Comparative Law and Language

2023
Vol.2 No.2

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 2 December 2023

Editorial

Already two thousand years ago, Pliny the Elder (AD 23-79) in his *Naturalis Historia* used powerful language and narration to 'convince' humans of their moral obligation to do something against the (over) exploitation of the earth and to enact laws, for instance, prohibiting the mining and importation of marble[1]: *"[…] so that our minds may rise […] to contemplate when the centuries of exhaustion of the earth will have reached its limits and to what depths our greed will penetrate."*

Pliny's ecological ethics can serve as compass in current discussions about how the green transition of our societies in Europe should be shaped and is one of the many narratives on the relationship between humankind and nature. In launching its Green Deal, the European Commission states that "climate change and environmental degradation are an existential threat to Europe and the world".[2]

Pliny's narrative resonates well with Pauline Phoa's contribution to this journal on *Narratives in Flux Legal Language, Digital Technologies, and the Climate Crisis*, who writes the following:

> "For jurists to be able to handle these challenges, we need to train our awareness of the narratives and normative qualities of our legal language, so that we are able to critically assess whether our vocabulary and regulatory toolkit is fit for the future."

In this essay, meant to be a first reflection of an interesting research in progress, the author eloquently explains the important relationship between law, language and narration, and reinforces the need for us to develop our skills in "recognizing narratives and norms within legal language, as well as acknowledging that language is far from normatively innocent".

In a different vein the important relationship between law and language also comes to the fore in the contribution by Stefaan Van der Jeught on *Linguistic Obstacles for Migrating Professionals in the EU Internal Market: Time for a Legislative Overhaul*. If there is one thing that makes the European Union stand out, is it enormous linguistic diversity. Not surprisingly linguistic differences thus constitute important barriers that EU citizens face in exercising their rights in the EU internal market. And Member States have, within the constraints of EU free movement law, the possibility to defend and promote the use of the national language.[3] In his article, Stefaan Van der Jeught elaborates on linguistic obstacles in the EU internal market, and more in particular seeks to determine in which cases and to what extent an assessment of linguistic proficiency may be admissible under EU law for professionals seeking employment in another EU Member State than their own.

'Going back in time' may not only be useful for a better understanding of also current narratives, as the reference to Pliny the Elder teaches, it is also crucial for gaining more insight into the historical background of languages and the law. The contribution by Anne-Sophie Milard revolves around Law French, which dates back to before 1066 but leaves traces in modern English law. The author has chosen the example of the 'cestui que trust' which meaning remains enigmatic and could be seen as the very vague equivalent of the French fiducie. But even today, it remains difficult to understand with certainty whether the trust and by extension the cestui que trust are products of Roman, Norman, English, French or other law.

---

[1] J. VAN GELDER, M. NIEUWENHUIS & T. PETERS (vert.), *Plinius – De Wereld - Naturalis Historia* (Athenaeum, 2018). See also M. Wade: https://www.jhiblog.org/2022/12/12/our-duties-to-the-earth-pliny-the-elder-as-a-proto-environmentalist/ (last consulted 10 December 2023).

[2] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en

[3] E.g. Case C-391/10, *Cilivics* ECLI:EU:C:2022:638.

The language of the law, and more in particular the way in which the law gives meaning to words, is the object of study of legal linguistics. In her contribution on *Les mots intraduisibles en droit à travers la comparaison entre les éléments du système juridique britannique, français et polonais* Agata de Laforcade further explores the specific vocabulary and discourse of legal systems and the challenges of legal translation. Sometimes the translator finds himself to be confronted with untranslatable words. And where legal comparison of terms is possible, the meaning of the law may still be modified. In the European Union, which is after all characterized by multilingualism and a diversity of legal cultures, there are specific challenges to legal translation, which relate to the in-part hybrid, new and autonomous legal system that the EU has created.

Elena Ioriatti's contribution fits in really well with this, as she addresses the challenges of multilingualism, and the nuanced process of translation and adaptation. She thereby emphasises that a multilingual EU legal narrative and multilingualism in the EU can only be preserved by means of *effective* multilingualism, and not when it is formally regulated and protected. After all, history shows us that a dominant language, such as French, may easily bypass the formal regulation and codification of multilingualism. This is not to say that certain common *forms* or *formats* in language are not relevant. In the end we will have to work towards a shared, common legal language in the European Union.

The issue is concluded by Alexander Teutsch's book review of the Volume "Language Choice in Postcolonial Law - Lessons from Malaysia's Bilingual Legal System" by Richard Powell.

All contributions in this volume endorse the importance of the study of the intimate relationship between law, narratives and language, not only with a view to gain a better knowledge of the law or to make us better jurists, but also with a view to make the law future-proof to deal with the challenges our societies face!

We express our gratitude to Mr. Cezary Węgliński for his valuable collaboration.

Prof. dr. Sybe A. de Vries (Utrecht University, The Netherlands), member of the CLL Editorial Board

Vol. 2 No. 2 - 2023

Comparative Law and Language

Narratives in Flux

Legal Language, Digital Technologies, and the Climate Crisis

Pauline Phoa*

Abstract: This article argues that legal language tells stories and presents a certain world view, and that the changing circumstances 'out there' in the real world require a corresponding change in the legal narrative/narratives contained in law. By changing circumstances I mean the so-called twin transitions of the ever-increasing importance of digital technologies in society, and the ever-increasing urgency of the climate change crisis. For jurists to be able to handle these challenges, we need to train our awareness of the narratives and normative qualities of our legal language, so that we are able to critically assess whether our vocabulary and regulatory toolkit is fit for the future.

Keywords: Narratives, Legal hermeneutics, Discourses; Digitalisation; Sustainability.

Summary: 1. Changing world, challenged narratives; 2. Law as narrative and legal hermeneutics to understand it; 3. The Power of Big Tech: discourses, narratives, paradigms; 4. Human/nature: suppressed voices, intergenerational justice and telling new economic stories; 5. Concluding remarks

1. Changing world, challenged narratives

In today's world there are two confluent, paramount phenomena, namely the ascendance of digital technologies and the escalating urgency of climate change, that bring forth unprecedented challenges for our societies. These twin forces challenge our conventional beliefs, our societal narratives, about progress, sustainability, and our relationship with the environment.

The law inevitably plays a role in dealing with these transnational phenomena. As digital technologies continually redefine the boundaries of, inter alia, privacy, intellectual property, and competition, traditional legal doctrines find themselves straining to adapt. Moreover, the ecological repercussions of unchecked production and consumption patterns necessitate the development of a novel legal framework to ensure climate justice, environmental stewardship and sustainability. These contemporary challenges therefore also necessitate a re-evaluation in terms of legal norms and narratives, and perhaps even educational paradigms.

Every action we take as legal professionals is intertwined with and reliant upon our interpretation and composition of written materials, of legal texts. The law, I therefore argue, can be seen as a creative process, and recognizing the artistic and imaginative nature of legal language invites us to consider critical perspectives drawn from literary theory and hermeneutic philosophy.[1] These perspectives offer us ways to critically assess whether the current legal narratives and norms are fit for the future, and whether and how new legal conceptualisations about technology and sustainability, as well as the responsibility of legal professionals, can be formed.

In this paper I shall, firstly, outline a way of thinking about the law and about our use of legal language that is based on contemporary insights in legal theory and Law & Humanities scholarship. I will then demonstrate how this way of thinking helps to critically assess the regulation of the effects of digitalization and Big Tech power, on the one hand, and the questions raised by sustainability concerns,

* Utrecht University School of Law, p.s.phoa@uu.nl. Many thanks to Stefan Euijen for his critical comments and diligent proofreading and to Clara Colonna for thought-provoking conversations and research.

[1] J. GAAKEER AND P. PHOA, *EU Law and Law and Humanities: a novel method inspired by Paul Ricoeur and James Boyd White*, IN R. DEPLANO, G. GENTILE, L. LONARDO, T. NOWAK (eds.), *Handbook on Interdisciplinary Research Methods in EU Law*, Cheltenham, 2024 (forthcoming).

on the other. This will result in an argument that we need this way of thinking in order for us jurists to play our part to adapt and adjust the system ethically and with integrity.

2. Law as narrative and legal hermeneutics to understand it

In legal theory, we can distinguish two contrasting views of law and of language. On the one hand, we have those who view law as merely a system of rules with a simple syllogistic application to a set of facts and language as a neutral vehicle for meaning. On the other hand, there are those who perceive the use of language and the application of law, as complex cultural practices.[2] This latter perspective aligns with what can be considered a late-Wittgensteinian view of language, and it is closely related to, and influenced by how we view the world.[3]

AG Stix-Hackl, in her Opinion on the *Intermodal transports* case, clearly adopts the second view of law. She observed that the legal interpretation process 'always involves a process of understanding which, as such, cannot be turned into a mathematical formula – this is particularly true of [Union] law, with its many variables of interpretation, which themselves include the dynamic evolution of that system of law'.[4] She emphasised that law is 'intrinsically bound by the possibilities of linguistic expression and is therefore as imprecise and imperfect as language itself'.[5] According to Stix-Hackl, a legal finding is never purely objective; it involves a degree of decision-making by the judges who have to *pronounce* this finding: as the traditional German and French judicial formula say 'hat für Recht erkannt'/'dit pour droit'.[6]

Taking a similar train of thought, though a step further, American legal theorist Robert Cover argued that 'we inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. […] No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning'.[7]

In a similar vein, American legal theorist James Boyd White posited that 'the fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it.' [8] White also noted that we engage in an ongoing process of recounting and revising our life stories, seeking to make sense of our past experiences while anticipating the future, adapting our narratives as necessary. Moreover, these narratives extend beyond the individual; they constitute a collective experience and practice as we continually narrate the stories of our communities.[9]

European philosophers, such as Hans-Georg Gadamer and Paul Ricoeur, have also extensively explored the process of interpretation. Ricoeur's phenomenological focus was on the experience of language use at the level of discourse, beyond syntax and lexicon, and its consequences for human subjectivity, emphasising the conscious experience of life and agency[10]

Adopting the second view of language and law, which sees both as complex cultural practices involving storytelling and narratives, opens a theoretical and methodological window to employ

[2] J. WHITE, *Justice as Translation: An Essay in Cultural and Legal Criticism,* Chicago, 1990, ix–x; see J. GAAKEER, *Judging from experience: law, praxis, humanities*, Edinburgh, 2019, pp. 47-48; See also P. PHOA, *EU Law as a Creative Process: A hermeneutic approach for the EU internal market and fundamental rights protection*, Zutphen, 2021, pp. 28-31.

[3] See J. VAN DORP, AND P. PHOA, *How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture* in *Utrecht Journal of International and European Law,* 34(1), 2018, p. 79.

4. Case C-495/03 *Intermodal transports* ECLI:EU:C:2005:215 [2005] ECR I-8151, Opinion of AG Stix-Hackl, para 101, reflecting on the CILFIT-doctrine.

[5] *Id.* at footnote 57.

[6] *Id.* at footnote 57.

[7] R. COVER, *The Supreme Court, 1982 Term – Foreword: Nomos and* Narrative, in *Harvard Law Review,* 97(1), 4.

[8] J. WHITE, *Telling stories in the law and in ordinary life: The Oresteia and "Noon Wine"* in J. WHITE, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, Madison, 1985, p. 169.

[9] *Id.* at pp. 169-70.

