contraband[,] or otherwise subject to seizure.

Justice Lopez also used gender-neutral titles in almost all cases (e.g., police officer[284]), although in one instance, he used the gendered "middleman" instead of non-gendered "mediator" or "intermediary".[285] Few other oversights committed by Justice Lopez, albeit seldom, include the use of masculine pronouns (referring to a generic "challenger" and "citizen"[286]) and not editing excerpts when they are presented in block quotations. Despite these, Justice Lopez remains to be one of the more conscious Justices when it comes to gender-neutrality in writing.

Justice Japar B. Dimaampao

Justice Dimaampao was an appellate court justice for almost two decades, one of the youngest to be appointed to the post, before his appointment to the Supreme Court in 2021. He is known for his expertise in taxation law.[287]

Although a few signs of gender-neutrality were evident in his decisions (e.g., using gender-neutral titles), Justice Dimaampao's style was predominantly gendered. In a case, he referred to the generic "Solicitor General" as "he".[288] Quoted excerpts were also not edited per the *Guidelines*, such as retaining the use of masculine pronouns.[289] In one case, he even quoted a case which reads:

> The difference between the basis of the authority of a de Jure officer and that of a de facto officer […] may be likened to the difference between character and reputation. One is the truth of a man, the other is what is thought of him.[290]

Justice Dimaampao also penned three decisions related to ethical violations of lawyers, where the application of the *Guidelines* varied. In *Pajarillo v. Yanto*[291] and *Dionisio v. Padernal*,[292] masculine pronouns were largely used to refer to a "lawyer" and "notary public", even in quoted materials, with the use of their plural equivalents scattered in few paragraphs. Positively, in *Ang v. Marapao*,[293] although masculine pronouns were still used, pluralization of nouns and pronouns were more copious.[294]

Justice Jose Midas P. Marquez

Justice Marquez is the only "homegrown" Justice, having been in the Supreme Court his entire judicial career. He served for several Justices before his appointment as Deputy Court Administrator. He served as the spokesperson of the Supreme Court at one time.[295] As of writing, the Supreme Court has not published any promulgated decision he had penned post-*Guidelines*.

Justice Antonio T. Kho Jr.

---

[284] People v. Jumarang, *op. cit.*
[285] Maristela v. Mirasol (2022) G. R. No. 241074.
[286] Aguinaldo v. New Bilibid Prison (2022) G. R. No. 221201.
[287] Justice Japar B. Dimaampao, Supreme Court, https://sc.judiciary.gov.ph/20903/.
[288] People of the Philippines v. Court of Tax Appeals (2022) G. R. No. 251270, 251291-301.
[289] Prime Steel Mill Incorporated v. Commissioner of Internal Revenue (2022) G. R. No. 249153
[290] Alamed v. Commission on Audit (2022) G. R. No. 254394.
[291] (2022) A. C. No. 13332.
[292] (2022) A. C. No. 12673.
[293] (2022) A. C. No. 10297.
[294] See also Valera v. People (2022) G. R. No. 209099-100.
[295] Justice Jose Midas P. Marquez, Supreme Court, https://sc.judiciary.gov.ph/22315/.

Justice Kho served as a former undersecretary of the justice department before he was appointed as a commissioner of the Commission on Elections. After the end of his tenure as commissioner, he was appointed as a Justice of the Supreme Court in 2022 a day before the *Guidelines* was issued.[296]

Although only a few decisions penned by Justice Kho were promulgated and published, his decisions have been consistent and compliant with the *Guidelines* so far. He employed of a variety of gender-neutral writing techniques, including the use of plural nouns and paired pronouns,[297] or avoiding the use of pronouns at all. In one case, for example, he used instead the word "latter" to refer to a generic "worker" previously mentioned.[298] He also adopted Filipino terms that the law employs for government offices, avoiding any possible gendering if translated to English. Notably, when quoting prior case law, he has the tendency to refer to cases which are also written in gender-neutral language.[299]

Justice Maria Filomena D. Singh

Justice Singh is the youngest member of the Supreme Court, having been appointed only in mid-2022. Like the majority of the justices, she was a trial court judge and then a Court of Appeals Justice before her appointment to the Supreme Court last year.[300]

Being new to the Supreme Court, Justice Singh has the least number of promulgated decisions. So far, two decisions which she penned show both use and non-use of gender-neutral language. In *Tallado v. Racoma*,[301] referring to the generic "judge", she used male gendered pronouns in most parts, "his or her" in others; although in the latter part of the decision she used the plural "judges" which avoided use of gendered pronouns. In *Department of Energy v. Court of Tax Appeals*,[302] the generic "President" and "Secretary of Finance" were followed by "he", although in some parts, she simply repeated "President" within the same paragraph, which eluded the use of any gendered pronouns; but when she referred to the generic "Chief Executive", the paired pronouns "he or she" and "his or her" were used.

6. Conclusion

The movement towards a more inclusive legal writing in the Philippines is arguably still at its early stage. A relevant prospect that has recently gained traction due to the comments of a lawmaker is the return to the use of Filipino in crafting laws and judicial decisions or, at the very least, have them published both in English and Filipino. As of writing, a bill is pending before the Philippine Senate to require all government issuances and documents, including judicial issuances and proceedings, to be issued and published in both English and Filipino.[303] Although the primary purpose for such use is to ensure inclusivity and equality in access to government and court documents amongst Filipinos, it will have the incidental benefit of reverting to the gender-neutrality of Philippine languages.

Among the three branches of the government, without doubt, the Judiciary has been very proactive in recent years in its endeavour to advocate gender empowerment through language. Just a few months ago, the Supreme Court finished a report on legal feminism in Philippine jurisprudence which looked into how courts respond to gender-responsive laws and remedies, including the awareness of gender biases, gender inequalities, and discrimination among judges.[304] Thus, it need not be passive and wait for a statutory enactment to start embracing the use of Filipino in court proceedings and issuances. In 2007, the Supreme Court actually piloted a project where three trial courts in the province of Bulacan were required to use Filipino in proceedings. Court stenographers were also taught *Ikilat*, a Filipino-

[296] Justice Antonio T. Kho, Jr., Supreme Court, https://sc.judiciary.gov.ph/24736/
[297] Agapito v. Agapito (2022) G. R. No. 255157.
[298] Paiton v. AMSCOR Global Defense (2002) G. R. No. 255656.
[299] Magaluna v. Office of Ombudsman (2022) G. R. No. 214747.
[300] Justice Maria Filomena D. Singh, Supreme Court, https://sc.judiciary.gov.ph/27072/.
[301] (2022) A. M. No. RTJ-22-022.
[302] (2022) G. R No. 260912.
[303] S. B. 228, 19th Cong. (1st Sess. 2022).
[304] SC Reaffirms Commitment Towards "Equal and Inclusive Justice", Supreme Court (November 25, 2022), https://sc.judiciary.gov.ph/31468/.

based stenography. Majority of trial court judges did not view the endeavour enthusiastically and the pilot project failed to fully materialize. In 2010, the Supreme Court finally made the use of Filipino only optional in court proceedings, with only one trial court judge opting to continue the use of Filipino in her court.[305]

Recently, however, the use of Filipino has gained traction in the Court of Appeals.[306] When this attracted the attention of several news outlet, including the Philippine News Agency – the newswire service of the Philippine government,[307] reactions from social media users were positive. Perhaps the Supreme Court can take off from this initiative from the appellate court level and slowly integrate the Filipino language in its decisions and issuances to set an example for trial courts and the legal profession, in general. After all, while an all-embracing change in legal language is not within the realm of the Supreme Court's authority alone, its initiatives and programs are always a welcome step towards gender equality, both in writing and practice.

Bibliography:

ABRAHAMSON S. S., *Toward a Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias*, in *University of Cincinnati Law Review*, vol. 61, No. 4, 1993, pp. 1209–1222.

ASUNCION-LANDE N., *Multilingualism, Politics, and "Filipinism"*, in *Asian Survey*, vol. 11, No. 7, 1971, pp. 677–692.

TINIO M. T. T. P., *The Triumph of Tagalog and the Dominance of the Discourse on English: Language Politics in the Philippines during the American Colonial Period* (May 18, 2009) (Ph.D. dissertation, National University of Singapore).

BURLINGAME B. R., *Reaction and Distraction: The Pronoun Problem in Legal Persuasion*, in *Scribes Journal of Legal Writing*, vol. 1, 1990, pp. 87–110.

CARLOTA S. T., *The Three Most Important Features of the Philippine Legal System That Others Should Understand*, Paper Presented at the Learning From Each Other: Enriching the Law School Curriculum in an Interrelated World, Milan, Italy (2010, May 20–22).

CONSTANTINO R., *The Miseducation of the Filipino*, in *The Journal of Contemporary Asia*, vol. 1, No. 1, 1970, pp. 20–36.

European Parliament, *Gender-Neutral Language in the European Parliament*, 2015.

FISCHER J. D., *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, in *University of San Francisco Law Review*, vol. 43, 2009, pp. 473–508.

FISCHER J. D., *The Supreme Court and Gender Neutral Language: Splitting la Difference*, in *Women's Rights Law Reporter*, vol. 33, No. 2/3, 2012, pp. 218–243.

GASTIL J., *Generic Pronouns and Sexist Language: the Oxymoronic Character of Masculine Generics*, in *Sex Roles*, vol. 23, 1990, pp. 629–643.

HAU C. S., *The Afterlives of María Clara*, in *Humanities Diliman*, vol. 18, iss. 1, 2021, pp. 118–161.

HILL JR., W. B., *A Need for The Use of Nonsexist Language in the Courts*, in *Washington and Lee Law Review*, vol. 49, iss. 2, 1992, pp. 275–278.

[305] I. P. MARTIN, *Expanding the Role of Philippine Languages in the Legal System: The Dim Prospects*, in *Asian Perspectives in the Arts and Humanities*, vol. 2, No. 1, 2012, pp. 1–14.

[306] R. PANALIGAN CA issues decision written in Filipino, Manila Bulletin (September 20, 2022), https://mb.com.ph/2022/09/20/ca-issues-decision-written-in-filipino/.

[307] Philippine News Agency (@pnagovph) TWITTER (September 20, 2022), https://twitter.com/pnagovph/status/1572091515387912192?s=61&t=i8hKLvzfB364Oh4ucBooZg

JACOBS G. M., ZHUO Q. Y., JOCSON P. C., ONG C. W., AUSTRIA M. E. D., SEVIER M., TEO W., *Asian Views on Gender-Inclusive English*, in Asia-Pacific Human Rights Information Center (eds.), *Human rights education in Asian schools*, Osaka, vol. 4, 2001, pp. 129–148.

KABBA, K., *Gender-Neutral Language: An Essential Language Tool to Serve Precision, Clarity and Unambiguity*, in *Commonwealth Law Bulletin*, vol. 37, No. 3, 2011, pp. 427–434.

LAGASSE K. M., *Language, Gender, and Louisiana Law: Removing Gender Bias from the Louisiana Civil Code*, in *Loyola Law Review*, vol. 64, No. 1, 2018, pp. 187–214.

LAUREL R. K., *"Pinoy" English: Language, Imagination, and Philippine Literature*, in *Philippine Studies*, vol. 53, No. 4, 2005, pp. 532–562.

MARTIN I. P., *Expanding the Role of Philippine Languages in the Legal System: The Dim Prospects*, in *Asian Perspectives in the Arts and Humanities*, vol. 2, No. 1, 2012, 1–14.

MOULTON J., ROBINSON G. M., ELIAS C., *Sex Bias in Language Use: "Neutral" Pronouns That Aren't'*, in *American Psychologist*, vol. 33, No. 11, 1978, pp. 1032–1036.

MUCCHI-FAINA A., *Visible or Influential? Language Reforms and Gender (In)Equality*, in *Social Science Information*, vol. 44, No. 1, pp. 189–215.

PAUWELS A., Winter J., *Generic Pronouns and Gender-Inclusive Language Reform in the English of Singapore and the Philippines*, in *Australian Review of Applied Linguistics*, vol. 27, No. 2, 2004, pp. 50–62.

PAZ C. J., *The Nationalization of a Language: Filipino*, in *The Fourth International Symposium on Language and Linguistics*, 1996, pp. 2052–2059.

RAFAEL V. L., *The War of Translation: Colonial Education, American English, and Tagalog Slang in the Philippines*, in *The Journal of Asian Studies*, vol. 74, No. 2, 2015, pp. 283–302.

REDL T., SZUBA A., DE SWART P., FRANK S. L., DE HOOP H., *The Male Bias of A Generically-Intended Masculine Pronoun: Evidence from Eye-Tracking and Sentence Evaluation*, in *Discourse Processes*, vol. 59, No. 10, 2021, pp. 828–845.

ROSE L. M., *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, in *Duke Journal of Gender Law & Policy*, vol. 17, 2010, pp. 81–129.

SMOLICZ J. J., *National Language Policy in the Philippines: A Comparative Study of the Education Status of "Colonial" and Indigenous Languages with Special Reference to Minority Tongues*, in *Southeast Asian Journal of Social Science*, vol. 12, No. 2, 1984, pp. 51–67.

TIBUBOS J. P., *Gender Bias in the National Internal Revenue Code of 1997*, in *NTRC Tax Research Journal*, vol. XXVII.3, 2015, pp. 1–16.

TODD-MANCILLAS W. R., *Masculine Generics = Sexist Language: A Review of Literature and Implications for Speech Communications Professionals*, in *Communications Quarterly*, vol. 29, iss. 2, 1981, pp. 107–115.

TUPAS T. R. F, *Bourdieu, Historical Forgetting, and the Problem of English in the Philippines*, in *Philippine Studies*, vol. 56, No. 1, 2008, pp. 47–67.

YULE E. S., *The English Language in the Philippines*, in *American Speech*, vol. 1, No. 2, 1925, pp. 111–120.

From Good Family Father to Reasonable Person

A Theoretical Discussion of Durability as an Argument in Favour of Gender-inclusive Legislative Language

Vince Liégeois[1]

Abstract: Gender-inclusive language is becoming increasingly important in legislation. In many countries, particularly within the European Union and the Commonwealth, there is a growing tendency for substituting gendered language structures with gender-inclusive ones in legislative texts. However, a gendered, and in particular masculine, language use remains the norm in these legal systems, with many legal scholars even doubting the positive effects attributed to gender-inclusive language. Consequently, it is important that within the fields of linguistics, legal and gender studies the various benefits and challenges of gender-inclusive language are properly weighed out against each other. To this end, this paper aims, on the one hand, to provide a comprehensive overview of (i) the principles and strategies of gender-inclusive language use, and (ii) the extent to which this gender-inclusive language is used in legislation and which benefits/problems have been formulated by previous literature. On the other hand, we consider *durability* as an additional argument in favour of using gender-inclusive language strategies in legislation. Departing from linguistic theory about language norms and the optimisation of specialised communication, we will illustrate how a too conservative language policy in legislation might lead to legislative language becoming an archaic language register. This means that legislative language will grow more and more distant from the language use in other communicative settings, as well as the standard language norm, in which we assume gender-inclusive strategies will keep gaining ground. This archaisation, in turn, might create the possibility that jurists will turn to more hybrid registers for other legal settings and text genres, in particular when less institutionalised settings, spoken communication and communication with lay persons are involved, thus leading to the fragmentation of legal language. Therefore, we will argue that by (i) implementing a sufficient amount of gender-inclusive language in the law and (ii) setting out clear guidelines on which gender-inclusive strategies should be employed, legislative language can become more time-resistant and user-friendly (= durable). Furthermore, we will point out how such durability is expected to have secondary positive effects regarding (a) the endorsement of legislative texts by the public, (b) the learnability of legal language and, by extension, the law, (c) clarity, and (d) the correspondence of various provisions with social reality.

Keywords: Gender-inclusive language, Language change, Language norms, Legislative language, Specialised communication.

Summary*:* 1. Introduction; 2. Gender-inclusive language; 2.1. Principles; 2.2. Strategies; 3. Application to legislative language; 3.1. Language use; 3.1.1. Gender-bias in legislation; 3.1.2. Language change; 3.1.3. Legal provisions; 3.2. Metalinguistic discourse; 3.2.1. Arguments for using gender-inclusive language; 3.2.2. Counter arguments; 4. The durability argument; 4.1. Hypothesis; 4.1.1. Fundamental assumption; 4.1.2. Possible scenarios; 4.2. Theoretical background: language variation; 4.3. The durability scenario; 4.3.1. Effects of gender-inclusive language on durability; 4.3.2. Positive effects of a durable legal language; 4.3.3. Disclaimers; 5. Conclusion and recommendations.

[1] *PhD-scholar Université de Bourgogne & HHU Düsseldorf; Research associate Institute for Philosophical and Social-scientific Education. Vince.Liegeois@u-bourgogne.fr.*

1. *Introduction*

In western society, gender counts as an important topic in public debate. This topic, in turn, comprises many subtopics concerning different aspects of human life. One such aspect is legislation, i.e., the codified body of rules according to which society is organised. Here, gender can be discussed in view of both the *content* and *language* of the law. In the case of the former, issues are raised about to what extent gender should be arranged by law. A well-known issue, in this regard, is decertification, whereby the state should withdraw from registering or assigning a person's sex and gender.[2] Concerning the latter, the language of the law, discussions revolve around the question to what extent legal drafters should make use of *gender-inclusive language*.[3] This gender-inclusive (also gender-neutral) language[4] appeals to the issue that our language embodies an androcentric worldview and that by considering different genders in our formulations or even avoiding gendered structures we can help promote social change and gender equality (cf. Sect. 2.1).

As of 2022, many gender-inclusive structures have been finding their way into legislation. A well-known example is the substitution of *good family father* by *reasonable person* in various civil law systems and European legislation (cf. Sect. 3.1).[5] However, not everyone inside the legal field has been equally supportive of such language structures and many even doubt their desirability. A major issue is that a lot of effort is required from jurists to adopt such gender-inclusive structures and change previous legislation accordingly. Furthermore, it has been argued that the legislator's main focus should be on the content of the law (cf. Sect. 3.2).[6] Consequently, it is important that, within linguistics, legal doctrine and gender studies, the various arguments pro and contra different gender-inclusive drafting strategies are laid out and weighed up against each other. Such reflections can help drafters to better apply such strategies in legislation, which, in turn, can contribute to equal gender representation in this text genre.

In this regard, this study will, on the one hand, reflect on the principles and strategies of gender-inclusive language, how they are employed in legislation and which metalinguistic comments (regarding both benefits and problems) have been formulated on the matter by previous literature. On the other hand, we will consider *durability* as another possible argument in favour of gender-inclusive legislation.[7] Concerning durability, we will depart from linguistic theory on language norms, the nature of specialised language (e.g., legal language) and how such specialised language can be optimised. We thereby hypothesise that by using gender-inclusive strategies, legislative language will remain better in line with the language use of other communicative settings (cf. Sect. 4.1.2), including other legal text genres and legal settings, thus (i) preventing legislative language to become outdated due to gender-related reasons, and (ii) avoiding linguistic discrepancies to arise between different legal

---

[2] Cf. D. COOPER, E. GRABHAM, F. RENZ, *Introduction to the Special Issue on the Future of Legal Gender: Exploring the Feminist Politics of Decertification*, in *Feminists@law*, 10/2, 2020, https://doi.org/10.22024/UniKent/03/fal.937 D. COOPER, R. EMERTON, *Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?* in *Feminists@law*, 10/2, 2020, https://doi.org/10.22024/UniKent/03/fal.938.

[3] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective*, in *Statute Law Review*, 19/2, 1998, pp. 93–112; S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments*, in *Statute Law Review*, 20/1, 1999, pp. 35–65; C. WILLIAMS, *The End of the 'Masculine Rule'? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland*, in *Statute Law Review*, 29/3, pp. 139–153.

[4] Note on the employed terminology: *gender-inclusive language* refers to a particular style that is used, whereas *gender-inclusive language structures/strategies* (e.g., the avoidance of the generic masculine) refer to the constitutive elements of this style.

[5] Cf. W. POSSEMIERS, *De goede huisvader gaat met pensioen*, in *Juristenkrant*, 428, 2021, p. 12; V. LIÉGEOIS, *De 'voorzichtig en redelijk persoon' in het nieuw Burgerlijk Wetboek: Een discourslinguïstische bespreking*, in *Tijdschrift voor Wetgeving*, 23/2, 2022, pp. 77–87.

[6] Cf. H. XANTHAKI, *Gender-inclusive legislative drafting in English: A Matter of Clarity*, in A. FLUCKIGER (ed.), *La rédaction administrative et législative inclusive: la francophonie entre impulsions et résistances*, Bern, 2019, pp. 57-72; H. XANTHAKI, *Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham*, in *Feminists@law*, 10/2, 2020, https://doi.org/10.22024/UniKent/03/fal.952.

[7] When using *gender-inclusive legislation* in this paper, we exclusively refer to the language of legislation.

language registers (cf. Sect. 4.3.1). This durable legislative language, in turn, might have positive effects on (a) the public's endorsement of the law, (b) the learnability of legal language, (c) clarity, and (d) the correspondence of various provisions with social reality (cf. Sect. 4.3.2). Our study thereby counts as an interdisciplinary one, since legal and – additionally – gender theory are taken into account as well.

This contribution is organised in the following manner. First, the underlying principles of gender-inclusive language and main strategies on the matter are laid out in Sect. 2. Thereafter, the use of and attitudes towards gender-inclusive language in legislation will be elaborated upon (Sect. 3). Sect. 4, the centre of our paper, then discusses durability as an additional argument in favour of using such language strategies in legislation. Finally, a conclusion and notes for future research are formulated in Sect. 5.

2. *Gender-inclusive language*

In order to elaborate on the use and perception of gender-inclusive language in legislation (cf. Sect. 3), as well as the possible benefits that it can have for the durability of legislative language (cf. Sect. 4), this section will explain the two main principles underlying gender-inclusive language (Sect. 2.1) and introduce the recurring strategies used by its proponents (Sect. 2.2).

2.1. Principles

When it comes to the question of why society should use gender-inclusive language structures, proponents will often make reference to two principles, which are closely linked to one another. The first principle regards the observation that our language is, in part, shaped according to an *androcentric worldview*.[8] This observation is backed up by empirical data within both linguistics and gender studies, and goes back to the work of Lakoff[9], which is often regarded as the beginning of gender linguistic research. This *linguistic androcentrism* thereby entails two aspects: (i) the differences in the language use of men and women, and (ii), the way in which gender is expressed by different language structures[10]:

(i) The fact that men and women use language differently is the main observation deriving from Lakoff's pioneering work.[11] By contrasting the language use of men and women in the U.S., she came to the conclusion that the latter group was – particularly with regard to spoken language – characterised by the use of a so-called *tentative language*. By this tentative language she meant that women frequently utilised language structures that put them in a weakened position in (professional) conversations.[12] Amidst these structures Lakoff counted, among other, mitigators (*sort of, kind of like*) and inessential qualifiers (*really happy*, *so kind*), which often do not add relevant information to discussions and can express (or are considered to express) insecurity and (too much) emotional involvement. Additionally, she also found that women were often overly polite in

[8] Cf. P. ECKERT, S. MCCONNELL-GINET, *Language and Gender: Historicizing Protest*, Cambridge, 2013, p. 1; M. HELLINER, H. BUßMANN, *Gender across languages: The linguistic representation of women and men*, in M. HELLINER and H. BUßMANN (eds.), *Gender across languages: The linguistic representation of women and men*, vol. 3, Amsterdam, 2003, p. 18; J. ABBOU, F.H. BAIDER, *Gender, Language and the Periphery: Grammatical and social gender from the margins*, Amsterdam, 2016, p. 4, 20.

[9] R. LAKOFF, *Language and Woman's Place*, New York, 1975.

[10] Cf. R. LAKOFF, *Language and Woman's Place*, *op. cit.*, p. 4; A.D. SVENDSEN, *Lakoff and Women's language: A Critical Overview of the Empirical Evidence for Lakoff's Thesis*, in *Leviathan: Interdisciplinary Journal of English*, 3/1, 2019, p. 1, https://doi.org/10.7146/lev.v0i4.112651.

[11] It should be noted that, within gender studies, the claims made by Lakoff have been subject to nuance due to newer, more adequate research on the matter, which (i) utilised more balanced corpora and more statistical data, and (ii) considered women as a more heterogeneous group, in which both social and linguistic variation can be found.

[12] Cf. A.D. SVENDSEN, *Lakoff and Women's Language*, *op. cit.*, 2019, https://doi.org/10.7146/lev.v0i4.112651.

discussions, possibly putting themselves in a "submissive" position with respect to male interlocutors.

(ii) The second aspect – the way in which gender is expressed by different language structures – comprises, in turn, two further subaspects: (a) the absence of female language structures in various communicative contexts and (b) the use of stereotypical – and possibly discriminating – language structures.

(a) The first subaspect regards the fact that, in many communicative contexts, masculine structures are used to refer to women (and non-binary persons) as well. This phenomenon is also known as the *generic masculine*.[13] In extreme cases, a feminine or neutral variant for the language structure in question might not even be available. This was, for instance, the case for the English form of address *sir*, for which for a long time no commonly agreed upon female variant (nowadays *ma'am*) existed.[14]

(b) The second subaspect concerns those structures which impose a certain (negative) role on females, such as the distinction between *miss* (= unmarried woman) and *mrs.* (= married women), which is exclusive for the female gender[15], as well as phraseology that stresses negative aspects of the female gender or even entails normative views regarding women's role in the household.[16]

Both of the aspects discussed above are problematic for a meritocratic society, since they prevent women from actively participating in it.[17] More precisely, the differences in language use (i) make it difficult for women to express their opinions, whereas the use of the generic masculine and stereotypical language (ii) make women feel left out or even discriminated against.[18]

However, linguists and gender scholars believe that both aspects are, in fact, mainly *ontogenetic* features of language and not *phylogenetic* ones.[19] This means that they are social products and thus the consequence of society's dynamics (e.g., upbringing, education, traditions) instead of biologically determined differences between men and women.[20] For instance, many features assigned to women's language by Lakoff, are, independently of a person's sex or gender, typical for informal and spoken settings.[21] Since many American women in the 1970s and the decades before were unemployed, they often found themselves in these settings and possibly utilised elements of these respective *language*

---

[13] Cf. W. MARTYNA, *What does 'He Mean? Use of the Generic Masculine*, in *Journal of Communication*, 28/1, 1978, pp. 131-138, https://doi.org/10.1111/j.1460-2466.1978.tb01576.x; J. SILVEIRA, *Generic masculine words and thinking*, in *Women's Studies International Quarterly*, 3/2-3, 1980, 165–178, https://doi.org/10.1016/S0148-0685(80)92113-2.

[14] Cf. P. ECKERT, S. MCCONNELL-GINET, *Language and Gender*, *op. cit.*, p. 53.

[15] Cf. European Parliament, *Gender-neutral language in the European Parliament*, 2015, p. 8, https://www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf.

[16] Cf. A. BARAN, *Gender in Estonian older Phraseology*, in *Linguo-cultural research on phraseology*, 3, 2015, pp. 315-336; E.G. RUBIO, *Gender Stereotypes in Spanish Phraseology*, in *GÉNEROS – Multidisciplinary Journal of Gender Studies*, 7/3, 2018, pp. 1709–1735, https://doi.org/10.17283/generos.2018.3632.

[17] Cf. A. CURZAN, *Gender shifts in the history of English*, Cambridge, 2009, p. 17; J. ABBOU, F.H. BAIDER, *Gender, Language and the Periphery*, *op. cit.*, p. 16.

[18] Cf. P. ECKERT, S. MCCONNELL-GINET, *Language and Gender*, *op. cit.*, p. 1.

[19] Cf. A. CURZAN, *Gender shifts in the history of English*, *op. cit.*, pp. 24–27; J. ABBOU, F.H. BAIDER, *Gender, Language and the Periphery*, *op. cit.*, p. 4.

[20] Cf. V. JOHN-STEINER, H. MAHN, *Sociocultural approaches to learning and development: A Vygotskian framework*, in *Educational Psychologist*, 31/3–4, pp. 191–206.

[21] Cf. P. KOCH, W. OESTERREICHER, *Gesprochene Sprache in der Romania: Französisch, Italienisch, Spanisch*, Berlin, 2011; P. KOCH, W. OESTERREICHER, *Language of Immediacy—Language of Distance: Orality and Literacy from the Perspective of Language Theory and Linguistic History*, in C. LANGE, B. WEBER and G. WOLF (eds.), *Communicative Spaces: Variation, Contact, and Change*, Frankfurt, 2012, pp. 441–473.

registers[22] in other communicative situations as well. Similarly, the use of the generic masculine and stereotypical language can be traced back to the dominant role men have historically occupied in society.

Linguists and gender scholars argue that, since both aspects can be regarded as ontogenetic features, they can also be subject to positive change. This brings us to the second principle: namely the assumption that a more inclusive language can combat this linguistic androcentrism and thus promote gender equality.[23] Such *gender-inclusive language* – also called *gender-neutral* or *gender-fair language*[24] – directly addresses aspect (ii) by providing functional variants for masculine and/or stereotypical structures. However, it is believed that through eliminating the latter structures, women will feel more at ease to participate in communication, as well as society in general, which causes positive effects with respect to aspect (i) too. This idea, i.e., that language can affect perception and even behavior, is not unique to studies on gender and language, and is widely agreed upon within the cognitive sciences.[25]

2.2. Strategies

The need for such a gender-inclusive language became highlighted by feminists in the 1970s, who – independently from linguistic research on the matter – stood up against the dominantly masculine language in society.[26] Their battle – which was later joined by other activists, scientists and policy makers – has not been without success, particularly in Europe, the U.S. and the Commonwealth. In these countries, we find that more awareness towards gender and language has arisen and that many gendered structures have been substituted by gender-inclusive ones.[27]

Though each language has a different way to express gender grammatically/lexically – meaning some languages entail significantly more gendered structures than others due to the language's grammatical architecture[28] – there are a few gender-inclusive strategies that are used cross-linguistically. Three of these will be discussed here. We will call the first strategy *neutralisation*[29], whereby a gendered structure (e.g., a noun, an adjective, a noun phrase) is substituted by a structure

---

[22] Cf. D. BIBER, S. CONRAD, *Register, Genre, and Style*, Cambridge, 2000; B. SZMRECSANYI, *Register in variationist linguistics*, in *Register Studies*, 1/1, 2019, pp. 76–99.

[23] Cf. A. CURZAN, *Gender shifts in the history of English*, *op. cit*., p. 19: S. SCZESNY, M. FORMANOWICZ, F. MOSER, *Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?* in *Frontiers in Psychology*, 25/7, 2016, https://doi.org/10.3389/fpsyg.2016.00025.

[24] Although these terms are mostly used as synonyms, some scholars associate gender-neutral and gender-inclusive language with different non-gendered strategies. For Xanthaki, for instance, gender-neutral language concerns strategies in which the male and female gender are both made explicit (e.g., *he or she who* […]), whereas gender-inclusive language seeks to cancel gendered structures from the texts (e.g., *a person who* […]). In our framework, both are simply different gender-inclusive language strategies, the former being *symmetricalisation* and the latter being *neutralisation* (cf. Sect. 2.2).

[25] Cf. M. PÜTZ, M.H. VERSPOOR (eds.), *Explorations in Linguistic Relativity*, Amsterdam, 2000; C. BEHME, M. NEEF, (eds.), *Essays on linguistic realism*, Amsterdam, 2018.

[26] Cf. E. BRACCHI, *Langage législatif européen et français selon une orientation genré*e, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, p. 69; F. PROIA, *EU—und bundesdeutsche Gesetzgebungssprache aus Genderperspektive*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, p. 213.

[27] Cf. W. STRUNK, E.B. WHITE, *The Elements of Style*, 4th edition, New York, 2000, p. 60; P. BAKER, *Will Ms ever be as frequent as Mr? A corpus-based comparison of gendered terms across four diachronic corpora of British English*, in *Gender and Language*, 4/1, 2010, pp. 125–149; A. CURZAN, *Gender shifts in the history of English*, *op. cit*., pp. 184–185, 188.

[28] Cf. European Parliament, *Gender-neutral language in the European Parliament*, *op. cit*., pp. 5–6; M.V. BUIATTI, Gender Neutral Legal Language: A Comparative Overview, in *Comparative Law and Language*, 1/2, p. 34.

[29] In some works on gender-inclusive language, *neutralisation* is used to designate the strategy that we have called *symmetricalisation*—cf. S. SCZESNY, M. FORMANOWICZ, F. MOSER, *Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?*, *op. cit*.

which does not entail specific reference to a gender.[30] The use of *him* in (1) is an example of such a gendered structure, since *someone* can also be female or non-binary. Therefore, substituting *him* by the generic pronoun *them*[31] (= neutralisation) can make the sentence more gender-inclusive (2).

(1) Eng.: *If someone comes and asks about me, tell* ***him*** *that I am on leave until the end of next month.*

(2) Eng.: *If someone comes and asks about me, tell* ***them*** *that I am on leave until the end of next month.*

The second strategy can be designated as *symmetricalisation*, which entails that both the male and female structure are used.[32] As such, the pronoun *him* in (1) is substituted by the multiword expression *him or her* (3).

(3) Eng.: *If someone comes and asks about me, tell* ***him or her*** *that I am on leave until the end of next month.*

The sentence in (3) regards what we will call *syntactic symmetricalisation*, meaning that the symmetricalisation happens at the level of the sentence. Yet, there are also languages – like German (4a) and French (4b) – where such symmetricalisation is realised in the word itself, which we will call *morphological symmetricalisation*. These structures are used here since both French and German are – as opposed to English – grammatical gender languages (cf. Sect. 3.1), in which the ending of nouns and adjectives are, like in Italian, gender-sensitive.

(4) a. Grm.: *Liebe Kolleg*innen / Liebe KollegInnen / Liebe Kolleg°innen / Liebe Kolleg-Innen*
b. Fr.: *Cher.e.s collègues / Cher-e-s collègues*
"Dear collegues"

The third and final strategy is that of *feminisation*. With this strategy, masculine structures are changed when the referents of the structure are (mainly) women.[33] Take, for instance, the scenario in which the president of the European Commission would be a woman. Here, one would need to use *la présidente* in French (5a) and *la presidente* – or the less standardised variant *presidentessa* - in Italian (5b), instead of *le président* or *il presidente*. The latter two would then be used exclusively for talking about male persons (6).

(5) a. Fr.: *La présidente Von der Leyen n'était pas d'accord*.
b. It.: *La presidente Von der Leyen non era d'accordo*.

---

[30] Cf. S. CAVAGNOLI, *Linguaggio giuridico europeo e italiano nella prospettiva linguistica di genere*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, p. 147; A. SANDRELLI, *Gender and language in English directives and UK national transportation measures*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 115–116; H. XANTHAKI, *Gender-inclusive legislative drafting in English: A matter of clarity*, cit., pp. 67–69.

[31] It should be noted that *they* and *them* are, however, homonymous pronouns, since they can both be used to refer to each possible gender [MEANING 1], as well as just to people who identify as non-binary [MEANING 2].

[32] S. CAVAGNOLI, *Linguaggio giuridico europeo e italiano nella prospettiva linguistica di genere*, cit., p. 147; F. PROIA, *EU—und bundesdeutsche Gesetzgebungssprache aus Genderperspektive*, *op. cit*., p. 236; A. SANDRELLI, *Gender and language in English directives and UK national transportation measures*, *op. cit*., p. 118.

[33] Cf. C. LIPOVSKI, *Gender-specification and occupational nouns: Has linguistic change occurred in job advertisements since the French feminization reforms?* in *Gender & Language*, 8/4, 2014, pp. 361–392; S. CAVAGNOLI, *Linguaggio giuridico europeo e italiano nella prospettiva linguistica di genere*, cit., pp. 147–148; S. PILON, *Toward a More Gender-Inclusive and Gender-Neutral French Language*, in *The French Review*, 94/2, 2020, p. 193.

"President [f.] Von der Leyen did not agree"

(6) a. Fr.: *Le président Barroso n'était pas d'accord*.
b. It.: *Il presidente Barroso non era d'accordo*.
"President [m.] Barroso did not agree"

Each strategy has, of course, different benefits and problems. Particularly the phenomenon of symmetricalisation has been subject to criticism. Whereas syntactic symmetricalisation causes elongated sentence structures, morphological symmetricalisation leads to non-canonical wordforms, which many language users are negative about. Both forms of symmetricalisation thus come with high processing costs, meaning that the readability of a text diminishes and that spoken discourses become more difficult to follow and produce.[34] This issue is also important when it comes to legislation, due to the already existing critique on the readability of law texts (cf. Sect. 3.1.2). With respect to syntactic symmetricalisation, the sequencing of the two genders has also been debated by activists and gender scholars, since in most structures and languages the masculine (pro)noun precedes the feminine one.[35] Finally, some language structures have arisen in recent years to refer to non-binary persons (e.g., the pronoun *iel* in French). These again cause problems when it comes to syntactic symmetricalisation, since, on the one hand, non-binary people are not included in a multiword expression like *he or she*, whereas, on the other, symmetrical structures including reference to a third gender weigh extra heavy on the processing costs of communication.[36]

3. Application to legislative language

We will now zoom in on legislative language, the language register at the heart of our study. In Sect. 3.1, we will first illustrate to what extent gendered structures are used in legislation and which measures have been taken to obtain more gender-inclusive law texts. In Sect. 3.2., we will then discuss which arguments have been formulated in favour of and against the use of such gender-inclusive language structures in this text genre.