[10] G. MADISON, *Ricoeur and the hermeneutics of the subject,* in L. HAHN (ed), *The Philosophy of Paul Ricoeur,* Chicago, 1995, p. 75.

disciplines, particularly from the humanities to study law's narrative content. This approach allows us to utilise methods like narratology, discourse analysis, or deconstruction to unpack the functions of legal language and what it communicates. These methods collectively form part of a 'hermeneutic philosophy', ie., a more or less coherent set of ideas about what texts are and how to *correctly* interpret them.[11] The term 'correctly' requires clarification here, as its use is qualified in this context. It is important to note that interpretative processes, when viewed in this way, lead to 'phronesis' or practical wisdom rather than 'episteme' or universal truths. [12] This does not negate the presence of a methodology to guide and stabilize the reading process. However, it underscores the significance of human subjectivity and contextual factors, including cultural and historical contexts, in the interpretative process. As Robin West expressed it,

> "To the extent that legal theory is narrative, however, it is also art. Therefore, we must decide not whether the worlds we envision are true or false, right or wrong. Rather we must decide whether they are attractive or repulsive, beautiful or ugly. Our acceptance or rejection of these aesthetic visions will in turn influence the historical choices we must make. (...)".[13]

White, West and Ricoeur all advocate a structured method of close reading, guided by specific questions that can be repeatedly applied. For instance, Robin West drew from Northrop Frye's classical work in structuralist literary criticism, *Anatomy of Criticism*,[14] while Ricoeur also drew from various strands of (French) structuralist narratology. Both pay attention to the levels of 'story' (chronological events as they occurred), 'narrative' (how events are portrayed and structured within the text, including temporal arrangement, character portrayal, and relationships), and 'narration' (how the story is conveyed, including voice, writing style, and point of view).[15]

While the narratological questions seem to offer some analytical rigour, West, White and Ricoeur also encourage a more profound and intuitive contemplation of the themes, characters, relational structures, and symbolism these questions reveal within the text. They assert that the meaning of a text is not found solely on its surface or within the historical context of the author's intentions. Instead, it resides within the entirety of the reader's experience with the text. As White puts it: 'the meaning of a text is thus not simply to be found within it, to be dug out like a kind of mineral treasure, nor does it come from the reader, as if he were a kind of movie projector. It resides in the life of reading itself, to which both text and reader contribute'.[16]

From this perspective, the process of legal interpretation, reading, and writing, becomes an ethical undertaking. Since readers interpret in a participatory manner, they must actively contemplate their actions and recognise their involvement in the reading and writing processes. A text can be seen as alluding to a particular reality and shaping societal roles and connections for individuals within that context, including both the reader and the author. By interpreting depictions of a world and its

---

[11] See for an overview of hermeneutic theories: For instance, L. SCHMIDT, *Understanding Hermeneutics,* New York and London, 2014. See also for a Law&Humanities view on hermeneutic philosophy: J. GAAKEER, *supra* note 2, at 5.

[12] This is my take on the so-called 'Ërklaren-Verstehen' controversy in hermeneutic philosophy. For a fuller discussion see P. Phoa, *supra* note 2*,* 26-62, referring to, inter alia, P. RICOEUR, *The Task of Hermeneutics*, in *Philosophy Today*, 17(1), 1973, p. 112; P. RICOEUR, *Interpretation Theory: discourse and the surplus of meaning*, essays reprinted in Texas Christian University Press, 1976, pp. 71-80; see generally L. SCHMIDT, *supra* note 11, at chapter 7; see also J. GAAKEER, *supra* note 2, at pp. 51-53 and 78-79. For a more profound discussion of phronesis versus episteme, see J. GAAKEER, *supra* note 2, at pp. 55-56 and 107-113.

[13] R. WEST, *Narrative, Authority and Law*, Ann Arbor, 1993, p. 418.

[14] *Id.*, referring to N. FRYE, *Anatomy of Criticism: Four Essays,* 1957.

[15] P. RICOEUR, *What is a text? Explanation and* understanding, in P. RICŒUR, J. THOMPSON (ed.) *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation*, Cambridge, 2016, pp. 117-119. See also P. RICOEUR, *The Narrative Function,* in *id*. pp. 244-247. See for a more detailed overview of the various approaches to narrative analysis and narratology L. HERMAN AND B. VERVAECK, *Handbook of Narrative Analysis,* Lincoln, 2005, pp. 41-101; See also H. PORTER ABBOTT, *The Cambridge Introduction to Narrative,* Cambridge, 2008, pp. 57–58.

16. J. WHITE, *When Words Lose Their Meaning*, Chicago, 1984, p. 19.

characters, individuals gain a deeper understanding of themselves and their communities. Consequently, each act of interpretation should be inherently self-reflective, and each act of writing is necessarily so.[17]

Through this lens, we will examine the 'twin' digital and green transitions that our society is currently undergoing. The ensuing discussion highlights several key issues through a research agenda, without claiming to provide an exhaustive analysis.

3. The Power of Big Tech: discourses, narratives, paradigms

The creation of the Internet for public use in the 1990s, and particularly the mainstreaming of smartphone technology in the early 2000s, has profoundly changed the way we communicate, interact socially, shop, travel, and access information. Can we still recall a time when online search engines like Google, direct messaging, or video calling did not exist? One only needs to stroll through the center of a medium-to-small-sized city to witness the challenges faced by brick-and-mortar shop owners as they struggle to compete with giant e-commerce platforms like Amazon. Additionally, the emergence of entirely new professional occupations, exemplified by the somewhat perplexing 'influencers' on social media, further contributes to this evolving landscape. The digitalization of society, coupled with the ascent of Big Tech conglomerates like Google, Apple, Facebook (Meta), Amazon, and Microsoft, has fundamentally reshaped our society. While these changes have ushered in technological advancements and benefits, they have also presented challenges to established narratives and paradigms across various domains, including privacy, capitalism, and power dynamics.[18] However, the current legal framework and the language employed to interpret and utilize it do not consistently align with these transformations.

One of the most conspicuous challenges posed by digitalization and Big Tech pertains to the erosion of privacy as we know it. Shoshana Zuboff's seminal work, "The Age of Surveillance Capitalism", elucidates how tech companies have commodified personal data, fundamentally reshaping the narrative around privacy. In this new paradigm, personal information becomes a valuable resource, feeding the surveillance capitalism machinery.[19] Think about the way in which social media platforms offer services that are 'free' in the sense that they do not charge a fee for their use, but they do collect wide-ranging data about their users and their behaviour. This data is, in turn, used to raise the value of targeted advertising on these platforms.[20] This is but an example of the way in which the very concept of privacy is being reframed, with individuals grappling with the consequences of pervasive surveillance and the dilution of personal agency.[21] However, regulatory instruments such as the GDPR are still largely based on traditional notions of privacy which are predicated on autonomy and control over personal information.[22] Therefore, they are increasingly incongruent with the reality of constant data collection, profiling, and monetization.[23] The safeguards that the GDPR offers, are hardly sufficient to protect users and provide a counterweight to these tech giants.

Furthermore, the digitalization of society calls into question economic models and discourse, which are currently largely dominated by capitalism and free-market thinking. Traditional narratives of capitalism have been based on ideas of competition between a plurality of market actors, the influence of (free) market forces, and the importance of consumer choice. Examining the wording of Articles 101 and 102 TFEU, as well as the corresponding EU Commission's guidelines and CJEU case law, reveals

---

[17] See P. PHOA, *supra* note 2, at 26-62, see also J. WHITE, *supra* note 2, at ix, xiv.

[18] See generally J. VAN DIJCK, T. POELL AND M. DE WAAL, *The Platform Society*, Oxford, 2018.

[19] S. ZUBOFF, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, London, 2019.

[20] See for a comprehensive discussion V. MOROZOVAITE, *Hypernudging in the changing European regulatory landscape for digital markets,* Policy & Internet, 15, 2023, pp. 78-99.

[21] See N. COULDRY AND U. MEJIAS, *Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject. Television & New Media*, 20(4), 2019, pp. 336-349.

[22] I. VAN OOIJEN, AND H. VRABEC, *Does the GDPR enhance consumers' control over personal data? An analysis from a behavioural perspective,* in *Journal of Consumer Policy*, 42(1), 2019, pp. 91–107.

[23] See for a comprehensive discussion of the GDPR, *inter alia*, B. VAN ALSENOY, *Data Protection Law in the EU: Roles, Responsibilities and Liability*, Antwerp, 2019, and L. FEILER, N. FORGÓ AND M. WEIGL, *The EU General Data Protection Regulation (GDPT): A Commentary*, Woking, 2018.

the prominence of these themes (or tropes, in literary terms) in the application and enforcement of EU competition law rules. However, while paying lip service to the narrative of consumer choice, innovation and competition, the rise of Big Tech actually disrupts corrective market mechanisms (including competition law) by consolidating power in the hands of a few tech giants, engendering monopolistic tendencies.[24] These corporations not only possess the capacity to manipulate markets based on their respective size and economic weight, but they also have a unique advantage in leveraging the data they accumulate to shape consumer behaviour and exert influence over governments and political processes.[25] Consequently, the narrative of a free and open market, once emblematic of capitalism, now contends with the reality of tech-driven monopolies that curtail competition and concentrate wealth. The challenge for current and future jurists is to adequately design and interpret regulatory frameworks in a way that addresses these contemporary market power imbalances. This includes rethinking the currently inadequate legal vocabularies and taxonomies to accurately describe and problematize the complex forms of power wielded by Big Tech companies. If our legal language remains inadequate, the result will be an equally inadequate range of instruments for addressing the power of tech giants.[26] For instance, a legal narrative analysis may help to assess if, and in what way, the Digital Markets Act (DMA) is conservative in the sense of preserving and confirming the position of large online platforms as so-called gatekeepers, and what needs to change in order make legislation that is less 'conservative' in this sense.[27] Moreover, an unforeseen consequence of the GDPR is that large platforms can now restrict their rivals' access to data, hampering their ability to compete effectively. Jurists will need to consider what this implies for the interpretation and potential future re-design of the GDPR.[28]

The developments described above are even more concerning given the profound transformation of power dynamics between citizens, governments, and Big Tech. The traditional narrative of governance and accountability is being redefined in the digital age as tech companies, with their global reach and immense resources, wield considerable influence over political processes, discourse, and policy formulation.[29] This necessitates a reassessment of democratic narratives that historically presumed governments as the primary custodians of power. As tech companies shape public opinion and policy outcomes, and increasingly provide services that could be considered as essential as public services,[30] the traditional paradigms of checks and balances are strained. Furthermore, the narrative of citizens' agency in a democracy requires critical examination in light of the outsized influence of tech platforms on political narratives and outcomes. Jurists need to be equipped with the narratological tools to design appropriate and effective countermeasures.[31] The recent development and proliferation of generative

[24] A. GERBRANDY AND P. PHOA, *The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-power*, in M. BENNETT, H. BROUWER AND R. CLAASSEN (Eds.), *Wealth and Power: Philosophical Perspectives*, London and New York, 2022, 166-176. See also for a careful discussion of the competitive constraint of innovation, versus the tipping point of dominant designs: L. HUMMEL, *Dominant positions or dominant designs? Market power and innovation in European competition law*, in V. ŠMEJKAL (Ed.), *EU ANTITRUST: HOT TOPICS & NEXT STEPS: Proceedings of the International Conference held in Prague on January 24–25*, 2022, 65-82, https://cld.bz/ExPAaRt.

[25] A. GERBRANDY AND P. PHOA, *supra* note 24, at pp. 166-185.

[26] *Id*., at pp. 166-185.

[27] T. SCHREPEL, *Digital Markets Act: a conservative piece of legislation*, Concurrentialiste (20 May 2021) https://www.networklawreview.org/digital-markets-act-is-conservative/.

[28] D. GERADIN, T. KARANIKIOTI AND D. KATSIFIS, *GDPR Myopia: how a well-intended regulation ended up favouring large online platforms - the case of ad tech*, in *European Competition Journal*, 17(1), 2021, pp. 47-92

[29] U. KLINGER, D. KREISS AND B. MUTSVAIRO, *Platforms, Power, and Politics: Global Political Communication for the 21st Century,* Cambridge, 2023. See also A. GERBRANDY AND P. PHOA, *supra* note 24, at pp. 166-185.

[30] L. LALIKOVA, *Google Search as a Public Service*, in J. VAN DE GRONDEN ET AL. (eds.), *Services of General (Economic) Interest: State of Play and Current Challenges* (forthcoming 2024, chapter on file with author).

[31] See for a start of this reconsideration as regards antitrust enforcement J. POLAŃSKI, *Antitrust shrugged? Boycotts, content moderation, and free speech cartels*, in *European Competition Journal*, 19(2), 2023, pp. 334-358. Moreover, as argued elsewhere, there is a need for a refined legal vocabulary to accurately 'see' and describe, as well as regulate, Big Tech's complex market power. This power is not just instrumental market power, but is also structural, political and discursive power. See A. GERBRANDY AND P. PHOA, *supra* note 24 at pp. 166-185.

AI and large language models (LLMs) such as ChatGPT and Bard will be particularly interesting to study from the perspective of discourses, narratives, authorship and agency.

The digitalization of society and the ascendancy of Big Tech have disrupted established narratives and paradigms across various domains. Understanding and grappling with these evolving narratives is essential for shaping a more equitable and resilient future. Equipping jurists with hermeneutical and narratological tools empowers them to make law that fulfills its potential.[32]

4. Human/nature: suppressed voices, intergenerational justice and telling new economic stories

The second transition, i.e., the advance of climate change and the urgent need for sustainability, has equally triggered a seismic shift in both societal and legal narratives and paradigms.[33] A careful reading of the law, along with the criticisms levelled against it, can lead to a growing awareness of the role of law both as part of the problem – i.e., creating or defending certain unsustainable practices and institutions and posing obstacles to innovative, sustainable alternatives – and as a potential driving force towards a solution. However, as Adelman aptly points out: "This requires more than effective legislation and enforcement; it requires a paradigm shift in ways we think about, teach and practice law".[34]

There are several problematic elements within the law and legal discourse surrounding sustainability and climate change that can be uncovered and addressed through a narrative analysis. For instance, the reality of climate change disrupts conventional narratives about the relationship between humankind and our natural environment. This traditional narrative revolves around human dominion over nature, which asserts that humans can extract natural resources without limits, without bearing responsibility for environmental damage and degradation. In this narrative, nature itself lacks agency and humans are portrayed as masters over, but not interconnected with, their natural environment.[35] Consider how nature is notably absent from the preamble of the EU Treaty, which merely mentions 'taking into account the principle of sustainable development' and 'environmental protection' but only in relation to promoting 'economic and social progress of the European people. Article 3(3) TEU goes a bit further by considering that the EU '…shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.' Art. 3(5) TEU states that the EU shall contribute to '…the sustainable development of the Earth'. The preamble of the TFEU does not even mention nature or sustainability, although Art. 11 TFEU mandates that '(e)nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. Article 13 TFEU states that, 'since animals are sentient beings [the Union and its Member States shall] pay full regard to the welfare requirements of animals'. It does add a qualification, mentioning that this shall be done 'while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage'. Viewed through the narratological lens, these recitals and provisions maintain a distance between humankind and the natural environment, subordinating the relationship between the European people and nature, if any, to the ultimate goal of economic and social progress.

Examining texts such as the EU Treaties for the presence or conspicuous absence of narratological elements involving nature can expose deep structures of legal and political reasoning that resonate in the interpretations of these texts and related legislation. Furthermore, a comparison to alternative narratives presented in critical scholarly works from a different perspective, such as Anna Tsing's *The Mushroom at the End of the World*, or in works of fiction, including Sarah Hall's short story *Mrs Fox*, Elif Shafak's *The Island of Missing Trees*, or Jeff VanderMeer's *Southern Reach Trilogy*, can broaden

[32] D. CARPI, *Have We Ever Been/Will We Still Be Human? Law and Literature Faced with the Shifting Boundaries of Humanity and Technology*, in *Pólemos*, 17(1), 2023, pp. 1-5.
[33] F. EKARDT, *Sustainability: transformation, governance, ethics, law,* New York, 2019.
[34] S. ADELMAN, *A legal paradigm shift towards climate justice in the Anthropocene,* in *Oñati Socio-Legal Series*, 11(1), 2021, 44-68, 49. See also: P. SERRAND, P. SZWEDO, W. ZAGORSKI AND L. HELIŃSKA, *La durabilité saisie par le droit,* in *Ser. Droit & science politique*, 2023; E. BOULOT J. STERLIN, *Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human,* in *Transnational Environmental Law*, 11(1), 2022, pp. 13-38.
[35] E. BOULOT AND J. STERLIN, *supra* note 34, at pp. 13-38.

the horizons of jurists' imaginations. This expansion is necessary if a different worldview is to be expressed in legal discourse.[36]

Connected to the challenge of the worldview, centered on humankind's mastery over nature, is the issue of property rights and resource exploitation on the one hand, and the division or lack of responsibilities on the other. American law professor Mary Christina Wood's pioneering work on the 'public trust doctrine' underscores the need for a paradigm shift in environmental law towards a fiduciary duty of governments to protect the atmosphere as a public trust resource for future generations. This alternative perspective challenges existing legal paradigms and invites a re-evaluation of the narratives that underpin environmental jurisprudence.[37] In certain countries, climate litigation is already prompting judges to reflect on these issues. The Dutch Urgenda foundation, for instance, is a pioneer in climate litigation and successfully established the Dutch government's legal duty to prevent dangerous climate change.[38] Many similar cases have followed the Urgenda ruling, with several cases currently pending before the European Court of Human Rights (ECtHR) in which various groups of claimants allege violations of the ECHR due to states' inadequate efforts to reduce greenhouse gas emissions.[39] Judges are starting to acknowledge the need to uphold sustainability commitments, and lawmakers and governments are scrambling to align (or justify) their policies. It is noteworthy that private citizens and activists need to resort to litigation to enforce climate goals that policymakers have formally agreed upon. This highlights the necessity for judges and litigators to possess critical skills for legal interpretation and argumentation to provide persuasive substance to these concerns. It also underscores the need to critically reflect on the implications for appropriate levels of judicial scrutiny, procedural rights, and the *trias politica* more generally.[40]

Moreover, the need for sustainability clashes with established economic narratives, which often form the foundation of legal rules, focussing on unbridled growth and consumption.[41] For instance, the EU's Common Agricultural Policy (CAP) has historically incentivised production and growth. Consider Article 39 TFEU, which states that the CAP aims to increase productivity, ensure a fair standard of living for farmers, stabilise markets, secure the availability of supplies and provide consumers with food at reasonable prices. Or examine recital number 1 of the most recent CAP financing Regulation (EU) 2021/2116, which holds that,

---

[36] See for instance S. ADELMAN, *supra* note 34, at p. 50. See also J. WHITE, *supra* note 2, at pp. 47-75, who spent an entire chapter examining neoclassical microeconomic thought, pointing out that this worldview sees the natural world as something external to the human actors, merely affording 'resources' for wealth. He contrasts this with an example of Buddhist economic thought as theorized by E. SCHUMACKER in his seminal *Small is Beautiful – A Study of Economics as if People Mattered,* London, 1973.

[37] M. BLUMM, AND M. WOOD, *The Public Trust Doctrine in Environmental and Natural Resources Law,* Durham, 2021.

[38] https://www.urgenda.nl/en/home-en/; Dutch Supreme Court ruling confirming the lower courts: ECLI:NL: HR:2019:2007 (English translation), Hoge Raad (20 December 2019) 19/00135, available at: https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007

[39] At the time of writing the following cases are still pending before the ECtHR: Duarte Agostinho and Others v Portugal and Others App no 39371/20; Verein Klimaseniorinnen Schweiz and Others v Switzerland App no 53600/20; Carême v. France (application no. 7189/21); Müllner v. Austria (no. 18859/21); and Greenpeace Nordic and Others v Norway App no 34068/21 (ECHR, Communicated Case, 16 December 2021). Uricchio v. Italy and 31 other States (application no. 14615/21) and De Conto v. Italy and 32 other States (no. 14620/21); Soubeste and 4 other applications v. Austria and 11 other States (nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22); Engels v. Germany (no. 46906/22).

[40] H. KELLER AND C. HERI, *The Future is Now: Climate Cases Before the ECtHR*, in *Nordic Journal of Human Rights*, 40(1), 2022, pp. 153-174.

[41] J. CAILLOSSE, A. BAILLEUX, *Le droit en transition*, in C. VÉRONIQUE, H. DEVILLERS AND M. CHAMBON (eds.) *Le paradigme de la croissance en droit public,* New York, 2022. See also L. KOTZÉ AND S. ADELMAN, *Environmental law and the unsustainability of sustainable development: a tale of disenchantment and of hope,* in *Law and critique*, 34(2), 2023, pp. 227-248.

> "The Common Agricultural Policy (CAP) should continue to step up its response to future challenges and opportunities by boosting employment, growth and investment, by fighting and adapting to climate change and by bringing research and innovation out of the laboratories and onto fields and markets. The CAP should furthermore address citizens' concerns regarding sustainable agricultural production."[42]

Viewing this recital through a narratological lens, paying particular attention to the significance of the ordering of the goals of the CAP, one may notice the emphasis placed on 'boosting employment, growth and investment' over 'fighting and adapting to climate change', and that the CAP's task to 'address citizens' concerns regarding sustainable agricultural production' is textually downplayed even further. Consider also that sustainability is subtly referred to as a 'citizens' concern' rather than a shared concern of the entire community.[43]

For a different example, consider Art. 101(3) TFEU, and reflect on the emphasis EU competition rules place on consumers' welfare, which regards limitations on choice or production as problematic. The interpretation of these rules has slowly been changing in response to the growing disparity between the rules and the growing importance of non-market values.[44] However, these recent efforts are largely based on ideas of 'green growth', which, at its core, remains a strategy for growth, an approach that remains problematic given the planetary boundaries and the ultimate need for true sustainability.[45] Moreover, the weak entrenchment of sustainability at an EU constitutional legal level, makes it particularly susceptible to political (and populist) whims and bargaining. It is quite telling that the most 'green' EU Commission to date has significantly scaled back its green ambitions in its 2023 State of the Union, likely in preparation for the 2024 elections for the European Parliament.[46]

This reframing of economic narratives is integral to addressing the sustainability imperative. Economists have proposed alternatives, such as Kate Raworth, who, in her book *Doughnut Economics* posits a narrative of an economy situated within ecological boundaries and social foundations. Raworth challenges the conventional narrative of economic growth as an unmitigated good and instead advocates for narratives that prioritise human well-being and ecological sustainability. Another example is the so-called degrowth movement, which has emerged as a thought-provoking and increasingly influential counterpoint to the prevailing economic paradigm fixated on growth. Degrowth proposes a shift towards economic systems that prioritise well-being, sustainability, and social equity over the pursuit of GDP growth. Advocates, such as Jason Hickel, argue that this alternative approach encourages a re-evaluation of our consumption patterns, prompting us to reduce waste, prioritise environmental stewardship, foster local, community-oriented economies, and reimagine success in terms of human flourishing rather than sheer material accumulation.[47] It is important for jurists to recognise the

---

[42] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013

[43] See for a similarly critical analysis of the CAP's green ambitions: A. LANGLAIS, *The new Common Agricultural Policy: reflecting an agro-ecological transition. The legal perspective,* in *Review of Agricultural, Food and Environmental Studies*, 104(1), 2023, pp. 51-66.

[44] A. GERBRANDY, *Solving a Sustainability-Deficit in European Competition Law*, in *World Competition*, 40(4), 2017, 539-562. See also on the most recent 'sustainable turn' in the EU Commission's guidelines: M. GASSLER, *The New Sustainability Chapter in the Horizontal Guidelines: Changes in the Final Version Compared to the Draft Version of March 2022*, 2023, available at: https://competitionlawblog.kluwercompetitionlaw.com/2023/06/07/the-new-sustainability-chapter-in-the-horizontal-guidelines-changes-in-the-final-version-compared-to-the-draft-version-of-march-2022/

[45] M. OSSEWAARDE AND R OSSEWAARDE-LOWTOO, *The EU's green deal: a third alternative to green growth and degrowth?* in *Sustainability*, 12(23), 2020, 9825, pp. 2-11.