3.1. Language use

Legislative language, as well as legal language in general, is a language register that has been particularly criticised for being gender-biased. Concretely, within legal language we observe an excessive use of masculine structures to refer to other genders, which has also been dubbed the *masculine rule*.[37] Here again, it should be noted that the extent to which gendered structures feature in legislation depends from language to language – and even from legal system to legal system (cf. Sect. 2.2.).[38] Particularly important, in this regard, is the morphological and grammatical system of each language, i.e., the extent to which nouns and adjectives show grammatical gender (= appearing with gendered articles, pronouns or inflection) and gender-neutral pronouns are available. In this regard, the

[34] Cf. A. SANDRELLI, *Gender and language in English directives and UK national transportation measures*, *op. cit.*, p. 118; F. PROIA, *EU—und bundesdeutsche Gesetzgebungssprache aus Genderperspektive*, *op. cit.*, p. 236.

[35] Cf. A. ROSAR, *'Mann und Frau, Damen und Herren, Mutter und Väter': Zur ‚(Ir-)Reversibilität der Geschlechterordnung in Binomialen*, in G. DIEWALD and D. NÜBLING (eds.), *Genus—Sexus—Gender, Berlin*, 2022, p. 267, https://doi.org/10.1515/9783110746396.

[36] Cf. A. SANDRELLI, *Gender and language in English directives and UK national transportation measures*, *op. cit.*, p. 118.

[37] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective*, cit., pp. 93–112; S. PETERSSON, Gender-Neutral Drafting: Recent Commonwealth Developments, cit., pp. 35-65; C. WILLIAMS, *The End of the 'Masculine Rule'?*, cit., pp. 139–153.

[38] A good example for this is the substitution of *goed(e) huisvader* (Eng. Good family father) in Dutch: whereas in the legislation of the Netherlands (a monolingual legal system) this term was substituted by *redelijk persoon* (Eng. reasonable person) in the 1990s, Belgian legislation (a multilingual legal system featuring French legislation as well) kept using *goed(e) huisvader* until the recent recodification of the Civil Code in 2020—cf. W. POSSEMIERS, *De goede huisvader gaat met pensioen*, *op. cit.*, p. 12.

European Parliament[39] makes a distinction between (i) *natural gender languages* (e.g., English and Dutch), where personal nouns are mostly gender-neutral and each gender has its own personal pronouns, (ii) *grammatical gender languages* (e.g., German and Italian), where every noun has grammatical gender and the pronoun/adjective mostly matches the noun's gender, and (iii) *genderless languages* (e.g., Estonian and Hungarian), where there is neither grammatical nor pronominal gender.[40]

Though genderless languages feature less gender-biased structures and grammatical gender languages are particularly prone to such a gender-bias, it should be noted that legislation in each language can undertake steps to be more gender-inclusive.[41] In our discussion of the language use in legislation – for which we first illustrate the gender-bias in legislation through some examples from Belgian law (Sect. 3.1.1) before pointing out some of the linguistic (Sect. 3.1.2) and legal measures taken against it (Sect. 3.1.3) – we will therefore try to take into account these differences between languages. However, the reader should be aware that in the following sections (which also include Sect. 3.2 and 4), our discussion will mostly concern gender and legislation in Europe and the Commonwealth, since previous literature on gender-inclusive legislation has mostly regarded these areas. Therefore, our depiction below – which is, due to the many legal systems/languages involved already generalising in nature – may not be valid for other legal systems which may be more conservative due to a variety of cultural factors.

3.1.1. Gender-bias in legislation

As mentioned in the paragraph above, gender-bias in legislation (mostly) consists in the use of masculine structures to refer to other genders as well, the so-called *masculine rule*. This gender-bias has often been regarded as a historical feature of legislative language. However, the origins of the masculine rule are not quite clear. Petersson found that, with respect to vagrancy law, the masculine rule found its origins in the early 1800s, when different legal scholars – among which Jeremy Bentham[42] – stressed the need for law texts to be more concise.[43] With the Abbreviation Act of 1850 the masculine rule became fully institutionalised.[44] Before this period, however, both masculine and feminine structures were used in vagrancy law. The collocation *hee or shee* was even considered to be a typical linguistic feature of Elizabethan legislation in the 16th century[45], during which syntactic symmetricalisation was thus used to equally represent men and women. Though Petersson argues that the language use of other types of law is likely to correspond to those of vagrancy laws[46], it is important for gender theory, historical sociolinguistics and legal history that the origins of masculine legislative language are mapped out in more detail. To this aim, research should extend to (i) different types of legislation, (ii) different legal systems and (iii) different languages.

Looking closer at the gendered language structures characterising legislation, it should be observed that such gendered structures can be found on different levels of language, such as *grammar*, *vocabulary* and *syntax*. The most famous feature with respect to *grammar* is the use of masculine 3rd singular pronouns, like *hij* ("he") in Dutch:

---

[39] European Parliament, *Gender-neutral language in the European Parliament*, *op. cit.*, pp. 5–6.

[40] Please note that (i) within both these categories and languages of the same language family further differences in the use of gendered structures can be observed and (ii) languages of the same language family do not necessarily belong to the same category: whereas English and Dutch count as natural gender languages, German counts as a grammatical gender one, even though all three of them belong to the Germanic language family.

[41] Cf. A. VAASA, *Foreword*, in S. Cavagnoli and L. Mori (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, p. 8.

[42] '[t]he development of phrases, instead of employing the usual ellipses: for example, when mention is made of the two sexes, in cases in which the masculine would have marked them both'—J. BENTHAM, *The Works of Jeremy Bentham*, Volume III, Edinburgh, 1984, p. 155.

[43] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective*, cit., p. 101.

[44] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective*, cit., p. 106.

[45] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective,* cit., pp. 97–98.

[46] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective,* cit., pp. 95–96.

(7) Dt.: *Behoudens indien **hij** kan aantonen dat **hij** niet tijdig in kennis is gesteld* […]
"Unless he can prove that he was not notified in a timely manner, […]"[47]

This feature has often been discussed in studies on gender in legislation. However, as indicated in our discussion of the different types of languages, such a grammatical gendering does not occur in genderless languages like Estonian and Hungarian. On the other hand, it becomes particularly problematic in grammatical gender languages like German and the Romance ones. As we shall see in Sect. 3.1.2., this will also have implications for the gender-inclusive strategies that can be used in these languages.

The sentence in (8) entails the prototypical example of gender-bias on the level of *vocabulary*, and more specific *terminology*: the collocation *goed(e) huisvader* (Eng. Good family father) which derives from the Latin *bonus pater familias* and designates a standard of care.[48] This term, which has mainly been used in legal systems on the European mainland, is an example of gender-bias that can be found in all three language types, since genderless languages, though not having grammatical gender, still have lexical gender and thus a distinction between *father* and *mother*.

(8) Dt.: *Hij is verplicht aan de zaakwaarneming alle zorgen van een **goed huisvader** te besteden.*
"He is required to care for the negotorium gestio like a good family father."[49]

Finally, on the syntactic level, we notice various syntactic patterns[50] featuring masculine structures. An example of this is the *hij die* + CAUSAL ACTION + CONSEQUENTIAL ACTION-pattern in Dutch (9). In this particular pattern, the masculine structure *hij die* functions as a fixed slot, meaning that it is the only lexically determined part of the pattern which returns in all its manifestations, thus leaving no place – according to the prevailing discourse tradition – for gender-inclusive structures.[51]

(9) Dt.: ***Hij die*** onder bezwarende titel, te goeder trouw, een zakelijk recht verkrijgt op een roerend goed van een p*ersoon die er niet over kon beschikken*[CAUSAL ACTION], *wordt titularis van dat recht […]*[CONSEQUENTIAL ACTION].
"He who for valuable consideration, in good faith, obtains an interest on a movable property from a person who could not have had access to it, becomes holder of that right […]"[52]

As said in Sect. 2.1., such an inequal representation of gender in the text of law is presumed to have a negative effect on (i) women's (and people of other genders') perception of the law and (ii) the social activity of these other gender groups. Yet, this does not mean that the rights and duties entailed in these provisions do not apply to people of other genders, since various legal provisions come into play to prevent such inequality from arising (see, however, the clarity argument in Sect. 3.2.1.). One such possible provision is the *principle of equal treatment*, which prevents people being discriminated due to factors as gender, sex, race and sexual orientation, and which is featured in the constitution of many countries.[53] As such, all rights/duties applying to men should also apply to other genders. Furthermore, in various common law systems the non-privileging interpretation of such masculine

[47] Art. 674 bis §5 Belgian Judicial Code, 1967 [Dutch version from December 30 2022], https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1967101004&table_name=wet.
[48] The common law equivalent is *reasonable man*.
[49] Art. 1374 Belgian [Old] Civil Code, 1804 [updated Dutch version from July 1 2022], https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1804032134&table_name=wet.
[50] Cf. S. STEIN, S. STUMPF, *Muster in Sprache und Kommunikation: Eine Einführung in Konzepte sprachlicher Vorgeformtheit*, Berlin, 2019, pp. 100–115.
[51] Cf. W. POSSEMIERS, *De goede huisvader gaat met pensioen, op. cit.*, p. 12.
[52] Art. 2 wet van 4 februari houdende boek 3 "Goederen" van het Burgerlijk Wetboek, *BS* 17 maart 2020, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2020020416&table_name=wet.
[53] Cf. D. BIJNENS, H. BORTELS, J. THEUNIS, *Behoorlijke wetgeving in de rechtspraktijk van het Grondwettelijk Hof (2019-2020)*, in *Tijdschrift voor Wetgeving*, 22/2, 2021, pp. 87–94.

provisions is accommodated by so-called *interpretation acts* which state that *he*, unless explicitly stated otherwise, includes *she*.[54]

3.1.2. Language change

As mentioned in our introduction, various actions have been taken to make legislative language more gender-inclusive over the past few decades. This resulted, on the one hand, in the publication of various guidelines on how to adapt legal language appropriately (which thus spanned more than just legislative texts), and the effective implementation of gender-inclusive structures in the law, on the other.

The first international institution to provide such guidelines was UNICEF in 1989.[55] Later on, also other international institutions, like NATO[56] and the European Parliament[57], went on to publish such guidelines. Nowadays, the guidelines of the European Parliament – which, however, only provide examples for the English language – are the most cited ones in legal linguistic literature. Among the various gender-inclusive strategies proposed in these guidelines are the avoidance of the free morpheme *-man* (10), the use of *they* instead of *he* (11), and the use of gender-inclusive job titles (12).[58]

(10) Eng.: *mankind* → ***humanity***; *manpower* → ***staff***; *Frenchman* → ***French person***.

(11) Eng.: *Someone may not know* ***their*** *tax number*.

(12) Eng.: *fireman* → ***firefighter***; *stewardess* → ***flight attendant***; *foreman* → ***supervisor***.

When comparing the above structures with the discussion of gender-inclusive strategies in Sect. 2.2, we see that the European Parliament mainly proposes *neutralisation* to combat gendered language. In fact, the only advice which cannot be regarded as neutralisation is related to the use of titles, where it is said to use *Mr*. and *Ms*. and to not make a further distinction between *Miss* and *Mrs*. for addressing female persons (cf. Sect. 2.1).[59]

We also see that, with regard to national legislation in the EU and the Commonwealth, such neutralisation structures are almost always preferred to other available gender-inclusive strategies. This can be best exemplified by the recent recodification of Belgian law, where in the new inheritance law *vader en moeder* ("father and mother") was substituted by *ouders* ("parents"), and *goed(e) huisvader* by *voorzichtig en redelijk persoon* ("careful and reasonable person") in the Civil Code, and

---

[54] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective,* cit., p. 102; S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments,* cit., p. 38.

[55] P. KHANNA, Z. KIMMEL, *CEDAW—Convention on the Elimination of All Forms of Discrimination Against Women*, UNICEF, 2016, https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/CEDAW-for-Youth.pdf; cf. S. CAVAGNOLI, *Introduzione: Lingua di genere e linguaggio legislative in Europa*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, p. 21.

[56] NATO, *Gender-Inclusive Language Manual*, 2020, https://www.nato.int/nato_static_fl2014/assets/pictures/images_mfu/2021/5/pdf/210514-GIL-Manual_en.pdf.

[57] European Parliament, *Gender-neutral language in the European Parliament*, *op. cit.*, https://www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf.

[58] Cf. European Parliament, *Gender-neutral language in the European Parliament*, *op. cit.*, pp. 10-11.

[59] Cf. European Parliament, *Gender-neutral language in the European Parliament*, *op. cit.*, p. 11.

normaal en redelijk persoon ("normal and reasonable person") in the Criminal Code.[60] The latter substitution also occurred in other national legal systems, for instance in France and the Netherlands.[61]

This neutralisation is, of course, mainly found in natural gender languages and genderless languages (cf. Sect. 3). This strategy is particularly advantageous since it includes every possible gender (masculine, feminine, non-binary) and will generally not lead to elongated sentences. However, in grammatical gender languages, such neutralisation is not always possible due to the language's structure. Consequently, here we see that *symmetricalisation* is sometimes employed, particularly when neutralisation structures from EU-legislation need to be translated or implemented in national legislation. However, due to the different deficiencies of such symmetricalisation, many gendered structures are left untouched in these languages/legal systems. When symmetricalisation is used this can also lead to criticism, from both inside and outside the legal field (cf. Sect. 3.2.2). Finally, the strategy of feminisation is almost uniquely used in legislation pertaining to women's rights, like abortion laws. This strategy has, however, become very frequent in contract drafting[62], where, unlike in legislative drafting, it is, in fact, possible to pinpoint the gender of the persons involved.

We thus see that in legislation, there is a trend to substitute gendered structures by gender-inclusive ones. This gender-inclusive drafting will at times also help the legislator to better depict social reality: for instance, by using *ouders* in the new inheritance law, the legislator accounts for the scenario in which the legal parents of a person have the same sex/gender and it is also more in line with the scenario in which a kid has only one legal parent (= single parenting). Nevertheless, a trend is not an absolute norm, meaning that (i) gendered structures are still used alongside gender-inclusive ones in legislation, and (ii) some legal systems put more effort into gender-inclusive drafting than others:

(i) Regarding the former, we saw, for instance, that the collocations *vader en moeder* and *goed(e) huisvader* were substituted by gender-inclusive ones during the recodification of Belgian law. However, in the Dutch version of the recodification bills, the syntactic pattern with *hij die* (cf. Sect. 3.1.1) was not,[63] even though in the other two national languages gender-inclusive structures (*quiconque* in French and *Wer* in German) were already used long before recodification began. Similar observations are made by Bracchi (2019), Sandrelli (2019) and Blini (2019) in their analysis of national legislation in, respectively, France, the UK and Spain.[64] Consequently, the incorporation of gender-inclusive language structures has led to a less uniform language norm in legislation, which may lead to interpretation problems or unwanted linguistic specialisation between different legal domains (cf. Sect. 3.2.2).

(ii) Concerning the latter, it should be noted that differences in the use of gender-inclusive strategies are not only the consequence of the type of the language (natural gender, grammatical gender, genderless) in which the legislation is drafted, but also of the language policy employed by society and, more specifically, the legislator. Countries that have been particularly applauded for their use of gender-inclusive language are, among other, Canada, Malta and India. The European Union is seen as a pioneer on the matter

[60] Cf. V. LIÉGEOIS, J. AKKERMANS, *Recodifying the Law: A Metalinguistic Inquiry into the Recodification of Belgian Law Between 2014–2019*, in *Semiotics of Law*, 35/5, 2022, p. 1779, https://doi.org/10.1007/s11196-022-09894-6; V. LIÉGEOIS, *De 'voorzichtig en redelijk persoon' in het nieuw Burgerlijk Wetboek*, *op. cit.*, pp. 77–87.

[61] Cf. W. POSSEMIERS, *De goede huisvader gaat met pensioen*, *op. cit.*, p. 12.

[62] Cf. C. WILLIAMS, *Legal drafting*, in J. VISCONTI (ed.), *Handbook of Communication in the Legal Sphere*, Berlin, 13–35.

[63] Cf. W. POSSEMIERS, *De goede huisvader gaat met pensioen*, *op. cit.*, p. 12.

[64] Cf. E. BRACCHI, *Langage législatif européen et français selon une orientation genrée*, *op. cit.*, pp. 101–103; A. SANDRELLI, *Gender and language in English directives and UK national transportation measures*, *op. cit.*, pp. 136-137; L. BLINI, *Usos inclusivos de género en el castellano legislativo de la Unión Europea y de España*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, p. 208.

too.[65] Other countries have, however, been criticised for not putting enough effort into this gender-inclusivity, most notable Italy.[66]

3.1.3. Interpretational provisions

Other than changing the language of legislation, some common law systems have also changed various interpretational provisions to better represent people of different genders.[67] As mentioned at the end of Sect. 3.1.1, many common law systems feature interpretational acts that prescribe how legal provisions should be interpreted. With respect to gender, these interpretational acts originally entailed the aforementioned *masculine rule*, which states that, unless mentioned otherwise, words importing the masculine gender include the feminine.[68] Petersson observed in her analysis of federal and regional legislation in the UK, Canada, Australia and New Zealand that said *masculine rule* was being substituted by other provisions by the end of the 20th century. More specifically, she noted that two new rules were being used: the *two-way rule* and the *all-gender rule*.

The former, the *two-way rule*, entails that in any act, unless mentioned otherwise, "(a) words importing the masculine gender include the feminine; (b) words importing the feminine gender include the masculine".[69] This interpretational rule is thus bidirectional, since masculine words can include the feminine and vice versa. Accordingly, the legislator could make (sole) use of feminine structures as well when drafting legislation. The latter, the *all-gender rule*, provides that in any act, unless again mentioned otherwise, "(a) words importing a gender include every other gender".[70] This provision thus seems particularly interesting when it comes to the legal and linguistic inclusion of non-binary persons. The two-way provision was implemented anno 1999 by the UK, Canada (federally, as well as regionally by four provinces: Alberta, Manitoba, New Brunswick and Prince Edward Island) and South Australia.[71] The all-gender rule, on the other hand, prevailed in Australia, where it was not only implemented on the federal level but also by various states: New South Wales, Queensland, Victoria and Western Australia.[72]

Though these interpretational provisions emerged because of the growing influence of various gender-related movements and provide a legal basis for a more gender-inclusive legislative language, Petersson (1999) argues that they do not dictate changes in drafting style: they state how to interpret legislation, not how to write laws. In fact, she notices that changes towards a more inclusive language use in these legal systems have happened independently from these provisions, i.e., due to other initiatives.[73] It should also be noted that the data provided by Petersson are over twenty years old and that the gender (language) movement has taken big steps in the last two decades. Consequently, it is imperative that new overviews on such gender-related interpretational acts are provided by legal scholars and that these are compared with the language use in each legal system, in order to empirically validate whether, in fact, no quantitative (regarding the number of gender-inclusive structures) or qualitative (regarding the types of strategies employed) correlations between these provisions and the corresponding legislative languages exist.

3.2. Metalinguistic discourse

The fact that many gender-inclusive language structures have been finding their way into legislation, whereas some gendered structures have remained untouched, makes it interesting to look at the issue from a metalinguistic perspective. This metalinguistic perspective regards the way legal

[65] Cf. M.V. BUIATTI, *Gender Neutral Legal Language*, *op. cit*., pp. 38–41, 51.

[66] Cf. S. CAVAGNOLI, *Linguaggio giuridico europeo e italiano nella prospettiva linguistica di genere*, cit., p. 143; M.V. BUIATTI, *Gender Neutral Legal Language, op. cit*., pp. 43–45.

[67] Cf. S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments,* cit., p. 35.

[68] Cf. S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments,* cit., p. 36.

[69] Cf. S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments,* cit., p. 37.

[70] Cf. S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments,* cit., p. 43.

[71] Cf. S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments*, cit., p. 39.

[72] Cf. S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments*, cit., p. 45.

[73] Cf. S. PETERSSON, *Gender-Neutral Drafting: Recent Commonwealth Developments*, cit., p. 57.

specialists have viewed such language changes and, more specifically, which benefits (Sect. 3.2.1) and problems (Sect. 3.2.2) they associate with such gender-inclusive language.

3.2.1. Arguments in favour of using gender-inclusive language

Three arguments in favour of gender-inclusive legislative language return in the literature, which we will call the *gender equality argument* (i), the *clarity argument* (ii), and the *plain language argument* (iii).

The *gender equality argument* (i) entails that since equality is a fundamental human right, legislation – which is one of most effective means to achieve equality – should be expected to use an inclusive language with respect to gender. This argument is thus closely linked to the second principle of gender-inclusive language (cf. Sect. 2.1), as well as the women's and LGBTQIA+ rights movement. For this matter, when drafting the Universal Declaration of Human Rights[74] in 1948, long before the debate about gender-inclusive language even began, changes were made to the text of article 1. Originally, this article stated – in line with the preamble of the US' Declaration of Independence[75] – that "all *men* are born free and equal in dignity and rights", which was then changed into the more gender-inclusive "all *human beings* are born free and equal in dignity and rights".[76] This gender equality argument also appeared in two recommendations of the Council of Europe, in which warnings were made against the excessive use of masculine structures[77]: R (90) 4 on the elimination of sexism in language[78] and Rec (2003) 3 on balanced participation of women and men in political and public decision-making.[79]

The second argument is, much like the third one, situated on a more pragmatic level than the gender equality argument and regards *legal clarity*. This argument, which we have called the *clarity argument* (ii), has been elaborated upon mainly by Xanthaki[80], but also Rose[81] and Sandrelli[82] mention clarity as a possible positive feature of gender-inclusive legislation. For Xanthaki, the point of departure for considering clarity is that, though masculine structures are a typical feature of legislative language, they also lead to some semantic anomalies. Typical of legal semantics is the pursuit of monosemy, meaning that every language structure, and particularly words and collocations, can only be attributed one meaning. This practice is expected to contribute to legal certainty. In this regard, the masculine rule forms an exception to said practice since a structure like *he* can have two different meanings in legislation: one in which it is synonymous for *a person* [MEANING 1] and one in which it only regards *a person of the male sex/gender* [MEANING 2].[83] Xanthaki points out that, consequently, such masculine structures can be cause for confusion, not only for the lay reader who is not familiar with the special conventions of legislative language, but also for lawyers and judges in case possible

---

[74] Universal Declaration of Human Rights, United Nations General Assembly, Res 217 A, 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[75] The unanimous Declaration of the thirteen united states of America, Second Continental Congress, 1776, https://www.archives.gov/founding-docs/declaration-transcript.

[76] Cf. S. CAVAGNOLI, *Introduzione*, *op. cit.*, p. 20.

[77] Cf. S. CAVAGNOLI, *Introduzione*, *op. cit.*, pp. 22–23.

[78] Council of Europe, Recommendation No R. (90) 4 of the Committee of Ministers to Member States on the Elimination of sexism from language, 21 February 1990, https://rm.coe.int/1680505480.

[79] Council of Europe, Recommendation Rec (2003) 3 of the Committee of Ministers on the Balanced participation of women and men in political and public decision-making, 12 March 2003, https://rm.coe.int/1680519084.

[80] Cf. H. XANTHAKI, *Gender-inclusive legislative drafting in English: A matter of clarity*, cit., pp. 57–72; H. XANTHAKI, *Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham*, cit., p. 8–9.

[81] Cf. L.M. ROSE, *The Supreme Court and gender-neutral language: Setting the standard or lagging behind?*, in *Duke Journal of Gender Law and Policy*, 17, p. 94.

[82] Cf. A. SANDRELLI, *Gender and language in English directives and UK national transportation measures*, *op. cit.*, p. 110.

[83] Cf. H. XANTHAKI, *Gender-inclusive legislative drafting in English: A matter of clarity*, cit., p. 63, 67; H. XANTHAKI, *Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham*, cit., pp. 8-9 https://doi.org/10.22024/UniKent/03/fal.952.

gender-specific or gender-independent purposes are not elaborated upon sufficiently. To this end, she formulates an hypothetical example regarding legislation about military personnel:

> For example, in jurisdictions where the military is exclusively male, one wonders whether the application of "he includes she" could lead to the admission of women in the army by broad interpretation of the male pronoun under the Interpretation Act, especially where there is no express provision to the contrary.[84]

Similarly, we can refer to the abortion laws previously discussed in Sect. 3.1.2: such laws, considered a typical example of women's rights, are mostly formulated in the female gender. But would a man who had undergone a uterus transplant and gotten pregnant also be able to legally abort a baby? Though it is likely that the legal principles mentioned in Sect. 3.1.1. will set in, it remains an interesting thought experiment with respect to the gender question. Furthermore, it should be noted that the ambiguity of these masculine structures can contribute to social unrest. Grabham recounts, for instance, how two decades after the Abbreviation Act in Britain, 5,347 Manchester women 'claimed the right to be put on the voting list on the basis that the Representation of the People Act 1867 should be read in conjunction with the masculine rule in the 1850 Act' since no mention was made about a gender distinction within the law itself.[85] Likewise, with respect to vagrancy law, Petersson observed how the exclusive use of *he* in vagrancy laws was used by women as an argument not to comply to the previsions of this bill. This issue was only settled when in 1917 court rulings confirmed that, despite the masculine formulations of the law, women were, in fact, liable for vagrancy.[86]

Finally, the *plain language argument* (iii) deals with the fact that more gender-inclusive legislative texts will seem less estranged to people of other genders, who would thus feel more included. This means, as Mori puts it, that the *textual acceptability*[87] of legislation will grow.[88] This textual acceptability, in turn, is expected to lead to less critique on the law, regarding both content and language (see also Sect. 4.3.2).

3.2.2. Counter arguments

When it comes to counter arguments on the matter, we will distinguish between the *content-before-language argument* (i), the *consumer argument* (ii) and the *readability-and-aesthetics argument* (iii).

The *content-before-language argument* (i) is used here to refer to the critical stance different legal scholars have taken with respect to the gender equality argument. Although these scholars agree with the latter's proponents that (in Western legislation) it is indeed the function of the law to promote equality, they stress that said equality is primarily accomplished by the *content* of the law, i.e., the scope of the provisions rather than the amount of gender-inclusive language used in them.[89] As such, many scholars consider the benefits of gender-inclusive language to be irrelevant marginal gains when compared to bills regulating civil rights, gender quota or appealing to the physical (e.g., breast cancer by women; prostate cancer by men) and social issues (e.g., sexual harassment) facing people from a certain sex or gender.[90]

---

[84] Cf. H. XANTHAKI, *Gender-inclusive legislative drafting in English: A matter of clarity*, op. cit., p. 67.

[85] Cf. E. GRABHAM, *Exploring the Textual Alchemy of Legal Gender: Experimental Statutes and the Message in the Medium*, in *Feminists@law*, 10/2, 2020, p. 11 https://doi.org/10.22024/UniKent/03/fal.950.

[86] Cf. S. PETERSSON, *Gender Neutral Drafting: Historical Perspective*, cit., p. 109.

[87] Cf. R.A. DE BEAUGRANDE , W.U. DRESSLER, *Einführung in die Textlinguistik*, Tübingen, 1981.

[88] Cf. L. MORI, *La sociolinguistica dei corpora per lo studio della lingua inclusiva di genere*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, p. 42.

[89] Cf. H. XANTHAKI, *Gender-inclusive legislative drafting in English: A matter of clarity*, cit., pp. 58, 60; E. GRABHAM, *Exploring the Textual Alchemy of Legal Gender*, *op. cit*., p. 1.

[90] This critical stance on the positive effects assigned to gender-inclusive language can partially be explained by the methodological differences between legal studies and linguistics. Whereas legal scholars primarily do literature research, linguists are mainly involved in empirical studies. Through these empirical studies linguists

In addition, these scholars point out that too great of a focus on gender-inclusive language has certain costs:[91] jurists will have to acquire additional language skills in order to make legislation (as well as other legal texts) gender-inclusive, extra care needs to go out to both gender and language during the drafting process, earlier legislation should be changed accordingly if uniformity is to be salvaged, etc. These costs may not outweigh the benefits when one considers the frequent content-related problems facing legislative texts, even those that are approved by parliament and have come into power. For instance, it is possible that the law does not take into account enough hypotheses to establish legal certainty, that case law and other (higher) legal norms have not been sufficiently considered, that the proportionality principle was not observed, etc. Subsequently, to what extent is it desirable that government and parliament, as well as those jurists advising both institutions, divert their attention from these content-related issues to the gender-inclusivity of the text (including both the law text and accompanying explanatory memorandum)?

The *consumer argument* (ii) then, is the counterclaim to the plain language argument. Whereas the plain language argument considers textual acceptability as a positive feat of gender-inclusive legislation, the consumer argument points out that legislation is mostly utilised (e.g., read, referenced) by people working with legal matters. This stance thus decreases the added value of textual acceptability and puts emphasis on the fact that legislative language is (part of) a specialised language register.[92] This means that legislation is expected (i) to have specific language conventions (e.g., terminology like *good family father*) that differ from other language registers, and (ii) to primarily accommodate jurists instead of lay persons. Consequently, according to the consumer argument a gendered structure would only be problematic when it creates problems for jurists – because it causes confusion (cf. the clarity argument) or is hardly used even within the legal field itself (cf. the durability argument in Sect. 4). Moreover, gender-inclusive language structures can even be seen as unwanted when they break with long-standing traditions and/or lead to language variation, which can both cause intelligibility problems for jurists not familiar with one of the two structures.

Finally, the *readability and aesthetics* of many gender-inclusive structures also form the object of language criticism.[93] This criticism particularly concerns the aforementioned symmetricalisation structures (cf. Sect. 2.2 and 3.1.2), but can also concern other structures that deviate too much from the prevailing idiomatic, lexical or grammatical norm of the language. As was pointed out in Sect. 2.2 this criticism is not unique for the legal field and, also from a purely linguistics point of view, various arguments can be formulated against the use of these symmetricalisation structures, particularly regarding their readability. In extreme cases, this criticism has even lead to the redrafting of legislative proposals. For instance, in 2020 the German legislator presented a draft on the further development bankruptcy and rehabilitation law[94], which only made use of the longer female versions of certain professions (e.g., *Arbeitnehmerinnen* instead of *Arbeitnehmer* ["employees"]). Since this linguistic feature of the law was heavily criticised both within and outside the legal field, the legislator eventually redrafted the text using only the shorter masculine structures.[95]

The counter arguments above all define valid issues when it comes to gender-inclusive legislation. Additionally, they debunk the claim that people opposing gender-inclusive language do so solely out of ideological reasons, since there are clear practical motivations underlying this more conservative stance. Independently from which further arguments linguists, gender scholars and jurists formulate in favour of gender-inclusive legislation (like the durability argument in Sect. 4), it is imperative that the issues above are attended to in the best way possible. In this regard, it seems particularly important to formulate clear guidelines on how to use gender-inclusive language in legislation, so that their

---

can, among other, gain insights in the mental processes behind language use. Yet, such mental processes are not important to the main legal research paradigms, which leads to different perspectives on things like gender-inclusive language.

[91] Cf. E. GRABHAM, *Exploring the Textual Alchemy of Legal Gender*, *op. cit.*, p. 19; W. POSSEMIERS, *De goede huisvader gaat met pensioen*, *op. cit.*, p. 12.

[92] Cf. V. LIÉGEOIS, *De 'voorzichtig en redelijk persoon' in het nieuw Burgerlijk Wetboek*, *op. cit.*, p. 79.

[93] Cf. W. POSSEMIERS, *De goede huisvader gaat met pensioen*, *op. cit.*, p. 12.

[94] Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, Germany, 30 December 2020, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Fortentwicklung_Insolvenzrecht.html.

[95] Cf. W. POSSEMIERS, De goede huisvader gaat met pensioen, *op. cit.*, p. 12.

implementation requires less effort from the legislator (= the content-before-language argument) and does not cause interpretation problems for jurists (= the consumer argument). These guidelines should also point out which gender-inclusive structures compromise the readability of the law/clash with other language norms and are thus best avoided (= the readability-and-aesthetics argument). In sum, a clear norm on the use of gender-inclusive language is needed, which, as mentioned in Sect. 3.1.2, is now lacking (see also Sect. 4.3.3).

4. The durability argument

The discussion in Sect. 3.2 is important for the legislative field, since it is due to such reflections that drafters can better estimate the pros and cons of both the gender-inclusive and gendered strategies they want to employ (cf. Sect. 1). In this regard, this section will consider *durability* as another possible argument in favour of gender inclusivity. To this end, this section will first lay out a general hypothesis on how our language is expected to evolve with respect to the use of gender-inclusive strategies and how – depending on the strategies chosen when drafting legislation – this might lead to legislative language becoming either a more archaic, isolated language register or a more adapted, durable one (Sect. 4.1). In Sect. 4.2, we will then briefly frame this hypothesis within linguistic theory on language variation. Finally, Sect. 4.3 will elaborate on the way in which gender-inclusive strategies are expected to contribute to a durable legislative language (Sect. 4.3.1), what the additional benefits of said durability are (Sect. 4.3.2) and formulate some disclaimers on the claims made in this section (Sect. 4.3.3).

4.1. Hypothesis

Our hypothesis entails two aspects: a main assumption on the evolution of our language use and language norms (Sect. 4.1.1), on the one hand, and possible scenarios regarding the ways in which legislative language is adapted to this evolution (Sect. 4.1.2), on the other.

4.1.1. Fundamental assumption

The starting point of our hypothesis is the assumption that *gender-inclusive structures will keep gaining ground in communication*. Various studies, qualitative and/or quantitative, have pointed out the fact that the use of gender-inclusive language has, much like metadiscourse on the matter, been growing exponentially within Western society, even though masculine structures still remain the norm. In this regard, we see that both already existing gender-inclusive strategies become more and more employed and new gender-inclusive structures are being introduced as well.[96]

We argue that this linguistic trend will continue since it correlates with various other societal gender-related trends, like the growing emancipation of women in both private and public life and the emergence of the gender fluid movement, neither of which are expected to cease in growth in the near future. We consider it likely that these other societal trends shall be supporting factors in the evolution of a more gender-inclusive language norm in society. This *gender-inclusive trend* is thereby expected to, first and foremost, lead to a different *language use*, spanning different communicative settings (professional, formal/informal, written/spoken, etc.) and different layers of the population. Thereafter, various gender-inclusive structures might also manifest themselves in changes to the *standard language norm*. This means that prescriptive dictionaries and grammars will entail explanations on how language is best used in a gender-inclusive manner, enlist preferred strategies and label some gendered structures as less-preferable variants. This, in turn, can lead to many gendered language structures not only being poorly used in language, but also becoming viewed as archaisms.

[96] Cf. W. STRUNK, E.B. WHITE, *The Elements of Style*, *op. cit.*, p. 60; P. BAKER, Will Ms ever be as frequent as Mr?, cit., pp. 125-149; A. CURZAN, *Gender shifts in the history of English*, *op. cit.*, pp. 184–185, 188.

4.1.2. Possible scenarios

This gender-inclusive trend can lead to two possible scenarios regarding the position of legislative language in the language continuum – i.e., with respect to other language registers (e.g., the academic register) and the standard language norm:

(i) The first one is the *archaisation scenario*, in which gender-inclusive strategies are not sufficiently employed in legislative texts. This is expected to lead to a legislative language which becomes more conventionalised – due to not following the usage and/or standard language norm – and which grows more distant from the other language registers.

(ii) The other one is the *durability scenario*, in which gender-inclusive strategies are, in fact, employed sufficiently enough in legislation for this language register to remain closer to the language registers/the standard language norm. This durability is expected to lead to a more time-resistant and user-friendly legislative language (cf. Sect. 4.3.1).

The scenarios above count as *opposite hypotheses*, since they entail that the opposite treatment of a certain element (i.e., gender-inclusive language) leads to an opposite outcome. Both hypotheses can, however, also be situated on a continuum, in which at the left end of the continuum we find *hypothetical* legislative languages[97] in which absolutely no gender-inclusive strategies are utilised (= extreme instances of the archaisation scenario). At the right end of such a continuum we would then find hypothetical legislative languages in which each gender-inclusive strategy is implemented (= extreme instances of the durability scenario). Between these two poles we then find legislative languages making use of a mixture of gender-inclusive and gendered language strategies.

In our depiction of both scenarios, the archaisation one is framed as being the one to avoid, since it creates more distance between legislative language and other language registers. The rest of our discussion will follow this line of argumentation. The following parts of our discussion – particularly Sect. 4.3.1 and Sect. 4.3.2 – will thus revolve around the benefits of the durability scenario and deficits of the archaisation one. However, some critical remarks regarding the durability scenario shall be pointed out in Sect. 4.3.3.

4.2. Theoretical background: language variation

The hypothesis elaborated in Sect. 4.1 departs from a fundamental aspect of human language, namely the fact that language is subject to variation. This observation is of crucial value for linguistic theory: theories about language can both be praised and criticised for the way they take language variation into account. Moreover, language variation constitutes the main research paradigm in a variety of linguistic subdisciplines, like historical linguistics, sociolinguistics and variationist linguistics. Subsequently, this "variation factor" needs to be taken into account when dealing with language policy and language planning. In this regard, two observations are important for our further discussion.

The first observation is that languages – take, for instance, English, Dutch and Italian – are not homogenous. This means that our use of such a language depends on the situation in which we find ourselves (e.g., the people with whom we conversate, professional/public/private settings, formal/informal settings, etc.). Consequently, whereas a language like Italian can have a *standard language norm* (which is codified in dictionaries and grammars), it also has, independently from this standard norm, different *usage norms* for the different situations in which the language is used.[98] For

[97] We speak of *hypothetical legislative languages* since no legislative language is expected to totally neglect gender-inclusive language use or does not already entail gender-inclusive structures. Similarly, no legislative language is expected, due to the specialised needs of the domain (e.g., conciseness), to implement all gender-inclusive strategies.

[98] Cf. E. COSERIU, *Einführung in die allgemeine Sprachwissenschaft*, Tübingen, 1988.

our discussion, we maintain that each usage norm corresponds to a certain language register.[99] Every speaker of the language is thereby accustomed with at least a few registers, whose total sum makes up the idiolect of the speaker. Examples of such registers are legislative language (part of the more general register of legal language) and weather reports (part of the more general meteorological register). These registers do not only vary with respect to the extent they correspond to/differ from the standard language norm, but also with respect to the extent that they allow for creativity and innovation in language use.