[46] U. VON DER LEYEN, *State of the Union address 2023*: https://ec.europa.eu/commission/presscorner/detail/ov/speech_23_4426

[47] J. HICKEL, *Less is more – how degrowth will save the world*, London, 2021; N. FITZPATRICK, T PARRIQUE AND I. COSME, *Exploring degrowth policy proposals: A systematic mapping with thematic synthesis,* in *Journal of Cleaner Production*, 2022, 365; M. SCHMELZER, A. VETTER AND A. VANSINTJAN, *The future is degrowth: A guide to a world beyond capitalism*, Brooklyn and London, 2022; C. FYOCK, *What Might Degrowth Mean for International*

influence of traditional economic narratives of growth in the law in order to address and correct these narratives in a legally coherent way. Moreover, narrative and discursive capabilities help jurists identify aspects of the law that may be compatible with alternative economic models, and therefore do not need to change, allowing for an effective and efficient targeting of reform efforts.[48]

The climate crisis also necessitates a rethinking of narratives surrounding *justice and equity*. Recognizing the disproportionate impact of climate change on vulnerable communities, scholars and activists like John Dryzek and Hindou Oumarou Ibrahim emphasize inclusive narratives of climate justice.[49] These narratives advocate for the equitable distribution of the burdens and benefits of climate action and underscore the imperative of intergenerational and intragenerational justice. The absence or oppression of certain voices and perspectives is something that contemporary Law & Humanities scholarship may also help to critically examine.[50] Additionally, science fiction works, such as Kim Stanley Robinson's *The Ministry for the Future*, provide ideas on how intergenerational justice could be implemented in real global governance structures.

Thus, like the rise of digital technologies, climate change and the imperative of sustainability have ushered in a profound transformation of societal and legal narratives and paradigms. Climate change challenges narratives of human dominion over nature, underscores systemic interconnectedness, necessitates legal paradigms grounded in public trust and ecological responsibility, prompts a critical examination of economic narratives and advocates for narratives of climate justice. In the face of this existential crisis, a recalibration of our narratives and paradigms – both within the law and outside of it – is, in the view of this author, not merely advisable but imperative.

5. *Concluding remarks*

In conclusion, this article underscores the profound relationship between legal language and the narratives that underpin it, emphasizing the need for legal scholars and practitioners to learn how to adapt to evolving circumstances in the real world. The "twin transitions" of an increasingly digitalized society and the pressing climate change crisis demand not only innovative legal solutions but also a re-evaluation of the narratives woven into the fabric of our legal frameworks. An approach informed by Law and Humanities scholarship, including legal hermeneutics, discourse analysis and narratology may help in that process of re-evaluation. Our exploration of both transitions has revolved around overarching themes of power, voice, agency and responsibility. Questions will need to be asked – continuously - about who speaks within the legal discourse, and whether that discourse still corresponds to our present realities.

Crucially, this work has highlighted the essential skill of recognizing narratives and norms within legal language, as well as acknowledging that language is far from normatively innocent. Narratives are dynamic, perpetually unfinished, and ever-evolving, much like the world they seek to describe. Thus, adapting to changing circumstances requires us to consistently reassess whether our legal vocabulary and regulatory tools remain fit for the future. In navigating these shifts, we not only gain a deeper understanding of the stories our laws tell, but also the potential to craft narratives that reflect our shared aspirations for justice, sustainability, and a harmonious coexistence with our ever-changing world. In this ongoing narrative of human progress, our legal language becomes a potent vehicle for shaping our collective destiny, ensuring that it remains responsive to the complex and multifaceted challenges of our time.

Economic Law? A Necessary Alternative to the (un) Sustainable Development Paradigm in A*sian Journal of International Law*, *12*(1), pp. 40-62.

[48] See for instance R. MAUGER, *Finding a needle in a haystack? Identifying degrowth-compatible provisions in EU energy law for a just transition to net-zero by 2050*, in *Journal of Energy & Natural Resources Law*, 41(2), 2023, pp. 175-193.

[49] J. DRYZEK, *The Politics of the Earth*, Oxford, 2021. See also D. MCGREGOR, S. WHITAKER, M. SRITHARAN, *Indigenous environmental justice and sustainability in Current Opinion in Environmental Sustainability*, 43, 2020, pp. 35-40; K. KEALIIKANAKAOLEOHAILILANI, AND C. GIARDINA, *Embracing the sacred: an indigenous framework for tomorrow's sustainability science*, in *Sustainability Science*, 2016, 11, pp. 57-67.

[50] See for instance the rich monograph by N. ROGERS, *Law, Fiction and Activism in a Time of Climate Change,* Abingdon, 2020.

Bibliography

ADELMAN, S., *A legal paradigm shift towards climate justice in the Anthropocene,* in *Oñati Socio-Legal Series*, 11(1), 2021, pp. 44-68.

VAN ALSENOY, B., *Data Protection Law in the EU: Roles, Responsibilities and Liability*, Antwerp, 2019.

BLUMM, M., AND M. WOOD, *The Public Trust Doctrine in Environmental and Natural Resources Law,* Durham, 2021.

BOULOT, E., J. STERLIN, *Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human*, in *Transnational Environmental Law*, 11(1), 2022, pp. 13-38.

CAILLOSSE, J., A. BAILLEUX, *Le droit en transition*, in C. VÉRONIQUE, H. DEVILLERS AND M. CHAMBON (eds.) *Le paradigme de la croissance en droit public*, New York, 2022

CARPI, D., *Have We Ever Been/Will We Still Be Human? Law and Literature Faced with the Shifting Boundaries of Humanity and Technology*, in *Pólemos*, 17(1), 2023, pp. 1-5.

COULDRY, N., U. MEJIAS, *Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject. Television & New Media*, 20(4), 2019, pp. 336-349.

COVER, R., *The Supreme Court, 1982 Term – Foreword: Nomos and* Narrative, in *Harvard Law Review,* 97(1), pp. 4-68.

VAN DIJCK, J., T. POELL AND M. DE WAAL, *The Platform Society*, Oxford, 2018.

VAN DORP, J., P. PHOA, *How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture* in *Utrecht Journal of International and European Law*, 34(1), 2018, pp. 73-87.

DRYZEK, J., *The Politics of the Earth*, Oxford, 2021.

EKARDT, F., *Sustainability: transformation, governance, ethics, law*, New York, 2019.

FITZPATRICK, N., T PARRIQUE AND I. COSME, *Exploring degrowth policy proposals: A systematic mapping with thematic synthesis*, in *Journal of Cleaner Production*, 2022.

FEILER, L., N. FORGÓ AND M. WEIGL, *The EU General Data Protection Regulation (GDPT): A Commentary*, Woking, 2018.

FRYE, N., *Anatomy of Criticism: Four Essays*, 1957.

FYOCK, C., *What Might Degrowth Mean for International Economic Law? A Necessary Alternative to the (un) Sustainable Development Paradigm* in A*sian Journal of International Law*, *12*(1), pp. 40-62.

GAAKEER, J., *Judging from experience: law, praxis, humanities*, Edinburgh, 2019.

GAAKEER, J., AND P. PHOA, *EU Law and Law and Humanities: a novel method inspired by Paul Ricoeur and James Boyd White*, IN R. DEPLANO, G. GENTILE, L. LONARDO, T. NOWAK (eds.), *Handbook on Interdisciplinary Research Methods in EU Law*, Cheltenham, 2024 (forthcoming).

GASSLER, M., *The New Sustainability Chapter in the Horizontal Guidelines: Changes in the Final Version Compared to the Draft Version of March 2022*, 2023, available at: https://competitionlawblog.kluwercompetitionlaw.com/2023/06/07/the-new-sustainability-chapter-in-the-horizontal-guidelines-changes-in-the-final-version-compared-to-the-draft-version-of-march-2022/

GERADIN, D., T. KARANIKIOTI AND D. KATSIFIS, *GDPR Myopia: how a well-intended regulation ended up favouring large online platforms - the case of ad tech*, in *European Competition Journal*, 17(1), 2021, pp. 47-92.

GERBRANDY, A., *Solving a Sustainability-Deficit in European Competition Law*, in *World Competition*, 40(4), 2017, pp. 539-562.

GERBRANDY, A. AND P. PHOA, *The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-power*, in M. BENNETT, H. BROUWER AND R. CLAASSEN (Eds.), *Wealth and Power: Philosophical Perspectives*, London and New York, 2022, pp. 166-176.

HERMAN, L. AND B. VERVAECK, *Handbook of Narrative Analysis*, Lincoln, 2005.

HICKEL, J., *Less is more – how degrowth will save the world*, London, 2021.

HUMMEL, L., *Dominant positions or dominant designs? Market power and innovation in European competition law*, in V. ŠMEJKAL (Ed.), *EU ANTITRUST: HOT TOPICS & NEXT STEPS: Proceedings of the International Conference held in Prague on January 24–25*, 2022, pp. 65-82, https://cld.bz/ExPAaRt.

KEALIIKANAKAOLEOHAILILANI, K., AND C. GIARDINA, *Embracing the sacred: an indigenous framework for tomorrow's sustainability science*, in *Sustainability Science*, 2016, 11, 57-67

KELLER, H. AND C. HERI, *The Future is Now: Climate Cases Before the ECtHR*, in *Nordic Journal of Human Rights*, 40(1), 2022, pp. 153-174.

KLINGER, U., D. KREISS AND B. MUTSVAIRO, *Platforms, Power, and Politics: Global Political Communication for the 21st Century*, Cambridge, 2023.

KOTZÉ, L. AND S. ADELMAN, *Environmental law and the unsustainability of sustainable development: a tale of disenchantment and of hope*, in *Law and critique*, 34(2), 2023, pp. 227-248.

LALIKOVA, L., *Google Search as a Public Service*, in J. VAN DE GRONDEN ET AL. (eds.), *Services of General (Economic) Interest: State of Play and Current Challenges* (forthcoming 2024, chapter on file with author).

LANGLAIS, A., *The new Common Agricultural Policy: reflecting an agro-ecological transition. The legal perspective*, in *Review of Agricultural, Food and Environmental Studies*, 104(1), 2023, pp. 51-66.

MADISON, G., *Ricoeur and the hermeneutics of the subject*, in L. HAHN (ed), *The Philosophy of Paul Ricoeur*, Chicago, 1995.

MAUGER, R., *Finding a needle in a haystack? Identifying degrowth-compatible provisions in EU energy law for a just transition to net-zero by 2050*, in *Journal of Energy & Natural Resources Law*, 41(2), 2023, pp. 175-193.

MCGREGOR, D., S. WHITAKER, M. SRITHARAN, *Indigenous environmental justice and sustainability in Current Opinion in Environmental Sustainability*, 43, 2020, p. 35-40.

MOROZOVAITE, V., *Hypernudging in the changing European regulatory landscape for digital markets*, Policy & Internet, 15, 2023, pp. 78-99.

VAN OOIJEN, I., AND H. VRABEC, *Does the GDPR enhance consumers' control over personal data? An analysis from a behavioural perspective*, in *Journal of Consumer Policy*, 42(1), 2019, pp. 91–107.

OSSEWAARDE, M., AND R OSSEWAARDE-LOWTOO, *The EU's green deal: a third alternative to green growth and degrowth?* in *Sustainability*, 12(23), 2020, 9825, pp. 2-11.

PHOA, P., *EU Law as a Creative Process: A hermeneutic approach for the EU internal market and fundamental rights protection*, Zutphen, 2021.

POLAŃSKI, J., *Antitrust shrugged? Boycotts, content moderation, and free speech cartels*, in *European Competition Journal*, 19(2), 2023, pp. 334-358.

PORTER ABBOTT, H., *The Cambridge Introduction to Narrative*, Cambridge, 2008.

RICOEUR, P., *The Task of Hermeneutics*, in *Philosophy Today*, 17(1), 1973.

RICOEUR, P., *Interpretation Theory: discourse and the surplus of meaning*, essays reprinted in Texas Christian University Press, 1976, pp. 71-80.

RICOEUR, P., *What is a text? Explanation and* understanding, in P. RICŒUR, J. THOMPSON (ed.) *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation*, Cambridge, 2016.

ROGERS, N., *Law, Fiction and Activism in a Time of Climate Change*, Abingdon, 2020.

SCHMELZER, M., A. VETTER AND A. VANSINTJAN, *The future is degrowth: A guide to a world beyond capitalism*, Brooklyn and London, 2022.

SCHMIDT, L., *Understanding Hermeneutics*, New York and London, 2014.

SCHREPEL, T., *Digital Markets Act: a conservative piece of legislation*, Concurrentialiste (20 May 2021) https://www.networklawreview.org/digital-markets-act-is-conservative/.

SCHUMACKER, E., *Small is Beautiful – A Study of Economics as if People Mattered*, London, 1973.

SERRAND, P., P. SZWEDO, W. ZAGORSKI AND L. HELIŃSKA, *La durabilité saisie par le droit*, in *Ser. Droit & science politique*, 2023.

WEST, R., *Narrative, Authority and Law*, Ann Arbor, 1993.

WHITE, J., *Telling stories in the law and in ordinary life: The Oresteia and "Noon Wine"* in J. WHITE, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, Madison, 1985.

WHITE, J., *Justice as Translation: An Essay in Cultural and Legal Criticism*, Chicago, 1990.

WHITE, J., *When Words Lose Their Meaning*, Chicago, 1984.

ZUBOFF, S., *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, London, 2019.

Linguistic Obstacles for Migrating Professionals in the EU Internal Market: Time for a Legislative Overhaul

Stefaan van der Jeught[1]

Abstract: In this article, I assess the law of the European Union (EU) as regards linguistic obstacles in the functioning of the internal market. In essence, the research aims to determine in which cases and to what extent an assessment of linguistic proficiency may be admissible under EU law for professionals seeking employment in another EU Member State than their own.

Indeed, assessing the linguistic skills of potential employees to determine their ability to communicate effectively in the workplace and with clients is quite common and widely accepted. In the same vein, self-employed private (medical) service providers who want to establish themselves in another EU Member State, or students wishing to study in another language than their own, may have to prove to possess adequate linguistic skills. However, making the threshold too high may amount to an indirect discrimination on the basis of nationality. Linguistic requirements are, furthermore, by no means limited to the exercise of a professional activity in a broad sense, but may also concern eligibiliy for social benefits, as these may be made conditional upon a certain level of proficiency in the local language.

It appears that there is a considerable degree of legal uncertainty surrounding these topics, not least with regard to self-employed professions. As it stands, EU law seems open to various interpretations as to the autonomy of EU Member States to regulate this field, not least when it comes to the intensity of language testing. The European Commission seems to focus primarily on free movement and is rather reluctant to establish clear guidelines. On a positive note, in its (limited) case law, the European Court of Justice has provided important albeit broad guidelines. It is argued that this topic is in need of a comprehensive legislative overhaul granting the EU Member States more autonomy, on the basis of clearly established criteria, to lay down and assess linguistic requirements for professionals migrating to their territory.

Keywords: European Union, Internal market, Free movement, Linguistic mequirements, Proof, scope and level of linguistic skills.

1. Introduction

In works of fiction language barriers are often blotted out or at least reduced to minor and merely transitional issues. Indeed, after a brief first multilingual encounter the main characters usually find a lingua franca, mostly English, in which they can effortlessly communicate with all the subtleties required. Alternatively, linguistic issues are used as a funny gimmick. In that regard classic British comedy comes to

[1] Court of Justice of the EU and Vrije Universiteit Brussel (mail: Stefaan.van.der.jeught@vub.be). The views and opinions expressed in this article are solely my own and do not reflect the position of the Court of Justice.

mind, more particularly the unfortunate yet endearing waiter Manuel in *Fawlty Towers*, or *Allo Allo!*, a sitcom which cleverly used English in different accents so as to represent various languages.[2]

More recently, attempts are sometimes being made to better reflect the multilingual reality. A case in point is *1899*, a dystopic story about immigrants from various countries travelling from the Old to the New continent on a steamship. Crew and passengers do not have a single common language and actors perform in French, English, Cantonese, Polish, Portuguese, Spanish, Danish and German![3] The journey is suspenseful to say the least (spoiler alert: there are only few survivors), and the apparent communication problems do not help. Rather, the myriad of languages spoken, with few useful combinations for meaningful communication, contribute to a large extent to a harrowing, nightmarish athmosphere in which characters often say phrases like "none of this makes any sense", as indeed it does not.[4]

Fortunately, in day-to-day life, the situation is (slightly) less dramatic. Yet, linguistic obstacles are still a fact of life to be reckoned with in an increasingly globalised work force and world. Proficiency in one or more local, or widely spoken international languages may (quite justifiably) be required in various contexts, not least in the job market. Such linguistic requirements may, however, also generate unwanted discriminatory effects and lead to exclusion, in particular when the required level of linguistic skills is too high to attain.

So what are then, the legal do's and dont's in this respect? In this article, I will look into the law of the European Union (EU) as regards the internal market and, more particularly, endeavour to determine in which cases and to what extent an assessment of linguistic proficiency may be admissible under EU law for professionals seeking employment in another EU Member State than their own.

Indeed, assessing the linguistic skills of potential employees to determine their ability to communicate effectively in the workplace and with clients is quite common and widely accepted. In the same vein, private (medical) service providers who want to establish themselves in another EU Member State, or students wishing to study in another language than their own, may have to provide evidence they possess adequate linguistic skills. However, making the threshold too high may amount to an indirect discrimination on the basis of nationality.

Linguistic requirements are, furthermore, by no means limited to professional activity in a broad sense, but may also concern eligibiliy for social benefits. Indeed, national authorities are increasingly laying down policies so as to foster social cohesion and (linguistic) integration of newcomers in society. In that regard, they may seek various ways and incentives to ensure that those newcomers acquire minimum linguistic skills, and to that end, make certain social benefits conditional upon a linguistic requirement.[5]

Different principles may apply in the internal market which are relevant to the topic at hand (free movement of workers, freedom to provide services and of establishment, non-discrimination on the basis of nationality, …). Yet, for the sake of clarity and structure, I will not discuss or assess the relevant regulatory EU framework and case law of the European Court of Justice along those classical lines, but rather from the perspectives of respectively employees (under 2), regulated professions (self-employed or not) (under 3) and beneficiaries of social benefits (under 4). For each and every perspective, a distinction will be made between the admissibility of linguistic requirements as such, on the one hand, and the standard

[2] The French, German and Italians each speak English with a strongly discernible national accent, while the English airmen use frightfully posh voices. The inimitable Peter Sellers and his French accent in English while impersonating *Inspector Clouseau* also deserves to be mentioned here.

[3] Fortunately, subtitles are made available to the audience …

[4] See L. LATIF, 1899 – this painfully slow sci-fi show is absolutely agonising (it is dour, obtuse and oppressive), in *The Guardian*, 17.11.2022, available here.

[5] An issue that clearly remains outside the scope of EU law, however, is the acquisition of nationality. Accordingly, this topic will not be discussed in this article. Neither will immigration law be covered (such as family reunification rules, often also entailing linguistic requirements).

of proof and intensity of language requirements/testing on the other.[6] I will then pinpoint remaining grey zones, challenges and possible ways to move forward (under 4) before concluding (under 5), pleading in short for a clearer constitutional demarcation of competences between the national and the EU decision-making levels.

2. Employees

2.1 Admissibility of language requirements

In essence, States' sovereignty remains largely intact as to their official national language policy. They determine in principle freely, in the public spheres, which languages are to be used in such domains as public administration, courts and State-funded education.[7]

In the private spheres of employment, however, the situation is quite different as, in principle, private employers may decide on all linguistic requirements they deem necessary for their potential employees.

In EU law, the situation is more complex. Indeed, the fundamental right of free movement for workers in the EU, as enshrined in the Charter of Fundamental Rights of the EU and the Treaty on the Functioning of the EU (TFEU)[8] entails *inter alia* the abolition of any discrimination based on nationality between nationals of the EU Member States as regards employment.

To that effect, EU Regulation 492/2011 establishes detailed rules concerning the eligibility for employment so as to prevent any discrimination between EU nationals.[9] Accordingly and irrespective of their place of residence, EU nationals have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State, under the same conditions as nationals of that (host) Member State.[10]

What does this imply as to linguistic conditions for employment in the private or in the public sector in an EU Member State other than one's own?

On the one hand, EU law protects the private freedom of language.[11] This entails that national autonomy as regards linguistic regulation of private employment is limited. A case in point occurred in 2001, when the European Commission criticised Estonia during the accession screening for EU Membership. The

---

[6] I will discuss case law only insofar as it concerns linguistic proficiency requirements for employment. The *Las* judgment of the European Court of Justice will therefore not be analysed, as it merely concerns the language of the contract, not of the employee (ECJ Judgment of 16 April 2013, *Las*, case C-201/11, ECLI:EU:C:2013:239).

[7] See S. VAN DER JEUGHT, *EU Language Law*, Groningen, 2015, 19 et seq. See also S. VAN DER JEUGHT, *The Loi Toubon and EU Law: a Happy or a Mismatched Couple?* in *European Journal of Language Policy*, 2016, pp. 139-152; S. VAN DER JEUGHT, *Territoriality and freedom of language: the case of Belgium,* in *Current Issues in Language Planning*, vol. 18, 2016/2, pp. 1-18; S. VAN DER JEUGHT, *Regulatory Linguistic Requirements for Product Labelling in the Internal Market of the European Union*, in *Comparative Law and Language Journal,* 2022/1 (online); H. VAN EYKEN, E. MEYERMANS SPELMANS, *Words travel worlds: language in the internal market and the national identity of Member States*, in *Comparative Law and Language Journal*, 2022/2 (online).

[8] Art. 45 and 46 TFEU; art 15 of the Charter of Fundamental rights of the EU.

[9] Art. 1, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141/1 of 27.5.2011.

[10] Art. 3(1) of Regulation 492/2011. See also art. 3(2) of the same Regulation, which precludes provisions or practices of a Member State to "*(a) prescribe a special recruitment procedure for foreign nationals; (b) limit or restrict the advertising of vacancies in the press or through any other medium or subject it to conditions other than those applicable in respect of employers pursuing their activities in the territory of that Member State; (c) subject eligibility for employment to conditions of registration with employment offices or impede recruitment of individual workers, where persons who do not reside in the territory of that State are concerned.*"

[11] Art. 3(1) of Regulation 492/2011.

Commission commented on the requirements of proficiency in the Estonian language for people working in the private sector, and recalled clearly that, under the *acquis*, mandatory requirements can only be applied in very exceptional circumstances, on a case-by-case basis.[12] Poland also received negative comments from the Commission concerning too strict general language requirements applicable to private employment. The Commission urged Poland to lift disproportionate Polish language requirements for board members of service providers, particularly in the financial sector.[13] Conversely, Slovenia got good marks for amending its company law, reducing the scope of the provisions concerning the compulsory use of the Slovenian language inside companies.[14]

In the private spheres of employment, language freedom therefore reigns, thus perfectly aligning EU law with general principles of constitutional law in this regard. Yet, where it becomes interesting is that EU law also limits national competence in the traditionally *public* domain, as it makes its own distinction between public and private employment, significantly limiting the scope of the former. In short, what is considered to be public employment under national law, is not necessarily the same under EU law. Indeed, as a result of case law of the European Court of Justice, public service employment is limited to those offices in which State authority is exercised, such as in the police or the justice department.[15] Consequently, for all other jobs in the public sector, also those involving health care, transport or education, the same rules as in the purely private sector apply. Hence, national autonomy is limited and linguistic requirements must be justified and proportionate, and are not valid *per se* as is the case from a traditional constitutional law perspective.[16]

Pursuing this topic, while under Regulation 492/2011, "*conditions relating to linguistic knowledge"* may be imposed, they must be "*required by reason of the nature of the post to be filled.*"[17] In other words, EU Member States may impose linguistic requirements for employment, only insofar such linguistic knowledge is objectively required for the jobs at issue.