This innovation brings us to the second observation: the fact that language changes over time, possibly due to innovation. This innovation can be situated on a purely grammatical level or rather on the interface with society. Grammatical innovation regards, for instance, the request to eliminate the subjunctive mood and *passato remoto* from the Italian standard norm, which some argue will lead to an "easier" language. On the societal level innovation then regards linguistic changes made with respect to the challenges society faces, such as inclusion. However, innovative structures – for instance, gender-inclusive pronouns – rarely enter directly in the standard norm. Mostly, such innovative structures manifest themselves in specific language registers first, before expanding to other registers and are only then included in prescriptive dictionaries and grammars (after being broadly used or regarded as useful additions to the language).[100]

4.3. The durability scenario

4.3.1. Effects of gender-inclusive language on durability

The legislative language register can, with regard to the first observation in Sect. 4.2, be classified as a very conservative one, as has also been pointed out by Koch & Oesterreicher.[101] First, the writing style of legislation is very formal and in most legal systems archaic language structures are utilised in these texts as well, which is in part due to legislation being an exclusively written text genre.[102] Second, since most legislative texts – and this is particularly true for codes and law books – are aimed for the long term, their language risks to become outdated when the standard language norm (or a variety of other language registers) changes. Furthermore, laws are normally only changed when adjustments need to be made to their *content*, and not for mere linguistic aims.[103] Consequently, legislation is a text genre that is poorly fit to adapt to language innovation and thus easily tends towards the use of outdated language. Regarding gender-inclusive language, we also see that many gender-inclusive structures that have now been adopted in various legislative systems were used in jurisprudence[104] and by legal scholars[105] long before changes to legislation were made. This is arguably because their respective legal language registers are less conservative than the legislative one (even though they still tend towards archaisation). Anno 2023, many – if not more – differences in the use of gender-inclusive language can still be observed between these different legal registers.

Accordingly, it becomes clear how both scenarios in Sect. 4.1.2 can either positively or negatively influence this feature inherent to legislative language. Regarding durability, the use of gender-inclusive language in legislation will – according to our assumption in 4.1.1 – first and foremost lead to a time-resistant legislation, meaning that legislative language will remain longer in line with other usage norms, as well as the standard language norm, thus not exacerbating criticism on the law's language. Though this time-resistance has never been at the heart of previous legal linguistic studies, various scholars have mentioned this issue, saying legislative languages needs to provide for the future

[99] Cf. D. BIBER, S. CONRAD, *Register, Genre, and Style*, *op. cit.*; B. SZMRECSANYI, *Register in variationist linguistics*, cit., pp. 76–99.

[100] Cf. V. LIÉGEOIS, *De 'voorzichtig en redelijk persoon' in het nieuw Burgerlijk Wetboek*, *op. cit*. pp. 79–80.

[101] Cf. P. KOCH, W. OESTERREICHER, *Gesprochene Sprache in der Romania*, cit.; P. KOCH, W. OESTERREICHER, *Language of Immediacy—Language of Distance*, cit., pp. 441–473.

[102] Cf. P. KOCH, W. OESTERREICHER, *Gesprochene Sprache in der Romania*, cit., p. 13.

[103] Cf. V. LIÉGEOIS, J. AKKERMANS, *Recodifying the Law*, *op. cit*., pp. 1783–1784.

[104] Cf. M.V. BUIATTI, *Gender Neutral Legal Language*, op. cit., p. 51.

[105] Cf. V. LIÉGEOIS, *De 'voorzichtig en redelijk persoon' in het nieuw Burgerlijk Wetboek*, *op. cit*., pp. 85–86.

or become outdated.[106] In order to create this time-resistance, however, the legislator should not only consider how gendered and gender-inclusive language is used when the law is drafted (= application of current language norms), but also how gendered and gender-inclusive language are likely evolve in the (near) future (= anticipation of future language norms).

This time-resistance, in turn, contributes, as mentioned in Sect. 4.1.2, to legislation being more user-friendly. Returning to the discussion in Sect. 4.2, we pointed out that every speaker of a language is familiar with at least a few registers (and thus usage norms) within that language. This also applies to those people making use of legislative texts (judges, lawyers, legal scholars, etc.). Consequently, these persons are influenced by these other language registers when it comes to their language use in legislative contexts and thoughts on the matter. If, due to the insufficient implementation of gender-inclusive language, legislation grows too distant from the other language registers, many structures within legislative language will become difficult to use even for those specialists. This will be particularly problematic for spoken communication, less institutionalised settings and communication with lay persons (e.g., legal clients). With respect to contract drafting, for instance, Pajak has observed that many clients of legal firms are actively asking for their legal documents to be drafted in a gender-inclusive manner, leading to contract language having a more gender-inclusive norm than its legislative variant.[107]

Subsequently, it is likely that jurists will turn to more hybrid registers, thus creating additional variation within the legal language register (see also the previous comments on jurisprudence and legal scholars). Liégeois notes, for instance, that even though *goed(e) huisvader* was only recently substituted in Belgian law, many legal scholars, judges and magistrates were using terms similar to *redelijk persoon* a long time before legislative language changed.[108] In this regard, following linguistic literature on the matter, he hypothesises that due to the term *goed(e) huisvader* growing more and more distant from other language norms, it became more difficult to use even by specialists, which thus led to them using terminological alternatives.[109] Many legal scholars and legal linguists warn against such variation, since it can lead to interpretational problems and unnecessary specialisation within the legal field (cf. Sect. 3.2.2 and Sect. 4.3.2).

Concerning the effects of gender-inclusive language on durability (time-resistance + user-friendliness), it is interesting to briefly return to the plain language (Sect. 3.2.1) and consumer arguments (Sect. 3.2.2). The former pointed out that gender-inclusive language can contribute to the textual acceptability of the law since these texts will appear more inclusive to persons from different genders reading them. However, our discussion above shows that if gender-inclusive language indeed keeps expanding in society, the implementation of such language in legislation also becomes important for its correspondence with "general language use", which is an issue often considered by proponents of plain language in legislation. The latter, on the other hand, saw gendered structures only as problematic when they led to difficulties for legal specialists. As our discussion illustrates, these specialists do interact with society and, like legal language in general, legislative language cannot be regarded independently from other registers. Therefore, if the use of gender-inclusive language is only considered with respect to the legal community, this may, in the long turn, lead to linguistic deficiencies.

4.3.2. Positive effects of a durable legal language

A durable legislative language, as discussed in Sect. 4.3.1, thus implies that legislation is time-resistant and that its language is not overly conventionalised with respect to other – particularly legal – language registers, so that it can be easily used in other legal settings and a more uniform legal

---

[106] Cf. E. BRACCHI, *Langage législatif européen et français selon une orientation genrée*, *op. cit.*, p. 103; A. POTTAGE, *Response to 'Exploring the Textual Alchemy of Gender'*, in *feminists@law*, 10/2, p. 1, https://doi.org/10.22024/UniKent/03/fal.951.

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

[108] Cf. V. LIÉGEOIS, *De 'voorzichtig en redelijk persoon' in het nieuw Burgerlijk Wetboek*, *op. cit.*, pp. 85–86.

[109] Future research is, however, needed to back up this hypothesis with empirical metalinguistic data on which variants were used before the recodification and what the reasons behind this usage were.

language register is maintained. These are, on their own, valid arguments for using gender-inclusive strategies in legislation, but secondary benefits of this durability should be pointed out as well:

(a) Concerning the time-resistance of legislation, gender-inclusive language is also expected to positively affect *the endorsement of legislative texts by the population*. A big amount – if not most – of the criticism to which legislation is subjected by the population regards the language of the law (cf. the previous comments on the plain language movement). Consequently, the more legislative language is in line with other language registers, the less such criticism is promoted.

(b) If legislative language should, however, grow more distant from other registers due to not properly integrating gender-inclusive structures, this will also affect the *learnability of both legislative language and the law*. Various studies – concerning various countries and languages – within linguistics have pointed out that students starting at university often encounter problems related to the specialised register used here.[110] This primarily regards terminology, but can also concern grammatical structures typical for this specialised register. Some universities have even started working on projects to tackle this issue.[111] Of course, the more distant such a specialist register becomes, the more difficult is to properly acquire this register, which, in turn, causes problems for understanding university lectures or, in relation to the focus of our paper, the law. Therefore, a more durable language register has positive effects for learnability as well.

(c) If due to this dissociation from other language registers, legal language becomes subject to internal variation, the possibility exists that this will lead to further linguistic specialisation (between different legal domains, legal text genres, legal systems using the same language, etc.), which, in turn, can contribute to *interpretational problems*. We once again refer to Liégeois's study on the collocation *voorzichtig en redelijk persoon* in the new Civil Code.[112] On the one hand, he noted that within legal theory various terms were used to substitute *goed(e) huisvader* – for instance, *voorzichtig persoon* ("careful person"), *redelijk persoon* ("reasonable person") and *voorzichtig en zorgvuldig persoon* ("gentle and careful person") – but that it is unclear whether semantic differences between these terms exists or whether they are absolute synonyms. This variation even translated itself into legislative language, since in the new Criminal Code *normaal en redelijk persoon* was used, whose difference with the *voorzichtig en redelijk persoon* is also unclear (cf. Sect. 3.1.2). As has been pointed out by Xanthaki[113] such unclarity is best avoided when it comes to legislation (cf. Sect. 3.2.1), thus also making durability interesting when it comes to the *clarity* and *effectiveness* of legislation.

(d) Finally, other than enhancing the correspondence with linguistic reality (i.e., the other language registers used in society), gender-inclusive language and durability can also be considered with respect to the law's correspondence with social reality (i.e., societal behaviour). In Sect. 3.1.2, we mentioned the structure *vader en moeder* ("father and mother") being substituted by *ouders* ("parents") in Belgian inheritance law. Though the latter is not likely to disappear from our language use or become an archaism (cf. Sect. 4.3.3), its substitution makes that the wordings of the law better account for new forms of parenthood that have emerged over the last decades, thus contributing to its durability.

---

[110] Cf. B. DEYGERS, *Validating university entrance policy assumptions: Some inconvenient facts*, in E. Gutiérrez (Ed.), *Learning and Assessment: Making the Connections—Proceedings of the ALTE 6th International Conference*, Cambridge, 2017, pp. 46-50; B. DEYGERS, K. VAN DEN BRANDEN, E. PETERS, Checking assumed proficiency: comparing L1 and L2 performance on a university entrance test, in *Assessing Writing*, 32, 2017, pp. 43–56.

[111] Cf. J. MATHYSEN, H. DE SMET, L. HEYVAERT, D. JASPERS, P. PAUWELS, B. SZMRECSANYI, E. PETERS, *Innovative Digital Learning: Taal-kundig Leren Leren*, Conference presentation *Dag van het Onderzoek*, Kortrijk, 09 Jun 2022.

[112] Cf. V. LIÉGEOIS, *De 'voorzichtig en redelijk persoon' in het nieuw Burgerlijk Wetboek*, *op. cit*., pp. 77–87.

[113] Cf. H. XANTHAKI, *Gender-inclusive legislative drafting in English: A matter of clarity*, cit., pp. 57–72; H. XANTHAKI, Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham, cit., pp. 8–9.

4.3.3. Disclaimers

The discussion in Sect. 4.3.1 and 4.3.2 has so far highlighted the positive aspects of the durability argument. However, some disclaimers are in order regarding the claims made above:

(i) First, whether legislative language is more time-resistant or archaic also depends on other language strategies than those related to gender. Therefore, the use of gendered or gender-inclusive structures has an effect on time-resistance, but does not determine this in its entirety. Other factors have to be taken into account as well if a time-resistant or even modern legislative language register is to be obtained.

(ii) Secondly, the amount to which gendered structures contribute to archaisation is likely to depend on the (type of) language involved, for which we refer to our discussion in Sect. 3. However, it is difficult to say in which type of language these structures have the biggest effect: such structures appear most frequently in the grammatical gender languages, but are a consequence of the language system itself, therefore it is possible that such structures have a bigger effect in natural gender and genderless languages, where they appear less frequently but deviate more from other language norms. Empirical research is imperative to provide more concrete insights on this matter.

(iii) Thirdly, is unlikely that every gendered structure used in legislation will become outdated. For instance, whereas a structure like *good family father* already seems out of line with current language use, a structure like *father and mother* – which we have previously considered with respect to a durable correspondence of legal provisions with social reality (cf. Sect. 4.3.2) – is highly unlikely to disappear from our language. Nevertheless, as pointed out in Sect. 3.1.2 and Sect. 4.3.2, it could still be beneficial for legislation to substitute such a structure by a gender-inclusive one. Consequently, the durability argument cannot be the only argument for substituting gendered structures. In this regard, we particularly refer to our discussion in Sect. 3.2.1, where other benefits of gender-inclusive legislation are highlighted.

(iv) Fourthly, not all gender-inclusive structures have the same potential to expand across registers and to be included in prescriptive dictionaries and grammars. This is important for legal drafting, since, as mentioned in Sect. 4.3.1, the legislator should not only take into consideration the language norms at the moment the law is drafted, but also anticipate on how they might change. In this regard, this paper has pointed out at various points that symmetricalisation structures have particular difficulty in being accepted by both the language community in its entirety and persons within the legal field. The legislator should refrain from using such structures as much as possible, since they may have a negative aspect on the durability of the law, as well as on other aspects (e.g., readability).

(v) Finally, it should be pointed out that the durability argument does not cancel out the various counter arguments that have been formulated against gender-inclusive legislative language. This is specifically true for the content-before-language and readability-and-aesthetics arguments (cf. Sect. 3.2.2). Particularly problematic is that, even though gender-inclusive language can contribute to the consistency of legal language in the long term, it will create inconsistencies in the short run. Such structures, in fact, break with the previous language traditions and the substituted structures might still resurface in older legislative texts or other legal settings.

Regarding points (iii), (iv) and (v), we again highlight the need for each legal system to have clear guidelines on how to use gender-inclusive legislative language (cf. 3.2.2). If this is not the case, gender-inclusive language may pose more problems for legislation than it was able to solve (see our previous observations about non-uniform language norms and language criticism in 3.1.2). As such, these guidelines should be backed by empirical data and consider which gender-structures are outdated (iii), which gender-inclusive structures should be preferred to others (iv), as well as list both the

gendered and gender-inclusive variant for important or recurrent structures that have been changed in legislation (v). Considering, then, the idea that the legislator should also anticipate which gendered structures are likely to become outdated, linguistic advice, based on empirical data, is once again needed. Linguists and drafters should thereby also be careful not to propose gender-inclusive structures that are not conform the standard language norm (e.g., *Arbeiter*Innen* and *ArbeiterInnen* in German) and/or not supported by either the language community in its entirety or the specialists from the legal fields themselves.

5. *Conclusion and notes for future research*

We opened our paper with the observation that gender-inclusive language structures become more and more prevalent in legislation. Consequently, we argued that, to successfully incorporate such structures in legislation, it is important that their benefits and problems are reflected upon by linguists, legal and gender scholars (cf. Sect. 1). To this end, our paper had two purposes. First, it sought to elaborate on the principles of gender-inclusive language and the main strategies used on the matter, after which the use and reception of such structures in legislation was discussed. Secondly, we considered durability as an additional argument in favour of gender-inclusive legislation.

Regarding the first objective, we were able to point out that *neutralisation* (e.g., the substitution of *good family father* by *reasonable person*) has been the preferred gender-inclusive strategy in legislation, whereas *symmetricalisation* (e.g., *he or she* instead of *he*) is avoided as much as possible, even though its use may be inevitable in certain (grammatical gender) languages (cf. Sect. 3.1.2). These observations also resurfaced at various other points throughout our paper. We then singled out three arguments in favour of gender-inclusive legislation, namely the *gender equality argument*, the *clarity argument* and the *plain language argument* (cf. Sect. 3.2.1), whereas the counter arguments comprised the *content-before-language argument*, the *consumer argument* and the *readability-and-aesthetics* argument (cf. Sect. 3.2.2).

When it comes to our own argument, the *durability argument*, we departed from the assumption that gender-inclusive language will keep gaining ground in society (cf. Sect. 4.1.1) and that the legislative language register counts as a very conservative one, which – due to a variety of reasons – does not easily allow for innovation (cf. Sect. 4.3.1). Consequently, we pointed out that by not sufficiently implementing gender-inclusive language, archaisation is exacerbated, whereas by sufficiently implementing gender-inclusive structures a more durable legislative language can be obtained. This durability, on the one hand, comprises that the language of the law becomes more time-resistant and, on the other, that – due to this time-resistance – legislative language will be easier to use for legal specialists, thus contributing to the uniformity of legal language. Additionally, four other secondary benefits of this durability were singled out: (a) a higher endorsement of the law by the population, (b) a higher learnability of legislative language (and the law), (c) more clarity and (d) a better correspondence with social reality.

Nevertheless, we should once again point out that our discussion of durability started from an assumption (which was then backed by some preliminary empirical studies). Therefore, it is important to study the evolution of both legislative language and gender-inclusive language in more detail. This paper also identified various research gaps in legal linguistic literature. These concerned, for instance, missing data on interpretational provisions, language attitudes and the use of gendered language. In this regard, it is important to do empirical research on (i) which gendered structures are outdated or likely to become so, (ii) which gender-inclusive structures are preferred over others, and (iii) to systematically register which gendered structures are or can be substituted by gender-inclusive ones. Such research should therefore regard both *usage-based* (i.e., data on how language is used) and *metalinguistic data* (i.e., data on how language is perceived). Based on this, the guidelines which we have argued to be imperative for both the problems singled out in Sect. 3.2.2, as well as the durability argument in Sect. 4, can be created.

Bibliography

ABBOU J., BAIDER F.H., *Gender, Language and the Periphery: Grammatical and Social Gender from the Margins*, Amsterdam, 2016.

BAKER P., *Will Ms Ever Be as Frequent as Mr? A Corpus-based Comparison of Gendered Terms across Four Diachronic Corpora of British English*, in *Gender and Language*, 4/1, 2010, pp. 125–149.

BARAN A., *Gender in Estonian Older Phraseology*, in *Linguo-cultural research on phraseology*, 3, 2015, pp. 315–336.

BEHME C., NEEF M. (eds.), *Essays on Linguistic Realism*, Amsterdam, 2018.

Belgian [Old] Civil Code, 1804 [updated Dutch version from July 1 2022], https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1804032134&table_name=wet.

Belgian Judicial Code, 1967 [Dutch version from December 30 2022], https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1967101004&table_name=wet.

BENTHAM J., *The Works of Jeremy Bentham*, Volume III, Edinburgh, 1984.

BIBER D., CONRAD S., *Register, Genre, and Style*, Cambridge, 2000.

BIJNENS D., BORTELS H., THEUNIS J., *Behoorlijke Wetgeving in de Rechtspraktijk van het Grondwettelijk Hof (2019-2020)*, in *Tijdschrift voor Wetgeving*, 22/2, 2021, pp. 86–116.

BLINI L., *Usos Inclusivos de Género en el Castellano Legislativo de la Unión Europea y de España*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in Legislative Languages: From EU to National Law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 183–211.

BRACCHI E., *Langage Législatif Européen et Français selon une Orientation Genrée*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in LegislativeLlanguages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 67–107.

BUIATTI M.V., *Gender Neutral Legal Language: A Comparative Overview*, in *Comparative Law and Language*, 1/2, pp. 33–54.

CAVAGNOLI S., *Introduzione: Lingua di Genere e Linguaggio Legislative in Europa*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in Legislative Languages: From EU to National Law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 13–37.

CAVAGNOLI S., *Linguaggio Giuridico Europeo e Italiano nella Prospettiva Linguistica di Genere*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in Legislative Languages: From EU to National Law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 143–182.

COOPER D., EMERTON R., *Pulling the Thread of Decertification: What Challenges are Raised by the Proposal to Reform Legal Gender Status?* in *Feminists@law*, 10/2, 2020, https://doi.org/10.22024/UniKent/03/fal.938.

COOPER D., GRABHAM E., RENZ F., *Introduction to the Special Issue on the Future of Legal Gender: Exploring the Feminist Politics of Decertification*, in *Feminists@law*, 10/2, 2020, https://doi.org/10.22024/UniKent/03/fal.937.

Council of Europe, Recommendation No R. (90) 4 of the Committee of Ministers to Member States on the Elimination of sexism from language, 21 February 1990, https://rm.coe.int/1680505480.

Council of Europe, Recommendation Rec (2003) 3 of the Committee of Ministers on the Balanced participation of women and men in political and public decision-making, 12 March 2003, https://rm.coe.int/1680519084.

COSERIU E., *Einführung in die Allgemeine Sprachwissenschaft*, Tübingen, 1988.

CRAWFORD M., *Talking Difference: On Gender and Language*, London, 1995.

CURZAN A., *Gender Shifts in the History of English*, Cambridge, 2009.

DE BEAUGRANDE R.A., DRESSLER W.U., *Einführung in die Textlinguistik*, Tübingen, 1981.

DEYGERS B., *Validating University Entrance Policy Assumptions: Some Inconvenient Facts*, in E. Gutiérrez (Ed.), *Learning and Assessment: Making the Connections – Proceedings of the ALTE 6th International Conference*, Cambridge, 2017, pp. 46–50.

DEYGERS B., VAN DEN BRANDEN K., PETERS E., *Checking Assumed Proficiency: Comparing L1 and L2 Performance on a University Entrance Test*, in *Assessing Writing*, 32, 2017, pp. 43–56.

ECKERT P., MCCONNELL-GINET S., *Language and Gender: Historicizing Protest*, Cambridge, 2013

European Parliament, *Gender-neutral language in the European Parliament*, 2015, https://www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf.

Gesetz zur Fortentwicklung des Sanierungs—und Insolvenzrechts, Germany, 30 December 2020, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Fortentwicklung_Insolvenzrecht.html.

GRABHAM E., *Exploring the Textual Alchemy of Legal Gender: Experimental Statutes and the Message in the Medium*, in *Feminists@law*, 10/2, 2020, https://doi.org/10.22024/UniKent/03/fal.950.

HELLINER M., BUßMANN H., *Gender Across Languages: The Linguistic Representation of Women and Men*, in M. HELLINER and H. BUßMANN (eds.), *Gender Across Languages: The Linguistic Representation of Women and Men*, vol. 3, Amsterdam, 2003, pp. 1–25.

JOHN-STEINER V., MAHN H., *Sociocultural Approaches to Learning and Development: A Vygotskian Framework*, in *Educational Psychologist*, 31/3-4, pp. 191-206.

KHANNA P., KIMMEL Z., CEDAW – *Convention on the Elimination of All Forms of Discrimination Against Women*, UNICEF, 2016, https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/CEDAW-for-Youth.pdf.

KOCH P., OESTERREICHER W., *Gesprochene Sprache in der Romania: Französisch, Italienisch, Spanisch*, Berlin, 2011.

KOCH P., OESTERREICHER W., *Language of Immediacy – Language of Distance: Orality and Literacy from the Perspective of Language Theory and Linguistic History*, in C. LANGE, B. WEBER and G. WOLF (eds.), *Communicative Spaces: Variation, Contact, and Change*, Frankfurt, 2012, pp. 441–473.

LAKOFF R., *Language and Woman's Place*, New York, 1975.

LIÉGEOIS V., AKKERMANS J., *Recodifying the Law: A Metalinguistic Inquiry into the Recodification of Belgian Law Between 2014-2019*, in *Semiotics of Law*, 35/5, 2022, pp. 1761–1795, https://doi.org/10.1007/s11196-022-09894-6.

LIÉGEOIS V., *De 'Voorzichtig en Redelijk Persoon' in Het Nieuw Burgerlijk Wetboek: Een Discourslinguïstische Bespreking*, in *Tijdschrift voor Wetgeving*, 23/2, 2022, pp. 77–87.

LIPOVSKI C., *Gender-specification and Occupational Nouns: Has Linguistic Change Occurred in Job Advertisements since the French Feminization Reforms?* in *Gender & Language*, 8/4, 2014, pp. 361–392.

MARTYNA W., *What does 'He Mean? Use of the Generic Masculine*, *in Journal of Communication*, 28/1, 1978, pp. 131–138, https://doi.org/10.1111/j.1460-2466.1978.tb01576.x.

MATHYSEN J., DE SMET H., HEYVAERT L., JASPERS D., PAUWELS P., SZMRECSANYI B., PETERS E., *Innovative Digital Learning: Taal-kundig Leren Leren*, Conference presentation *Dag van het Onderzoek*, Kortrijk, 09 Jun 2022.

MORI L., *La Sociolinguistica dei Corpora per lo Studio della Lingua Inclusiva di Genere*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 39–65.

NATO, *Gender-Inclusive Language Manual*, 2020, https://www.nato.int/nato_static_fl2014/assets/pictures/images_mfu/2021/5/pdf/210514-GIL-Manual_en.pdf.

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

PETERSSON S., *Gender Neutral Drafting: Historical Perspective*, in *Statute Law Review*, 19/2, 1998, pp. 93–112.

PETERSSON S., *Gender-Neutral Drafting: Recent Commonwealth Developments*, in *Statute Law Review*, 20/1, 1999, pp. 35–65.

PILON S., *Toward a More Gender-Inclusive and Gender-Neutral French Language*, in *The French Review*, 94/2, 2020, pp. 193–205.

POSSEMIERS W., *De Goede Huisvader Gaat met Pensioen*, in *Juristenkrant*, 428, 2021, p. 12.

A. POTTAGE, *Response to 'Exploring the Textual Alchemy of Gender'*, in *feminists@law*, 10/2, https://doi.org/10.22024/UniKent/03/fal.951.

PROIA F., *EU—und Bundesdeutsche Gesetzgebungssprache aus Genderperspektive*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in legislative languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 39–65.

PÜTZ M., VERSPOOR M.H. (eds.), *Explorations in Linguistic Relativity*, Amsterdam, 2000.

ROSAR A., '*Mann und Frau, Damen und Herren, Mutter und Väter': Zur ‚(Ir-)Reversibilität der Geschlechterordnung in Binomialen*, in G. DIEWALD and D. NÜBLING (eds.), *Genus – Sexus – Gender, Berlin*, 2022, pp. 267–292, https://doi.org/10.1515/9783110746396.

Rose L.M., *The Supreme Court and Gender-neutral Language: Setting the Standard or Lagging Behind?*, in *Duke Journal of Gender Law and Policy*, 17, pp. 81–130.

RUBIO E.G., *Gender Stereotypes in Spanish Phraseology*, in *GÉNEROS—Multidisciplinary Journal of Gender Studies*, 7/3, 2018, pp. 1709–1735, https://doi.org/10.17283/generos.2018.3632.

SANDRELLI A., *Gender and Language in English Directives and UK National Transportation Measures*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in Legislative Languages: From EU to national law in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 109–141.

SCZESNY S., FORMANOWICZ M., MOSER F., *Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?* in *Frontiers in Psychology*, 25/7, 2016, https://doi.org/10.3389/fpsyg.2016.00025.

SILVEIRA J., *Generic Masculine Words and Thinking, in Women's Studies International Quarterly*, 3/2–3, 1980, 165–178, https://doi.org/10.1016/S0148-0685(80)92113-2.

STEIN S., STUMPF S., *Muster in Sprache und Kommunikation: Eine Einführung in Konzepte sprachlicher Vorgeformtheit*, Berlin, 2019.

STRUNK W., WHITE E.B., *The Elements of Style*, 4th edition, New York, 2000.

SVENDSEN A.D., *Lakoff and Women's language: A Critical Overview of the Empirical Evidence for Lakoff's Thesis*, in *Leviathan: Interdisciplinary Journal of English*, 3/1, 2019, https://doi.org/10.7146/lev.v0i4.112651.

SZMRECSANYI B., *Register in Variationist Linguistics*, in *Register Studies*, 1/1, 2019, pp. 76–99.

The unanimous Declaration of the thirteen united states of America, Second Continental Congress, 1776, https://www.archives.gov/founding-docs/declaration-transcript.

Universal Declaration of Human Rights, United Nations General Assembly, Res 217 A, 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

VAASA A., *Foreword*, in S. CAVAGNOLI and L. MORI (eds.), *Gender in Legislative Languages: From EU to NationalLlaw in English, French, German, Italian and Spanish*, Berlin, 2019, pp. 7–9.

Wet van 4 februari houdende boek 3 "Goederen" van het Burgerlijk Wetboek, *BS* 17 maart 2020, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2020020416&table_name=wet.

WILLIAMS C., *Legal Drafting*, in J. VISCONTI (ed.), *Handbook of Communication in the Legal Sphere*, Berlin, 13–35.

WILLIAMS C., *The End of the 'Masculine Rule'? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland*, in *Statute Law Review*, 29/3, pp. 139–153.

XANTHAKI H., *Gender-inclusive Legislative Drafting in English: A Matter of Clarity*, in A. Fluckiger (ed.), *La rédaction administrative et législative inclusive: la francophonie entre impulsions et résistances*, Bern, 2019, pp. 57–72.

XANTHAKI H., *Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham*, in *Feminists@law*, 10/2, 2020, https://doi.org/10.22024/UniKent/03/fal.952.

Droit comparé *vs* droit comparé appliqué à la traduction

Analyse comparative du point de vue de la traductologie

***Jorge Valdenebro Sánchez*[1]**

Résumé : Dans cet article, nous nous proposons d'explorer les liens entre le droit comparé et la traduction juridique. Nous sommes conscients que le traducteur, à partir du moment où il travaille avec des textes juridiques, doit réaliser un exercice de droit comparé afin de pouvoir proposer des solutions traductologiques adaptées au contexte en question. De même, pour pouvoir étudier les droits étrangers, le juriste comparatiste doit s'appuyer sur la traduction, celle-ci lui permettant de comprendre les concepts étrangers et, par conséquent, d'analyser les similitudes et les différences qui lui permettront de tirer des conclusions pour son étude. Cependant, malgré la proximité entre les deux disciplines que sont la traductologie et le droit comparé, il convient de se demander si le droit comparé réalisé par le comparatiste et par le traducteur sont différents.

Convaincus, qu'en dépit des similitudes, il ne s'agit pas du même exercice, l'objectif principal de notre étude est de réfléchir aux différences entre droit comparé et droit comparé appliqué à la traduction. Pour ce faire, nous structurerons notre étude en deux grands blocs : le premier se concentrera sur la relation entre le droit comparé et la traduction et le second se focalisera davantage sur le point de vue du traducteur juridique et sur la manière dont ce professionnel devient un *comparatiste particulier*, qui le différencie du juriste traditionnel, pour réaliser la traduction de textes juridiques. Enfin, nous terminerons notre travail par la présentation des conclusions de notre étude.

Mots-clés : Systèmes juridiques, Droit comparé, Droit comparé appliqué à la traduction, Traduction Juridique, Effets juridiques.

Sommaire : 1. Introduction ; 2. Le droit comparé dans le domaine scientifique ; 2.1. Le droit comparé et la traduction ; 3. La traduction juridique et le droit comparé ; 3.1. Droit comparé *vs* droit comparé appliqué à la traduction ; 4. Réflexions finales ; 5. Bibliographie.

Comparative Law vs. Comparative Law Applied to Translation

Comparative Analysis from a Translational Perspective

Abstract : In this article, we propose to explore the links between comparative law and legal translation. We are aware that the translator, when working with legal texts, must carry out a comparative law exercise to be able to propose translational solutions adapted to the context in question. Likewise, to study foreign law, the comparative lawyer must rely on translation, as it allows them to understand foreign concepts and, consequently, to analyse the similarities and differences that will enable them to draw conclusions for their study. However, despite the proximity between the two disciplines of translation studies and comparative law, it is worth asking whether the comparative law carried out by the comparatist and that carried out by the translator are different.

Despite the similarities, it is not the same exercise; the main objective of our study is to reflect on the differences between comparative law and comparative law applied to translation. Accordingly, our study will be divided into two main parts, with the first part focusing on the relationship between comparative law and translation. The second part will focus more on the view of the legal translator

[1]*Université de Lorraine, Nancy (France). Adresse électronique : jorge.valdenebro-sanchez@univ-lorraine.fr.*

and on the way this professional becomes a particular comparatist, which differentiates him from the traditional jurist, to carry out the translation of legal texts. Finally, we will present the conclusions of our study.

Keywords : Legal systems, Comparative law, Comparative law applied to translation, Legal translation, Legal effects.

Summary :1. Introduction; 2. Comparative law in the scientific field; 2.1. Comparative law and translation; 3. Legal translation and comparative law; 3.1. Comparative law vs. comparative law applied to translation; 4. Final reflections; 5. Bibliography.

1. Introduction

À partir du moment où le traducteur travaille avec des textes juridiques ou des textes faisant partie d'une procédure judiciaire, l'activité ne se limite pas à une simple transposition de mots, mais devient une activité culturelle nécessitant une connaissance des droits qui font l'objet de la traduction. Par conséquent, le processus documentaire du traducteur doit s'appuyer, à tout moment, sur le droit comparé. À cet égard, Gémar souligne que « [d]ès l'instant où l'on entreprend de traduire un texte juridique, on fait intervenir la comparaison des droits, et l'opération de traduction devient alors un exercice de droit comparé […] ».[2] Cependant, il nous semble que le sens de l'expression prend des nuances différentes chez le juriste et chez le traducteur juridique. Ainsi, concernant le droit comparé réalisé par le juriste, Bocquet souligne que la méthode est focalisée sur l'étude des institutions et la comparaison des règles de droits de différents systèmes juridiques qui permettent d'améliorer et de créer un système meilleur.[3] En revanche, en traduction juridique, le fait de posséder des connaissances juridiques, d'une part, et de maîtriser plusieurs langues, d'autre part, sans établir aucun lien entre ces compétences, n'est pas suffisant pour saisir, sans ambiguïté, les différences de concepts juridiques entre les différents droits et leurs possibles effets juridiques.

Ainsi, l'objectif de notre travail est de réfléchir, sous l'angle de la traductologie, au concept de droit comparé appliqué à la traduction. Ce dernier, à la différence du droit comparé traditionnel, n'est, d'après nous, qu'un moyen, mais essentiel, qui consiste à mettre en relation des institutions et des concepts appartenant à des systèmes juridiques différents dans le but de trouver quels éléments du discours de la langue cible (au niveau terminologique, phraséologique ou du discours global) peuvent être utilisés pour exprimer le message de la langue source tout en respectant son effet juridique. À partir de cette hypothèse, notre travail s'est fondé, d'une part, sur l'analyse de la littérature juridique à ce sujet, d'autre part, sur l'analyse de la littérature traductologique, afin de pouvoir formuler une réflexion qui se fonde sur l'étude comparative des données analysées. Par conséquent, outre l'approche traductologique dont ce travail fait l'objet, nous adoptons également une approche analytique-contrastive.

2. Le droit comparé dans le domaine scientifique

La comparaison en matière de droit est une activité ancienne. Ainsi, dans la Grèce antique, l'étude des lois étrangères était récurrente en vue de leur application dans les *polis*. Néanmoins, le véritable fondateur du droit comparé, d'après plusieurs auteurs (Pollock[4], Lathier[5], Rodríguez Villabona[6], entre

[2] J. C. GEMAR, *L'analyse jurilinguistique en traduction, exercice de droit comparé. Traduire la lettre ou "l'esprit des lois" ? Le cas du Code Napoléon*, in *Comparative Legilinguistics*, No. 37, 2019, p. 13.
[3] C. BOCQUET, *La traduction juridique : fondement et méthode*, Bruxelles, 2008, p. 14.
[4] F. POLLOCK, *The History of Comparative Jurisprudence*, in *Journal of the Society of Comparative Legislation*, 5/1, 1903, p. 83.

autres), est Montesquieu, qui dans *L'Esprit des lois*, du XVIII[e] siècle, étudia les droits étrangers afin de dégager les principes d'un meilleur système de gouvernement.[7]

La comparaison est aussi présente dans les systèmes juridiques actuels. À titre d'exemple, plusieurs systèmes pénaux actuels se sont servis des droits allemand et italien. De même, dans le domaine international, les juges ont besoin d'une étude de droit comparé dans le but d'appliquer les solutions les pertinentes dans les décisions de justice. À cet égard, Morán affirme que[8] :

> En tant qu'outil juridique, le droit comparé s'est également révélé être un instrument précieux et irremplaçable dans l'activité procédurale et judiciaire. Un bon exemple est la pratique judiciaire dans les tribunaux de l'Union européenne, où les juges, liés à leur propre formation et système juridique, ont besoin de connaître et d'évaluer d'autres systèmes juridiques afin d'appliquer des solutions viables et efficaces dans leurs décisions juridiques.[9]

Toutefois, pour parler de droit comparé en tant qu'activité scientifique, il faut remonter à la seconde moitié du XIX[e] siècle. En effet, le développement du droit comparé est dû, en grande partie, au renforcement institutionnel tant sur le plan international qu'européen. Ainsi, c'est en 1869 que la Société de Législation comparée a été créée. Plus tard, en 1900, le terme *droit comparé* commence à s'utiliser plus fréquemment, notamment après le premier Congrès international de droit comparé, organisé par Édouard Lambert et Raymond Saleilles à Paris. Ces événements affirment « […] la légitimité universitaire du droit comparé »[10] et favorisent la création des instituts de droit comparé ailleurs en Europe, comme c'est le cas de l'Institut international pour l'unification du droit privé (UNIDROIT), dont la naissance a lieu à Rome en 1926. D'autres instituts viennent mettre en avant l'essor de cette discipline, notamment après la Seconde Guerre mondiale, comme l'*American Society of Comparative Law*, créée en 1951, et l'*Associazione Italiana di Diritto comparato*, créée en 1958.