---

[12] Estonia 2001 Progress Report, p. 41. See similar remark with regard to Latvia, which was in line with the *acquis* (Latvia 2003 Progress Report, p. 19). All the Progress Reports were available here and have been consulted by the author.

[13] Poland 2003 Progress Report, p. 24.

[14] Slovenia 2001 Progress Report, pp. 44-45.

[15] An abundant case law of the European Court of Justice exists in this regard. This is due to the fact that the notions of "public service" and "public administration" (terminology of Article 45 para. 4 TFEU in the various language versions) have always varied considerably from one EU Member State to another. In 1982, the Court of Justice held that the notions cover those "*posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality*" (ECJ judgment of 26 May 1982, *Commission of the European Communities v Kingdom of Belgium*, case 149/79, pt. 7). In subsequent case law the Court of Justice has consistently confirmed this interpretation, and has and made it clear that both criteria are not alternative but cumulative (exercising of powers conferred by public law and safeguarding general interests). The Court has ruled, for example, that jobs such as postal or railway workers, plumbers, gardeners or electricians, teachers, nurses and civil researchers may not be reserved for nationals of the host Member State. Criteria must be assessed on a case-by-case basis with regard to the nature of the tasks and responsibilities involved (see European Commission, *Staff Working Document, Free movement of workers in the public sector*, 2010, p. 11 and the case law cited, available here).

[16] See B., DE WITTE, *The impact of European Community Rules on Linguistic Policies of the Member States*, in F. COULMAS (ed.), *A Language policy for the European Community. Prospects and Quandaries*, Berlin, 1991, p. 168; see also B. DE WITTE, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?*, in R. C. SMITH (ed.), *Culture and European Union Law*, New York, 2004, 225.

[17] Art. 3(1) of Regulation 492/2011.

Groener (1989)

In that regard, a case was brought before the European Court of Justice in 1987. It involved a Ms *Anita Groener*, a Dutch national, who had applied for an appointment to a permanent full-time post as an art teacher in a public vocational education institution in Dublin.[18] She was, however, required by the applicable rules to hold a certificate of proficiency in the Irish language (the *Ceard-Teastas Gaeilge*). As she did not have that, she had to pass a special examination in Irish, consisting of an oral test. Ms *Groener*, unfortunately, failed that examination (even after having followed a four-week beginners course), and was therefore refused the appointment.

Ms *Groener* challenged that refusal on the grounds that the requirement of Irish was contrary to her freedom of movement under EU law.[19]

The case came before the Irish High Court, which referred a question to the European Court of Justice. The Irish judge needed guidance as to the concept of "*the nature of the post to be filled*". In other words, the judge wanted to know if in this case it was really admissible to require certain linguistic skills of employees (under a public policy). Indeed, the High Court pointed out that knowledge of the Irish language was in actual fact "*not required to discharge the duties attached to the post*", clearly backing the argument put forward by Ms *Groener*.[20]

In its Judgment, the European Court of Justice acknowledged the fact that the teaching of art, like that of most other subjects taught in Irish public vocational education schools, is conducted "*essentially or indeed exclusively*" in English.[21] However, the Court deemed that finding "*not in itself sufficient*" to assess whether the linguistic requirement was justified.[22] In what one could qualify as a daring move away from the provision in the Regulation, the Court took into account the "*special linguistic situation in Ireland*" where Irish, as the national language, is the first official language.[23]

The Court conceded that Irish is not spoken by the "*whole Irish population*", but it underscored that the Irish governments have designed a policy to promote the use of Irish as a means of expressing national identity and culture.[24] The Treaty does not "*prohibit*" such a linguistic public policy (read, it is a legitimate aim), yet its implementation "*must not encroach upon the free movement of workers*".[25]

The Court thus considerably broadened national autonomy to lay down a public language policy. Even in a situation such as in this case, where certain language skills are not necessary for the specific job that is sought, a linguistic requirement may nevertheless be legitimate if founded on a national language policy.

In this regard, it is important to note that the Court also referred to the fact that the case concerned a job as a teacher, and stressed the link between a national language policy and education: "*(t)he importance of education for the implementation of such a policy must be recognized. Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the*

[18] ECJ judgment of 28 November 1989, *Groener*, case C-379/87, ECLI:EU:C:1989:599.
[19] Then art. 48 EEC and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257 of 19/10/1968, 2.
[20] Pt. 10 of the judgment.
[21] Pt. 15 of the judgment. Anita Groener submits that the full-time duties which she wishes to take up are not significantly different from the temporary duties which she was carrying out without any knowledge of the Irish language (pt. 15, Opinion of Advocate General DARMON in this case, ECLI:EU:C:1989:197).
[22] Pt. 16 of the judgment.
[23] Pt. 17 of the judgment.
[24] Pt 18 of the judgment. In his Opinion (pt. 15), Advocate General DARMON quotes the order making the reference according to which 33,6% of the population of Ireland professes fluency in the Irish language.
[25] Pt. 19 of the judgment.

school and the privileged relationship which they have with their pupils. In those circumstances, it is not unreasonable to require them to have some knowledge of the first national language."[26]

It is not entirely clear, however, whether the reasoning of the Court is limited to educational positions or has a broader scope.[27] Implicitly, the latter seems to be the case, although the Court has had no other occasion since to clarify this judgment (which was handed down more then three decades ago). At any rate, the Court found the Irish language requirement compatible with EU law and made it crystal clear that it intended to give a very broad interpretation of the compatibility of a national language policy in general.

This makes *Groener* to this day one of the most remarkable constitutional judgments of the European Court of Justice, and however often criticised,[28] and justifiably so, because the Court in essence discarded the provision of the Regulation, it has laid the foundations of respect for the national (linguistic) identity and an according language policy. In a way, the Court safeguarded the traditional sovereignty of States regarding linguistic requirements for public employment, at least with regard to publicly funded education. It must be stressed, however, that it did not give *carte blanche*, as it also established that such a linguistic policy does come under the scrutiny of EU and national courts.[29]

2.2 Standard of Proof

As said, in its Groener Judgment, the Court held that "*it is not unreasonable to require [teachers] to have some knowledge of the first national language*" (my underscore).[30]

But what exactly is *some* knowledge? The Court gives some indications, defining the required level of proficiency which would qualify as admissible in this context as "*adequate knowledge (...) provided that the level of knowledge required is not disproportionate in relation to the objective pursued*".[31]

---

[26] Pt. 20 of the judgment.

[27] Advocate General DARMON emphasises the educational nature of the job at issue, but the Court takes a more general approach (pt. 19 of the judgment). In his Opinion (pt. 21), the Advocate General asserts that "*(o)nce a Constitution (that is to say, all the fundamental values to which a nation solemnly declares that it adheres) recognises the existence of two official languages without limiting their use to specific parts of the national territory or to certain matters, each citizen has the right to be taught in those two languages. The fact that only 33.6% of Irish citizens use the Irish language is no justification for sweeping away that right altogether, for its importance is measured not only by its use but also by the possibility of preserving its use in the future*." In pt. 24 of the Opinion, the Advocate General concludes that *"(…) it seems to me that teaching posts fall by their nature within a field essential to the pursuit of a policy of preserving and fostering a language*." Interestingly, the Advocate General bases his reasoning mainly on the preservation of a minority language. One wonders if this holds true for a "stronger" language.

[28] According to N. N. SHUIBHNE, the *Groener* judgment leaves more questions than answers, as it is difficult to maintain the argument that a pre-employment examination of proficiency in Irish was strictly necessary in the given circumstances (*EC law and minority language policy: culture, citizenship and fundamental rights*, The Hague, 2002, pp. 87-89). See, in the same sense, P. DUPARC PORTIER, A. MASSON, *Une meilleure gouvernance linguistique est-elle possible dans l'Union européenne*, in *Revue du marché commun et de l'Union européenne*, 2007, p. 353 and pp. 356-357. CREECH argues that the ruling only applies to the specific situation in Ireland (R. CREECH, *Law and language in the European Union: the paradox of a Babel "United in Diversity"*, Groningen, 2005, p. 100 and 105; see, similarly, P. DUPARC PORTIER, A. MASSON, *op. cit.*, p. 357.). R. CREECH adds that such a policy sits rather uneasily with the integrationist aim of the EU (R. CREECH, *op. Cit*., 105-106).

[29] As B. DE WITTE aptly puts it, the idea of conditional national autonomy prevails (*Internal Market Law and National Language Policies*, in K. PURNHAGEN, P. ROTT (eds.), *Varieties of European economic law and regulation : liber amicorum for Hans Micklitz*, 2014, p. 426).

[30] Pt. 20 of the judgment.

[31] Pt. 21 of the judgment.

In his Opinion, Advocate General Darmon had suggested some more practical indications in this regard. In his view, the level of knowledge required may not be so high as to make it impossible for a foreigner to pass the examination. He also points out that out of six non-Irish candidates, four passed at the first attempt and one at the second. Furthermore, he indicates that the oral examination which *Groener* took related to topical questions and was not particularly difficult. He concludes therefore that the test was flexible in a number of ways, and limited to what was strictly necessary.[32] Interestingly, the Advocate General also discusses the possibility of applying a less strict measure, consisting, for example, in requiring a teacher, once appointed, to take lessons in Irish. In his view, this does not seem to meet satisfactorily the aim in question. First, the learning of the language would not be immediate and, secondly, the teachers involved would undoubtedly be less conscious of the necessity of having a knowledge of the Irish language.[33]

Moreover, the Court establishes other conditions as to language tests.

First and foremost, exemption from the linguistic requirement must be exercised in a non-discriminatory matter (which is less relevant in casu, but matters as a general principle).[34]

Furthermore, the Court precludes the imposition of any requirement that the linguistic knowledge in question must be acquired within the national territory.[35] This seemingly mysterious condition can be explained by reading the Opinion of the Advocate General. The argument seems to stem from the European Commission which pointed out that Irish may be studied in Paris, Bonn, Rennes, Brest and Aberystwyth.[36] However, the Irish Government stated at the hearing that EU nationals who had learned Irish outside Ireland, were not granted any exemptions.[37] Clearly, the Court took issue with that part of the Irish scheme.

The Court also clarifies that a candidate should be offered the possibility to retake the (oral) exam.[38]

In sum, the Court seems to accept the principle of a language test, which is non-discriminatory, accessible also in other EU Member States, which can furthermore be retaken, provided such a test is reasonable as to the level required (which must be assessed on a case-by-case basis in relation to the employment sought).

Angonese (2000)

A few years later, in the case of *Roman Angonese*, the Court had the occasion to be even more specific as to the standard of proof.[39] Residing since his birth in the Italian province of Bozen/Bolzano and having German as his mother tongue, Mr *Angonese* had spent five years (between 1993 and 1997) in Austria, working as a draughtsman[40] and doing studies in English, Slovene and Polish at the Faculty of Philosophy of the University of Vienna.[41] Additionally, he could demonstrate professional experience, practising as a draughtsman and as a Polish-Italian translator in Cracow (Poland).

[32] Pt. 25 of the Opinion.
[33] Pt. 25-26 of the Opinion.
[34] Pt. 22 of the judgment.
[35] Pt. 23 of the judgment.
[36] Pt. 32 of the Opinion.
[37] Pt. 33 of the Opinion.
[38] Pt. 23 of the judgment.
[39] ECJ judgment of 6 June 2000, *Angonese*, case C-281/98, ECLI:EU:C:2000:296.
[40] The profession is translated as "*géomètre*" in French, "*geometra*" in Italian, "*Vermessungstechniker*" in German and "*landmeter*" in Dutch (pt. 8 of the judgment in the various linguistic versions).
[41] It is clear that *Angonese* had not completed studies in Austria. Indeed, the Advocate General clearly indicates that *Angonese* had undertaken studies of philosophy and Slavic languages (pt. 3 and 33). Conversely, he does not mention any studies to become a draughtsman, only working experience. See also pt. 8 of the judgment.