La nature du droit comparé n'est pas absente de débats, comme Mastor[11] le souligne. En effet, certains juristes considèrent que le droit comparé est une science autonome qui consiste en la systématisation des matériaux juridiques d'un système juridique précis à travers l'utilisation de matériaux juridiques d'autres systèmes. Cependant, Espósito affirme que :

> [d]'autres [auteurs] soutiennent à leur tour que le Droit comparé est une méthode de recherche parce qu'il s'agit d'un recours employé par le chercheur pour résoudre les problèmes qui se posent dans son propre système juridique. Ces doctrinaires proposent une approche fonctionnaliste : le comparatiste ne doit pas s'orienter vers les normes et les structures mais vers la recherche des « équivalents fonctionnels » dans les systèmes juridiques en comparaison.[12]

Effectivement, cette position est critiquée par plusieurs auteurs, tels que David et Brierley[13], qui considèrent que, même si le droit comparé n'est pas une discipline autonome, il ne s'agit pas non plus d'une simple méthode. En effet, pour eux, la méthode comparée visant à étudier les droits étrangers et les comparer avec leur propre droit peut avoir le statut de science. Ainsi, outre ces deux positions,

---

[5] Y. M. LATHIER, *Droit comparé*, Paris, 2009.

[6] A. A. RODRIGUEZ VILLABONA, *La circulation de modèles juridiques. Les origines de l'État providence en Colombie pendant les années trente et l'influence du constitutionnalisme français du début du xx[e] siècle*, thèse de doctorat, Université Grenoble Alpes, 2015.

[7] C'est précisément dans ce travail que l'auteur soutient le principe de la séparation des pouvoirs.

[8] Toutes les citations en espagnol de cet article seront traduites en français par nous.

[9] G. M. MORÁN, *El derecho comparado como disciplina jurídica : la importancia de la investigación y la docencia del derecho comparado y la utilidad del método comparado en el ámbito jurídico*, in *Anuario da Facultade de Dereito da Universidade da Coruña*, No. 6, 2002, p. 501.

[10] B. BARRAUD, *La recherche juridique—Sciences et pensées du droit*, Paris, 2016, p. 91.

[11] W. MASTOR, *L'épreuve de la comparaison en droit. Rédaction et adresse aux jeunes comparatistes*, in *Cahiers de méthodologie JURIDIQUE*, No. 34, 2020, pp. 1423–1438.

[12] J. ESPOSITO, *Le droit comparé dans la formation de traducteurs juridiques en Argentine*, in *Synergies Argentine*, No. 5, p. 112.

[13] R. DAVID et J. E.C. BRIERLEY, *Major Legal Systems in the World Today* (3[e] éd.), Londres, 1985.

nous en trouvons une intermédiaire, soutenue aussi par d'autres auteurs tels que Fix-Zamudio[14], Zweigert et Kötz[15] ou Morán[16]. À cet égard, le droit comparé n'est pas qu'une analyse des systèmes juridiques étrangers, mais une étude qui a besoin d'une méthode comparative comme activité juridique. Cela implique donc une distinction des autres branches chargées d'étudier de façon occasionnelle d'autres systèmes juridiques étrangers. C'est pourquoi, le droit comparé, d'après cette approche, peut être défini comme

> […] la science de la comparaison des droits et, plus largement, la science étudiant les droits étrangers. Si différentes branches du droit interne pourraient être comparées (par exemple, droit des contrats privés et droit des contrats publics), le droit comparé consiste traditionnellement à comparer des droits issus de différentes cultures juridiques ou, du moins, de différents États.[17]

En conséquence, le droit comparé est la discipline qui étudie le droit étranger en se servant d'une méthodologie de recherche comparative (celle-ci pouvant être aussi appliquée dans d'autres branches juridiques) afin d'améliorer les connaissances du droit national, de comprendre les cultures juridiques étrangères et développer les relations internationales.

En ce sens, si le droit comparé nécessite une analyse des systèmes juridiques étrangers, la traduction prend un rôle très important chez les comparatistes. À cet égard, Mastor affirme que l'une des difficultés des chercheurs en droit comparé est précisément « […] la lecture de travaux scientifiques dans une langue étrangère, et de leur traduction »[18] et Monjean-Decaudin souligne que « [l]a traduction est un outil auxiliaire du droit comparé ».[19]

2.1. Le droit comparé et la traduction

Le langage juridique naît tout d'abord dans le but de raconter le droit, puis, de le créer. Étant donné que plusieurs systèmes juridiques existent et, par conséquent, plusieurs langues du droit, « […] il se peut que le juriste traduise ; il se peut aussi que le juriste ait besoin de traduire ».[20] En effet, l'étude des systèmes juridiques étrangers passe toujours par un travail de la langue dudit système, vu que cette dernière constitue le véhicule linguistique permettant d'exprimer le droit du pays en question. Ainsi, le comparatiste français qui s'intéresse au système juridique espagnol devrait, par conséquent, présenter une connaissance approfondie de la langue espagnole. C'est pourquoi Mastor[21] affirme que la comparaison en matière juridique est « [u]ne porte qui nécessite des séjours à l'étranger […] », idée soutenue aussi par d'autres auteurs, tels que Monjean-Decaudin[22], vu que le perfectionnement de la culture juridique étrangère et, donc, du langage juridique étranger est la *conditio sine qua non* pour mener à bien une étude en droit comparé. Ce n'est pas étonnant, donc, que Legrand affirme que « […] *tout* travail sur un texte étranger comporte un travail de traduction—lequel suppose un pré-entendement, car on ne peut traduire que ce que l'on entend, sauf que pour entendre quoi que ce soit il faut bien avoir traduit ».[23] Ainsi, la traduction devient une activité fondamentale pour le juriste, étant

[14] H. Fix-Zamudio, *Tendencias actuales del derecho comparado*, in J. M. Serna de la Garza (ed.), *Metodología del derecho comparado. Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados*, México, 2005, pp. 23–68.

[15] K. Zweigert, K. et H. Kötz, *An Introduction to Comparative Law* (traduction par T.Weir) (3e éd.), Oxford : New York, 1998.

[16] G. M. Morán, *op. cit.*, pp. 501–530.

[17] B. Barraud, *op. cit.*, p. 91.

[18] W. Mastor, *op. cit.*, p. 1427.

[19] S. Monjean-Decaudin, *La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique*, Paris, 2012, p. 312.

[20] R. Sacco, *Aperçus historique et philosophique des relations entre droit et traduction*, in M. Cornu et M. Moreau (dirs.), *Traduction du droit et droit de la traduction*, Paris, 2011, p. 15.

[21] W. Mastor, *op. cit.*, p. 1427.

[22] S. Monjean-Decaudin, *Traité de juritraductologie*, Villeneuve d'Ascq, 2022, p. 55.

[23] P. Legrand, *Le droit comparé* (5e éd.), Paris, 2015, p. 113.

donné que celle-ci rend possible la connaissance et la circulation des idées et des concepts issus des différents systèmes juridiques.

À cet égard, Dullion affirme que de 1830 à 1914, en France, la traduction dans le processus de documentation joue un rôle clé dans la constitution du droit comparé en tant que discipline scientifique.[24] En effet, lorsque le comparatiste exerce son travail, il est face à un contexte juridico-culturel différent, écrit très souvent en langue étrangère[25], avec des références parfois très éloignées de celles de sa culture maternelle. Il n'est pas étonnant que le comparatiste ait besoin de la traduction. En ce sens, Mastor mène une réflexion concernant l'importance de la traduction lors du processus comparatiste et lance une critique au Conseil national des universités (CNU), qui devrait prendre plus en considération l'activité traduisante :

> Pour un comparatiste, s'atteler et briller dans l'exercice de la traduction est indispensable, et l'un des prochains combats à mener au CNU notamment doit être celui-ci : les traductions doivent être mieux valorisées. Elles révèlent des qualités fortes du doctorant futur enseignant-chercheur : abnégation, force de travail, finesse juridique, littéraire, humilité face au texte traduit. Ce sont notamment ces réflexions qui ont mené à l'organisation, en compagnie des historiens, d'un colloque suivi d'un ouvrage sur la traduction.[26]

Bien évidemment, comme nous l'avons souligné précédemment, le droit comparé est une discipline scientifique qui se sert d'une méthode comparative. Le comparatiste qui travaille alors sur différents systèmes et langages juridiques se voit confronté aux problèmes de la traduction, aux concepts plus ou moins *équivalents*, voire, parfois, sans équivalents. Il s'agit, en effet, de l'une des difficultés principales de la recherche comparatiste, tel que Morán l'affirme,[27] compte tenu des différences linguistiques, culturelles, sémantiques et terminologiques auxquelles il faut faire face. En effet, cette même auteure octroie une place très importante à la traduction lorsqu'elle propose une méthode à suivre pour mener à bien une comparaison juridique. Selon elle, cette méthode se compose de quatre phases[28] :

- Phase élective : il s'agit, *grosso modo*, de l'étape où le juriste choisit l'objet de comparaison.
- Phase descriptive : il s'agit de l'analyse comparative proprement dite, où l'on se sert aussi bien de la macro-comparaison que de la micro-comparaison.[29]
- Phase d'identification : il s'agit de l'étape permettant d'identifier les similitudes et les différences entre les systèmes juridiques objets d'analyse.
- Phase explicative ou conclusive : il s'agit de l'étape ou l'on vérifie la pertinence des résultats, grâce à une série de questions qu'il faut se poser (par exemple, si l'étude du droit étranger a permis d'enrichir notre propre système).

La phase descriptive, particulièrement, concerne l'activité traduisante, vu que le comparatiste, afin de mener à bien une étude efficiente et efficace, doit prêter attention aux aspects terminologiques, conceptuels et, par conséquent, à la traduction. Lors de cette étape, l'auteure souligne que :

> [...] il sera nécessaire de connaître la structure et le fonctionnement de chaque système juridique dans son ensemble et dans l'institution, la règle ou l'application pratique qui fait l'objet de notre étude, en accordant une attention

[24] V. DULLION, *Droit comparé et traduction juridique en France entre 1830 et 1914*, in N. KASIRER, J. C. GEMAR (dirs.), *Jurilinguistique : entre langues et droits—Jurilinguistics : Between Law and Language*, Montréal : Bruxelles, 2005, pp. 477–489.

[25] À noter que le fait d'étudier un système juridique étranger n'implique pas un changement de langues. C'est le cas, par exemple, du droit espagnol et argentin, tous les deux véhiculés par la même langue.

[26] W. MASTOR, *op. cit.*, p. 1428.

[27] G. M. MORÁN, *op. cit.*, pp. 523–524.

[28] G. M. MORÁN, *op. cit.*, pp. 525.

[29] En droit, nous parlons de *macro-comparaison* quand l'analyse comparative porte sur des systèmes juridiques dans la globalité, alors que la *micro-comparaison* s'intéresse plutôt à l'étude des institutions spécifiques où aux règles du droit visant la résolution d'un problème précis.

> particulière à la terminologie et à sa traduction appropriée. On procédera donc à une étude parallèle des systèmes juridiques, en décrivant leur mode de fonctionnement, leurs structures, leurs sources, les notions juridiques sur lesquelles ils reposent, et les problèmes juridiques posés par leur application.[30]

Ainsi, le fait que la traduction soit nécessaire en droit comparé semble tout à fait clair et compréhensible, mais ce n'est qu'à une époque récente que le juriste a compris que le droit est le produit d'une culture et, donc, que le langage juridique fait référence à des concepts propres à cette culture. La prise en considération de la traduction par le juriste se manifeste plus spécialement vers la fin du XXe siècle. Jusqu'à cette date, la communauté de juristes croyait en général que la traduction consistait en un traduction mot à mot. Il s'agissait donc d'une activité peu difficile, car malgré les différentes langues, les concepts étaient universels ou « […] doués d'une forte vocation à l'universel ».[31] L'intérêt des comparatistes pour les problèmes posés par la traduction juridique commence à véritablement être pris en considération à partir des années 1980, quand l'auteur Rodolfo Sacco, dans son ouvrage *Introduction au droit comparé*, établit que la traductologie juridique est un domaine de recherche pour les juristes. Dès lors, plusieurs évènements mettent en relief l'essor de cet intérêt, à noter l'intégration de la traduction juridique parmi les thèmes du congrès tenu à Sidney en 1986, organisé par l'Académie internationale de droit comparé.

L'histoire du droit international public et du droit européen a aussi contribué à renforcer ces liens entre droit comparé et traduction. Dans ce sens, « [l]es conférences internationales, qui ont jalonné la période de l'après-guerre et n'ont cessé de se multiplier, ont propulsé la traduction (orale et écrite) et la comparaison des droits sur la scène mondiale ».[32] De même, l'élaboration de la norme juridique supranationale se sert des travaux réalisés en matière de droit comparé et de traduction, étant donné que cette norme arrive dans le domaine national à travers la version de la langue officielle de l'État en question. Aujourd'hui, l'intérêt des juristes au sujet des rapports entre le droit comparé et la traduction ne fait qu'augmenter. À titre d'exemple, le colloque organisé en 2017 par Bassano et Mastor, suivi de la parution de leur ouvrage en 2020, portant sur la traduction[33] ou l'essor de la juritraductologie, considéré comme un champ d'étude interdisciplinaire qui s'intéresse à la question de la fonction du droit comparé et de la traduction juridique.[34] Fruit du développement de cette discipline de réflexion,[35] la juriste et traductologue Sylvie Monjean-Decaudin crée en 2015 le *Centre de Recherche Interdisciplinaire en JuritraductologiE* (CERIJE)[36]. Il s'agit du premier centre de recherche interdisciplinaire dédié à l'étude de la traduction juridique, tant des points de vue pratique et théorique que traductologique et juridique.

Ainsi, après avoir analysé les rapports entre droit comparé et traduction plutôt sous l'angle du juriste, les paragraphes suivants s'attachent à les analyser plutôt du point de vue de la traductologie.

3. La traduction juridique et le droit comparé

Dans le domaine traductologique, le lien entre la traduction juridique et le droit comparé a été étudié par différents auteurs, tels que Gémar[37], Borja Albi[38], Terral[39], Vázquez y del Árbol[40],

[30] G. M. MORÁN, *op. cit.*, pp. 525.

[31] R. SACCO, *op. cit.*, p. 16.

[32] S. MONJEAN-DECAUDIN, *La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique*, *cit.*, p. 318.

[33] M. BASSANO et W. MASTOR (dirs.), *Justement traduire. Les enjeux de la traduction juridique (histoire du droit, droit comparé)*, 2020, Toulouse.

[34] S. MONJEAN-DECAUDIN, *La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique*, *cit.*, 400.

[35] S. MONJEAN-DECAUDIN, *Peut-on traduire le droit ? Approche juritraductologie*, in R. BAUMERT, A. GESLIN, et S. ROUSSEL (dirs.), *Langues et langages juridiques. Traduction et traductologie, didactique et pédagogie*, Bayonne, 2021, p. 37.

[36] Pour plus d'information, cf. https ://www.cerije.eu/.

[37] J. C. GEMAR, *Le traducteur juridique ou l'interprète du langage du droit*, in P. NEKEMAN (ed.), *Translation, our Future. Xth World Congress of FIT*, Maastricht, 1988, pp. 22–430 ; J. C. GEMAR, *L'analyse comparée en traduction*

Bocquet[41], Monjean-Decaudin[42], Holl[43], Dullion[44], Barceló Martínez et Valdenebro Sánchez[45], entre autres. Plusieurs raisons mènent les traductologues à s'intéresser à la pertinence du recours au droit comparé lors du processus traductif, mais il nous semble judicieux de mettre en avant les deux aspects qui, pour nous, sont les plus représentatifs : la culture et les effets juridiques que les textes du droit portent.

En ce qui concerne la culture, « [l]e droit est par nature un phénomène local ; il franchit difficilement les frontières. Le langage du droit d'un pays exprime au plus haut degré le poids historique d'une notion, d'une institution […] ».[46] Ainsi, bien au-delà d'une simple question terminologique, cette dernière étant la plus *célèbre*, notamment chez les profanes ou chez ceux qui s'initient dans ce domaine, il y a la particularité de la dimension culturelle de la langue du droit (et, par conséquent, de ses textes), porteuse de concepts élaborés à l'intérieur d'une communauté bien précise (le droit international excepté) dans le but de répondre à ses besoins. Même si des concepts semblent *a priori* communs dans plusieurs systèmes juridiques, dans la plupart des cas, cette similitude n'a lieu que superficiellement. Pensons, par exemple, au concept d'adoption. Sans viser l'exhaustivité, en France, l'une des conditions de l'adoptant est d'avoir plus de **vingt-six ans**. Cela étant, en Espagne, l'adoptant doit être âgé de plus de **vingt-cinq ans**.[47] En effet, même si une réalité commune existe, chaque système juridique s'en saisit d'une manière qu'il considère pertinente. C'est précisément cette manière différente de matérialiser les réalités qui entraînera des concepts infranchissables au-delà des frontières, bien que les termes, c'est-à-dire, les signifiants, soient identiques. À cet égard, Barceló Martínez, Delgado Pugés et Valdenebro Sánchez proposent une classification par niveaux, qu'ils nomment *macroconcept* et *microconcept juridiques*. Pour eux, le *macroconcept juridique* est une notion issue du droit, à caractère générique, qui maintient un rapport hiérarchique de *supériorité* avec d'autres notions plus spécifiques avec lesquelles il a un rapport. Ces notions plus spécifiques sont les *microconcepts juridiques*. Ceux-ci sont fruit du découpage que chaque système fait des réalités juridiques, tels que les auteurs le soulignent :

> Nous comprenons par macroconcept juridique une notion d'un domaine du droit qui, en raison de son caractère « générique », englobe d'autres notions plus spécifiques, qui entretiennent avec elle une relation hiérarchique. Ces notions plus spécifiques, qui sont le résultat de la matérialisation et de l'organisation du

juridique, ses enjeux, sa nécessité, in *International Journal for the Semiotics of Law—Revue internationale de Sémiotique juridique*, No. 31, 2018, pp. 957–975 ; J. C. GEMAR, *L'analyse jurilinguistique en traduction, exercice de droit comparé. Traduire la lettre ou " l'esprit des lois " ? Le cas du Code Napoléon*, cit. ; entre autres.

[38] A. BORJA ALBI, *El texto jurídico inglés y su traducción al español*, Barcelone, 2000.

[39] F. TERRAL, *Derecho comparado y traducción jurídica : relación de interdependencia*, in *Sendebar. Revista de Traducción e Interpretación*, No. 14, pp. 97–106.

[40] E. VÁZQUEZ Y DEL ÁRBOL, *Derecho Comparado Aplicado a la Traducción : Aspectos Sucesorios (Reino Unido vs. España)*, in *Lebende Sprachen*, 58/1, 2013, pp. 1–22.

[41] C. BOCQUET, *op. cit*.

[42] S. MONJEAN-DECAUDIN, *Traité de juritraductologie*, cit. ; S. MONJEAN-DECAUDIN, *La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique*, cit. ; entre autres.

[43] I. HOLL, *La traducción jurídica : entre derecho comparado y el análisis textual contrastivo*, in I. ALONSO ARAGUÁS, J. BAIGORRI JALÓN et H. CAMPBELL (eds.), *Translating Justice. Traducir la Justicia*, Grenade, 2010, pp. 98–117.

[44] V. DULLION, *Droit comparé et traduction juridique en France entre 1830 et 1914*, cit.

[45] T. BARCELO MARTINEZ et J. VALDENEBRO SANCHEZ, *Degrés d'(in)équivalence en traduction juridique : application au droit des successions*, in F. SERRANO (dir.), *Analyser et traduire les concepts juridiques dans leurs cultures en Europe*, Chambéry, 2022, pp. 296–289.

[46] J. C. GEMAR, *Forme et sens du message juridique en traduction*, in *International Journal for the Semiotics of Law—Revue internationale de Sémiotique juridique*, 2008, No. 4, p. 327.

[47] Quand il y a deux adoptants, cette condition, tant en Espagne qu'en France, est réduite seulement à l'un des deux.

> macroconcept dans chaque système juridique, constitueraient ce que nous appelons les microconcepts juridiques.[48]

Si les auteurs proposent une telle classification lors du processus traductif, c'est justement pour faciliter la tâche documentaire en droit comparé, celle-ci étant le seul moyen permettant de connaître les similitudes et les différences entre deux concepts issus de systèmes juridiques différents et de donner, par la suite, une solution traductologique en langue cible adaptée au *skopos*. En ce sens, « […] le droit est là pour offrir une base solide permettant d'opérer des choix en fonction de critère pragmatiques ».[49] Ainsi, tel que Gémar le souligne, dès que le traducteur est face à un texte du droit il faut, *nolens volens*, mener à bien une méthode comparative, c'est-à-dire, une activité de droit comparé.[50]

En effet, les nombreuses études visant à analyser la compétence en traduction (PACTE[51], Prieto Ramos[52], entre autres), mettent en évidence, en dépit de quelques différences, l'importance des paramètres culturels (sous-compétence extralinguistique pour le groupe PACTE ; *thematic and cultural competence*, pour Prieto Ramos), d'une part, et de la documentation (sous-compétence instrumentale pour le groupe PACTE ; *instrumental competence*, pour Prieto Ramos), d'autre part. Ainsi, si la compétence culturelle et thématique de Prieto Ramos établit qu'il est fondamental d'avoir une « […] awareness of asymetry betweenlegal notions and structures in different legal traditions »[53] c'est grâce à la compétence instrumentale, autrement dit, à la documentation, que le traducteur pourra pallier le manque de connaissances culturelles ou, le cas échéant, approfondir ses connaissances déjà acquises. Le traducteur, qu'il soit juriste ou non, ne peut pas être un expert de tous les droits du monde ou de tous les aspects juridiques contenus dans le texte dont la traduction fait l'objet. En conséquence, le droit comparé intervient dans la recherche documentaire afin de saisir des concepts présentant un degré plus ou moins élevé d'asymétrie culturelle. Ces derniers constituent l'un des problèmes principaux auxquels le traducteur juridique doit faire face. Dans ce sens, René David, l'un des comparatistes les plus connus du XX siècle, parle même de l'impossibilité de traduire :

> Ne correspondant à aucune notion connue de nous, les termes du droit anglais sont intraduisibles dans nos langues, comme sont les termes de la faune ou de la flore d'un autre climat. On en dénature le sens, le plus souvent, quand on veut coûte que coûte les traduire […].[54]

À la difficulté que les concepts asymétriques présentent, s'ajoutent aussi les effets juridiques des textes de droit. En général, les textes de droit sont porteurs d'effets juridiques et entraînent une

---

[48] T. BARCELÓ MARTÍNEZ, I. DELGADO PUGÉS et J. VALDENEBRO SÁNCHEZ, *Simetría y asimetría en los ordenamientos jurídicos francés y español. Consecuencias para la traducción*. Dans T. BARCELÓ MARTÍNEZ, I. DELGADO PUGÉS et P. SAN GINÉS AGUILAR (eds.), *Introducción a la traducción jurídica y jurada (francés español)* (3e éd.), Grenade, 2020, p. 116.

[49] V. DULLION, *Droit comparé pour traducteurs : de la théorie à la didactique de la traduction juridique*, in *International Journal for the Semiotics of Law—Revue internationale de Sémiotique juridique*, No. 28, 2014, p. 99.

[50] J. C. GEMAR, *L'analyse comparée en traduction juridique, ses enjeux, sa nécessité*, in *International Journal for the Semiotics of Law—Revue internationale de Sémiotique juridique*, No. 31, 2018, p. 959.

[51] PACTE, *La competencia traductora y su adquisición*, in *Quaderns. Revista de traducción*, No. 6, pp. 39–45.

[52] F. PRIETO RAMOS, *Developing legal translation competence : An integrative processoriented approach*, in *Comparative Legilinguistics International Journal for Legal Communication*, No. 5, 2011, pp. 7–21.

[53] F. PRIETO RAMOS, *op. cit.*, p. 12.

[54] DAVID, R., *Les Grands Systèmes de droit contemporains* (6e éd.), Paris, 1974, p. 346 ; Cette question, cependant, nous paraît être répondue avec l'affirmation que Terral nous présente et que nous partageons : « Cependant, une telle affirmation " d'intraduisibilité " doit être tempérée. En effet, poussée à l'extrême, cette idée porterait à croire que la traduction juridique est tout simplement impossible ou vaine. Or, la traduction juridique est un fait, ce qui est indéniable si l'on prend en compte le nombre de textes traduits, jour après jour, et qui ne cesse de croître en suivant le mouvement d'internationalisation de notre monde » (F. TERRAL, *L'empreinte culturelle des termes juridiques*, in *Meta : journal des traducteurs*, 49/4, 2004, p. 883).

conséquence légale. Par exemple, dans un texte normatif, tel que le Code pénal, le but n'est pas simplement d'informer, mais aussi de produire un effet : le non-respect de la loi implique des peines comme une amende ou une privation de liberté, entre autres. Ces effets peuvent varier d'un pays à l'autre et ce qui peut être puni ou autorisé par la loi dans un système donné ne doit pas nécessairement l'être dans un autre. Ainsi, à titre d'exemple, les textes législatifs relatifs au changement de *genre*[55] en Espagne et en France ne produisent pas les mêmes effets : alors qu'en Espagne, la nouvelle *ley trans* approuvée en février 2023[56] établit que les personnes âgées de 16 à 18 ans peuvent changer de genre en indiquant simplement leur volonté de le faire, en France, la personne mineure voulant mener à bien cette démarche doit être émancipée et est assujettie à certaines conditions, à savoir[57] :

- qu'elle se présente publiquement comme appartenant au sexe revendiqué ;
- qu'elle soit connue sous le sexe revendiqué de son entourage familial, amical ou professionnel ;
- qu'elle ait obtenu le changement de son prénom afin qu'il corresponde au sexe revendiqué.

Par conséquent, le fait qu'une personne âgée de 16 à 18 ans non émancipée en Espagne soit reconnue dans le genre qu'elle souhaite au niveau officiel, suppose, par exemple, que tous les actes de l'État civil et autres documents administratifs prennent en considération ce changement, ce qui n'est pas le cas en France, où l'émancipation est une condition obligatoire aujourd'hui pour aboutir à cette modification légale. De plus, le système espagnol permet l'autodétermination dans la tranche d'âge susmentionnée sans aucun prérequis. Le système français, pour sa part, impose certaines obligations comme la présentation dans la vie publique avec le *genre* revendiqué. La traduction ne doit pas échapper à cette réalité. À cet égard, Monjean-Decaudin souligne comme suite :

> La traduction effectuée pour le juge afin de l'éclairer sur la teneur d'une pièce rédigée en langue étrangère […] entraîne des effets directs sur la procédure et sur les parties. La pièce de procédure dont la traduction est ordonnée par l'administration de justice comporte des effets dans la procédure en plus du contenu intrinsèque du texte qu'elle contient. La traduction d'une pièce de procédure peut revêtir une valeur probante et emporter la conviction du juge.[58]

Ces difficultés sont d'autant plus présentes que le traducteur est influencé par la culture juridique *maternelle* et « [c]e n'est qu'au prix d'un " écart culturel " et d'une vigilance contextuelle qu'il peut éviter une mauvaise compréhension du texte ».[59] Par conséquent, un mauvais traitement des concepts asymétriques peut donner lieu à une altération des effets juridiques. Il ne s'agit alors pas de trouver une équivalence dans le système cible, mais de respecter l'effet juridique source dans la langue d'arrivée. C'est pourquoi la traduction doit veiller non seulement au transfert du sens, mais aussi à la bonne réalisation du droit et cela en passant, bien évidemment (et nécessairement), par le droit comparé. C'est donc la fusion de l'effet juridique et du texte équivalent que le traducteur devrait privilégier.

---

[55] Il nous semble pertinent de faire ici une distinction entre *genre* et *sexe*. Nous partageons le point de vue des socio-constructivistes. Ainsi, le *genre* désigne l'identité sexuelle d'un individu au sein d'une société, c'est-à-dire, le genre est une construction sociale. Le *sexe*, pour sa part, est la catégorie anatomique en fonction de l'appareil génital et reproductif, c'est-à-dire, l'identité biologique. À savoir que la législation française emploi le terme *sexe* dans nos exemples, alors que, selon la définition des socio-constructivistes, l'idée exprimée ici est celle de *genre*. Cela s'explique par le fait que la *Commission générale de terminologie et de néologie* soutient l'usage du terme *sexe*, y compris pour dans sa dimension sociale. Toutefois, nous ne ferons pas dans ce travail l'emploi encouragé par la *Commission*, compte tenu de notre posture socio-constructive.

[56] BOLETÍN OFICIAL DEL ESTADO, *Anteproyecto de Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI*, 2022, https ://www.boe.es/buscar/doc.php?id=CE-D-2022-901.

[57] LÉGIFRANCE, *Code civil*, 2023, https ://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000033437635.

[58] S. MONJEAN-DECAUDIN, *La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique*, *cit.*, p. 278–279.

[59] A., GUIGUE, *La dimension culturelle du langage juridique. Brèves réflexions théoriques et pratiques*, in F. SERRANO (ed.), *Analyser et traduire les concepts juridiques dans leurs cultures en Europe*, Chambéry, 2022, pp. 178–179.

3.1. Droit comparé vs *droit comparé appliqué à la traduction*

Les liens entre le droit comparé et la traduction sont à ce jour plus évidents encore. Sans aucun doute, le juriste comparatiste a besoin de la traduction et le traducteur juridique a besoin de droit comparé pour que, tous deux, puissent accomplir leurs tâches documentaires. Toutefois, s'agit-il du même droit comparé ?

En effet, « [l]es démarches, comparative et traductionnelle, passent par des étapes similaires qui consistent en tout premier lieu à un décryptage du texte »[60], mais cette similitude n'est pas synonyme, pour nous, d'une correspondance exacte. D'après nous, le juriste comparatiste est, précisément, un expert en droit. Il se sert de la langue pour donner des réponses à des questions juridiques. En revanche, le traducteur juridique est un expert en traduction. Le droit n'est qu'un moyen de donner une réponse linguistique. Cette idée peut être représentée de la façon suivante :

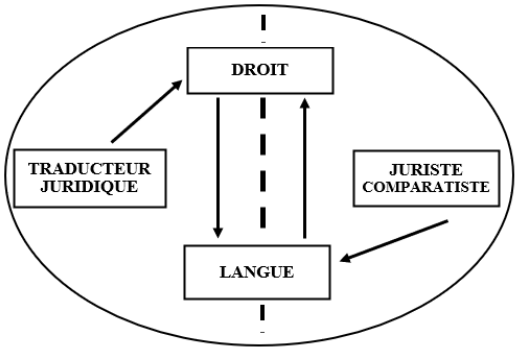

Fig. 1. Le processus comparatif chez le traducteur juridique et le juriste

Ainsi, nous constatons dans la figure ci-dessus que le droit comparé est un exercice commun chez le traducteur juridique et chez les juristes. Cependant, le juriste fait un usage de la langue dans le but d'une étude en droit (il passe par la langue pour sa conclusion juridique), alors que le traducteur juridique fait un usage du droit afin d'une étude traductologique (il passe par le droit pour sa conclusion linguistique). Dans ce sens, Dullion affirme que :

> Pour le traducteur, le droit comparé n'est pas une fin en soi : traduire est une autre entreprise, à la fois plus modeste et plus ambitieuse. Il ne s'agit pas de mener une comparaison approfondie pour en exposer les résultats et, éventuellement, parvenir à des conclusions d'ordre juridique. Il s'agit de transférer dans une autre langue un message faisant appel aux notions qui ont fait l'objet de la comparaison, en produisant un texte dans une situation et pour un destinataire donné (*sic*).[61]

En effet, le but des juristes n'est pas la traduction en soi-même, bien que celle-ci soit fondamentale pour leurs travaux comparatifs. Ainsi, les experts en droit ne traduisent pas pour un client, comme c'est le cas des traducteurs, mais pour eux-mêmes. Cela explique, en grande partie, le fait qu'ils puissent prendre certaines libertés vis-à-vis de la terminologie juridique, une liberté qui n'est pas possible dans le domaine de la traduction, tel que Bestué Salinas l'indique : « dans le domaine des études descriptives ou comparatives, les juristes prennent certaines "libertés" avec la terminologie

[60] S. MONJEAN-DECAUDIN, *La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique*, *cit*., p. 313.

[61] V. DULLION, *Droit comparé pour traducteurs : de la théorie à la didactique de la traduction juridique*, in *International Journal for the Semiotics of Law—Revue internationale de Sémiotique juridique*, cit., p. 99.

juridique, et si nous ne les justifions pas, c'est certainement dans le domaine de la traduction que de telles libertés ne devraient pas avoir leur place ».[62]

Imaginons qu'un traducteur doive faire face à la traduction d'un testament français (France) vers l'espagnol péninsulaire. Il doit, effectivement, mener à bien une activité de droit comparé. Connaître le fonctionnement en termes de successions est essentiel pour savoir s'il est possible de traduire, par exemple, *légataire* par *legatario*. Ainsi, après une étude comparative on arrive à la conclusion qu'une telle traduction n'est pas toujours possible, vu que le terme français peut faire référence à toute personne bénéficiant d'un legs, que ce soit à titre universel ou particulier, alors que le terme espagnol concerne seulement les personnes bénéficiant d'un legs de la part du testateur à titre particulier. Ainsi, le droit comparé permet au traducteur, qu'il soit traducteur spécialisé ou juriste-linguiste, de comprendre le degré d'équivalence[63] et, par conséquent, de pouvoir appliquer les techniques de traductions pertinentes pour accomplir le *skopos* souhaité. Ce dernier aspect est fondamental aussi. La traduction varie en fonction de la finalité du texte et de son contexte. La traduction au sein d'une procédure, porteuse d'effets juridiques, n'est pas la même que la traduction à caractère purement informatif, où c'est plutôt le sens qui est privilégié. À cet égard, peut-on traduire *Juzgado de lo Mercantil* par *tribunal de commerce* ? Si le but n'est qu'informer, oui, une telle traduction pourrait être tout à fait valable. Cela étant, si le texte objet de traduction fait partie d'un contexte entraînant des conséquences légales, non, étant donné les différences conceptuelles existantes.[64] Le juriste comparatiste, pour sa part, n'a pas comme but de communiquer linguistiquement toutes les particularités notionnelles présentes dans le texte juridique étranger, tel que Bestué Salinas l'affirme :

> En effet, alors que le juriste comparatiste se tourne vers des textes spécialisés étrangers afin de mettre en évidence les différences et les similitudes qui existent entre les différents systèmes juridiques, le traducteur spécialisé, quant à lui, a pour objectif implicite de communiquer le contenu notionnel du texte source au moyen d'un texte cible équivalent. Ainsi, alors que le texte produit par le traducteur comparatiste est un document destiné aux spécialistes du droit comparé et peut donc bénéficier de certaines " libertés ", le texte produit par le traducteur juridique (qu'il s'agisse d'un traducteur spécialisé ou d'un juriste-linguiste) doit respecter tous les paramètres pragmatiques de cette discipline et ne peut donc se limiter à l'analyse des paramètres linguistiques ou juridiques, mais doit également prendre en compte les aspects communicatifs et culturels qui sont en jeu.[65]

Le juriste comparatiste se sert donc de la comparaison principalement comme voie constructive (comme c'est le cas de l'Union européenne et son intérêt de développement du droit communautaire) et d'amélioration du droit national[66], en rendant possible aussi l'élargissement de la culture juridique et le progrès des connaissances en matière de droit. Un exemple en sont les cours administratives d'appel françaises, dont la création en 1987 « […] a été encouragée par les enseignements tirés de l'étude du droit allemand »[67] ou les mécanismes du *parlementarisme rationalisé*, définis par la Constitution du 4 octobre 1958, inspirés par les institutions britanniques. C'est précisément cet objectif du juriste qui explique dans une large mesure les *libertés* terminologiques de celui-ci vis-à-vis de la traduction. En effet, le juriste est un expert en droit et non en langues et en traduction (le juriste-linguiste excepté). C'est pourquoi il trouve parfois que le discours juridique est intraduisible, à la

[62] C. BESTUÉ SALINAS, *El método comparativo en la traducción de textos jurídicos. Úsese con precaución*, in *Sendebar. Revista de Traducción e Interpretación*, No. 19, 2008, p. 200.

[63] Pour plus d'information, cf. T. BARCELÓ MARTÍNEZ et J. VALDENEBRO SÁNCHEZ, *op. cit*.

[64] En Espagne, la juridiction est constituée par un juge professionnel (formation unipersonnelle), alors qu'en France cette juridiction est composée par des juges consulaires (formation collégiale).

[65] C. BESTUÉ SALINAS, *op. cit.*, p. 201–202.

[66] À noter que les comparatistes peuvent comparer et traduire également à des fins politiques. Dans ce cas, la traduction est conçue comme une *arme* de domination. Pour plus d'information, cf. S. MONJEAN-DECAUDIN, *Traité de juritraductologie*, *cit*., p. 55.

[67] B. BARRAUD, *op. cit.*, p. 97.

différence, en général, du traducteur, qui « […] dispose de ressources lui permettant de rendre moins dramatiques les difficultés qu'il rencontre sur son chemin »[68].

En définitive, aussi bien les traducteurs juridiques que les juristes comparatistes se servent du droit comparé pour mener à bien leurs travaux. Toutefois, alors que pour les premiers la traduction est l'objectif principal, pour les second elle n'en est qu'un moyen.

4. Réflexions finales

Le travail que nous présentons nous conduit aux réflexions suivantes.

D'abord, bien que la finalité du droit comparé pour le juriste et pour le traducteur ne soit pas la même, tel que nous l'avons souligné *supra*, il est indéniable que les deux disciplines *cohabitent* et partagent beaucoup d'aspects communs. Ainsi, ne serait-il peut-être pas pertinent de disposer de plus de travaux faits par des juristes comparatistes et des traductologues en collaboration ? Si dans des contextes pédagogiques nous disposons déjà de quelques projets qui vont dans ce sens, comme c'est le cas du projet *Perspectiva práctica de la traducción, interpretación y aplicación del derecho extranjero*, de l'Universidad de Granada (1999-2000)[69], le projet *Estudios de Derecho comparado: ¿herramienta o método para la traducción jurídica y la didáctica de la traducción en Argentina?* de l'Universidad Nacional de La Plata (UNLP) (2017-2022)[70] ou le projet de collaboration de futurs traducteurs avec des experts et étudiants en droit de l'Universitat de València (2017-2018)[71], nous encourageons la réalisation de plus d'activités similaires en France et ailleurs. De même, nous souhaiterions que cette collaboration s'étende aussi dans le domaine scientifique, vu que les études collaboratives entre les chercheurs comparatistes et traductologues pourraient être très enrichissantes pour chacune des disciplines.

D'ailleurs, tenant compte du paragraphe précédent, si dans le domaine scientifique les rapports entre la traduction juridique et le droit comparé semblent être clairs, nous croyons que dans la pratique il manque encore une prise de conscience au sujet des liens que ces deux disciplines entretiennent. Par exemple, en France, il n'y a pas de niveau de diplôme requis pour devenir traducteur assermenté. L'un des aspects les plus étudiés pour la première inscription est la maîtrise en langues, mais, comme nous l'avons constaté, sans une maîtrise documentaire en droit comparé, l'activité du traducteur risque toujours de poser des problèmes dans la phase de compréhension et de réexpression. Ainsi, nous encourageons une plus grande valorisation des formations en droit comparé appliqué à la traduction lors de la nomination de traducteurs assermentés.

Enfin, à la lumière de ce qui vient d'être exposé, nous aimerions mener à bien, en collaboration avec d'autres collègues traducteurs assermentés et juridiques ou comparatistes et juristes-linguistes, des formations visant à proposer des méthodologies documentaires appliquées. En tant que membre de la Chambre des Traducteurs assermentés de l'Est de la France (CETTAF) et enseignant-chercheur à l'Université de Lorraine-Nancy (France), notre idée est de pouvoir former dans l'avenir de nouveaux traducteurs-interprètes assermentés, spécialement en Grand Est[72], en proposant des ateliers méthodologiques et pratiques ouverts aussi bien à des anciens traducteurs-interprètes qu'à des étudiants des cours de traduction spécialisée de notre Université et des universités participant à ce projet. Une idée, à ce jour en cours de discussion avec les différents milieux concernés, intéressante selon nous, puisqu'elle donnerait l'opportunité à des étudiants, des professionnels et des enseignants-chercheurs d'échanger et de collaborer, en un même lieu, sur ces thématiques.

[68] R. SACCO, *op. cit.*, p. 13.

[69] C. WAY, *Traducción y Derecho: Iniciativas para desarrollar la colaboración interdisciplinar*, in *Puentes*, nº 2, 2002, pp. 15–26.

[70] J. ESPÓSITO, *op. cit.*

[71] R. SANZ MORENO, *El jurista, colaborador necesario en la traducción jurídica. Reflexiones sobre su intervención en el proceso de traducción*, in *Estudios de Traducción*, No. 10, pp. 155–170.

[72] En effet, la plupart des membres de la CETTAF proviennent de la région Grand Est. Cela n'implique pas que dans l'avenir cette idée de projet puisse s'élargir ailleurs en France.

Bibliographie

BARCELÓ MARTÍNEZ, T. et VALDENEBRO SÁNCHEZ, J., *Degrés d'(in)équivalence en traduction juridique : application au droit des successions*, in SERRANO, F (dir.), *Analyser et traduire les concepts juridiques dans leurs cultures en Europe*, Chambéry, 2022, pp. 296–289.

BARCELÓ MARTÍNEZ, T., DELGADO PUGÉS, I. et VALDENEBRO SÁNCHEZ, J., *Simetría y asimetría en los ordenamientos jurídicos francés y español. Consecuencias para la traducción*, in BARCELÓ MARTÍNEZ, T., DELGADO PUGÉS, I. et SAN GINÉS AGUILAR, P. (Éds.), *Introducción a la traducción jurídica y jurada (francés español)* (3e éd.), Grenade, 2020, pp. 109–126.

BARRAUD, B., *La recherche juridique—Sciences et pensées du droit*, Paris, 2016.

BASSANO, M. et MASTOR, W. (dirs.), *Justement traduire. Les enjeux de la traduction juridique (histoire du droit, droit comparé)*, Toulouse, 2020.

BESTUÉ SALINAS, C., *El método comparativo en la traducción de textos jurídicos. Úsese con precaución*, in *Sendebar. Revista de Traducción e Interpretación*, No. 19, 2008, pp. 199–212.

BOCQUET, C., *La traduction juridique : fondement et méthode*, Bruxelles, 2008.

BOLETÍN OFICIAL DEL ESTADO*, Anteproyecto de Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI*, 2022, https ://www.boe.es/buscar/doc.php?id=CE-D-2022-901.

BORJA ALBI, A., *El texto jurídico inglés y su traducción al español*, Barcelone, 2000.

DULLION, V., *Droit comparé et traduction juridique en France entre 1830 et 1914*, in KASIRER, N., GEMAR, J. C. (dirs.), *Jurilinguistique : entre langues et droits—Jurilinguistics : Between Law and Language*, Montréal : Bruxelles, 2005, pp. 477–489.

DAVID, R. et BRIERLEY, J. E.C., *Major Legal Systems in the World Today* (3e éd.), Londres, 1985.

DAVID, R., *Les Grands Systèmes de droit contemporains* (6e éd.), Paris, 1974.

DULLION, V., Droit comparé pour traducteurs : de la théorie à la didactique de la traduction juridique, in *International Journal for the Semiotics of Law—Revue internationale de Sémiotique juridique*, No. 28, 2014, pp. 91–106.

ESPOSITO, J., *Le droit comparé dans la formation de traducteurs juridiques en Argentine*, in *Synergies Argentine*, No. 5, pp. 109–120.

FIX-ZAMUDIO, H., *Tendencias actuales del derecho comparado*, in SERNA DE LA GARZA, J. M. (ed.), *Metodología del derecho comparado. Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados*, México, 2005, pp. 23–68.

GEMAR, J. C., *Forme et sens du message juridique en traduction*, in *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique*, 2008, No. 4, pp. 323–335.

GEMAR, J. C., *L'analyse comparée en traduction juridique, ses enjeux, sa nécessité*, in *International Journal for the Semiotics of Law—Revue internationale de Sémiotique juridique*, No. 31, 2018, pp. 957–975.

GEMAR, J. C., *L'analyse jurilinguistique en traduction, exercice de droit comparé. Traduire la lettre ou " l'esprit des loi " ? Le cas du Code Napoléon*, in *Comparative Legilinguistics*, No. 37, 2019, pp. 9–61.

GEMAR, J. C., *Le traducteur juridique ou l'interprète du langage du droit*, in NEKEMAN, P. (Éd.), *Translation, our Future. Xth World Congress of FIT*, Maastricht, 1988, pp. 22–430.

GUIGUE, A., *La dimension culturelle du langage juridique. Brèves réflexions théoriques et pratiques*, in SERRANO, F. (Éd.), *Analyser et traduire les concepts juridiques dans leurs cultures en Europe*, Chambéry, 2022, pp. 177–191.

HOLL, I., *La traducción jurídica: entre derecho comparado y el análisis textual contrastivo*, in ALONSO ARAGUÁS, I., BAIGORRI JALÓN, J. et CAMPBELL, H. (eds.), *Translating Justice. Traducir la Justicia*, Grenade, 2010, pp. 98–117.

LATHIER, Y. M., *Droit comparé*, Paris, 2009.

LEGIFRANCE, *Code civil*, 2023, https ://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000033437635.

LEGRAND, P., *Le droit comparé* (5e éd.), Paris, 2015.

MASTOR W., *L'épreuve de la comparaison en droit. Rédaction et adresse aux jeunes comparatistes*, in *Cahiers de méthodologie juridique*, No. 34, 2020, pp. 1423–1438.

MONJEAN-DECAUDIN, S., *La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique*, Paris, 2012.

MONJEAN-DECAUDIN, S., *Peut-on traduire le droit ? Approche juritraductologie*, in BAUMERT, R., GESLIN, A. et ROUSSEL, S. (dirs.), *Langues et langages juridiques. Traduction et traductologie, didactique et pédagogie*, Bayonne, 2021, pp. 25–46.

MONJEAN-DECAUDIN, S., *Traité de juritraductologie*, Villeneuve d'Ascq, 2022.

MORÁN, G. M., *El derecho comparado como disciplina jurídica: la importancia de la investigación y la docencia del derecho comparado y la utilidad del método comparado en el ámbito jurídico*, in *Anuario da Facultade de Dereito da Universidade da Coruña*, No. 6, 2002, pp. 501–530.

PACTE, *La competencia traductora y su adquisición*, in *Quaderns. Revista de traducción*, No. 6, 2001, pp. 39–45.

PEGORARO, L. et RINELLA, A., *Introducción al derecho público comparado*, Mexico, 2006.

POLLOCK, F., *The History of Comparative Jurisprudence*, in *Journal of the Society of Comparative Legislation*, 5/1, 1903, pp. 74–89.

PRIETO RAMOS, F., *Developing legal translation competence : An integrative processoriented approach*, in *Comparative Legilinguistics International Journal for Legal Communication*, No. 5, 2011, pp. 7–21.

RODRÍGUEZ VILLABONA, A. A., *La circulation de modèles juridiques. Les origines de l'État providence en Colombie pendant les années trente et l'influence du constitutionnalisme français du début du XXe siècle*, thèse de doctorat, Université Grenoble Alpes, 2015.

SACCO, R., *Aperçus historique et philosophique des relations entre droit et traduction*, in CORNU, M. et MOREAU, M. (dirs.), *Traduction du droit et droit de la traduction*, Paris, 2011, pp. 13–27.

SANZ MORENO, R., *El jurista, colaborador necesario en la traducción jurídica. Reflexiones sobre su intervención en el proceso de traducción*, in *Estudios de Traducción*, No. 10, pp. 155–170.

TERRAL, F., *Derecho comparado y traducción jurídica: relación de interdependencia*, in *Sendebar. Revista de Traducción e Interpretación*, No. 14, 2003, pp. 97–106.

TERRAL, F., *L'empreinte culturelle des termes juridiques*, in *Meta : journal des traducteurs*, 49/4, 2004, pp. 876–890.

VÁZQUEZ Y DEL ÁRBOL, E., *Derecho Comparado Aplicado a la Traducción: Aspectos Sucesorios (Reino Unido vs. España)*, in *Lebende Sprachen*, 58/1, 2013, pp. 1–22.

WAY, C., *Traducción y Derecho: Iniciativas para desarrollar la colaboración interdisciplinar*, in *Puentes*, No. 2, 2002, pp. 15–26.

ZWEIGERT, K. et KÖTZ, H., *An Introduction to Comparative Law* (traduction par T.WEIR) (3e éd.), Oxford : New York, 1998.

The Role of Legal Transfer in Post-Communist Poland

The Search for a Metaphor

Michelle Albani[1]

Abstract: The fall of the Berlin Wall in November 1989 marked the symbolic end of socialism. The collapse of the Soviet Union and the end of the socialist system meant that the legal system in force had to be rebuilt. The purpose of this article is to deal with the role of legal transfer in this transitional period, using the example of the change of the property regime in Poland. This question is embedded in the search for an appropriate metaphor for this unprecedented process.

The article elaborates on how Poland has managed the transformation of the property regime. This elaboration is oriented to the central question of the role of legal transfer.

The theories of *Watson*, *Legrand*, *Frankenberg* and *Foljanty* are used to characterise the transformation process in terms of legal theory. This aims to provide an optimal metaphor for the post-communist transformation of the Polish legal system. The central issue in this context is transfer in all its facets. Transfer is not only considered in the form of translation in the sense of a technical translation of a norm from one language into another, but also with regard to cultural differences and a possible change in meaning as a result of the transfer. In this respect, the object of research is the translation process as such, but also the continued existence of the norms at issue in the new legal order.

Keywords: Legal transfer, Post-communist transformation, Legal translation, Poland, Property rights, Socialist law.

Summary: 1. Introduction: Poland and property; 2. Historical context; 3. The socialist property regime; 3.1. The Marxist concept of property; 3.2. Types of property and owners in the Polish legal system; 3.2.1. Property at the constitutional level; 3.2.2. Property at the civil law level; 4. The transformation process; 4.1. The constitutional reform; 4.2. The civil law amendments; 4.3. Foreign participation in the transformation and the "war of advice"; 4.4. The first reform stage (1989/90); 4.5. The transformation of the property regime; 4.6. The evolution of Art. 128 of the Civil Code; 4.7. The elimination of other legal provisions; 4.8. The (re)privatisation; 5. Property law after the collapse of the Soviet Union; 6. The post-communist transformation: Legal transfer or return to the legal tradition?; 6.1. Theoretical approaches; 6.1.1. Autonomy of law (*Watson*); 6.1.2. Contextuality of law (*Legrand*); 6.1.3. Identity and politics in comparative law (*Frankenberg*); 6.1.4. Cultural translation (*Foljanty*); 6.2. Theoretical conclusion; 7. The end of the transformation?

1. Introduction: Poland and property

[1] *University of Vienna, Austria (Department of Legal and Constituitional History, Chair for Globalisation and Legal Pluralism), michelle.albani@univie.ac.at.* *I would like to express a sincere thank you to Alexander Teutsch for helpful comments and valuable perspectives.*

The fate of post-communist legal systems after the collapse of the Soviet Union and the end of the socialist system has long been perceived as a blank slate to be filled from nothing.[2] Contrary to this simplistic assumption, the transformation process is more multi-layered and complex. The transformation of the property regime can serve as an example to illustrate the entire process, guided by the question of the role of the transfer of rights and the search for a metaphor capable of capturing this process.

At first glance, it seems evident to regard property as the central legal institution in connection with the change from a communist economic order to a capitalist system. The link between the political and economic system and the prevailing property regime can be described in a well-founded way on the basis of socialist law. At its core, the systemic antagonism between state socialism and private capitalism could even be reduced to opposing conceptions of property and property regimes, and their effects.[3] At the very least, the transformation of the property regime is one of the most far-reaching measures in the transition from a communist to a post-communist market economy, which affects the legal sphere of both the state and its citizens. For the particularity of the legal institution of property is that it affects everyone and moreover, represents a legal, economic and social category at the same time.

The peculiarity of the post-communist transformation in the case of Poland lies in the combination of several significant aspects. First of all, Poland's geopolitical position is a special feature. Bordering Germany, it is located in direct proximity to the countries of the West and situated in the centre of Europe.

Poland's position in the overall transformation process of Eastern Europe should also be mentioned. Poland has played a pioneering role in democratisation and the introduction of a market economy. The People's Republic of Poland is one of those post-Soviet states that showed a clear tendency to establish overtly capitalist institutions in both politics and the economy right after the collapse of the Soviet Union.[4]

In order to further describe Poland's role in this context, Poland's earlier legal history before socialism must be taken into account. In particular, this upheaval must be seen against the background of a long and difficult process: with the attainment of independence in 1918, the young state of Poland was confronted with problems of unification and codification of law. At the time, the state had to be rebuilt from territories that were under the rule of different countries, each with distinctly different legal systems. In the case of civil law, this involved French, Russian, German and Austrian law.[5] Therefore, Poland has always been under the influence of various continental European legal traditions, so the legal system appears amenable to legal transfer at its core.

Another peculiarity is that the communist revolution in Poland did not take place on the same scale as in Russia, meaning that there was no complete discarding of the pre-socialist legal order during the socialist system.[6] As a result, the postwar period is characterised by a transformation process that is oriented both to the original legal order and to other legal systems.

In comparative law, the Polish legal system is considered to be a legal system that, after the collapse of communism, was actively oriented toward other legal systems and adopted parts of these legal systems. In this respect, the unification of the law, predominantly influenced by both German and French traditions, is a particular feature, also with regard to legal harmonisation within Europe.[7]

---

[2] B. KORDASIEWICZ, M. WIERZBOWSKI, *Polish Civil and Commercial Law*, in S. FRANKOWSKI, P. B. STEPHAN III (eds.), *Legal Reform in Post-Communist Europe*, Dordrecht 1995, p. 163.

[3] H. ROGGEMANN, *Rechtsentwicklung in Mittel–und Osteuropa*, Berlin, 1999, p. 36.

[4] H. IZDEBSKI, *General Survey of Developments in Eastern Europe in the Field of Civil Law*, in D. D. BARRY, G. GINSBURGS, W. B. SIMONS (eds.), *The Revival of Private Law in Central and Eastern Europe*, The Hague, 1996, pp. 5, 8.

[5] M. GONDEK, *Article Poland*, in J. M. SMITS (eds.), *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2012, p. 681; P. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit*., p. 163 f.

[6] B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 163.

[7] M. GONDEK, *op. cit*., p. 681; W. GLATZ, *Die Entwicklung des polnischen Zivilrechts: Darstellung und Bewertung unter dem Aspekt des wirtschaftlichen Wandels*, Berlin, 2000, p. 24 ff.

2. Historical context

In Poland, the system change in 1989/90 took the form of a negotiated transition, which was initiated by the 1989 Round Table negotiations and was eventually characterised by Poland's return to a parliamentary democracy.[8] Previously, the independent trade union *Solidarność*, along with the Catholic Church, had been the main force behind the movement that marked the end of communism in Poland.[9] This transformation of the communist system into a democratic state governed by the rule of law also set the course for the legal way of dealing with the past.

3. The socialist property regime

To understand the transformation of the legal system in Poland and the challenges it created, hawse have to look back to the socialist legal system and the socialist property regime. Two aspects must be taken into account when examining the legal institution of property in the socialist system:

Firstly, after 1945, research on Eastern European law predominantly took the form of a comparison of systems that combined several or even all socialist countries.[10] Hence, from this legal research persepective, a general presentation of the socialist concept of property is given for the purpose of this article, although supplemented with the specific Polish implementations. Secondly, in socialist law many civil law matters, in particular property, were characterised by a strong public law component.[11] For this reason, the property regime will be discussed in the following primarily on the basis of constitutional law.

3.1. The Marxist concept of property

The Marxist concept of property served as a foundation for defining the concept of property as a socio-economic category in socialist doctrine.[12]

> At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they had been at work before.[13]

According to Marxist theory, property is not a relation between person and object that authorises the person with the power of disposal. On the contrary, it is a social relationship.[14] Although it contains all the powers of the subjective property right, it is not an exclusive right in the traditional sense, since other legal subjects are intended to participate in the utilisation of that same property.[15]

3.2. Types of property and owners in the Polish legal system

[8] T. DE VRIES, *Der rechtliche Umgang mit der Vergangenheit in der Republik Polen*, in F. C. SCHROEDER, H. KÜPPER (eds.), *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Osteuropa*, Frankfurt, 2010, p. 128.

[9] K. ZIEMER, Das politische System Polens, Wiesbaden, 2013, p. 21 f., 85; see generally A. MICEWSKI, *Kirche, „Solidarność" und Kriegszustand in Polen*, München, 1988.

[10] H. KÜPPER, *Einführung in die Rechtsgeschichte Osteuropas*, Frankfurt am Main, 2005, p. 696 f.

[11] H. KÜPPER, *op. cit.*, p. 697.

[12] O.W. JAKOBS, *Eigentumsbegriff und Eigentumssystem des sowjetischen Rechts*, Köln, 1965, p. 6.

[13] Original version: "*Auf einer gewissen Stufe ihrer Entwicklung geraten die materiellen Produktionskräfte der Gesellschaft in Widerspruch mit den vorhandenen Produktionsverhältnissen oder, was nur ein juristischer Ausdruck dafür ist, mit den Eigentumsverhältnissen, innerhalb derer sie sich bisher bewegt hatten*…", K. MARX, *Zur Kritik der politischen Ökonomie* (1859), in: Marx-Engels-Werke, vol. 13, Berlin, 2015, p. 9; English translation by N. I. STONE, *K. MARX, A Contribution to the Critique of Political Economy*, New York, 2014, p. 12.

[14] V. PETEV, *Sozialistisches Zivilrecht*, Berlin, 1975, p. 76.

[15] V. PETEV, *op. cit.*, p. 112.

In agreement with this theory, ownership was not treated as a unitary legal concept, applying to all legal subjects and all legal objects. Instead, the socialist property regime knew different types of ownership. In total, three types of property were distinguished: social, individual and personal property. The first type was further divided into state-owned and cooperative property.[16]

3.2.1. Property at the constitutional level

The tripartite divison of property was initially embodied at the constitutional level: The socialist constitutions contained not only fundamental provisions on property, but also detailed regulations on the economic foundations of the socialist state and social order.[17]

Socialist property was understood to mean property based on the socialisation of the means of production.[18]

State property as the first form of social property was the highest form of socialist property and therefore particularly protected. Since it was intended to serve the entire people, the Polish Constitution referred to it as the people's property.[19] However, the people functioned only as a theoretical institution, personified by the state. State property could refer to any object and was thus not subject to any restrictions.[20]

The objects of Polish state property were goods such as natural resources, transportation and communication facilities, and banking and insurance institutions. However, land was not nationalised in the Polish People's Republic.[21]

This form of ownership found expression in Art. 77, par. 1 of the Constitution of the Polish People's Republic as follows:

> It is the duty of every citizen of the Polish People's Republic to safeguard and strengthen social property, which is the unshakable foundation of the development of the State, the source of the wealth and might of the country.[22]

The other component of social property was cooperative property. Its subject was a group, so it qualified as group property. Due to its nature as a component of socialist property, cooperative property also received special care and protection from the state.[23]

This was expressed in Art. 11 of the Constitution of the Polish People's Republic as follows:

> The Polish People's Republic promotes the development of various forms of the co-operative movement in town and country and gives it every help in the fulfilment of its tasks, while extending special care and protection to co-operative property, as constituting social property.[24]

[16] V. PETEV, *op. cit.*, p. 78; O. W. JAKOBS, *op. cit.*, p. 52; correspondingly for Polish Law: A. BILINSKY, *Das Eigentumsrecht in Polen*, in *Studien des Instituts für Ostrecht, Band 5, Das Eigentum im Ostblock*, West-Berlin, 1958, p. 96 f.

[17] V. PETEV, *op. cit.*, p. 77; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 171.

[18] O.W. JAKOBS, *op. cit.*, p. 53.

[19] O.W. JAKOBS, *op. cit.*, p. 53; A. BILINSKY, *op. cit.*, p. 98.

[20] V. PETEV, *op. cit.*, p. 78 f.

[21] V. PETEV, *op. cit.*, p. 79; A. BILINSKY, *op. cit.*, p. 97.

[22] Art. 77 (renumbered as Art. 91 by decree of February 1976) § 1, Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r7.html (as consulted online on 26 January 2023).

[23] A. BILINSKY, *op. cit.*, p. 96 f.; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 171.

[24] Art. 11 (renumbered as Art. 16 by decree of February 1976), Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r2.html (as consulted online on 26 January 2023).

Furthermore, the socialist property regime knew individual and personal property, with the distinction based on the criterion of its use. While individual property was used for production purposes, personal property was defined as property conceptualised to satisfy the consumption needs of the individual.[25]

According to this concept, the Constitution of the Polish People's Republic stated in Art. 12:

> The Polish People's Republic recognises and protects, on the basis of existing laws, individual property and the right to inherit land, buildings and other means of production belonging to peasants, craftsmen and persons engaged in domestic handicrafts.[26]

Personal property concerned the property of objects for personal use.[27] Characteristic of personal property were its sources as well as its destination, namely the creation through individually earned income or inheritance and the use to satisfy material needs.[28] The Constitution guaranteed full protection of personal property in Art. 13:

> The Polish People's Republic guarantees to citizens full protection of personal property and the right to inherit such property.[29]

Legal objects accessible to this form of ownership, though, were not mentioned.[30]

The form of classic private property remained a relic for the socialist order. Nevertheless, some countries granted it to varying degrees. Unlike in the Union of Soviet Socialist Republics (USSR), land was not generally nationalised in Poland. In addition, private catering establishments were very common.[31]

3.2.2. Property at the civil law level

The property regime of the Polish Constitution then formed the basis for the civil law concept of property in the Civil Code (*kodeks cywilny*). Consequently, the Civil Code also distinguished between three types of property: social, personal and individual property. Here, property law outlined the abstract limits of entitlement. These resulted from the entire legal system, from the principles of social coexistence regulated in Art. 140 of the Civil Code, from the social-economic purpose of property law, as well as from other special regulations.[32]

The principle of special protection of social property found expression in Art. 126 and 127 of the Civil Code: Art. 126 contained the definition of social property already enshrined in the Constitution as either state property or cooperative property. Art. 127 obliged every citizen to protect social property from any harm threatening it.[33]

The owner's entitlement finds its limits according to Art. 140 of the Civil Code in the principles of social coexistence as well as in the purpose of the property:

---

[25] B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 171.

[26] Art. 12 (renumbered as Art. 17 by decree of February 1976), Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r2.html (as consulted online on 26 January 2023).

[27] A. BILINSKY, *op. cit*., p. 97.

[28] V. PETEV, *op. cit*., p. 82.

[29] Art. 13 (renumbered as Art. 18 by decree of February 1976), Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r2.html (as consulted online on 26 January 2023).

[30] A. BILINSKY, *op. cit*., p. 97.

[31] A. BILINSKY, *op. cit*., p. 97; V. PETEV, *op. cit*., p. 83 f.

[32] D. KEMPTER, *Der Einfluss des europäischen Rechts auf das polnische Zivilgesetzbuch*, Baden-Baden, 2007, p. 45; W. GLATZ, *op. cit*., p. 54 f.

[33] Art. 126, 127, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93.

> Within the limits set by the laws and principles of social coexistence, the owner may, with the exception of other persons, benefit from things according to the socio-economic purpose of his or her right, and may, in particular, charge the benefits and other income from the things. Within the same limits, it can dispose of a thing.[34]

Furthermore, the socialist conception of property implied ist loss in function as a means of securing credit. Mortgages and other forms of security were partially or completely eliminated as legal institutions.[35]

4. The transformation process

The transformation process in Eastern Europe can be divided into three areas of a coherent reform process: institutional infrastructure, currency stabilization and real regulation at the microlevel, i.e. at the level of enterprises. Property rights can be identified as one of the most important elements of the institutional infrastructure.[36] Looking at the overall Eastern European transformation process, it can be seen that apart from Hungary, only Poland preserved the tradition of the socialist principle of the unity of civil law in the legislative process.[37] Moreover, in Poland it was even a question of accentuating this unity.[38]

4.1. The constitutional reform

The political and economic development of the transition countries after the end of Soviet influence represented a revolution. This revolutionary process was not initiated simply by enacting a civil code. Rather, the first step was a constitutional reform, which was characterised by the essential importance of the legal institution of property. The reform pursued the abolition of the tripartite division of types of property and thus the establishment of a uniform property right that applied equally to all legal subjects.[39]

This revolutionary process was undertaken in Poland through a significant amendment to the 1952 Constitution, which was passed in December 1989.[40] Thus, Poland was the only post-socialist state that, even after the reform, preserved a large part of the socialist constitution—albeit in a modified form—without, however, enacting a completely new version.[41]

Apart from the actual property regime, though, the 1952 constitution with its democratic values was meaningless during Soviet rule, since in practice, it was disregarded by the Polish leadership, first completely and, from the 1970s onwards, at least to a large extent. It is noteworthy that by 1989, when the most significant amendment was passed, the 1952 constitution had been amended 17 times.[42]

The new property right was initially reflected in Art. 6 and 7 of the Constitution as amended in 1989. Art. 6 guaranteed the freedom of economic activity, which could only be restricted by law, and Art. 7 protected property and inheritance rights, and made expropriation subject to the conditions of just

---

[34] Art. 140, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93; English translation: https://www.globalregulation.com/translation/poland/2985870/act-of-23-april-1964-civil-code.html (as consulted online on 30 January 2023).

[35] H. ROGGEMANN, *op. cit*., p. 36.

[36] H. SIEBERT, *The Transformation of Eastern Europe*, in KIEL INSTITUTE FOR THE WORLD ECONOMY (ed.), *Kieler Diskussionsbeiträge*, Vol. 163, Kiel, 1991, p. 7.

[37] Unity of civil law means that the relations of the socialist economy are also fundamentally subject to the regulations of civil law, so that there is no need for a special economic law, W. GLATZ, *op. cit*., p. 39.

[38] H. IZDEBSKI, *op. cit*., p. 5.

[39] H. IZDEBSKI, *op. cit*., p. 6.

[40] M. GONDEK, *op. cit*., p. 681.

[41] H. IZDEBSKI, *op. cit*., p. 7.

[42] M. BREZINSKI, L. GARLICKI, *Polish Constitutional Law*, in S. FRANKOWSKI, P. B. STEPHAN III (eds.), *Legal Reform in Post-Communist Europe*, Dordrecht 1995, p. 21.

compensation and pursuit of public purposes.[43] What is noteworthy in this respect is the explicit mention of "personal property", which is a legacy of the earlier provisions on property. This formulation specifically expressed the recognition of private property in contrast to the previous constitution.[44] The regulations had thus introduced a right to property, which also included the individual's right to economic activity.[45]

As a consequence of the constitutional amendment, the property guarantee existed in the post-socialist constitutional law of Poland, and its provisions could, in turn, be used as a basis for civil law reform.

The *"Little Constitution"* of 1992 enabled the Polish state to function properly until the final Polish constitution (*Konstytucja Rzeczypospolitej Polskiej*) came into force in 1997.[46] The current Constitution of Poland was enacted on 2 April 1997, granting all property rights as well as the right of succession.[47]

4.2. The civil law amendments

On the basis of constitutional law, the property right was then defined sub-constitutionally in civil law.

As early as the beginning of the 1980s, under pressure from both the economic crisis and the *Solidarność* trade union, the first reforms of economic law were introduced in Poland with the aim of gradually denationalising the economy. Despite the socialist basis of the Civil Code, the amendment of civil law provisions was initially not considered necessary, as the fundamental influence of Polish legal tradition on the Civil Code was invoked.[48]

However, this approach was not sustainable for long, so that by 1985 the Legislative Council noted the incompatibility of the Civil Code with socioeconomic changes. Since a new codification of the Civil Code was not considered, the only option was successive amendment.[49]

The aim of the reform was to provide legal protection and support for economic change. In formal terms, the continental European system implemented in the Civil Code of 1964 was to be retained.[50]

4.3. Foreign participation in the transformation and the "war of advice"

After the collapse of socialism, a "war of advice"[51] broke out within the Western community of values, a dispute over the choice of model legal systems for the transition countries.

While it is true that massive financial resources flowed from the USA, the work enabled by it refuted the assumption that common law countries were better suited for transformation assistance than countries with codified civil law in the Roman tradition.[52]

---

[43] Art. 6, 7, Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Act amending the Constitution of the Polish Peoples' Republic of Poland), Dziennik Ustaw, 31 December 1989, nr. 75, poz. 444.

[44] W. GÄRTNER, *Die Eigentumsgarantien in den Verfassungen Polens, Ungarns, der Tschechischen und der Slowakischen Republik – Verfassungsrechtliche Grundlagen und Verfassungspraxis*, in H. ROGGEMANN (ed.), *Eigentum in Osteuropa*, Berlin, 1996.

[45] W. GLATZ, *op. cit*., p. 119.

[46] See generally K. ZIEMER, *op. cit*.

[47] Art. 64, Constitution of the Polish People's Republic (1997), official English translation: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm (as consulted online on 17 February 2023).

[48] W. GLATZ, *op. cit*., p. 89.

[49] W. GLATZ, *op. cit*., p. 89.

[50] W. GLATZ, *op. cit*., p. 89 f.

[51] "*War of advice may break out in Russia*", in: Financial Times, 21. Dezember 1992, cited after: H. SCHMIEGELOW, *Why Legal Transformation Assistance from Germany and Japan to Former East-Bloc Countries?* in H. KÜPPER, W. BRENN (ed.), *Rechtstransfer und internationale rechtliche Zusammenarbeit: Deutsche und japanische Erfahrungen bei der Kooperation mit Osteuropa und Zentralasien*, Frankfurt am Main, 2010, p. 76.

[52] H. SCHMIEGELOW, *op. cit*., p. 76 f.

The transformation assistance provided by Japan and Germany, which in contrast to the U.S. approach can be characterised as cautious and oriented toward the needs of the respective countries, was considerably less costly. While Japan concentrated on Southeast Asia, German assistance was directed at Eastern Europe, the former Soviet Union and China, including Poland. In this context, German advice mainly concerned civil and commercial codes.[53]

The motives of Germany and Japan were of a foreign policy nature and can be explained by the similar experiences of their own post-war transformations and reintegration into the Western community of values. The possibility of working with civil law books, yet freed from the legislative proliferation induced by a planned economy, proved to be a precondition for the 'economic miracle' of the two countries. Hence, Germany and Japan were valuable sources of legal transformation advice.[54]

Regarding assistance from the German side, the following institutes were engaged in transformation consulting: the German Foundation for International Legal Cooperation (*Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit e.V.*; *IRZ*), the German Society for Technical Cooperation (*Deutsche Gesellschaft für Technische Zusammenarbeit*; *GTZ*) and the Institute for Eastern Law (*Institut für Ostrecht*; *IOR*).[55] On the Austrian side, the Center of Legal Competence in Vienna was established to provide consulting services to the transition countries.[56]

The founding of the *IRZ* in May 1992 coincided with a time when German experience with restructuring the law in the former German Democratic Republic was still very fresh.[57] Moreover, the inspiration for these efforts was the idea that, in view of the upheaval in the Eastern bloc countries, reunified Germany in particular had a special obligation to help the affected countries quickly and effectively in shaping the legal framework.[58] The legal advice of the IRZ was intended to contribute to the establishment of the legal system and to provide assistance in the implementation of this legal system.[59] The focus in this respect was on support for the reform of the private legal system, which includes the creation of a private property regime.[60] The consulting activities were based on the maxim of merely providing support for independent reform.[61]

A large part of the *IRZ's* work consisted of advising on the preparation, drafting and implementation of laws. In addition to the adoption of new laws, the transformation process for the practical implementation of the new legal system required measures for the education and training of legal practitioners. Specifically, this part of assistance consisted of seminars, as well as providing internships at courts, law firms, authorities, chambers or even companies in Germany.[62]

4.4. The first reform stage (1989/90)

[53] H. SCHMIEGELOW, *op. cit.*, p. 78, 80.

[54] H. SCHMIEGELOW, *op. cit.*, p. 78 f.

[55] H. SCHMIEGELOW, *op. cit.*, p. 78 f.; about the work of the IRZ: https://www.irz.de/index.php/en/about-us (as consulted online on 1 February 2023). The GTZ was merged with two other German governmental public development organisations to form the German Agency for International Cooperation GmbH (GIZ), https://archive.ph/20130915125908/http:/www.bmz.de/en/press/aktuelleMeldungen/2010/december/20101216_pm_184_fusion/index.html (as consulted online on 1 February 2023); website URL GIZ: https://www.giz.de (as consulted online on 1 February 2023); website URL IOR: https://www.ostrecht.de (as consulted online on 1 February 2023).

[56] Website URL: https://www.clc.or.at (as consulted online on 1 February 2023).

[57] K. HOBE, *Politik und Institutionen der deutschen Zusammenarbeit* in M. BOGUSLAWSKIJ, R. KNIEPER (eds.), *Wege zu neuem Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, Berlin, 1998, p. 259.

[58] L. FADÉ, *Die Tätigkeit der Deutschen Stiftung für internationale rechtliche Zusammenarbeit*, in M. BOGUSLAWSKIJ, R. KNIEPER (eds.), *Wege zu neuem Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, Berlin, 1998, p. 262.

[59] K. HOBE, *op. cit.*, p. 260.

[60] L. FADÉ, *op. cit.*, p. 263.

[61] L. FADÉ, *op. cit.*, p. 264.

[62] L. FADÉ, *op. cit.*, p. 265; in this article, the work of the IRZ in particular is presented as an example of foreign participation.

In accordance with a *"policy of small steps"*, the Commission under the Ministry of Justice for the Reform of Civil Law, created in 1986, determined that the revision should be carried out in stages as needed.[63]

It was decided to carry out the civil law reform in two stages, with the first stage to be implemented quickly and to include the most important and urgent changes, while the second stage was to deal with less urgent problems.[64]

The first stage of reform is of primary importance for the property regime, so that only this reform stage will be considered here. It took effect mainly through the adoption of the Law of 28 July 1990 on the Amendment of the Civil Code.[65]

Notwithstanding this classification, short-term reforms had become so urgent by the end of 1988 that a special committee and members of the Polish Parliament drew up further new regulations: An amendment, passed in advance on 31 January 1989, was programmatic in nature, changing only Art. 128 of the Civil Code and deleting Art. 535, par. 2 of the Civil Code.[66]

What is relevant to property is the following: The amended Art. 128 of the Civil Code, under which national property belonged to the treasury or other legal entities, broke with the principle of the unity of state property and was thus intended to adapt the Civil Code to the requirements of economic change.[67] With the deletion of Art. 535, par. 2, the most important follow-up provision to the concept of unitary state ownership was abolished. Art. 535, par. 2 detached the seller's obligation of a state economic unit from the transfer of ownership in sales contracts between state enterprises, and instead made it sufficient that the thing was handed over to the buyer and left at his exclusive disposal. With its deletion, this restriction of the seller's obligation thus ceased to apply. The elimination of the unity of state ownership accordingly also meant the end of Art. 535, par. 2.[68]

4.5. The transformation of the property regime

One of the key elements of the reform of the Civil Code, aimed at adapting it to the requirements of the market economy, was the abolition of the distinction between types and forms of property, as well as of the special provisions protecting state property. The point of departure of the problem was therefore everywhere where state property had previously been regulated.[69]

However, it was not necessary to completely reintroduce private property, as the institution of private property had always existed in Poland to a certain extent. While jurisprudence in the 1980s was still pursuing the question of *how* state property was structured in accordance with the economic model, once the decision was made to unify ownership, the focus shifted to the question of *who*, i.e. the ownership of the formerly state-owned property. By abolishing all privileges of state property and the underlying tripartite division, a uniform form of property was established, irrespective of the diversity of the legal entities, including equal treatment in principle.[70]

Any preferential treatment was no longer based on fundamental, economic policy considerations, but at best on a rule-exception principle through legal regulations. The emergence and special treatment of state property, on the other hand, was not ruled out. Nevertheless, state property no longer had any intrinsic value that could be traced back to the people as a whole through the state's legal authority. Accordingly, state property lost its legitimacy. In addition to the ideological justifications that once applied, no legal justifications could be found.[71]

---

[63] D. KEMPTER, *op. cit.*, p. 53.
[64] W. GLATZ, *op. cit.*, p. 91; D. KEMPTER, *op. cit.*, p. 53; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 170.
[65] D. KEMPTER, *op. cit.*, p. 54; H. IZDEBSKI, *op. cit.*, p. 9.
[66] W. GLATZ, *op. cit.*, p. 92; Ustawa z dnia 31 stycznia 1989 r. o zmianie ustawy – Kodeks cywilny (Amendment of of the Civil Code), Dziennik Ustaw, 1989, nr. 3, poz. 11; own translation.
[67] L. FADÉ, *op. cit.*, p. 92.
[68] L. FADÉ, *op. cit.*, p. 62, 92.
[69] D. KEMPTER, *op. cit.*, p. 54.
[70] W. GLATZ, *op. cit.*, p. 119.
[71] W. GLATZ, *op. cit.*, p. 121.