However, when *Angonese* – bilingual German/Italian as the national judge found for a fact – , wanted to take part in a competition for a post with a private bank in Bozen/Bolzano (*Cassa di Risparmio*), he was not admitted on the grounds that he needed a specific certificate of bilingualism stating his proficiency in Italian and German. This certificate, commonly known as the *patentino*, is issued by the public authorities of the province of Bozen/Bolzano after an examination which is held in that province only.

Angonese did not possess that certificate and other evidence of his alleged linguistic proficiency was not taken into account.

In the legal proceedings which ensued, *Angonese* did not question the right of the bank at issue to assess his linguistic (bilingual) proficiency, but focused rather on the unlawfulness of the evidence which was required. He brought his case before an Italian judge (*pretore di Bolzano*) who referred a question to the European Court of Justice. According to the national court, the requirement to provide evidence solely by means of one particular diploma such as the certificate was contrary to the free movement for workers as it penalised job candidates not resident in Bolzano and could have been prejudicial to Mr *Angonese* who had taken up residence in another Member State for the purpose of studying there.[42]

The Court of Justice in essence confirmed this point of view in an admirably short and concise judgment.[43] It examined the question exclusively in light of the free movement for workers in the EU, entailing a principle of non-discrimination based on nationality applicable to both public authorities and private undertakings.[44]

The Court assessed the possibilities of obtaining the certificate. As it was available only in one province of Italy, the Court held that *"(p)ersons not resident in that province therefore have little chance of acquiring the Certificate and it will be difficult, or even impossible, for them to gain access to the employment in question.*[45] *Since the majority of residents of the province of Bolzano are Italian nationals, the obligation to obtain the requisite Certificate puts nationals of other Member States at a disadvantage by comparison with residents of the province*."[46]

The Court did concede, however, that requiring an applicant to have a certain level of linguistic knowledge could be legitimate (the issue was in actual fact undisputed). In the same vein, possession of a diploma such as the Certificate could constitute a criterion for assessing that knowledge. Yet, with the exclusiveness of the proof, a red line had been crossed: "*the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view*."[47]

The Court thus took a clear stance and, interestingly, a completely different one than both the European Commission and the Advocate General.

The European Commission argued in fact that the *patentino* was a justifiable condition of employment, and focused entirely on the "*practical obstacles*" in obtaining it. They were disproportionate and principally affected non-residents of the province. Hence, it would have been sufficient to make the procedure more

[42] Art. 48(1), (2) and (3) of the EC Treaty and Art. 3(1), 7(1) and (4) of Regulation (EEC) No 1612/68.

[43] The merits are discussed from pt. 21 to pt. 46 of the Judgment, on barely two pages. Moreover, most of the reasoning concerns the applicability of the non-discrimination principle to private persons (until pt. 36). The same applies to the Opinion of Advocate General FENNELLY, who dedicates only two paragraphs (42-43) to the unlawful discrimination suffered by the applicant.

[44] Pt. 28 et seq. of the judgment.

[45] Advocate General FENNELLY points out that examinations are taken almost exclusively by residents of the province and that of 20799 applications to sit the examination in 1996, only 1077 (5,18 %) were submitted by candidates residing outside the province (pt. 2, footnote 2).

[46] Pt. 39-40 of the judgment.

[47] Pt. 44 of the judgment.

accessible.[48] An online test, available all year round would probably have done the trick (admittedly, such digital possibilities were not yet common in the nineties of the previous century).

Advocate General Nial Fennely was even more dismissive. He concluded "*that there is nothing in the facts outlined to the Court which establishes the existence of covert discrimination on grounds of nationality* (…) *or which could be remedied by an assessment of the equivalence of his studies to the evidence of bilingualism afforded by the patentino*".[49] He advised the Court to rule that the bank at issue, in light of the linguistic regime in the province of Bolzano and of the linguistic make-up of its population, was entitled to require its potential employees to give evidence of bilingualism. The fact that examinations for the *patentino* were held only four times a year did not appear to him to pose a problem. Indeed, as he pointed out, the examinations for many professional qualifications are much more infrequent.[50]

The line which the Court took in the *Angonese* case (more than two decades ago) was confirmed in a more recent Belgian case (*SELOR*) in 2015,[51] following infringement proceedings. Interestingly, the Court dealt with this case in a chamber of three judges only, without an Opinion of the Advocate General, which indicated that established case law was to be followed.[52] The Judgment is again very concise. The issue concerned a requirement for candidates for posts in the local services in the French-speaking and German-speaking regions of Belgium to provide evidence of linguistic knowledge by passing an exam conducted by the selection office of the Federal Public Staff and Organisation Service (*SELOR*). Those candidates having carried out their studies in either French or German were, however, exempted.

The European Commission made reference to the *Angonese* judgment, and argued that that case law could be applied to the Belgian legislation. The Court acknowledged that it may be legitimate to require an applicant for a post in a local public service to have adequate knowledge of the language of the Region as the ability to communicate with the local administrative authorities and with the public may be relevant.[53]

However, the Court held that, to require of that applicant to provide evidence of his or her linguistic knowledge exclusively by means of one particular type of certificate, issued only by one particular Belgian body tasked with conducting language examinations was disproportionate. According to the Court, that requirement precludes any consideration of the level of knowledge which a holder of a diploma obtained in another Member State can be assumed to possess.[54] Moreover, although applicable to Belgian nationals and to those of other Member States alike, that requirement puts nationals of other Member States wishing to apply for a post in a local service in Belgium at a disadvantage (as they must most likely travel to Belgium).[55]

Arguably, the reasoning in the *SELOR* Judgment seems factually flawed. In actual fact, all diploma's in French or German were accepted, so proof was not exclusively required by means of one certificate only. Moreover, the argument that the mere travelling to a Region where one intends to go and work anyway is putting non-residents at a disadvantage is not entirely convincing as the effort required does not seem to be disproportionate as such (as a matter of fact, intra-State travel may sometimes imply a comparable burden). At any rate, digital possibilities for obtaining a certificate would do away with all the issues the Court raises.

The fact remains that there are no real criteria as to the question of the proof (except that there must be a certain leniency in assessing evidence of linguistic skills). As to the level which is required, it would seem

[48] Pt. 12 of the Opinion.
[49] Pt. 43 of the judgment.
[50] Pt. 42 of the Opinion.
[51] ECJ judgment of 5 February 2015, *Commission/Belgium*, case C-317/14, ECLI:EU:C:2015:63.
[52] The Court refers 3 times to *Angonese* (pt. 27, 29, 30) and once to *Groener* (pt. 25).
[53] Pt. 26 of the *SELOR* judgment.
[54] Pt. 29 of the *SELOR* judgment.
[55] Pt. 30 of the *SELOR* judgment.

that the only element is "proportionality", which leaves the matter entirely to national judges on a case-to-case basis.

3. Regulated (Self-Employed) Professionals

3.1 Admissibility of Language Requirements

Other rules apply for so-called regulated (self-employed) professions, i.e. those where professional qualifications must be recognised by the host State before the professional in question may practise his or her profession.

As different national rules and conditions in this regard may hamper the freedom to provide services and of establishment, secondary EU law (currently mainly Directive 2005/36 regarding professional qualifications)[56] establishes specific rules in that regard.[57] More concretely, the Directive explicitly deals with medical doctors, dental practitioners, pharmacists, nurses, midwives, veterinary surgeons and architects. The Professional Qualifications Directive provides for a general framework, but when other EU secondary law lays down specific arrangements directly related to the recognition of professional qualifications (as is the case for lawyers, for instance), the latter apply.[58]

As to its principal aim, the Professional Qualifications Directive is clear: the host Member State must recognise professional qualifications which have been obtained in one or more other EU Member States.

Yet, besides conditions related to study and traineeship, linguistic issues may come into play, given the fact that the profession will most likely be exercised in another language, namely that of the host Member State. In that regard, article 53(1) of the Directive rather enigmatically lays down the principle that: *"(p)rofessionals benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State*."

The provision is seemingly worded as an obligation, yet, initially, the Professional Qualifications Directive did not stipulate by whom, when or indeed to what extent the "*necessary*" language skills could be verified. It was only in 2013 that some clarifications were added (which will be discussed infra in more detail under subparagraph *3.2 Standard of Proof*).[59]

---

[56] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22 of 30.9.2005, as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation"), OJ L 354/132 of 28.12.2013 (hereafter referred to as the "Professional Qualifications Directive").

[57] Art. 3(1) of the Professional Qualifications Directive defines a "regulated profession" as: "*a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit.* (…)".

[58] Interestingly, notaries "*who are appointed by an official act of government*" explicitly fall outside the scope of the Professional Qualifications Directive (see Art. 2 para. 4).

[59] A previous version of the currently applicable provision read as follows: "*Member States shall see to it that, where appropriate, the persons concerned acquire, in their interest and in that of their patients, the linguistic knowledge necessary for the exercise of their profession in the host Member State*" (Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 233/1 of 24.08.1978). The wording of the initial provision is clearer as it seemingly

The case law of the Court of Justice has made an important contribution in this regard. The Court has outlined its views in two landmark judgments concerning dentists (*Haim*, 2000) and solicitors (*Wilson*, 2006).

Haim (2000)

In 1992, only three years after the landmark *Groener* judgment, the case of the Italian-Turkish dentist, Dr *Haim*, was brought to the Court of Justice. Dr *Haim* held a diploma in dentistry awarded in 1946 by the University of Istanbul (Turkey), the city in which he practised as a dentist until 1980. In 1981, he obtained permission to practise as a self-employed dental practitioner in Germany. In 1982, his Turkish diploma was recognised by the Belgian authorities. Dr *Haim* subsequently worked in Brussels as a dental practitioner. He interrupted that activity between November 1991 and August 1992 in order to work in his son's dental practice in Germany. In 1988, Dr *Haim* applied to be enrolled on the register of dental practitioners so that he could work as a dentist under the German social security scheme. That application was, however, refused on the ground that *Haim* had not completed the two-year preparatory training period as required by national law. The subsequent appeal before the German courts ended up before the Court of Justice, which ruled in favour of Dr *Haim* (the *Haim I* judgment).[60]

Following that first judgment, Dr *Haim* was enrolled, as of 1995, on the register of dental practitioners in Germany. On account of his age, he did not take steps to obtain his appointment as a dental practitioner under a social security scheme. But nonetheless he brought a further action against the German competent authority. Indeed, Dr *Haim* sought compensation for the loss of earnings he suffered by virtue of the fact that he had been unlawfully refused appointment (as confirmed by the Court of Justice in *Haim II*). That second case ended up again before the Court of Justice, and it is this judgment which is particularly relevant for the topic at hand.[61]

Indeed, the German judge raised questions about the right to reparation for Dr *Haim*, but, more relevantly, also asked whether national authorities are entitled to make the appointment as a dental practitioner under a social security scheme subject to language requirements.[62]

The Court emphasised first and foremost that the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner subject to language requirements.[63] The Court was clear: dialogue with patients, compliance with rules of professional conduct and law specific to dentistry in the Member State of establishment and performance of administrative tasks require an appropriate knowledge of the language of that State.[64] Accordingly, the Court ruled that the

obliges the EU Member States to proactively verify linguistic knowledge. The 2005 version is clearly weakened in that regard without apparent reason.

[60] ECJ judgment of 9 February 1994, *Haim I*, case C-319/92, ECLI:EU:C:1994:47.

[61] ECJ judgment of 4 July 2000, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein*, case C-424/97, ECLI:EU:C:2000:357.

[62] In light of Article 18(3) of Directive 78/686 and to the right of establishment (Art. 52 EC Treaty; currently Art. 43 TFEU). In its judgment the Court ruled out the application of Directive 78/686, as it did not apply to diplomas obtained in a non-member country (Turkey), even when recognised by a Member State.