4.6. The evolution of Art. 128 of the Civil Code

The legal restructuring of the nature and protection of property can be exemplified by the aforementioned amendment of Art. 128 of the Civil Code. In particular, the course of the legislation of this norm shows the problem of the gradual departure from the principle of uniform state property.

Thus, Art. 128 (old version) of the Civil Code regulates the principle of the unity of state property and furthermore constructs an overall social property of the people:

> Art. 128, par. 1. Socialist people's property (state property) belongs indivisibly to the state.[72]
>
> Art. 128, par. 2. Within the limits of their legal capacity, the state legal persons shall exercise in their own name the rights flowing from the state property with regard to the part of the people's property administered by them.[73]

Here, the state's property position results from the wording. The state legal persons only had the objects of state property for administration, so that they could not become owners.[74]

The dissolution of state property under civil law thus had the consequence that it became questionable who should move into this formerly comprehensive social ownership position. The previously chosen path of gradual reform proved to be problematic in this respect.[75]

The amendment of 31 January 1989 changed Art. 128 of the Civil Code to the effect that state property should go to the treasury or other legal entities:

> Common property (state property) serves the state assets or other legal persons under public law.[76]

The fact that this amended Art. 128 of the Civil Code was ultimately deleted altogether in the course of the 1990 reform shows that Art. 128 (new version) of the Civil Code was not a satisfactory provision, either, with regard to relieving the burden of legal practice. For even after the enactment of the new version of Art. 128 of the Civil Code, the question remained as to whether state legal persons should acquire property directly by virtue of the new regulation.[77]

Art. 128 of the Civil Code was intended to provide a solution to an interpretation dilemma and to satisfy the need for a provision, which, on the one hand, grants the treasury property of the assets managed by the companies and, on the other hand, enables the management of the state-owned properties.[78]

A differentiating solution then assumed that Art. 128 (new version) of the Civil Code only standardised a direct regulation insofar as no special provision existed. Accordingly, in the absence of a special provision for movable property, the companies were directly entitled to ownership of the objects that had been in their possession until then.[79]

---

[72] Art. 128, par. 1, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93; own translation.
[73] Art. 128, par. 2, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93; own translation.
[74] D. KEMPTER, *op. cit.*, p. 48 f., 56.
[75] W. GLATZ, *op. cit.*, p. 122.
[76] Art. 1, Ustawa z dnia 31 stycznia 1989 r. o zmianie ustawy – Kodeks cywilny (Amendment of the Civil Code), Dziennik Ustaw, 1989, nr. 3, poz. 11; own translation.
[77] W. GLATZ, *op. cit.*, p. 122.
[78] W. GLATZ, *op. cit.*, p. 123.
[79] W. GLATZ, *op. cit.*, p. 123 f.

After the elimination of Art. 128 of the Civil Code, Art. 44 of the Civil Code assigned property to the treasury and only incidentally to other state legal persons.[80]

4.7. The elimination of other legal provisions

In addition to Art. 128 of the Civil Code, Art. 126 to 135 of the Civil Code, which made the treatment of persons under civil law dependent on the form of ownership they represented, were ultimately deleted without replacement. Furthermore, the regulations of Art. 129, 131 and 139 of the Civil Code, which standardised special rules of interpretation regarding the protection of forms of property, as well as Art. 177, which excluded the possibility of the acquisition of a state property, were repealed.[81]

4.8. The (re)privatisation

The transformation of the property regime now also required a corresponding implementation in actual terms. The principles of economic freedom and the protection of private property pushed the state out of the economy to a certain extent, so that legal constructions became necessary to accomplish the transition from state property to people's property.[82]

In the first phase of the privatisation policy, which ended with the legal regulation of privatisation, the legal foundations that are still valid today were created.[83] Privatisation is regulated by the Law on Privatisation of State Enterprises of 13 July 1990[84], which was amended in August 1996 by the Law on Commercialisation and Privatisation of State Enterprises.[85] For the enforcement of privatisation, a ministry was established on the basis of the Law on the Establishment of the Ministry for Ownership Transformation[86], which was dissolved in 1996. Its tasks were then taken over by the Ministry of State Treasury.[87] These laws only concern enterprises, but no general privatisation law has been enacted.[88]

In the case of property transformation based on the privatisation laws, a distinction must be made between indirect and direct privatisation. While indirect privatisation occurs through the transformation of a state-owned enterprise into a company (commercialisation) and the subsequent sale of the shares or stock, direct privatisation is based on the direct transfer of ownership into private hands.[89]

The implementation of the privatisation programme resulted in an enormous discrepancy between the legislator's conception, the people's expectations, and the results. The reason for this lies in enforcement: The implementation of the law, which was developed by the political right, became the

[80] W. GLATZ, *op. cit*., p. 123.

[81] D. KEMPTER, op. cit., p. 56.

[82] B. POPOWSKA, *Der Wandel der rechtlichen Rahmenbedingungen für das Eigentum in Polen in den Jahren 1989-2003,* in *Jahrbuch für Ostrecht, Vol.* 45, 1/2004, pp. 11-28, 12.

[83] D. SÜß, *Privatisierung und öffentliche Finanzen: Zur Politischen Ökonomie der Transformation*, Stuttgart, 2011, pp. 98, 117.

[84] Ustawa z dnia 13 lipca 1990 r. o prywatyzacji przedsiębiorstw państwowych, Dziennik ustaw, 1990, nr. 51, poz. 298; English translation: Z. SLUPINSKI, *Poland: Law on Privatization of State-Owned Enterprises*, in: *International Legal Materials*, vol. 29, iss. 5, 1990, pp. 1226-1243, 1229-1243.

[85] Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i niektórych uprawnieniach pracowników, Dziennik Ustaw, 1996, No. 118, poz. 561; E. MROCZEK, L. VON SCHUTTENBACH, C. MIECZYSLAW, *Mittelständische Unternehmen in Polen: Ihre Entwicklung und ihr Einfluss auf die Transformation*, Heidelberg, 2000, p. 40.

[86] Ustawa z dnia 13 lipca 1990 r. o utworzeniu urzędu Ministra Przekształceń Własnościowych, Dziennik Ustaw, 1990, No. 51, poz. 299.

[87] Z. SLUPINSKI, *op. cit*., p. 1226; Zarządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 30 września 1996 r. w sprawie zmian w składzie Rady Ministrów, Dziennik Ustaw, 1996, nr. 60, poz. 558; Zarządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 1 października 1996 r. w sprawie zmiany w składzie Rady Ministrów, Dziennik Ustaw, 1996, nr. 60, poz. 559.

[88] T. DE VRIES, *op. cit*., p. 132 f.

[89] B. POPOWSKA, *op. cit*., p. 16 ff.; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit*., p. 181. P. LIS, J. MAZURKIEWICZ, *Ownership transformations of state-owned enterprises in Poland (1990-2008)* in J. J. TOMIDAJEWICZ (ed.), *Privatization in Poland and Formation of European Social Order*, Poznań, 2009, p. 55f.

responsibility of the political left after a change of government. Thus, the resulting low level of participation of the originally envisaged large companies led to only meagre effects.[90]

Another area of transformation of the property regime was reprivatisation, i.e. the restitution of the property of private owners that was taken over by the state in the mid-1940s. From the perspective of today's values and the legal system introduced after 1989, these nationalisations violated the principle of property protection and thus were among the injustices that had to be remedied. Compensation for the nationalisations is prevented, however, because corresponding implementing regulations were never issued. Nor has there been a repeal of the nationalisation laws, so that nationalisation has remained a legal institution. Accordingly, civil proceedings would not be successful due to the lack of an invalid administrative act. Therefore, the only remaining option is to challenge the nationalisation decision in an administrative procedure. [91]

What would be required is regulation by the legislator through a comprehensive single reprivatisation law. However, such a regulation has not been enacted to date. Instead, as outlined above, the reprivatisation process has been slow and based on a patchwork of several smaller, limited laws.[92] Reprivatisation as an important economic, moral and legal task, especially with regard to the constitutional protection of property, remains problematic to this day.

5. Property law after the collapse of the Soviet Union

With regard to property order and *legal transfer*, two aspects in particular are relevant for property law after the reform processes:

For the transfer of ownership, the causal system of title transfer was chosen, i.e. the direct transfer of ownership by sale. This corresponds to French law and clearly not to the German abstract system of title transfer.[93]

Furthermore, by moving away from the tripartite division of property types, property regained its function as a means of security, so that regulations regarding limited rights in rem and security interests became necessary.

A vestige of the socialist order is found as regards mortgages. There are no regulations on mortgages in the amended Civil Code itself. These were standardised in a separate law. The question of why no integration into the Civil Code was sought cannot be answered unequivocally. Possible reasons are the lack of time during the reforms or the assumption that the existing regulations outside the Civil Code were sufficient. Ultimately, however, there was no urgent need, as mortgages had developed to become, in practice, the most important means of security at banks anyway, and therefore did not require a theoretical increase in importance associated with integration into the Civil Code.[94]

6. The post-communist transformation: Legal transfer or return to the legal tradition?

The civil law reforms in the course of the transformation in Poland create the initial impression that only the socialist passages were deleted. However, this was a much more complex process, which is characterised not least by the resumption of the development of European legal institutions from the 19th and early 20th centuries.[95]

Nevertheless, the new version consisted almost exclusively of deletions, especially in property law, from which one can draw the conclusion that the original Polish property law did not have a basis completely different from the Western market-oriented property systems.[96]

[90] B. POPOWSKA, *op. cit.*, p. 21.
[91] B. POPOWSKA, *op. cit.*, p. 23 f.
[92] B. POPOWSKA, *op. cit.*, p. 25 f.
[93] W. GLATZ, *op. cit.*, p. 164.
[94] W. GLATZ, *op. cit.*, p. 130 f., 162.
[95] W. GLATZ, *op. cit.*, p. 169.
[96] W. GLATZ, *op. cit.*, p. 170.

Consequently, the question arises as to whether the reforms should be classified as a transformation process from West to East or as a return to the country's own national legal tradition.

In this respect, it should first be noted that Polish civil law was already close to the continental legal tradition before 1990/91. Both the original and the 'new' version of the Civil Code were strongly influenced by the legal systems of other countries, especially Germany, France and Switzerland.[97]

Glendon, Gordon and *Osakwe* divided the socialist legal tradition into three subgroups, differentiating between Eastern and Central Europe (1), China (2) and Southeast Asia (3), with the first having abolished socialist law and returned to its *"civil law roots"*.[98]

It is true that a large part of the transformation consists of a return to the roots of civil law. In this respect, one could speak of a renaissance of civil law. However, the reform is a much more complex and multilayered process, consisting of a wide variety of components in addition to a mere return.

The transition from a socialist, centrally administered economy to a market economy does not represent the creation of an unprecedented economic order. Rather, a return to the original system is also taking place in economic terms. These results neither in the simple transfer of a new, 'foreign' legal system or regulations, nor in a mere return to the original legal system, but rather in a combination of both aspects.

When searching for a metaphor, the discussion of the respective foreign norm or principle that served as an example for the concrete implementation in Poland is problematic, especially due to the fact that the Polish legal system has always been influenced by foreign legal traditions. Having said that, Polish civil law did borrow from German law.

The extent of Germany's advisory activities in the Eastern Bloc was based on the need for advice. The demand for those activities was also influenced by the degree of interest in continuing a legal tradition related to German law.[99] In Poland, such interest is likely to have existed to a high degree in view of the implementation, so that a strong German influence can be assumed.

The advisory function was intended to mainly have a supporting function in the process of independent reform efforts. The adoption of a foreign system without restrictions, for example through a mere translation of laws, was not to be expected. Rather, the legal advice aimed at a transfer of knowledge, experience and legal know-how.[100]

This approach also contributes to the difficulty of ascertaining whether, and if so to what extent, the specific legal provisions were influenced by German or other foreign law. Not least for this reason, it is fruitful to shift the perspective from specific provisions to actors and processes.

For in connection with the aforementioned advisory function, there is also the question of actors raised above. In addition to the foreign advisors, the reform process was mainly shaped by the Polish Commission for the Reform of Civil Law.[101] For the evaluation of the transformation process with regard to the actors on the basis of the concepts of transfer and renaissance of civil law, this is significant insofar as foreign consultation is an indicator of a transfer, while the Polish Commission is an indicator of a renaissance. The exclusion of the US legal system as a possible model legal system is remarkable. This means an orientation towards continental European, codified law and the rejection of a completely new legal system. Consequently, the question of the actors also results in an interplay of transfer and renaissance.

The question of how the new legislative regulations and their implementation were achieved allows the following evaluation: The emphasis on the autonomy of reforms, on the one hand, and their implementation with foreign, practical assistance, on the other, represent the aforementioned two components of transformation. Thus, the legislative process itself, admittedly not entirely uninfluenced by foreign law, could be characterised as a return to legal tradition and a 'Polish achievement', while

[97] H. IZDEBSKI, op. cit., p. 9.

[98] M. A. GLENDON, M. W. GORDON, C. OSAKWE, *Comparative Legal Traditions,* Saint Paul (Minnesota), 1991, p. 396.

[99] L. FADÉ, *op. cit.*, p. 264.

[100] L. FADÉ, *op. cit.*, p. 264; see 4.2.1. Foreign participation in the transformation and the "war of advice".

[101] W. GLATZ, *op. cit.*, p. 90.

the actual legal transfer is more evident in the advice given regarding its implementation in legal practice.

The question of the reaction of legal practitioners, and of the synchronicity of legislative change and change in legal awareness and application, must be answered in a differentiated manner. A uniform answer is probably not possible because of individual and local differences. In addition, the various factors are interrelated as well in this respect. The transformation of Eastern Europe started in Poland, so that the reform mood before the fall of communism[102] could show a change in legal consciousness even before the changes in the law. Germany's practical help in implementing the law, on the other hand, speaks for a change in legal awareness and application that followed the legislation in time.

6.1. Theoretical approaches

A metaphor is a rhetorical figure transposing a term from its original concept to another and similar one to suggest a likeness between them.[103] Metaphors can not only be an embellishment, but also go hand in hand with specific possibilities of cognition (Erkenntnis).[104] This epistemological function of metaphors can also be utilised for research in legal history and comparative jurisprudence. Notwithstanding the three most influential theories on metaphors[105], the search for a metaphor in the context at hand is based on the following concept: capturing the post-communist transformation in Poland with a term other than transformation is intended to make visible similarities to and differences from transformation processes in other former Eastern bloc countries. A concise denotation allows insights into the transformation of communist to post-communist legal systems and could reveal blind spots. At the same time, a clear denotation opens the space for discourse.

Further criteria for a conceptual classification of transformation and corresponding metaphors are offered by the theoretical approaches of *Watson* and *Legrand*, *Frankenberg* and *Foljanty*.

6.1.1. Autonomy of law (Watson)

Based on the relative autonomy of law, *Watson* argues that "*the moving of a rule or a system of law from one country to another, or from one people to another*"[106] is possible and even a central driver of legal development.[107] *Watson* coined the term *legal transplant* to describe this very process. According to this approach, most changes in most legal systems are the result of borrowing. The term *legal transplant* implies a technical and isolated understanding of this process. Furthermore, it refers to the result rather than to the process itself.[108]

This autonomy of law from the rest of culture cannot be assumed for the post-communist transformation because the socialist legal system was strongly ideologically influenced, especially by political considerations oriented toward a planned economy. In a sense, law served as a tool of politics and ideology. Like property itself, as a central legal institution in the context of the transformation from a planned economy to a market economy, the transformation process as a whole is composed of economic, social and legal components that are interwoven with one another. Regardless of whether law

---

[102] As early as 1986, the *Commission under the Ministry of Justice for the Reform of Civil Law* was entrusted with the amendment of the Civil Code; D. KEMPTER, *op. cit.*, p. 53.

[103] *Article Metaphor*, in D. D. RUNES (ed.), *Dictionary of Philosophy*, 1942, URL: http://www.ditext.com/encyc/frame.html (as consulted online on 20 April 2023); A. P. MARTINICH, *Article Metaphor*, in E. CRAIG (ed.), *Routledge Encyclopedia of Philosphy*, London, 1998, URL: https://www-rep-routledge-com.uaccess.univie.ac.at/articles/thematic/metaphor/v-1 (as consulted online on 20 April 2023).

[104] See for the academic fields of literature studies and philosophy: A. HETZEL, *Metapher, Metaphorizität, Figurativität* in A. ALLERKAMP, S. SCHMIDT (eds.), *Handbuch Literatur & Philosophie*, Berlin/Boston, 2021, p. 125.

[105] The comparison theory, the interaction theory and the speech act theory; see A. P. MARTINICH, *Article Metaphor*, in E. CRAIG (ed.), *Routledge Encyclopedia of Philosphy*, London, 1998, URL: https://www-rep-routledge-com.uaccess.univie.ac.at/articles/thematic/metaphor/v-1 (as consulted online on 20 April 2023).

[106] A. WATSON, *Legal Transplants: An Approach to Comparative Law*, Second Edition, Athens (Giorgia), 1993, p. 21.

[107] A. WATSON, *op. cit.*, p. 21 f.

[108] See G. ARJANI, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, in The American Journal of Comparative Law, vol. 43, iss. 1, 1995, pp. 93–117, 93.

can induce socio-economic change, or whether this change is a condition of the legal system, there is at least a connection between law and the economy. The two interact with each other and apply to received law as well as internally set law. A conclusion of the possibility of legal transfer in the post-communist transformation of the Polish legal system is precluded by *Watson*'s very concept of law.

6.1.2. Contextuality of law (Legrand)

In contrast, *Legrand* qualifies law as part of culture and thus denies the possibility of such transfers in the sense of *legal transplants*. Due to the contextuality of law, a new meaning, in short, a new law would always emerge in the cultural and historical framework in question.[109] *Legrand* criticizes the etymological criterion of *Watson's* choice of the term *legal transplant* to the effect that transplant always means displacement.[110] This concerns solely statutory rules.[111] However, according to *Legrand*, at best, *"what can be displaced from one jurisdiction to another is, literally, a meaningless form of words"*.[112] Due to its nature as a rule, it must necessarily undergo change as soon as it crosses the borders of a jurisdiction.[113] Overall, *Legrand* disagrees with *Watson's* understanding of both law and rules.

As discussed earlier, the autonomy of law in socialist structures can be ruled out because of the close intertwining of politics and ideology with law. In post-communist transformation, law cannot be viewed in isolated terms. As has been seen, not even the terminology of property can be transferred from a legal system oriented to market-economy needs to a post-communist legal system. This is because although the socialist property system itself had been abolished, the concept of property was in a state of flux, which meant that transitional arrangements had to be found for the socialist relics.

An emergence of new law in *Legrand's* sense could be seen in the transformation process of Poland through the return to the old legal system in terms of substantive law, in combination with foreign assistance in practical implementation and application. Although foreign elements were borrowed in both substantive and practical respects, the product of this composition is found neither on the foreign, e.g. German side nor on the Polish side, thus creating 'new law'.

6.1.3. Identity & politics in comparative law (Frankenberg)

Against the background of the advisory work in Albania, *Frankenberg* critically presents the newly acquired function of comparative jurisprudence as an *"invasive political enterprise"*[114]. *Frankenberg* thus describes a change in comparative law, more precisely in the motivation and intention of the comparativists, from an academic approach to political intervention.[115] In the transformation context, a form of this *"invasive political enterprise"* can be found in the *"war of advice*".

Frankenberg proceeds to create two stereotypical characters: On the one hand, there is the *"hegemonic comparatist"*, symbolising the politics of paternalism in comparative law, who is an ambivalent persona. Guided by humanistic and idealistic motives, he is in search of the ideal law. At the same time, however, he finds himself in uneasy coexistence with the pragmatic politician, who pursues uniformity and unification under the patronage of the very rule of law he likes best. His approach, however, is characterised by the attempt *"to suppress their peculiar perspective behind the rhetoric of objectivity and neutrality, while camouflaging their politics by pragmatism."*[116] On the other hand,

[109] P. LEGRAND, *The Impossibility of 'Legal Transplants'*, in Maastricht Journal of European and Comparative Law, vol. 4, iss. 2, 1990, pp. 111–124.
[110] P. LEGRAND, *op. cit*., p. 111.
[111] P. LEGRAND, *op. cit*., p. 112.
[112] P. LEGRAND, *op. cit*., p. 120.
[113] P. LEGRAND, *op. cit*., p. 120.
[114] G. FRANKENBERG, *Stranger than Paradise: Identitiy & Politics in Comparative Law,* in Utah Law Review, iss. 2, 1997, pp. 259–274, 260.
[115] G. FRANKENBERG, *op. cit*., p. 261.
[116] G. FRANKENBERG, *op. cit*., p. 263.

Frankenberg introduces the *"tragic comparatist"*, symbolising the politics of modesty in comparative law, who seems to be well aware of the limits and defects of her home law and her intellectual situation, and ends up in a *"dilemma of showing equal concern and respect for the known as well as the knowable"*.[117] Yet being aware of the traps of ethnocentrism and Western paternalism, and wanting to take the pluralism of legal cultures seriously, in the end, she avoids the unsafe immersion into the other. This approach is characterised by modesty overall.[118]

These opposite poles of the characters of the *"hegemonic comparatist"* and the *"tragic comparatist"* can also be assigned in a generalized way to the approach of the USA, on the one hand, and the cautious, demand-oriented assistance provided by Germany on the other. However, there was also a certain dependence of Poland on these same characters at the individual level with regard to German transformation assistance, although the fact that the desire to adapt to Western legal and economic systems came from Poland itself could in some ways offer protection against the approach of a hegemonic comparatist. In addition, the subjective aspects mentioned by Frankenberg also played a role in reform work. For example, the first reform stage was characterised by time pressure, which affected individual working methods and ultimately necessitated repeated improvements to the changes. The fact that a general privatisation law has not been enacted could also be attributed to various subjective aspects. One could also think of identity issues. It is obvious, for example, that Poland in particular, with its pioneering (legal) role in the transformation process, attached importance to its own legal system, which was influenced by, but not simply adopted from foreign models.

6.1.4. Cultural translation (Foljanty)

With the concept of *cultural translation*, *Foljanty* offers a metaphor that makes it possible to gain a deeper understanding of transfer processes and, with the help of the disciplines of translation and cultural studies, to grasp the most diverse aspects of the transfer process. In contrast to the common perception of translation as a technical act, translation in this context is a creative process in which pragmatic or aesthetic considerations often take precedence over the exact reproduction of the original. Accordingly, translation does not take place in a vacuum. With this expanded concept of translation in terms of transcultural transfer, the metaphor of *cultural translation* goes beyond the concepts of both *legal transplant* and legal transfer to make the characteristics of the transformation process, such as complex positionings of actors, visible.[119]

The pragmatic nature of the first stage of the reform reveals the external aspects of the alignment of the Polish property regime with the Western system. In the course of this stage, ultimate solutions had to give way to considerations of urgency, and corresponding priorities had to be set.

The tripartite division of property types disappeared from the Civil Code, but was still of actual relevance due to the lack of regulations on conversion. However, legal provisions that continued to differentiate between types of property became necessary to clarify their fate. Thus, the concept of property could not entirely be equated with the Western concept of property immediately. The emphasis on the process of translation is reflected precisely in this necessity. Just as a concept cannot be translated from one language to another in a technical and isolated way, a legal institution cannot be transferred directly from one legal system to another. The metaphor of translation is able to capture this process.

The general alignment with the Western property regime, detached from concrete norms, can therefore be summarised in its complexity by the metaphor of *cultural translation*.

6.2. Theoretical conclusion

[117] G. FRANKENBERG, *op. cit*., p. 266, 269.
[118] G. FRANKENBERG, *op. cit*., p. 269 f.
[119] L. FOLJANTY, *Rechtstransfer als kulturelle Übersetzung: Zur Tragweite einer Metapher*, in Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, vol. 98, iss. 2, 2015, pp. 89–107.

Ultimately, no clear result emerges for the transformation in Poland in the sense of an exclusion of the respective other term. An approach to the conceptual question is offered by the following consideration: The mere fact that a complete recodification was never considered, and that the 1964 Civil Code continues to exist to a large extent as a result, speaks in favour of a renaissance of civil law, supported by the arguments already mentioned. Such a return, however, by no means excludes a legal transfer. On the contrary, the renaissance of civil law can be brought about precisely by a transfer. On the whole, the transformation in Poland can be characterised as a renaissance, which, in addition to independent reform work in awareness of its own legal tradition, was also achieved through the means of transfer.

Neither transfer nor reform work happens in a vacuum. The metaphor of cultural translation is able to capture this with regard to transfer. The metaphor of renaissance also includes reform work oriented toward the country's own legal tradition. After the collapse of the socialist system, the Polish legal system was not a blank slate to be filled.[120] Instead, passages had to be uncovered and elaborated, removed and filled with entirely new elements or old forgotten elements—a renaissance.

7. The end of the transformation?

Due to the ongoing effects of the transformation process, there are doubts as to whether the transformation can even be considered as complete. It is true that the relevant laws have been enacted, implementation has begun and legal practice has been adapted accordingly. However, the transformation of the legal system still poses problems today.

Furthermore, it is questionable which criteria should be used to measure the end and/or success of the transformation of legal systems after the fall of socialism. There are various points of reference:

The consequences of decades of state-socialist property law and property thinking remain effective, to say the least. Hence, in 1999, *Roggemann* ventured the prognosis that the effects of this very system would be encountered for decades to come. New legislation is not capable of forcing an immediate and total change in the consciousness of legal practitioners and in the application of the law in practice. The socialist property regime also remains relevant insofar as reprivatisation and privatisation measures are linked to the preceding legal situation.[121]

Instead of enacting a completely new civil code, comprehensive revisions were made, so that the civil code had a provisional character. According to *Izdebski*, concerns arise from the fact that even the most comprehensive legislative amendment cannot modify the legal nature of a codification of socialism. Moreover, it is doubtful whether such an amendment would lead to sufficient homogeneity and thus meet the needs of a market economy.[122]

Küpper also sees the after-effects of the thinking and legal ideas of the socialist past in the post-socialist legislative acts themselves. Old socialist legal stereotypes can be identified in the underlying textual and mental layers of Eastern European laws. Thus, some laws or judgements in various post-socialist states are more similar than one would assume based on the great differences in (legal) culture. With regard to the transformation process, this means that these similarities are fading as the generations that received their general and jurisprudential socialisation under communism withdraw from lawmaking, application and teaching of law.[123]

The high legislative level of the 1964 Civil Code[124] speaks against such a critical view, as does the fact that there is still a deficit of historisation in order to be able to adequately analyse the transformation.

[120] See Footnote 2.
[121] H. ROGGEMANN, *op. cit.*, p. 35.
[122] H. IZDEBSKI, *op. cit.*, p. 10.
[123] H. KÜPPER, op. cit., p. 701.
[124] B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 164.

As explained above, civil law was only gradually reshaped during communism. This led to a similar approach in shaping the transformation system, thereby preserving the basic structure of the Civil Code.

Since the late 1990s, the post-communist transformation has increasingly been replaced by the integration of the legal systems of the candidates for membership of the European Union (EU) into the legal system of the EU.[125] This harmonisation with European Union law is also part of the work of the IRZ. Especially for the judges of Central and Eastern Europe, including Poland, the foundation began to hold seminars on questions of the impact of European law on judicial practice as early as 1995. These served to familiarise the judges with the question of the influence of European law on national law, as well as interactions between national and European jurisdictions.[126]

Regardless of any success or completion of the transformation, Poland, along with all other European Union member states at least, thus faces the challenge of transformation, then as now.

Bibliography

ARJANI G., By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, in *The American Journal of Comparative Law*, vol. 43, iss. 1, 1995, pp. 93–117.

BILINSKY A., *Das Eigentumsrecht in Polen.* Bd. 5, in *Studien des Instituts für Ostrecht: Das Eigentum im Ostblock*. West-Berlin, 1958.

BREZINSKI M., Garlicki L., Polish Constitutional Law, in *Legal Reform in Post-Communist Europe*, S. FRANKOWSKI, STEPHAN P. B. III (eds.). Dordrecht, 1995.

DE VRIES T., Der rechtliche Umgang mit der Vergangenheit in der Republik Polen, in *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Osteuropa*, in SCHROEDER F. C., KÜPPER H. (eds.). Frankfurt am Main, 2010.

RUNES D. D. (ed.), *Dictionary of Philosophy 1942.* http://www.ditext.com/encyc/frame.html (as consulted online on 20 April 2023).

FADÉ L., Die Tätigkeit der Deutschen Stiftung für Internationale Rechtliche Zusammenarbeit, in *Wege zu neuem Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, M. BOGUSLAWSKIJ AND R. KNIEPER (ed.). 1998, Berlin.

FOLJANTY L., Rechtstransfer als Kulturelle Übersetzung: Zur Tragweite einer Metapher, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, vol. 98, iss.2, 2015, pp. 89–107.

FRANKENBERG G., Stranger than Paradise: Identity & Politics in Comparative Law, in *Utah Law Review*, iss. 2, 1997, pp. 259–274.

GÄRTNER W., Die Eigentumsgarantien in den Verfassungen Polens, Ungarns, der Tschechischen und der Slowakischen Republik - Verfassungsrechtliche Grundlagen und Verfassungspraxis, in *Eigentum in Osteuropa*, ROGGEMANN H. (ed.). Berlin, 1996.

GLATZ W., *Die Entwicklung des Polnischen Zivilrechts: Darstellung und Bewertung unter dem Aspekt des Wirtschaftlichen Wandels*, Berlin, 2000.

GLENDON M. A., GORDON M. W., OSAKWE C., *Comparatice Legal Traditions*, Saint Paul (Minnesota), 1991.

GONDEK M., Poland, in *Elgar Encyclopedia of Comparative Law*, SMITS J. M. (ed.), Cheltenham, 2012.

[125] L. FADÉ, *op. cit.*, p. 266; G. ARJANI, *op. cit.*, 95.
[126] L. FADÉ, *op. cit.*, p. 266.

HETZEL A., Metapher, Metaphorizität und Figurativität, in *Handbuch Literatur & Philosophie*, ALLERKAMP A., SCHMIDT S. (eds.), 2021.

HOBE K., Politik und Institutionnen der Deutschen Zusammenarbeit, in *Wege zu neuem Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, BOGUSLAWSKIJ M., KNIEPER R. (eds.). Berlin, 1998.

IZDEBSKI H., General Survey of Developments in Eastern Europe in the Field of Civil Law, in *The Revival of Private Law in Central and Eastern Europe*, BARRY D. D., GINSBURGS G., SIMONS W.B. (eds.), Den Haag, 1996.

JAKOBS O. W., *Eigentumsbegriff und Eigentumssystem des Sowjetischen Rechts.* Köln, 1965.

KEMPTER D., *Der Einfluss des Europäischen Rechts auf das Polnische Zivilgesetzbuch,* Baden-Baden, 2007.

KORDASIEWICZ B., WIERZBOWSKI M., Polish Civil and Commercial Law, in *Legal Reform in Post-Communist Europe*, Herausgeber: FRANKOWSKI S., STEPHAN P. B. III (eds.), Dordrecht, 1995.

KÜPPER H., *Einführung in die Rechtsgeschichte Osteuropas,* Frankfurt am Main, 2005.

LEGRAND P., *The Impossibility of 'Legal Transplants'*, in *Maastricht Journal of European and Comparative Law*, vol. 4, iss. 2, 1990, pp. 111–124.

LIS P., MAZURKIEWICZ J., Ownership Transformations of State-owned Enterprises in Poland (1990-2008), in *Privatization in Poland and Formation of European Social Order*, TOMIDAJEWICZ J. J. (ed.), Poznań, 2009.

MARTINICH A. P., Metaphor, in *Routledge Encyclopedia of Philosophy*, London, 1998.

MARX K., *Zur Kritik der Politischen Ökonomie (1859), Marx-Engels-Werke.* Bd. 13. Berlin, 2015.

MICEWSKI A., *Kirche, „Solidarność" und Kriegszustand in Pole,*. München, 1988.

MROCZEK E., VON SCHUTTENBACH L., MIECZYSLAW C., *Mittelständische Unternehmen in Polen: Ihre Entwicklung und ihr Einfluss auf die Transformation,* Heidelberg, 2000.

PETEV V., *Sozialistisches Zivilrecht,* Berlin, 1975.

POPOWSKA B., Der Wandel der Rechtlichen Rahmenbedingungen für das Eigentum in Polen in den Jahren 1989-2003, vol. 45, in *Jahrbuch für Ostrecht*, 11-27, München, 1/2004, pp. 11–28.

ROGGEMANN H., *Rechtsentwicklung in Mittel-und Osteuropa,* Berlin, 1999.

SCHMIEGELOW H., Why Legal Transformation Assistance from Germany and Japan to Former East-Bloc Countries?, in *Rechtstransfer und internationale rechtliche Zusammenarbeit: Deutsche und japanische Erfahrungen bei der Kooperation mit Osteuropa und Zentralasien*, KÜPPER H., BRENN W. (eds.), Frankfurt am Main, 2010.

SIEBERT H., *The Transformation of Eastern Europe.* Bd. 163, in *Kieler Diskussionsbeiträge*, Kiel Institute for the World Economy (ed.), Kiel, 1991.

SLUPINSKI Z., *Poland: Law on Privatization of State-Owned Enterprises*, in *International Legal Materials*, vol. 29, iss. 5, 1990, pp. 1226–1243.

STONE N. I., MARX K., *A Contribution to the Critique of Political Economy*, New York, 2014.

SÜß D., *Privatisierung und öffentliche Finanzen: Zur Politischen Ökonomie der Transformation.* Stuttgart, 2011.

WATSON A., *Legal Transplants: An Approach to Comparative Law,* 2, Athens (Giorgia), 1993.

ZIEMER K., *Das politische System Polens*. Wiesbaden, 2013.

L'emploi du présent dans le contexte juridique trilingue

Une approche contrastive à partir d'un corpus anglais, français et russe

Anton Osminkin[1]

Résumé : L'objet de cet article est en premier lieu de faire apparaître les deux valeurs du présent dans le contexte juridique en anglais, en français et en russe. Il s'agit des valeurs constative et déontique. En deuxième lieu, dans cette étude, nous analyserons, dans une perspective contrastive, les propriétés linguistiques des trois formes employées dans les trois langues, afin d'exprimer les valeurs constative et déontique dans le discours juridique. Il s'agit du présent simple en anglais, du présent de l'indicatif en français et du présent imperfectif en russe.

Notre étude est inspirée par la grammaire cognitive, l'analyse du discours, ainsi que par la linguistique de corpus. À cet égard, nous employons dans notre travail des termes qui proviennent de ces domaines linguistiques.

L'ensemble des documents sélectionnés et analysés pour notre étude forment deux corpus : un corpus parallèle trilingue et un corpus comparable. Le corpus parallèle comprend la Charte de l'Organisation des Nations Unies, la Déclaration Universelle des Droits de l'Homme, ainsi que la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels de 1970. Pour le corpus comparable, nous avons sélectionné le Traité de l'Union Economique Eurasiatique dont le texte original est écrit en russe (2014), la Convention Cadre sur les Changements Climatiques dont le texte original est écrit en anglais (2015), ainsi que la version consolidée du Traité sur l'Union Européenne (2012) en français**.**

Selon notre analyse, la valeur constative du présent sert à instaurer ou reporter un état des choses, sans pour autant être déontique. En revanche, la valeur déontique du présent est susceptible d'exprimer des obligations. Pour notre analyse, nous parlons des verbes au présent dont le sémantisme n'exprime pas l'obligation en dehors des documents juridiques. Cependant, dans le contexte prescriptif qu'impliquent de tels documents, ces verbes acquièrent l'interprétation déontique. Dans notre article, nous posons que ce sont les textes juridiques analysés qui confèrent ce statut aux verbes ayant la valeur déontique du présent. Ceci se produit dans une configuration morphosyntaxique spécifique qui se présente sous forme de deux schémas. De plus, notre étude démontre que dans le contexte juridique la dimension temporelle du présent dans les trois langues reste en arrière-plan, alors qu'une autre dimension, modale, ressort au premier plan.

Mots-clés : Présent juridique, Valeur constative, Valeur déontique, Sème inhérent, Sème affèrent.

Sommaire : Introduction ; 1. L'état de l'art. Les spécificités du discours juridique. Du présent général vers le présent juridique ; 1.1. Les spécificités du discours juridique ; 1.2. Du présent général vers le présent juridique : la caractérisation linguistique du présent en anglais, en français et en russe ; 2. Méthodologie : le choix des corpus. Les deux valeurs du présent juridique ; 3. Les deux valeurs du présent dans les documents juridiques internationaux ; 3.1. Le présent juridique : la valeur constative ; 3.2. Le présent juridique : la valeur déontique ; Conclusion.

[1] *Jurilinguiste, enseignant d'anglais et de russe juridique, ISIT Paris - -* osminkin.anton@isitparis.eu

The Use of the Present Tense in a Trilingual Legal Context

A Contrastive Approach Based on an English, French and Russian Corpus

Abstract : The main purpose of this article is to outline two functions of the present tense in a legal context in English, French, and Russian. These are the constative and deontic functions. Secondly, this paper analyses, from a contrastive perspective, the linguistic properties of the three forms used in the three languages, in order to express the constative and deontic functions of the present tense in legal discourse. These are Present Simple in English, the Indicative form of the Present in French and the Imperfective Present tense in Russian.

Our study is inspired by cognitive grammar, discourse analysis and corpus linguistics. Consequently, we use some of the terms of these three linguistic fields.

The set of documents selected and analysed for our study form two corpora : trilingual parallel corpus and comparable corpus. The parallel corpus includes the Charter of the United Nations, the Universal Declaration of Human Rights, as well as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. For the comparable corpus, we selected the Eurasian Economic Union Treaty, the original text of which is written in Russian (2014), the Framework Convention on Climate Change, the original text of which is written in English (2015), as well as the consolidated version of the Treaty on the European Union (2012) in French.

According to our analysis, the constative function of the present tense in legal discourse serves to institute and report a state of affairs, without conveying a deontic sense. On the other hand, the deontic function of the present tense is aimed at expressing obligations. Our analysis concerns the verbs the deontic sense of which is not explicitly expressed by their semantics. In this study, we assume that it is legal texts that confer the deontic interpretation on such verbs. This occurs in a specific morphosyntactic configuration that takes the form of two patterns. Moreover, our study shows that, in the legal context, the temporal dimension of the present tense in the three languages remains in the background while another dimension, i.e. modal, comes to the fore.

Keywords : Present tense in legal discourse, Constative function, Deontic function, Inherent seme, Afferent seme.

Summary : Introduction ; 1. The State of the art. The specificities of legal discourse. From the general present tense towards the present tense in legal discourse ; 1.1. The specificities of legal discourse ; 1.2. From the general present to the present tense in legal discourse : linguistic features of the present tense in English, French, and Russian ; 2. Methodology : the choice of corpora. The two functions of the present tense in legal discourse ; 3. The two functions of the present tense in international legal documents ; 3.1. The present tense in legal discourse : the constative function; 3.2. The present tense in legal discourse : the deontic function ; Conclusion.

Introduction

À travers les études menées dans différentes disciplines telles que l'analyse du discours, l'histoire, l'analyse littéraire, etc., on a établi différents types d'emploi du présent : le présent historique ou le présent de narration[2], le présent scientifique[3], etc. Dans le contexte juridique, on peut également retrouver un autre type d'emploi du présent, que certains jurilinguistes définissent comme étant le

[2] A. ZALIZNJAK, A. ŠMELEV, *Vvedenie v russkuju aspektologiju [Introduction dans à l'aspectologie russe]*, Moscou, 2000 ; R. HUDDLESTON, G. PULLUM, *The Cambridge Grammar of the English Language*, Cambridge, 2002 ; G. LEECH, *Meaning and the English Verb*, Harlow, 2004.

[3] M. JOOS, *The English Verb : Form and Meanings*, Madison, 1964 ; R. HUDDLESTON, *Sentence and Clause in Scientific English*, Cambridge, 1968.

présent juridique[4]. Dans leurs ouvrages, surtout dans ceux consacrés à l'anglais juridique, les spécialistes mentionnent parfois la valeur déontique du présent, celle qui exprime l'obligation[5]. Dans notre étude, nous distinguerons les deux valeurs du présent juridique. Les formes du présent juridique, employées dans les trois langues, sont le présent simple en anglais, le présent de l'indicatif en français[6] et le présent imperfectif en russe, comme dans l'occurrence suivante, tirée de notre corpus trilingue :

(1) Afin d'assurer l'action rapide et efficace de l'Organisation, ses Membres **confèrent** au Conseil de sécurité la responsabilité principale du maintien de la paix et de la sécurité internationales et **reconnaissent** qu'en s'acquittant des devoirs que lui impose cette responsabilité le Conseil de sécurité agit en leur nom.

In order to ensure prompt and effective action by the United Nations, its Members **confer** on the Security Council primary responsibility for the maintenance of international peace and security, and **agree** that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Dlja obespečenija bystryx i èffektivnyx dejstvij Organizatsii Ob''edinennyx nacij eë Členy **vozlagajut** na Sovet Bezopasnosti glavnuju otvetstvennost' za podderžanie meždunarodnogo myra i bezopasnosti i **soglašajutsja** v tom, čto pri ispolnenii ego objazonnostej, vytekajuščix iz etoj otvetstvennosti, Sovet Bezopasnosti dejstvuet ot ix imeni[7].

(Для обеспечения быстрых и эффективных действий Организации Объединенных Наций, ее Члены **возлагают** на Совет Безопасности главную ответственность за поддержание международного мира и безопасности и **соглашаются** в том, что при исполнении его обязанностей, вытекающих из этой ответственности, Совет Безопасности действует от их имени).

(Corpus trilingue)

Il convient de noter que nous n'envisageons pas d'étudier ici l'emploi des verbes au présent dans les trois langues qui expriment explicitement l'obligation et qui renferment un sème déontique inhérent à leur sémantisme. Nous pouvons observer de tels verbes ayant le sémantisme explicitement déontique dans l'occurrence suivante, tirée de notre corpus trilingue :

(2) Chaque Membre des Nations Unies **s'engage** à se conformer à la décision de la Cour internationale de Justice dans tout litige auquel il est parti.

Each Member of the United Nations **undertakes** to comply with the decision of the International Court of Justice in any case to which it is a party.

Každyj Člen Organizacii **objazuetsja** vypolnit' rešenie Meždunarodnogo Suda po tomu delu, v kotorom on javljaetsja storonoj[8].

(Каждый Член Организации **обязуется** выполнить решение Международного Суда по тому делу, в котором он является стороной).

(Corpus trilingue)

[4] J.-L. SOURIOUX, P. LERAT*, Le Langage du droit*, Paris, 1975.

[5] R.-M. GERBE, *Le Présent de l'indicatif et la non-actualisation des procès*, Paris, 2010 ; I. RICHARD, *L'évolution de l'emploi de shall, de must et du présent simple dans le discours juridique normatif dans le cadre du Plain Language Movement*, in *ASp*, pp. 49-50, [en ligne], 2006, pp. 137-153 ; CH. WILLIAMS, *Is legal English « going European ? » The case of the simple present*, in *Canadian Journal of Linguistics*, 58(1), Toronto, 2013, pp. 105–126 ; Z. DOXOVA, *Lingvističeskie osobennosti sudebnogo diskursa*, in recueil d'articles sur la base du colloque *Voprosy russkogo jazyka v juridičeskix delax i procedurax*, Sankt-Peterbourg, 2021, p. 27.

[6] Pour le français, nous continuerons à utiliser le terme de présent de l'indicatif parce que le présent du subjonctif peut également s'employer si le contexte l'exige, comme le note M.-R. GERBE, *Le Présent de l'indicatif et la non-actualisation des procès,* Paris, 2010, p. 249.

[7] Charte de l'Organisation des Nations Unies, Chapitre V, Art. 24.1.

[8] Charte de l'Organisation des Nations Unies, Chapitre XIV, Art. 94.1.

Ainsi, dans notre article, nous nous intéressons aux verbes employés au présent dans les trois langues, qui ne contiennent pas la valeur déontique dans leur sémantisme, mais qui acquièrent un sens d'obligation dans le contexte juridique, comme dans l'exemple (1).

Cependant, dans les ouvrages jurlinguistique étudiés, les jurilinguistes abordent le sujet du présent juridique de manière brève, parmi d'autres marqueurs modaux qui sont susceptibles d'exprimer des obligations et des contraintes. En outre, selon notre recherche, il n'existe pas d'ouvrages ou d'articles consacrés au présent juridique dans une perspective contrastive[9].

Il est vrai que le nombre d'occurrences du présent à valeur déontique dans les trois langues n'est pas significatif par rapport à l'emploi des autres marqueurs, notamment en anglais juridique dans lequel prédomine l'auxiliaire modal *SHALL*. Cependant, le présent juridique mérite d'être analysé pour différentes raisons.

Dans cette étude, nous souhaitons analyser plus profondément le fonctionnement du présent juridique dans une perspective contrastive, c'est-à-dire en anglais, en français et en russe juridique. L'approche contrastive nous permettra de déceler des propriétés linguistiques du présent communes ou propres à chacune des trois langues. Cette approche aide également à observer ce qui se produit quand une même catégorie appartient à un champ sémantique qui est configuré différemment d'une langue à l'autre [10], l'obligation dans notre cas. Par exemple, en anglais c'est le présent simple, et non le présent continuous ou le présent perfect continuous, qui véhicule la valeur d'obligation, exprimée par le présent imperfectif en russe ou le présent de l'indicatif en français.

Plus précisément, nous étudierons les propriétés linguistiques des formes du présent dans les trois langues, afin de comprendre la motivation de leur choix pour exprimer ce type de présent. En outre, notre analyse préalable montre que le présent juridique est susceptible d'exprimer l'obligation, mais il peut avoir une autre valeur dans le contexte juridique. Enfin, il est essentiel d'analyser et de démontrer le mécanisme pragmatique qui permet aux verbes au présent dans les trois langues d'exprimer la valeur déontique. À cet égard, nous supposons que, dans le contexte juridique, la dimension temporelle du présent dans les trois langues reste en arrière-plan alors qu'une autre dimension, modale, ressort au premier plan.

Sur le plan jurilinguistique, le présent juridique ayant la valeur déontique exprime l'obligation, l'un des trois pôles modaux principaux (l'obligation, la permission, et le possible) dans le discours juridique. Pour cette raison, l'analyse du présent juridique est importante pour comprendre le fonctionnement et l'emploi de ce marqueur dans les textes juridiques uni-, bi- ou trilingues. Une autre motivation jurilinguistique pour étudier l'emploi du présent juridique est une recommandation de la part des partisans de *the Plain English Movement* de remplacer *SHALL* par le présent simple dans les documents juridiques comme l'observe I. Richard[11]. Ceci prouve l'existence d'un lien sémantico-pragmatique entre ces deux marqueurs en anglais juridique.

Sur le plan pédagogique, les résultats de recherche dans cet article peuvent être pertinents pour les cours de traduction juridique avec nos étudiants à l'ISIT Paris, d'autant plus que certains éléments de notre analyse préalable leur ont été déjà exposés et ont été discutés avec eux.

Notre analyse se base sur les deux corpus de textes juridiques. Pour le premier, nous avons choisi d'analyser la Charte de l'Organisation des Nations Unies (ci-après « l'ONU »), la Déclaration Universelle des Droits de l'Homme, ainsi que la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels de 1970. Tous les textes sont disponibles en français, en russe et en anglais sur le site officiel de l'ONU et de l'UNESCO. Ces documents constituent notre corpus d'étude principal. Notre deuxième corpus comprend le Traité de l'Union Economique Eurasiatique avec toutes les annexes dont le texte original

[9] Nous pouvons également constater la quasi-absence de travaux consacrés au temps présent en russe juridique.
[10] Inspiré par les idées de Karin Aijmer, linguiste suédoise.
[11] I. RICHARD, *L'évolution de l'emploi de shall, de must et du présent simple dans le discours juridique normatif dans le cadre du Plain Language Movement*, cit., p. 2.

est écrit en russe (2014), la Convention Cadre sur les Changements Climatiques dont le texte original est écrit en anglais (2015),[12] ainsi que la version consolidée du Traité sur l'Union Européenne (2012).

Sur le plan linguistique, notre analyse s'inscrit dans les travaux récents qui traitent du présent, en ajoutant des données issues d'un genre discursif spécialisé [13]. Cette étude est inspirée par la grammaire cognitive, l'analyse du discours ainsi que par la linguistique de corpus.

Dans la première section nous ferons un état de l'art en deux parties. Nous présenterons, en premier lieu, les spécificités du contexte prescriptif pertinentes pour l'étude du présent juridique. Ensuite, nous considérerons les caractéristiques générales des formes du présent dans les trois langues. Dans la deuxième section, nous décrirons notre méthodologie de recherche et fournirons un aperçu des valeurs du présent juridique. Dans la troisième et dernière section, nous évoquerons les observations détaillées de notre étude sur l'emploi du présent dans le contexte juridique trilingue.

1. L'état de l'art. Les spécificités du discours juridique. Du présent général vers le présent juridique

Dans cette partie nous présenterons certains éléments du discours juridique, afin de décrire l'environnement linguistique dans lequel s'emploie le présent juridique dans les trois langues. Ces éléments s'avèrent être pertinents pour notre étude. Ensuite, nous étudierons les particularités linguistiques générales des formes du présent, utilisées en anglais, en français et en russe en tant que présent juridique.

1.1. Les spécificités du discours juridique

G. Cornu définit le discours juridique comme « l'ensemble des énoncés du droit »,[14] qui a pour objet la création ou la mise en œuvre du droit. Selon lui, ce critère commande tout à la fois la logique et le ton du discours, qui laissent dans l'énoncé des marques linguistiques repérables. Il souligne que ce discours se caractérise par un fond et une forme spécifiques. Qu'est-ce que le fond dans ce cas-là ?[15]

Le fond est transmis par des formes spécifiques. Nous souhaitons évoquer les particularités linguistiquement les plus marquées de ces formes spécifiques.

Sur le plan syntaxique, la majeure partie des énoncés est des énoncés affirmatifs, moins fréquemment ils contiennent la négation. Aucun document juridique analysé dans nos corpus ne fournit d'énoncés interrogatifs, exclamatifs ou impératifs. Selon notre étude, on emploie les phrases déclaratives pour exposer et imposer des dispositions juridiques, comme dans les occurrences suivantes, tirées de notre corpus trilingue :

(3) Toute personne a droit à un recours effectif devant les juridictions nationales compétentes contre les actes violant les droits fondamentaux qui lui sont reconnus par la constitution ou par la loi.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

[12] Malgré le fait que cette Convention a été produite sous l'égide de l'ONU, le texte original de cette convention est l'anglais. Ceci nous a été communiqué par nos collègues juristes. En plus, le problème lié à l'emploi des auxiliaires modaux *SHALL* et *SHOULD,* afin d'exprimer les obligations dans la Convention, est divulgué dans la presse française, notamment dans *Le Monde*.

[13] L. GOSSELIN, *Les Modalités en français. La validation des représentations*, Amsterdam/New York, Rodopi, 2005 ; K. JASZCZOLT KATARZYNA, L. DE SAUSSURE, *Time : Language, Cognition and Reality*, Oxford, 2013 et d'autres linguistes, A. DE WIT, *The Present Perfective Paradox*, Oxford, 2017.

[14] G. CORNU, *Linguistique juridique*, Paris, 2000, p. 28.

[15] «Le droit balise les comportements humains avec des mots : il prescrit et ordonne, il autorise et interdit, il indique et sanctionne» écrit F. Thibaut, F. Thibaut, *Le mystère des mots*, in *Revue de la Recherche Juridique Droit Prospectif*, XXVI-90, T. 2, Aix Marseille, 2001, pp. 2162–2163.

Každyj čelovek imeet pravo na èffektivnoe vosstanovlenie v pravax kompetentnymi nacionalnymi sudami v slučajax narušenija ego osnovnyh prav, predostavlennyx emu konstituciei ili zakonom[16].

(Каждый человек имеет право на эффективное восстановление в правах компетентными национальными судами в случаях нарушения его основных прав, предоставленных ему конституцией или законом).

(Corpus trilingue)

Sur le plan morphosyntaxique, le sujet syntaxique est toujours exprimé par la troisième personne du singulier ou du pluriel, comme dans les occurrences suivantes, tirées de nos corpus :

(4) **L'Assemblée générale** peut attirer l'attention du Conseil de Sécurité sur les situations qui semblent devoir mettre en danger la paix et la sécurité internationales.

The General Assembly *may call the attention of the Security Council to situations which are likely to endanger international peace and security.*

General'naja Assambleja *možet obraščat' vnimanie Soveta Bezopasnosti na situacii, kotorye mogli by ugrožat' meždunarodnomu miru i bezopasnosti.*[17]

(**Генеральная Ассамблея** может обращать внимание Совета Безопасности на ситуации, которые могли бы угрожать международному миру и безопасности).

(Corpus trilingue)

(5) **Les citoyens** sont directement représentés, au niveau de l'Union, au Parlement européen.[18]

(6) **The Conference of the Parties** decides that Parties shall submit to the secretariat their nationally determined contributions referred to in Article 4 of the Agreement at least 9 to 12 months in advance of the relevant meeting of the Conference of the Parties [...].[19]

(7) **Organizacionnoe**, **informacionnoe i material'no-texničeskoe obespečenie podgotovki i provedenija zasedanij** mežpravitel'stvennogo soveta osuščestvljaetsja Komissiej pri sodejstvii prinimajuščego gosudarstva-člena. [20]

(Организационное, информационное и материально-техническое обеспечение подготовки и проведения заседаний межправительственного совета осуществляется Комиссией при содействии принимающего государства-члена).

Traduction littérale : Un appui organisationnel, informatif et logistique à la préparation et à la conduite des réunions du Conseil intergouvernemental est effectué par la Commission, à l'aide de l'État membre-hôte.

(Corpus comparable)

Notre analyse préalable a révélé que dans le discours juridique les juristes utilisent des sujets syntaxiques dont les référents représentent deux grands types. Le premier type comprend des entités collectives pourvues d'agentivité, potentiellement animées, telles que « l'assemblée », « la partie », « l'organisation », etc. Pour cette étude, nous définissons *l'agentivité* comme la capacité socio-physique d'une entité d'agir et de contrôler intentionnellement la réalisation de l'action que cette entité est contrainte d'exercer[21].

[16] La Déclaration Universelle des Droits de l'Homme, Chapitre V, Art. 8.
[17] Charte de l'Organisation des Nations Unies, Chapitre IV, Art. 11.3.
[18] La version consolidée du Traité sur l'Union Européenne, Titre II, Art. 10.2.
[19] Convention Cadre sur les Changements Climatiques, III, 25.
[20] Traité de l'Union Economique Eurasiatique, Art. 11.5.
[21] Il existe un certain nombre de linguistes français et anglo-américains qui ont étudié le concept de l'agentivité en prenant en compte différents critères qui définissent cette propriété d'une entité. Ces critères comprennent

Le deuxième grand type de référents du sujet syntaxique regroupe des notions et des termes à sens abstrait ou spécifique, tels que « la protection », « les pouvoirs » ou « les décisions », « les modifications », etc. Ces référents sont des entités inanimées, non-agentives, qui manquent de capacité d'agir. Une telle entité, assimilable à un patient, subit, elle-même, la réalisation d'une action.

Nous avons également remarqué l'emploi des deux types de verbes, *statiques et dynamiques*. *Les verbes statiques* regroupent des verbes atéliques, qui se réfèrent à une description d'un état des choses ou d'une condition. Ces verbes ne supposent aucun changement et aucune évolution dans le procès qu'ils expriment. En revanche, les *verbes dynamiques* regroupent des verbes qui peuvent être téliques ou atéliques. Ce type de verbes marquent un acte ou une opération à effectuer par un agent explicite ou implicite[22]. Contrairement aux verbes statiques, les verbes dynamiques peuvent impliquer un changement ou une évolution.

En ce qui concerne la syntaxe, nous pouvons également constater l'emploi des formes actives et passives dans le discours juridique. En français on peut aussi trouver la forme pronominale à valeur de passif telle que « *l'admission comme Membres des Nations Unies de tout Etat remplissant ces conditions se fait par décision… »*. En russe on utilise la forme exprimée par le postfixe *–ся (-sja)*, qui correspond à la forme pronominale en français, telle que « *denonsacija notificiruetsja pis'mennym aktom*…/денонсация нотифицируется письменным актом » (« La dénonciation se communiquera par un instrument écrit… »). Certains linguistes[23]définissent cette combinaison comme le medio-passif ou le moyen passif. Le médio passif se distingue du passif simple, car il a parfois un caractère générique, régulier, implicitement modal, comme dans l'exemple ci-dessus entre parenthèses. Pour d'autres, notamment pour[24] A. Boulanger [1999 : 47], il s'agit de la forme pronominale-passive. Pour notre étude, nous avons inclus ces formes en russe et en français, à sens explicitement passif, à la catégorie « diathèse passive » (*Cf*. annexe).

---

l'animé/inanimé, (D.A. CRUSE, *Some Thoughts on Agentivity*, *in Journal of Linguistics*, vol. 9, No. 1, Cambridge, 1973, p. 16 ; le constituent intentionnel et le contrôle de la réalisation de l'action (T. GIVON, *Syntax : An introduction,* Amsterdam, Philadelphia, 2001, p. 109 ; L. GOSSELIN, *Les modalités en français*. *La validation des représentations,* cit.). Dans notre cas, c'est-à-dire dans les documents juridiques internationaux, l'agentivité est la propriété qui appartient, en règle générale, aux entités animées qui se regroupent, afin d'agir sous la forme d'une entité collective. Une telle entité collective sert systématiquement de référent du sujet syntaxique de l'énoncé dans le contexte juridique en question.

[22] Notre distinction entre les verbes statiques et dynamiques se base sur le concept proposé par Z. Vendler, qui parlait des «states» et des «activities» dans son article (Z. VENDLER, *Verbs and Times*, in *The Philosophical Review*, vol. 66, No. 2., 1957, pp. 143–160). Il faut également noter que cette distinction a été nuancée par la suite par d'autres linguistes qui précisent que cette distinction est indissociable du critère télique/atélique. (Les verbes statiques sont atéliques, ce qui signifie qu'ils n'impliquent aucun but ou un point final dans leur sémantisme (Par exemple, "signifier", "représenter", etc.). En revanche, les verbes dynamiques peuvent être téliques (« transférer des documents à l'autre partie », « payer des dettes au créancier ») et atéliques ("passer", "décider", "payer", etc.). Les verbes dynamiques et téliques expriment une action ou un évènement qui est orienté.e vers un but envisagé comme atteint et qui implique un achèvement ou un accomplissement. H. B. GAREY, *Verbal Aspect in French*, in *Language*, vol. 33, No. 2, 1957, pp. 91–110 ; C. SMITH, *A Theory of Aspectual Choice,* in *Language*, vol. 59, No. 3, 1983, pp. 479–501 ; M. KRIFKA, *Nominal reference, temporal constitution and quantification in event semantics*, in RENATE BARTSCH, JOHAN VAN BENTHEM AND PETER VAN EMDE BOAS (eds.), *Semantics and Contextual Expressions*, Dordrecht, 1989, pp. 75–115 ; H. DE SWART, *Aspect Shift and Coercion*, in *Natural Language & Linguistic Theory*, vol. 16, No. 2, 1998, pp. 347–385 ; E. CORRE, *De l'aspect sémantique à la structure de l'événement*, Paris, 2009 ; R. HUYGHE, *(A)telicity and the mass-count distinction: the case of French activity nominalizations*», in *Recherches linguistiques de Vincennes* [Online], 40, 2011, pp. 101–126 ; L-M. PERRIN, *Approche cognitive et typologique de l'opposition verbes d'état versus verbes d'action,* in *Verbum* XXX, 2-3, 2008, pp. 221–241).

[23] CH. HENAULT-SAKHNO, *Les verbes réflexifs en russe : avec—sja ou sebja ?* in *Revue Russe,* 27, 2005, 103–110 ; V. PLUNGJAN, *Obščja morfologija [Morphologie générale]*, 2000.

[24] A. BOULANGER, *Voix passive et voix active en russe et en français : approche comparative et problèmes de traduction*, in *Revue russe*, 15, 1999, pp. 47–62.

1.2. Du présent général vers le présent juridique : la caractérisation linguistique du présent en anglais, en français et en russe

Dans cette section, nous étudierons les spécificités linguistiques du présent simple, du présent de l'indicatif en français et du présent imperfectif en russe. Ces propriétés nous ont servi de point de départ lors de notre analyse, afin de comprendre le choix de ces trois formes employées en tant que présent juridique.

Pour ne pas alourdir la présentation, nous analyserons le présent simple en anglais et le présent de l'indicatif en français simultanément. Ensuite, nous procèderons à l'étude du présent imperfectif en russe. Les exemples suivants fournissent les principaux cas de l'emploi du présent simple et du présent français de l'indicatif :

(8) I **know** it\ Je le **sais**.

(9) The Moon **goes** round the Earth\ La Lune **tourne** autour de la Terre.

(10) Smith **passes** the ball to Devaney, Devaney to Barnes\ Smith passe le ballon à Devaney […].[25]

(11) My train **leaves** tomorrow at 5 pm\ Mon train part demain à 17h.

(12) Là, maintenant, je **lis** un livre intéressant\ Right now, I am reading an interesting book.

(13) Je **vis** à Paris depuis 3 ans\ I have lived in Paris for 3 years.

Les présents en anglais et français sont polysémiques, comme le montrent ces exemples. La différence principale est que le présent de l'indicatif en français n'est pas sensible à la distinction spécifique/générique : on le trouve aussi bien dans l'exemple (9) que dans l'exemple (12). Le présent simple de l'anglais est essentiellement « global », « résultatif » ou « perfectif », c'est-à-dire il dénote un événement générique, dans l'exemple (9) ; il est la norme pour désigner les états dépourvus de dynamisme, dans l'exemple (8), et peut occasionnellement désigner un procès spécifique et résultatif, comme dans l'exemple (10). En revanche, l'anglais a obligatoirement recours aux périphrases aspectuelles progressive, comme dans l'exemple (12) ou parfaite, comme dans l'exemple (13) lorsqu'il s'agit d'ancrer un événement explicitement à (To) et de souligner son caractère étendu. Nous pouvons définir ce moment (To) comme un point centre de référence[26] sur l'axe chronologique[27].

Les deux formes du présent en anglais et en français peuvent exprimer une action dont la réalisation visée à un moment postérieur à (To) sur l'axe chronologique, comme dans l'exemple (11). La réalisation d'une telle action au futur est quasi-certaine.

Néanmoins, le présent de l'indicatif en français implique une temporalité plus large et étendue que le présent simple en anglais. Le présent de l'indicatif en français est susceptible d'exprimer explicitement que l'action a commencé à un moment antérieur à To comme dans l'exemple (13). Dans cet exemple, l'emploi du présent avec le complément de temps « depuis 3 ans » révèle que le début de la réalisation de l'action renvoie au moment antérieur à (To). En revanche, le présent simple marque implicitement le fait que l'action a commencé ou était valable au moment antérieur à To, comme dans les exemples (8 et 9). Dans ces exemples nous nous rendons compte que les actions continuent à être valables depuis un moment antérieur à (To).

Cependant, les deux formes du présent en anglais et en français sont susceptibles d'exprimer une action qui n'est pas liée à un moment spécifique sur l'axe chronologique, c'est-à-dire une action à caractère omnitemporel, ce qu'on peut également définir en tant que vérité générale, comme dans les exemples (9).

En ce qui concerne le russe, il possède un système aspectuel. Cette catégorie morphosyntaxique est la manière dont on envisage le procès verbal. La majeure partie des verbes russes se présente à l'infinitif

[25] L'exemple est emprunté à G. VANDEN WYNGAERD, *Simple Tense*, in *The Function of Function Words and Functional Categories*, Amsterdam, 2005, p. 191.

[26] Le terme proposé par C. DOUAY, D. ROULLAND, *Théorie de la relation interlocutive : sens, signe, réplication*, Limoges, 2014, p. 269.

[27] Le terme proposé par M. GUIRAUD-WEBER, *Le verbe russe : temps et aspect*, Aix-en-Provence, 2004, p. 105.

sous la forme d'un couple verbal, chaque unité du couple verbal ayant un aspect soit perfectif soit imperfectif. En règle générale, le verbe à l'aspect imperfectif exprime l'action envisagée dans son déroulement, dans sa durée, dans sa répétition, sa permanence : *pisat'*—écrire. Le verbe à l'aspect perfectif exprime l'action envisagée dans sa globalité, dans son résultat : *napisat'*—écrire (une fois).

Comme le précise M. Guiraud-Weber,[28] l'aspect est une catégorie complexe qui relève à la fois de la morphologie, de la syntaxe et du lexique. Nous adoptons ici également un modèle d'aspect unifié. Ainsi, nous considérons que l'aspect lexical et grammatical forment un continuum[29].

Les linguistes slavistes distinguent deux présents en russe : le présent-futur perfectif et le présent imperfectif. En russe juridique, la forme du présent la plus utilisée dans le discours juridique est le présent à l'aspect imperfectif, comme dans l'exemple (1). Celui que nous appelons ici, par commodité, le présent imperfectif. La forme du présent-futur est également employée dans le discours juridique, mais son occurrence est moins fréquente.

Comme le présent de l'indicatif en français, le présent imperfectif en russe a également une ampleur temporelle plus large que le présent simple en anglais.

(14) *Ja seičas* ***čitaju*** *knigu* (Ru).
Je maintenant lire IPFV. PRS. 1SG livre
(Я сейчас читаю книгу)
Traduction littérale : *« Maintenant, je lis un livre ».*

(15) *Ja eto* ***znaju*** (Ru).
Je le savoir IPFV. PRS. 1SG
(Я это знаю)
Traduction littérale : « *Je le sais* ».

(16) *Luna* ***vraščaetsja*** *vokrug Zemli* (Ru).
Lune tourner IPFV. PRS 3SG autour Terre
(Луна вращается вокруг Земли)
Traduction littérale : *« La Lune tourne autour de la Terre »*

(17) *Ja* ***živu*** *v Pariže 3 goda* (Ru).
Je vivre IPFV. PRS. 1SG à Paris 3 ans
Ja ***živu*** *v Pariže s 2004 goda* (Ru).
Je vivre IPFV. PRS. 1SG à Paris depuis 2004.
(Я живу в Париже 3 года)
Traduction littérale : *« Je vis à Paris depuis 3 ans » / « Je vis à Paris depuis 2004 »*

(18) *Moj poezd uhodit zavtra v 15 časov* (Ru).
Mon train partir IPFV. PRS 3SG demain à 15 heures
(Мой поезд уходит завтра в 15 часов)
Traduction littérale : « *Mon train part demain à 15h* »

IPFV. – imperfectif ; PRS. – présent ; 1SG. – première personne du singulier ; 3SG – troisième personne du singulier.

Le présent imperfectif en russe s'emploie avec les verbes statiques, comme dans les exemples (15), (17), ou avec les verbes dynamiques, comme dans les exemples (14, 16, 18). Ce présent est susceptible d'exprimer une action qui se réalise à (To), comme dans l'exemple (14), soit elle peut explicitement commencer au moment antérieur à (To), comme dans l'exemple (17), soit elle peut ne pas être liée à un laps de temps ou à un moment précis sur l'axe chronologique, comme dans les exemples (15, 16). Une telle action peut également s'actualiser dans son intégralité. Tout comme en français, cette forme du

[28] M. GUIRAUD-WEBER, *Le verbe russe : temps et aspect,* cit., p. 9.
[29] A. DE WIT, *The Present Perfective Paradox*, cit., p. 143.

présent en russe est susceptible de s'employer avec le complément circonstanciel de temps « *sejčas* » (maintenant), qui se réfère au moment de la parole (To).

De façon similaire au présent simple en anglais et au présent de l'indicatif en français, le présent imperfectif peut exprimer une action se déplaçant sur l'axe chronologique au futur, c'est-à-dire devant s'actualiser à un moment postérieur à (To). La visée impliquée par cette forme du présent ne peut laisser aucun doute par rapport à la réalisation de l'action au futur comme dans l'exemple (18).

Ainsi, sur le plan temporel, nous pouvons constater que les trois formes du présent dans les trois langues peuvent marquer une action coïncidant avec (To) ou se déplaçant sur l'axe chronologique. À cet égard, A. de Wit fournit une observation importante[30]. Nous pouvons définir la propriété commune aux trois langues, comme « *extended now* »[31], selon les linguistes mentionnés par A. de Wit dans son ouvrage. Cette linguiste fournit également une observation concernant une autre propriété que les trois formes du présent en question possèdent. A. de Wit écrit que l'énonciateur peut reproduire (« *replay* »)[32] toute la situation exprimée par une action, comme vraie et validée, à tout moment au présent simple, au présent français de l'indicatif et au présent imperfectif en russe. Cette propriété est indiquée par T. Ruchot au regard de l'emploi du présent « La lune tourne autour de la Terre ». Il note que dans le discours scientifique la situation exprimée par le verbe au présent est vraie à tout moment[33]. A. Bondarko précise également que les faits scientifiques ne sont pas localisés temporellement [34].

Dans la section suivante, nous présenterons la méthodologie appliquée dans cette étude ainsi que des particularités générales des valeurs du présent juridique.

2. Méthodologie : le choix des corpus. Les deux valeurs du présent juridique

Comme nous l'avons mentionné dans l'Introduction, nous avons choisi deux corpus pour notre étude. Le premier corpus comprend les versions russe, anglaise et française de la Charte de l'ONU (25551 mots pour les trois versions), celles de la Déclaration Universelle des Droits de l'Homme (5381 mots pour les trois versions), ainsi que celles de la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels de 1970 (8894 mots pour les trois versions).

Sur le plan linguistique, ces documents représentent un *corpus trilingue parallèle tridirectionnel*. Ce type de corpus implique un texte source commun[35]. *Tridirictionnel* signifie que notre corpus constitue un ensemble de textes en anglais ou en français ou en russe et leurs traductions vers les deux des trois langues et vice versa.

Il est vrai que notre corpus n'est pas considérable par son volume, mais il est équilibré et condensé. Il peut être aussi défini comme étant un corpus spécialisé compact. A. O'Keeffe confirme l'avantage de ce type de corpus.[36]

En outre, un tel corpus est plus facilement susceptible de donner des résultats fiables en permettant une analyse à la fois qualitative et quantitative, qui ne serait pas possible avec un grand corpus.

De plus, nous avons eu recours à un deuxième corpus, afin d'éviter les biais liés à la traduction dans le corpus trilingue parallèle. Il comprend le Traité de l'Union Economique Eurasiatique dont le texte

---

[30] «*…the present tense typically refers to situations that extend over the boundaries of the speech event into the past and into the future, and that a conception of the present as indicating strict simultaneity is therefore flawed*», A. DE WIT, *The Present Perfective Paradox*, cit., p. 15

[31] A. DE WIT, *The Present Perfective Paradox*, cit., p. 13.

[32] A. DE WIT, *The Present Perfective Paradox*, cit., p. 76.

[33] T. RUCHOT, «Quelques questions récurrentes pour l'analyse des TAM», in *Syntaxe & Sémantique*, No. 16, Caen, 2015.

[34] A. BONDARKO, *La Théorie de la grammaire fonctionnelle*, 1990, pp. 64–65.

[35] Il nous est difficile d'identifier les langues des textes source des documents trilingues analysés dans cette étude.

[36] «*Specialized corpora are carefully targeted […] Even with relatively small amounts of data, specialized lexis and structures are likely to occur with more regular patterning and distribution than in a large, general corpus»,*[36] A. O'KEEFFE, *From Corpus to Classroom : Language Use and Language Teaching*, Cambridge, 2007, p. 98

original est écrit en russe (2014, 152509 mots), la Convention Cadre sur les Changements Climatiques dont le texte original est écrit en anglais (2015, 16445 mots), ainsi que la version consolidée du Traité sur l'Union Européenne (2012, 12306 mots). Sur le plan juridique, ce corpus comprend des documents représentant le même type de documents que ceux dans notre corpus trilingue parallèle, c'est-à-dire les documents internationaux. Sur le plan linguistique, cet ensemble de documents est un *corpus comparable*, c'est-à-dire un ensemble de textes unilingues[37].

Enfin, il faut noter que la glose des exemples en russe sera fournie selon les Règles de Leipzig (*The Leipzig Glossing Rules*)[38].

Selon nos observations préalables, nous avons remarqué que l'emploi du présent juridique était lié à deux grands types de sujets syntaxiques, plus précisément aux référents des sujets : agentifs et non-agentifs ; et à des verbes aussi bien statiques que dynamiques. Nous avons également analysé les types de structures syntaxiques : forme active et passive.

Il convient de noter que nous n'avons inclus dans notre analyse quantitative que les énoncés suivant le schéma : sujet + verbe + complément/circonstanciels. Nous n'avons pas inclus les énumérations, les tournures sans sujet et verbes, etc.

Les pourcentages indiqués dans l'annexe pour les catégories « type de sujet », « type de verbe », « type de phrase » et « les valeurs constative et déontique du présent juridique » sont calculés comme la proportion d'un nombre d'occurrences par rapport au nombre total d'occurrences. Par exemple, dans la Charte de l'ONU nous avons, au total, trouvé 206 occurrences de sujets agentifs et non-agentifs (132 occurrences de sujet agentif et 74 occurrences de sujet non-agentif), ce qui correspond à 100%. Par conséquent, le nombre d'occurrences du sujet agentif représente 64% alors que le nombre d'occurrence du sujet non agentif correspond à 36%.

Dans les documents en anglais appartenant à nos deux corpus, nous pouvons constater que les formes du présent en russe et en français se traduisent vers l'anglais soit par le présent simple, soit par l'auxiliaire modale *SHALL*. Selon l'analyse quantitative l'auxiliaire *SHALL* prédomine sur l'emploi du présent simple. Pour cette raison, nous avons décidé de calculer le nombre total de traductions des marqueurs déontiques, autres que les formes du présent en russe et en français, en présent simple et en *SHALL* en anglais (Cf. annexe). Les pourcentages indiqués dans l'annexe sont calculés selon la même méthode que celle pour les types de sujets, de verbes, de formes actives et passives.

Ainsi, nous pouvons voir qu'en anglais le champ sémantique de l'obligation est partagé entre le présent simple et l'auxiliaire *SHALL* dont l'occurrence prévaut dans le contexte. Il faut également noter que notre corpus trilingue révèle principalement la valeur constative du présent juridique en anglais. L'obligation y est systématiquement exprimée par *SHALL*. En revanche, nous avons trouvé un nombre important d'occurrences du présent simple ayant la valeur déontique dans notre corpus comparable par rapport au corpus trilingue.

Nous avons utilisé *Word* et *Excel* afin de collecter les données brutes et effectuer l'analyse quantitative. Pour faciliter l'extraction de *SHALL* des documents en anglais, nous avons eu recours au logiciel *Parts-of-speech.Info,* comme sur l'image suivante :

[37] M.-M. KENNING, *What are parallel and comparable corpora and how can we use them ?*, cit., p. 488.
[38] Committee of Editors of Linguistics Journals, https://www.eva.mpg.de/lingua/pdf/Glossing-Rules.pdf.

Selon l'analyse quantitative effectuée, nous pouvons constater que le présent juridique dans les deux corpus a deux valeurs, comme dans les occurrences suivantes, tirées de nos corpus :

(19) Les Etats parties à la présente Convention **reconnaissent** que l'importation, l'exportation et le transfert de propriété illicites des biens culturels constituent l'une des causes principales de l'appauvrissement du patrimoine culturel des pays d'origine de ces biens […].

The States Parties to this Convention **recognize** that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property […].

Gosudarstva-učastniki nastojaščej Konvencii **priznajut**, čto nezakonnye vvoz, vyvoz i peredača prava sobstvennosti na kul'turnye cennosti javljajutsja odnoi iz glavnyx pričin obednenija kulturnogo nasledija stran proisxoždenija ètix cennostej[39].

(Государства-участники настоящей Конвенции признают, что незаконный ввоз и передача права собственности на культурные ценности являются одной из главных причин обеднения культурного наследия стран происхождения этих ценностей).

priznajut
reconnaître-IPFV. PRS. 3PL.
IPFV. – imperfectif ; PRS. – présent ; 3PL. - troisième personne du pluriel ;

(Corpus trilingue)

(20) […] Parties **report** information on adaptation action and planning including, if appropriate, their national adaptation plans […].[40]

(Corpus comparable)

Dans l'exemple (19), on a affaire à la valeur que nous proposons de définir comme la valeur constative. En revanche, dans l'exemple (20), nous pouvons observer la valeur déontique, proprement dite.

L'occurrence de la valeur constative du présent représente 42% dans nos deux corpus, par rapport aux 58% de l'occurrence de la valeur déontique.

Dans les lignes qui suivent, nous décrirons les propriétés linguistiques de la valeur constative du présent, et définirons le but de son emploi dans le contexte en question, car la littérature jurilinguistique passe sous silence cette valeur du présent. Ensuite, notre analyse sera axée sur la valeur déontique du présent juridique, laquelle constitue le cœur de cette étude.

3. Les deux valeurs du présent dans les documents juridiques internationaux

[39] Convention concernant les mesures à prendre pour interdire et empêcher l'importation […], Art. 2.1.
[40] Convention cadre sur les changements climatiques, II, 94 (c).

3.1. Le présent juridique : la valeur constative

Il est vrai que c'est la valeur déontique du présent juridique qui est un des marqueurs modaux essentiels dans le contexte prescriptif, car elle exprime l'obligation, l'un des pôles modaux primordiaux du point de vue jurilinguistique. Cependant, la valeur constative du présent juridique mérite d'être évoquée ici, du moins pour deux raisons : on peut fournir une distinction nette des deux valeurs du présent juridique ; cela permet également de se rendre compte des propriétés linguistiques que l'une des deux valeurs possède ou ne possède pas par rapport à l'autre.

Nous avons précédemment cité l'occurrence de la valeur constative du présent, tirée de notre corpus trilingue. Nous la trouvons assez fréquemment dans notre corpus comparable, également, comme dans les occurrences suivantes :

(21) L'Union **a** pour but de promouvoir la paix, ses valeurs et le bien-être de ses peuples.[41]

(22) « Conference of the Parties » **means** the Conference of the Parties to the Convention.[42]

(Corpus comparable)

Sur le plan linguistique, en français, en anglais et en russe juridique, le verbe au présent juridique constatif est un verbe statique, qui s'emploie soit à la voix active comme dans les exemples (19, 21, 22), soit à la voix passive. Dans le cas du russe, le sens passif est souvent exprimé par des verbes pronominaux avec le postfixe *–ся (-sja)* (Par exemple, *« ce terme se traduit par…* [on peut le traduire en russe par : « *etot termin tolkuet**sja**…*/этот термин толкуется]). Dans ce cas, le référent du sujet syntaxique implique la cible de l'action. Le rôle de l'entité effacée de l'énoncé, qui doit réaliser cette action, n'est pas important, car l'action est à caractère statique.

Les verbes ayant la valeur constative au présent juridique n'impliquent aucune agentivité du référent du sujet syntaxique, même si un tel référent (l'Union) en dispose potentiellement, comme dans l'exemple (21). De plus, les verbes à la valeur constative ne marquent aucun contrôle de la réalisation d'une action par quelque entité que ce soit, qui est le référent du sujet syntaxique de l'énoncé.

Par ailleurs, dans nos corpus, il existe un certain type d'énoncés dans lesquels on peut trouver un verbe ayant le sens potentiellement dynamique qui s'emploie avec un sujet dont le référent est une entité dépourvue d'agentivité, comme dans les occurrences suivantes, tirées de notre corpus trilingue :

(23) Les pouvoirs de l'Assemblée générale énumérés dans le présent Article **ne limitent pas** la portée générale de l'Article 10[43].

(24) Aucune disposition de la présente Charte **ne s'oppose** à l'existence d'accords ou d'organismes régionaux […][44].

(Corpus trilingue)

Nous pouvons constater que l'entité sans agentivité, qui ne contrôle pas la réalisation des actions, empêche l'interprétation dynamique des verbes. Dans ce cas, ces verbes deviennent des verbes relationnels, désignant un rapport constant entre un sujet non dynamique et non agentif et une autre entité.

En revanche, l'emploi de ces verbes avec un sujet agentif, qui contrôle la réalisation de l'action, peut éventuellement mener à l'interprétation dynamique du verbe, voire de la valeur déontique du présent, par exemple, dans l'énoncé suivant : « *l'Assemblée générale ne limite pas la portée générale de l'Article 2* » ou « *Aucune organisation ne s'oppose pas aux actions exercées par…* ».

Sur le plan jurilinguistique, la valeur constative du présent juridique sert à instaurer un état de choses qui ne préexiste pas, sans imposer d'obligation. Dans l'exemple (21), s'il s'agit d'une disposition selon laquelle on définit et décrit le but de l'Union, sans que celui-ci ne préexiste pas à l'instauration de celle-ci. Dans l'exemple (22), on propose de se mettre d'accord sur la valeur d'un terme, laquelle ne préexiste

[41] La version consolidée du Traité sur l'Union Européenne, Titre I, Disposition Communes, Art. 3.
[42] Convention cadre sur les changements climatiques, Annexe, Art. 1, (b).
[43] Charte de l'Organisation des Nations Unies, Chapitre IV, Art. 11.4.
[44] Charte de l'Organisation des Nations Unies, Chapitre VIII, Art. 52.1.

pas à sa définition. Dans les exemples (19, 23, 24), la valeur constative permet de reporter l'existence de la reconnaissance ou des limites juridiques.

Ainsi, la valeur constative revêt une force performative, sans pour autant être déontique.

3.2. Le présent juridique : la valeur déontique

Comme nous l'avons mentionné dans l'Introduction, la valeur déontique du présent juridique attire systématiquement l'attention des jurilinguistes. Cependant, ils ne dépassent souvent pas la simple présentation de cette valeur dans différentes langues. Nous voudrions étudier cette valeur plus en détail sur la base des occurrences suivantes, tirées de nos corpus :

(25) Afin d'assurer l'action rapide et efficace de l'Organisation, ses Membres **confèrent** au Conseil de sécurité la responsabilité principale du maintien de la paix et de la sécurité internationales et **reconnaissent** qu'en s'acquittant des devoirs que lui impose cette responsabilité le Conseil de sécurité agit en leur nom.

In order to ensure prompt and effective action by the United Nations, its Members **confer** on the Security Council primary responsibility for the maintenance of international peace and security, and **agree** that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Dlja obespečenija bystryx i èffektivnyx dejstvij Organizatsii Ob''edinennyx nacij eë Členy **vozlagajut** na Sovet Bezopasnosti glavnuju otvetstvennost' za podderžanie meždunarodnogo myra i bezopasnosti i **soglašajutsja** v tom, čto pri ispolnenii ego objazonnostej, vytekajuščix iz etoj otvetstvennosti, Sovet Bezopasnosti dejstvuet ot ix imeni.[45]

vozlagajut	**soglašajutsja**
conférer-IPFV. PRS. 3PL.	**reconnaître**-IPFV. PRS. 3PL.

IPFV. – imperfectif ; PRS. – présent ; 3PL. - troisième personne du pluriel ;

(Для обеспечения быстрых и эффективных действий Организации Объединенных Наций, ее Члены **возлагают** на Совет Безопасности главную ответственность за поддержание международного мира и безопасности и **соглашаются** в том, что при исполнении его обязанностей, вытекающих из этой ответственности, Совет Безопасности действует от их имени)

(26) Les décisions relatives à la politique de sécurité et de défense commune, y compris celles portant sur le lancement d'une mission visée au présent article, **sont adoptées** par le Conseil statuant à l'unanimité, sur proposition du haut représentant de l'Union pour les affaires étrangères et la politique de sécurité ou sur initiative d'un État membre.[46]

(27) Parties hereby **establish** the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change[47].

(28) Zasedanija Vysšego soveta **provodjatsja** ne reže 1 raza v god.
provodjatsja
se tenir-IPFV. PRS. 3PL. REFL.
IPFV. – imperfectif ; PRS. – présent ; 3PL. - troisième personne du pluriel ; REFL. – réfléchi.
(Заседания Высшего совета проводятся не реже 1 раза в год)
Traduction littérale : Les réunions du Conseil supérieur **se tiennent** au moins 1 fois par an.

(Corpus comparable)

On peut constater que le présent ayant la valeur déontique s'emploient en anglais, en français, et en russe juridiques à la voix active comme dans les exemples (25, 27). Dans ce cas, les référents des sujets des énoncés « ses membres » ou « les parties » se présentent comme des entités explicitement agentives

[45] Charte de l'Organisation des Nations Unies, Chapitre V, Art. 24.1.
[46] Version consolidée du Traité sur l'Union européenne, Titre V, Section 2, Art. 42.4.
[47] Convention cadre sur les changements climatiques, Annexe, Art. 7.1

qui réalisent les actions. On peut également trouver cette valeur du présent à la voix passive comme dans l'exemple (26) ou à la forme réfléchie en russe avec le postfixe *–ся (-sja)*, comme dans l'exemple (28). À la voix passive, l'agent réalisant l'action est effacé de l'énoncé. Un tel agent se manifeste de manière implicite dans l'énoncé. Dans ce cas, les sujets de l'énoncé « les décisions » ou « les réunions » se présentent comme les cibles de l'action. Autrement dit, les référents de ces sujets subissent les actions à exercer.

Sur le plan juridique, le cadre juridique d'un document sélectionne un ensemble de marqueurs linguistiques, parmi lesquels on trouve le présent à valeur déontique, afin d'exprimer des obligations.[48.]

Ainsi, sur le plan jurilinguistique, nous pouvons remarquer que le présent ayant la valeur déontique ne se contente pas de décrire l'action que l'agent, explicite ou effacé, doit réaliser, mais il signale que ce dernier est contraint d'agir comme prescrit. Par exemple, « ne pas conférer au Conseil de sécurité la responsabilité principale du maintien de la paix [...] » ou « ne pas reconnaître le droit légitime du Conseil à agir » dans l'exemple (25) signifie une violation du texte de la Charte de l'ONU. Le fait que l'agent soit contraint d'agir révèle la dimension déontique de la valeur exprimée par les trois formes dans les trois langues. En outre, elles se combinent avec les verbes de type dynamique par opposition à la valeur constative du présent juridique qui s'emploie avec les verbes statiques.

Sur le plan linguistique, nous pouvons constater que la valeur déontique des trois formes du présent en anglais, en français et en russe n'est pas un sème inhérent du morphème du présent. « Conférer la responsabilité », « tenir des réunions » ou « establish the global goal » ne sont pas déontiques en tant que tels. Cependant, ces verbes employés au présent dans le contexte juridique deviennent susceptibles d'exprimer l'obligation. Ainsi, les trois formes du présent dans les trois langues acquièrent la valeur déontique en tant que sème afférent, activé par le discours juridique.[49] Cette valeur déontique apparaît dans les deux configurations morphosyntaxiques suivantes :

- Schéma 1 : [sujet à la 3ème personne, agent explicite + verbe dynamique au présent, voix active] ;
- Schéma 2 : [sujet à la 3ème personne, agent effacé à caractère implicite + verbe dynamique au présent, voix passive].

Le schéma 1 représente l'énoncé à la voix active dans lequel le référent du sujet syntaxique est un agent explicite qui est contraint d'agir (« les membres », « les parties », « le conseil », etc.) comme dans les exemples (25), (27). Selon le schéma 2, on a affaire à l'énoncé dans lequel le véritable agent contraint d'agir est effacé et il est à caractère implicite, comme dans les exemples (26), (28). Dans ce cas, le référent du sujet syntaxique est une entité qui subit la réalisation de l'action (« les décisions », « les réunions », etc.)

Ainsi, le présent permet à l'énonciateur, en tant que source déontique, d'exposer le contenu prescriptif de manière impersonnelle et écartée. En instaurant ce que le législateur-énonciateur expose, le texte juridique crée une obligation pour celui qui le lit.

Quel que soit le référent du sujet syntaxique, agent explicite ou implicite, l'emploi systématique de la troisième personne, et non de la deuxième personne, par exemple, démontre également que l'énonciateur prend des distances par rapport au référent du sujet syntaxique. Les schémas 1 et 2 permettent d'imposer l'obligation qui ne se présente pas comme un commandement direct. Néanmoins, ces deux schémas impliquent la non-autonomie absolue de l'agent explicite ou implicite, qui devient la cible de l'obligation. L'intériorisation par cet agent de l'obligation se présente comme allant de soi. Par l'emploi du présent, l'obligation est incarnée dans le contexte juridique, sans aucun choix de la part de l'entité contrainte d'agir. En imposant l'obligation, l'énonciateur se fonde sur l'agentivité d'une telle entité et elle devient responsable du contrôle de la réalisation de l'action.

---

[48] « Une chose est la vocation instrumentale donnée aux normes d'encadrer de manière rigide ou de manière souple la conduite des destinataires : on est ici au niveau des attributs spécifiques assignés aux normes émises ; et l'élément de contrainte, dans le cas des commandements, résulte du type même de normes dont il s'agit », P. AMSELEK, *Autopsie de la contrainte associée aux normes juridiques*, Paris, 2008, p. 9.

[49] F. RASTIER, *La sémantique des textes : concepts et applications*, No. 16, 1996, pp. 28–29 ; J. LONGHI, *Pour une saisie holistique des fonctionnements de la grammaire et de la généricité : formes, normes et situations génériques comme contribution aux visées discursives*, in *Quand les genres de discours provoquent la grammaire… et réciproquement*, Dijon, 2012, pp. 187–203.

Le sémantisme dynamique du verbe au présent fait ressortir son sème incitatif dans les schémas 1 et 2, précédemment mentionnés, ce qui mène à l'interprétation déontique de la valeur du présent.

L'obligation exprimée par le verbe au présent bénéficie des propriétés linguistiques des trois formes employées en anglais, en français et en russe, que nous avons étudiées dans la section 1.2 ci-dessus.

Autrement dit, l'action à réaliser est vue comme perfective dans le sens de A. de Wit, c'est-à-dire devant s'actualiser à tout moment dans son intégralité. Il s'agit toujours d'énoncés à valeur gnomique, c'est-à-dire exprimant des faits et des vérités généraux[50].

Sur le plan jurilinguistique, les obligations exprimées au présent dans le contexte juridique sont à caractère quasi-omnitemporel. Leur realisation est limitée par la durée de validité des documents dans lesquels ces obligations apparaissent.

Nous suggérons également que la dimension temporelle du présent dans le contexte passe à l'arrière-plan tandis que la dimension modale, c'est-à-dire déontique, ressort au premier plan.

A cet égard, il faut rappeler qu'en anglais l'expression de l'obligation se partage systématiquement entre le présent simple et l'auxiliaire modal *SHALL*, qui est explicitement déontique. En outre, le présent de l'indicatif en français et le présent imperfectif en russe se traduisent en anglais par ces deux marqueurs d'obligation, c'est-à-dire par le présent simple et par *SHALL*. Cette observation renforce notre suggestion que le présent est susceptible d'exprimer la valeur déontique, la valeur que lui donne le texte prescriptif.

En outre, nous supposons que l'interchangeabilité entre le présent simple et l'auxiliaire *SHALL* devienne possible parce que la dimension modale du présent simple en anglais, du présent de l'indicatif en français et en russe se met au premier plan.

Selon l'analyse effectuée par certains (juri)linguistes,[51] *SHALL* représente l'équivalent idéal du présent en tant que marqueur d'obligation. *SHALL* implique également la non-autonomie du référent du sujet syntaxique, qui est contraint d'exercer une action dont la réalisation reste incontestable durant tout laps de temps à partir du moment d'énonciation.

Dans le cas du présent ayant la valeur déontique et de *SHALL*, la dimension temporelle s'avère non-essentielle, en prenant en compte que l'ampleur temporelle du présent dans les trois langues est en tout cas plus large que celle de *SHALL*. Cet auxiliaire modal marque une action qui est exprimée au moment d'énonciation, mais sa réalisation est visée au futur.

A propos de l'emploi de *SHALL*, il convient d'évoquer notre observation obtenue lors de l'analyse quantitative. Nous avons mentionné que dans notre corpus trilingue la valeur déontique en anglais est majoritairement exprimée par *SHALL*. Pour nous, cela s'explique par le fait que notre corpus trilingue représente des documents juridiques produits par l'ONU, une organisation européenne. Ch. Williams note que les institutions et organisations européennes restent assez conservatrices par rapport à l'emploi de *SHALL*,[52] malgré les recommandations de *the Plain English Movement* de remplacer *SHALL* par le présent simple, *MUST* et *WILL*. En effet, dans notre corpus comparable ainsi que dans les autres documents, avec lesquels nous travaillons, dont la langue originale est anglais, nous pouvons constater l'emploi plus fréquent du présent simple ayant la valeur déontique.

Conclusion

[50] L. GOSSELIN, *Les modalités en français*. *La validation des représentations*, cit., p. 365.

[51] I. RICHARD, *L'anglais du droit : interpréter les modaux en contextes normatifs*, Aix-en-Provence, 2008, 53 ; CH. WILLIAMS, *Tradition and Change in Legal English, Verbal constructions in prescriptive texts*, Berne, 2005, pp. 115–121.

[52] CH. WILLIAMS, *Tradition and Change in Legal English, Verbal constructions in prescriptive texts*, Berne, 2005, 172–174 ; F. PALMER, *Modality and the English Modals*, London/New York, Second edition, 1990, 74 ; P. M. TIERSMA, *Legal language*, 1999, 104–106 ; P. LARREYA, *Le possible et le necessaire : modalités et auxiliaires modaux en anglais britannique*, Paris, 1984, p. 228.

Dans cet article, nous avons tenté de décrire les propriétés jurilinguistiques des deux valeurs du présent dans le contexte juridique, c'est-à-dire la valeur constative et la valeur déontique.

Nous avons vu que le français, l'anglais et le russe coïncident dans l'usage de la forme du présent, même si celle-ci rentre en concurrence avec le modal SHALL en anglais, Si l'emploi déontique du présent est réel et largement attesté dans les textes juridiques, nous avons argumenté que ce n'était pas lié à un sème inhérent au présent, mais que c'était le texte juridique qui lui conférait ce statut. La valeur déontique est donc une valeur dérivée et liée à l'intériorisation de l'obligation par les sujets qui en sont la cible.

Afin d'exprimer l'obligation, les verbes au présent doivent être employés selon la configuration [sujet à la 3ème personne, agent explicite + verbe dynamique au présent, voix active] ou [sujet à la 3ème personne, agent effacé à caractère implicite + verbe dynamique au présent, voix passive]. L'énonciateur impose l'exécution de l'obligation sur l'agent explicite ou implicite, qui ne possède aucune autonomie. Ainsi, ce sont l'agentivité de l'entité contrainte d'agir et le sème incitatif des verbes dynamiques dans les schémas morphosyntaxiques, mentionnés ci-dessus, qui permettent l'interprétation déontique du présent. Ce marqueur d'obligation exprime l'action dans sa globalité résultante, qui reste réalisable à tout moment auquel on s'y réfère. Le caractère omnitemporel des obligations au présent est limité par la durée de validité des documents juridiques étudiés.

Enfin, sur le plan traductionnel, nous pouvons constater qu'on peut employer le présent dans les trois langues juridiques en tant que marqueur d'obligation sous conditions spécifiques, étudiées dans cet article. Par conséquent, le verbe dynamique au présent peut concourir avec les verbes possédant le sémantisme explicitement déontique, tels que « s'engager » « être obligé », « devoir », etc. Lors de la traduction vers l'anglais, le traducteur peut choisir soit le présent simple ayant la valeur déontique, soit SHALL, afin d'exprimer l'obligation à caractère omnitemporelle. S'il est partisan de *the Plain English Movement,* le traducteur peut accorder sa préférence au présent simple ou aux auxiliaires modaux MUST, WILL ou aux autres expressions modales. Sinon, il peut utiliser SHALL s'il adhère au style traditionnel et conservateur de la rédaction des documents en anglais.

Cette étude, qui nous a permis d'atteindre certains résultats, devra bien sûr être complétée par une étude différenciée en fonction des types de textes juridiques, que nous n'avons pu qu'esquisser dans ce travail. Il sera intéressant aussi de prendre en compte les corrélations entre l'usage modal des verbes au présent et les particularités des référents des noms, et peut-être, d'autres facteurs linguistiques ou extra-linguistiques.

Corpus trilingue

Charte des Nations Unies, site officiel de l'ONU, disponible sur : http://www.un.org/ru/charter-united-nations/index.html.

Déclaration universelle des droits de l'homme, site officiel de l'ONU, disponible sur : https://www.un.org/en/universal-declaration-human-rights/index.html.

Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels, disponible sur : https://fr.unesco.org/fighttrafficking/1970.

Corpus comparable

Traité de l'Union Economique Eurasiatique (2014), site officiel de l'Organisation Mondiale de la Propriété Intellectuelle, disponible sur : https://wipolex.wipo.int/fr/treaties/results?typeOfTreaty=24&countryOrgs=EAEU.

Version consolidée du Traité sur l'Union (2012), disponible sur : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT.

Convention cadre sur les changements climatiques (2015), site officiel de l'ONU, disponible sur : https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf.

Bibliographie

Sources (juri)linguistique

AIJMER K., *The Swedish Modal Auxiliary ska/skall Seen Through its English Translations*, in *Corpora et comparatio linguarum : Textual and contextual perspectives*, vol. 9, No.1, Bergen, 2018. Disponible sur : https://bells.uib.no/index.php/bells/issue/view/257.

AMSELEK P., *Autopsie de la Contrainte Associée aux Normes Juridiques*, Paris, 2008.

BONDARKO A., *Teoria Funkcionalnoj Grammatiki* [Théorie de la grammaire fonctionnelle], 1990.

Centre National de Ressources Textuelles et Lexicales (CNRTL), disponible sur : https://www.cnrtl.fr/.

BOULANGER A., *Voix Passive et Voix Active en Russe et en Français : Approche Comparative et Problèmes de Traduction*, in *Revue russe*, 15, 1999, pp. 47–62.

CORNU G., *Linguistique Juridique*, Paris, 2000.

CORRE E., *De l'Aspect Sémantique à la Structure de l'Événement*, Paris, 2009.

CRUSE D. A., *Some Thoughts on Agentivity*, in *Journal of Linguistics*, vol. 9, No. 1, Cambridge, 1973, pp. 11–23.

DE SWART H., *Aspect Shift and Coercion*, in *Natural Language & Linguistic Theory*, vol. 16, No. 2, 1998, pp. 347–385.

DOUAY C., ROULLAND D., *Théorie de la Relation Interlocutive : Sens, Signe, Réplication*, Limoges, 2014.

DE WIT A., *The Present Perfective Paradox across Languages*, Oxford, 2017.

GAREY H. B., *Verbal Aspect in French*, in *Language*, vol. 33, No. 2, 1957, pp. 91-110.

GERBE R.-M., *Le Présent de l'Indicatif et la Non-actualisation des Procès*, Paris, 2010.

GIVON, T., *Syntax : An Introduction*, Amsterdam, Philadelphia, 2001.

GOSSELIN L., *Les modalités en Français. La Validation des Représentations*, Amsterdam/New York, Rodopi, 2005.

GUIRAUD-WEBER M., *Le Verbe Russe : Temps et Aspect*, Aix-en-Provence, 2004.

FILLMORE CH. J., *The Case for Case*, in E. BACH, AND R. HARMS (eds.), *Universals in Linguistic Theory*, London, 1968, pp. 1–25.

HENAULT-SAKHNO CH., *Les Verbes Réflexifs en Russe : avec—sja ou sebja ?* in *Revue Russe*, 27, 2005, pp. 103–110.

HUDDLESTON R., *Sentence and Clause in Scientific English*, Cambridge, 1968.

HUDDLESTON R., PULLUM G., *The Cambridge Grammar of the English Language*, Cambridge, 2002.

HUYGHE R., *(A)telicity and the Mass-count Distinction : the Case of French Activity Nominalizations*, in *Recherches linguistiques de Vincennes* [Online], 40, 2011, pp. 101–126.

JASZCZOLT K., SAUSSURE L., *Time : Language, Cognition and Reality*, Oxford, 2013.

JOOS M., *The English Verb : Form and Meanings*, Madison, 1964.

KENNING M.-M., *What Are Parallel and Comparable Corpora and HowCcan We Use Them ?*, in M. MCCARTHY, A. O'KEEFFE (eds.), *The Routledge Handbook of Corpus Linguistics*, Londres et New-York, 2012, pp. 487–501.

KRIFKA M., *Nominal Reference, Temporal Constitution and Quantification in Event Semantics*, in RENATE BARTSCH, JOHAN VAN BENTHEM, PETER VAN EMDE BOAS (eds.) *Semantics and Contextual Expressions*, Dordrecht, 1989, pp. 75–115.

LARREYA P., *Le Possible et le Nécessaire : Modalités et Auxiliaires Modaux en Anglais Britannique*, Paris, 1984.

LEECH, G., *Meaning and the English Verb*, Harlow, 2004.

LONGHI J., *Pour une Saisie Holistique des Fonctionnements de la Grammaire et de la Généricité : Formes, Normes et Situations Génériques Comme Contribution aux Visées Discursives*, in KRAZEM MUSTAPHA (ed.), *Quand les genres de discours provoquent la grammaire…et réciproquement*, Dijon, 2012, pp.187–202.

O'KEEFFE A., *From Corpus to Classroom : Language Use and Language Teaching*, Cambridge, 2007.

PALMER F. R., *Modality and the English Modals*, London/New York, Second edition, 1990.

PERRIN, L-M., *Approche Cognitive et Typologique de l'Opposition Verbes d'Etat versus Verbes d'Action*, in *Verbum XXX*, 2–3, 2008, pp. 221–241.

PLUNGJAN V., *Obščja Morfologija [Morphologie générale]*, Moskva, 2000.

RASTIER F., *La Sémantique des Textes : Concepts et Applications*, No. 16, 1996, pp.15–37.

RICHARD I., *L'Evolution de l'Emploi de Shall, de Must et du Présent Simple dans le Discours Juridique Normatif dans le Cadre du Plain Language Movement*, in *GERAS*, [en ligne], 2006, pp. 137–153, disponible sur : http://asp.revues.org/742.

RICHARD I., *L'Anglais du Droit : Interpréter les Modaux en Contextes Normatifs*, Aix-en-Provence, 2008.

RUCHOT T., *Quelques Questions Récurrentes pour l'Analyse des TAM*, in *Syntaxe & Sémantique*, Caen, 2015, pp. 11–37.

SMITH C., *A Theory of Aspectual Choice*, in *Language*, vol. 59, No. 3, 1983, pp. 479–501.

SOURIOUX J.-L., LERAT PIERRE, *Le Langage du Droit*, Paris, 1975.

The Leipzig Glossing Rules, disponible sur : https://www.eva.mpg.de/lingua/pdf/Glossing-Rules.pdf.

THIBAUT F., *Le Mystère des Mots*, in *Revue de la Recherche Juridique Droit Prospectif*, Aix-Marseille, No. XXVI-90 (26 année, 90 numéro), t. 2, 2001–4, pp. 2153–2168.

TIERSMA P. M., *Legal Language*, Chicago, 1999.

VANDEN WYNGAERD G., *Simple Tense*, in *The Function of Function Words and Functional Categories*, Amsterdam, 2005, pp. 187–215.

VENDLER, Z., *Verbs and Times*, in *The Philosophical Review*, vol. 66, No. 2, 1957, pp. 143–160.

WILLLIAMS, CH., *Tradition and Change in Legal English, Verbal Constructions in Prescriptive Texts*, Berne, 2007.

WILLIAMS CH., *Is legal English « Going European ? » The Case of the Simple Present*, in *Canadian Journal of* Linguistics, Toronto, Québec, 2013, pp. 105–126.

ZALIZNJAK A., ŠMELEV A., *Vvedenie v Russkuju Aspektologiju* [Introduction dans à l'aspectologie russe], Moscou, 2000.

Roundtable for the Semiotics of Law – Panel on Comparative Law and Methodology

Francesco Petrosino[1]

The International Roundtable for the Semiotics of Law, held in the splendid setting of the Auditorium Antonianum from May 24th to 27th, 2023, represented a valuable opportunity for the working group, primarily composed of scholars from the Faculty of Law of the University of Trento, to revitalize a research thread focused on the study of comparative law.

The panel, where the outcomes of individual investigations were subsequently realized, bore the title "Comparative Law Methodology". The panel included interventions that were diverse in terms of content, but were marked by a common focal element. To put it more precisely, they shared a common methodological framework that underpinned all the presented works and materialized in the adoption of a *comparative law methodology*.

The reference to this term has indeed sparked a debate among scholars on the nature of comparative law methodology, including whether there are multiple interpretations and what it entails. Specifically, it raises questions about the implications of conducting legal research based on a comparative law axiological framework.

Therefore, on one hand, there are those who believe that comparative law is based on a specific methodological approach, each time grounded in certain guiding principles[2]. On the other hand, there are those who find it problematic to identify comparative law with a single methodological strategy. They argue that there is no "pure" method of comparison and that, instead, one can employ various approaches[3]. Despite the ongoing debate surrounding the method - or methods - of comparison, the research group's intention was to conceptualize comparative law not only as a scientific reference point, but also as a tool aimed at effectively managing the changes – and the challenges– arising from the continuous progress of the current social and economic context. A context that, moreover, must grapple with a process of globalization – both in economic terms and in

[1] *University of Trento (Italy), francesco.petrosino@unitn.it.*

[2] In this regard see K. ZWEIGERT, H. KÖTZ, *An Introduction to Comparative Law*, II ed, vol. I, Oxford, 1987, 31, where the authors specify that functionality is the core principle on which comparative law is based; R. SCHELSINGER, *Comparative Law. Cases – Text – Materials*, VI, New York, 1998, p. 47.

[3] Please remember in this regard the considerations of R. SACCO, P. ROSSI, *Introduzione al diritto comparato*, R. Sacco (dir. da) in *Trattato di diritto comparato*, Milano, 2019, 9, according to which a comparative reading based on a single and unique methodological approach leads to a narrow view of comparative law. Rather than focusing on the method, it would be preferable to consider that comparative law, in the practice of comparison, employs various "techniques," as well emphasized by V. V. PALMER, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 *Am. J. Comp. L.*, 2005, pp. 262-263 where he specifies that «Method is now identified by the "techniques" by which comparison is carried out. These techniques have thereby acquired the status of separate methods: thus, we have historical, functional, evolutionary, structural, thematic, empirical and statistical comparisons and all of these can be carried out from a micro or a macro point of view».

relation to legal systems – which calls for a critical response, that comparative legal science appears to be capable of providing.

It is evident, therefore, that if the goal of the working group was to highlight the use of comparative law as a valuable tool to address certain challenges that have emerged in individual legal systems due to global economic, social, and cultural phenomena, a foundational premise must be acknowledged. Specifically, the scientific approach of the modern comparativist needs to evolve in a renewed form, while also maintaining its foundational theoretical orientations. It should emphasize a comparative study attitude that is inclined to address the issues coming from the globalized scenario it must contend with[4], abandoning the veneer of excessive descriptiveness that has been criticized by comparatists and, more broadly, by the wider scientific community of law scholars[5].

Therefore, adopting such a perspective as a common research framework, the contributions presented during the Roundtable have unfolded along multiple guiding lines.

Indeed, on one hand, the first part of the panel focused on the interaction between comparative methodology and language, considering both natural language and legal language dimensions. In this regard, a portion of the studies focused on the relationship between the legal system of the European Union and its transposition into the legal systems of individual Member states. This bond was emphasized in the panel discussions through various approaches, all of which shared the necessary presence of comparative methodology as a tool for integration not only in terms of legal aspects, but also encompassing the linguistic and cultural ones.

The research perspective based on the combination of law and language primarily focused on the scenario of EU law. Particular attention was given to the phenomenon of hybridization affecting EU law, where different legal systems, languages, and cultures coexist. In such an environment, there is a risk that EU common legal concepts may be interpreted differently, even to the extent of losing their meaning and effectiveness. Therefore, the theoretical comparative trend, supported by the adoption of specific methods such as that of “the theory of legal formants”, needs to be upheld in order to ensure the consistent application of directives and regulations. In essence, to consolidate the so-called "European meaning," that is, a shared understanding of terminologies used in EU legislation among individual member states. Various solutions were put forward during the panel in response to such potential challenges. For instance, the emergence of "EU digital corpora" was highlighted, referring to documentary databases made available to legal practitioners to address interpretative problems related to the application of EU legislation. Additionally, an interdisciplinary perspective on EU law and European autonomous concepts, through the use of comparative law and semiotics was suggested too. This approach to EU law and concepts highlights that the interrelation between EU legislation and the normative forces grounding the practices of law in Europe is giving rise to common contexts of meanings in the European legal setting.

A second part of the panel, on the other hand, focused on the development of certain legal notions, particularly in the field of private law, through their connection to market and technology dynamics. In this regard, for example, the concept of property has been

[4] On the relationship between comparative law and globalization, see W. TWINING, *Globalization and Comparative Law*, in *Journal of European and Comparative Law*, 1999, II, 217; D. GERBER, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 *Tul. L. Rev*., 2001, p. 950.
[5] J. MAYDA, *Some Critical Reflections on Contemporary Comparative Law*, 39 *Rev. Jur. U. P. R*., 1970, p. 443.

extensively debated. It cannot be considered solely from the perspective of the owner and their sovereignty over tangible and intangible resources in the face of evolving production systems. Thanks to the evolution of property through the lens of *common goods*, various meanings and modes of resource management stemming from the use of goods can be appreciated. At the same time, the placement of the right to property in a technological context dominated by blockchain and distributed ledger systems leads to a rethinking of the boundaries of proprietary rights. It also prompts reconsideration of its relationship with the concept of *entitlement* – developed in common law legal scholarship – and with so-called obligation rights.

The technological background has also had an impact on contract law, particularly in terms of interpretation. The role of the interpreter has become increasingly complex with the advent of automated contract execution mechanisms (so-called smart contracts), necessitating the translation of natural language expressions into computer code.

Finally, in embracing a contemporary vision of comparison, the comparative method was examined both in terms of its legal nature and its anthropological dimension, which is closely related to its cultural aspect.

In particular, there was an effort to deepen the connection between Western legal systems and those of countries marked by a recent colonial past. This includes exploring the present-day reliance on legal models established by colonizers, with a particular focus on legal systems in the Horn of Africa region. Through this particular perspective, which draws on the appreciation of the so-called stratigraphic theory, a specific critique was aimed at a "Western-oriented" understanding of comparative legal science in the study of African legal systems.

From the brief overview focused on the content of the contributions presented during the Roundtable, particularly within the panel on comparative law and its methodology, one can draw a concluding reflection on the current state of legal comparison and on potential insights derived from the ongoing epistemological debate.

It is undoubtedly crucial to consider the connection between comparative law science and language in conducting comparisons and discerning points of convergence and divergence among distinct legal systems and uncovering the norm in complex and global environments. At the same time, comparative law is moving towards a broader horizon of meaning, aimed at finding a practical and appropriate solution not only to issues related solely to the meaning of common expressions across different legal systems, but also to guide the complex process of legal innovation in the face of the "developments" of modernity. These changes primarily refer to those related to the growth of markets, characterized by mass-produced and serialized production systems that are increasingly interconnected. They also include technological improvements that, as emphasized, require the application of a renewed legal language, which can and should be increased through the beneficial cross-pollination of various legal experiences. Lastly, comparative legal theory appears to be capable of facilitating a sort of cultural transition in which the Western legal tradition undertakes the challenging task of consolidating the rule of law – along with legal certainty and the protection of fundamental rights and freedoms – on a global scale, within other legal systems.