[63] Astoundingly, the German authorities based the linguistic requirement for dentists on a general provision which precludes the exercise of the profession for a dentist "*with serious shortcomings relating to his mental state or to his person, in particular one who has been a drug addict or an alcoholic in the five years preceding the submission of his application* (…)."! Dr *Haim* argued that that provision did not, and could not, apply to linguistic shortcomings (pt. 55 of the judgment). The Court of Justice handled this issue in a diplomatic way and did not rule on the interpretation of this national provision …

[64] Pt. 59 of the Opinion.

appointment in question could be made conditional upon the linguistic knowledge necessary for the exercise of the profession at issue in the Member State of establishment.[65]

However, the Court also stressed that it is important that language requirements do not go beyond what is necessary to attain the objective. Interestingly, the Court also indicated that it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language.[66]

Wilson (2006)

A few years later, the Court ruled in another case concerning a regulated profession, namely that of solicitors. Lawyers fall outside the scope of the Professional Qualifications Directive as they are covered by a specific Directive (98/5/EC).[67] The latter Directive does, however, not contain any provision on linguistic proficiency in the language(s) of the host Member State.

The case which came before the Court of Justice was set against the Luxembourgish multilingual background.[68] In 2002, when transposing Directive 98/5/EC into Luxembourgish law, Luxembourg had added language requirements as a condition for registration to the Luxembourg Bar.[69] To be admitted, a solicitor needed to be proficient in the administrative and court languages of Luxembourg, meaning French, German and Luxembourgish.[70]

These language requirements also applied to those lawyers already admitted to the Bar in another EU Member State and wanting to exercise their profession in Luxembourg under their home-country title (the so-called *European* or *migrant* lawyers, as opposed to the *domestic* ones). In 2004, Mr *Wilson*, an English solicitor challenged these language requirements.[71] Mr *Wilson* had practised as a lawyer in Luxembourg since 1994, under his home-country title (member of the Bar of England and Wales since 1975). Following the language requirements laid down in the Luxembourgish 2002 Law, Mr *Wilson* was requested to attend a hearing to verify his language proficiency in French, German and Luxembourgish. He refused to attend the hearing without the assistance of a Luxembourgish barrister, and the case was brought before the *Cour administratif* which submitted a request for a preliminary ruling to the European Court of Justice.

[65] Pt. 61 of the Opinion.
[66] Pt. 60 of the Opinion.
[67] Directive 98/5/EC of 16 February 1998 of the European Parliament and the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77/36 of 14.3.1998.
[68] ECJ judgment of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, case C-506/04, ECLI:EU:C:2006:587. The Commission had also brought an infringement procedure. Both judgments were delivered on the same day, confirming incompatibility of the prior language test with Directive 98/5/EC (ECJ judgment of 19 September 2006, *Commission v Grand Duchy of Luxemburg*, case C-193/05, ECLI:EU:C:2006:588).
[69] The Directive is transposed in Luxembourg by the Law of 13 November 2002, *Mémorial* A no 140 of 17.12.2002, 3202. M. THEWES points out that the language requirements were controversial, as business lawyers in practice need other languages, such as English (*La profession d'avocat au Grand-Duché de Luxembourg*, Brussels, 2010, p. 40). The compatibility of these requirements with the Luxembourgish Constitution was, however, confirmed by the *Conseil disciplinaire et administratif d'appel,* judgment of 13 July 2004, 5/04, reprinted in M. THEWES, *op. cit*., p. 388).
[70] Art. 6(1)(d) of the Law of 10 August 1991 (*Loi sur la profession d'avocat*, *Mémorial* A no 58 of 27.8.1991, 1110), as amended.
[71] As well as the appeal procedure against the decision refusing registration (which is, however, irrelevant to the topic under discussion in this article).

In its defence, the Luxembourgish government referred to the *Haim* judgment, mentioned above, and argued that, just as is the case for dentists, solicitors need to be able to reliably communicate with clients, the authorities and professional associations.[72]

The Court of Justice ruled, however, that Directive 98/5 does not allow the registration of a European lawyer to be conditional on a hearing to determine whether the person concerned is proficient in the languages of that EU Member State.[73] The Court pointed out that the European legislature carried out a complete harmonisation of the prior conditions for the registration of European (migrant) lawyers. With a view to making it easier for those European lawyers to exercise their freedom of establishment, the legislature did not opt for a system of prior (language) testing. The argument that linguistic skills were required did not convince the Court, taking into account the various safeguards. The Court emphasised in that regard that the use of the home-country title makes it clear to clients that that lawyer has not obtained his qualification in the host Member State, and does not necessarily have the linguistic knowledge to deal with specific cases. Furthermore, such European (migrant) lawyers may be required by national authorities to work in conjunction with a local lawyer. The rules of professional conduct may also lay down sanctions when a European lawyer handles matters for which he or she is not competent, owing to lack of linguistic knowledge.

In 2007, following this ruling, Luxembourg abolished the linguistic requirements for European lawyers who wish to practise under their home-country title in Luxembourg.[74] The linguistic requirements were, however, maintained should those migrant lawyers want to become fully integrated in the Luxembourgish Bar and be entitled to plead before Luxembourgish courts or tribunals.[75]

In 2012, the European Commission sent a reasoned opinion[76] requesting Luxembourg to allow European lawyers to become fully-fledged members of the Luxembourgish Bar, without having to comply with any linguistic requirements. The Commission considered that there were less restrictive and more effective means of safeguarding the efficiency of the legal system, the protection of clients and the country's linguistic heritage. For example, it pointed to the fact that the Luxembourg Bar maintains a publicly available list of lawyers which refers to their specialisations and the languages in which they practise.

In response to these proceedings, the Luxembourgish Law was again amended in 2013, allowing European lawyers to accede to the Luxembourgish title of *avocat* if they have practised in Luxembourg for

[72] See Opinion of Advocate General STIX HACKL in case C-193/05 (*Commission vs Luxembourg*) in which more details are given on the linguistic regime. The Luxembourgish government argued that a lawyer who practises his profession under his home-country title may give advice also on Luxembourgish law and must therefore have the language knowledge necessary to enable him to read and to understand Luxembourgish legal texts. In addition, the Luxembourgish government emphasised that penalty notices issued by the police following road traffic accidents are normally written in German, as are the Luxembourgish tax laws, which makes it necessary to consult case-law and commentaries written in German (pt. 25 of the Opinion). Moreover, a Luxembourgish party who represents himself in court will normally use the Luxembourgish language before the lower courts, where there is no obligation to be represented by a member of the Bar Association (*avocat à la cour*). Furthermore, many Luxembourgish nationals speak exclusively in their native language when consulting a lawyer (pt. 26 of the Opinion). In addition, the whole of the professional rules of the Luxembourgish Bar Associations are written exclusively in French. See also L. DUPONG*, Liberté d'établissement et pratique linguistique du pays d'accueil*, in B. FAVREAU (ed.), *L'avocat dans le droit européen*, Brussels, 2008, pp. 49-55.

[73] See pt. 70 of the *Wilson* judgment. Interestingly, the Court is prudent and focuses on the "hearing", rather than on the linguistic requirement itself, although it comes down to the same thing.

[74] Law of 21 June 2007, *Mémorial A* no 101 of 26.6.2007, 1856.

[75] M. THEWES, *op. cit.*, p. 70.

[76] Second infringement proceedings, following the first ruling of the Court of Justice in case C-193/05 *Commission/Luxembourg* (see supra). See Press Release MEMO/12/708 of 27 September 2012, Infringements package: main decisions, available here.

more than three years under their home-country title provided though they are proficient in the language of legislation, namely French.[77] European lawyers in that case still have to limit their activities to those not requiring proficiency in German or Luxembourgish. Moreover, lawyers taking on activities for which they lack the necessary linguistic abilities are liable to face disciplinary sanctions. In addition, the level of language proficiency required is defined more precisely than was the case previously and is currently based on the Council of Europe common European framework of reference for languages. In particular for French, active and passive knowledge at level B2 is required.[78]

As far as can be ascertained, the Commission did not take any further action.[79] This case and in particular the follow-up by the European Commission raise some important questions.

It should be borne in mind that the *Wilson* judgment applies only to a particular class of European (migrant) lawyers, namely those practising under their home-country title. The Commission seemed to take it one step further, and also took issue with linguistic requirements for those lawyers wanting to obtain the Luxembourgish title. It would seem that the European Commission is of the opinion that in the absence of explicit rules, the autonomy of national authorities to impose linguistic requirements is limited. Indeed, though the Commission eventually accepted the requirement of proficiency in French, it would not have agreed with a full multilingual requirement (proficiency in French, German and Luxembourgish). Admittedly, it is rather difficult for non-Luxembourgish to fulfill that trilingual requirement, yet, doesn't that also hold true to some extent for a bilingual situation or with regard to lesser widely spoken languages such as Gaelic or Maltese, to name but two? Furthermore, it may also depend on the level of proficiency which is required. Under 5, the particular situation of multilingual EU Member States will be discussed further.

3.2 Standard of Proof

The Professional Qualifications Directive contains, in its current version, some indications as to language testing. As was explained above, the principle is established that professionals need "*a knowledge of languages necessary for practising the profession in the host Member State*."

Yet, initially, Article 53(1) did not stipulate by whom, when or indeed to what extent the (undefined) *necessary* language skills could be verified.

What is more, the European Commission has shown itself clearly reluctant to any general testing scheme. It has consistently held that systematic language tests for foreign professionals are disproportionate. Only on a case-by-case basis language tests would be compatible with EU law.[80] Instead, foreign professionals should be able to prove their language knowledge by other means, such as a diploma acquired in the relevant language, professional experience or a language certificate.[81] Furthermore, language tests could take place only after the end of the recognition procedure and could not be a reason for refusing recognition of professional qualifications as such.[82]

As a consequence of increasing migration of professionals in the internal market as of 2005, however, the issue became acutely controversial, particularly with regard to health professionals working in direct

[77] Loi modifiant la loi modifiée du 10 août 1991 sur la profession d'avocat, 13 June 2013, *Mémorial A* no 102 of 21.6.2013, 1478.

[78] For Luxembourgish and German, a mere passive knowledge at level B2 is required and an active knowledge at level B1.

[79] No case was ever brought to the Court of Justice

[80] Commission Green Paper Modernising the Professional Qualifications Directive, 22 June 2011, COM/2011/367, under "Language requirements".

[81] See Green Paper, COM/2011/367, at footnote 27.

[82] *Idem.*

contact with patients.[83] Examples of medical malpractice due to lack of local language knowledge were reported by the media and led to public outcry.[84]

In 2011, under pressure, the Commission proposed amendments to the Professional Qualifications Directive,[85] aiming at striking a balance between, on the one hand, the need for an effective mobility of professionals in the internal market and, on the other, the protection of consumers, notably patients who expect adequate language skills from health professionals.[86]

Surprisingly though, instead of proposing substantial amendments to the Professional Qualifications Directive in order to tighten the language requirements and to increase testing possibilities, the Commission essentially confirmed its views on the issue, as set out above.

Indeed, in its current version, the Professional Qualifications Directive does still not define the vacuous notion of *necessary* knowledge.

Furthermore, language tests may take place only for professions entailing "*patient safety implications*".[87] For other professions, tests may be imposed only "*in cases where there is a serious and concrete doubt about the sufficiency of the professional's language knowledge in respect of the professional activities that that professional intends to pursue*".[88] That is quite restrictive, because it puts the burden of proof on the authorities, rather than on the professionals. In addition, there may be no testing in advance, but only after the recognition procedure is completed.

A further restriction to the testing of linguistic skills is that, at any rate, such assessments are limited to "*the knowledge of one official language of the host Member State, or one administrative language of the host Member State provided that it is also an official language of the Union*." This aspect will be discussed further, under 5).

Last but not least, it is explicitly stipulated as well that any "*language controls shall be proportionate to the activity to be pursued. The professional concerned shall be allowed to appeal such controls under national law*".[89]

The rather odd and restrictive manner in which the possibility of tests (*controls* in typical Euro-English jargon) is provided, by implicitly allowing that these may take place, yet only in specific situations and as

[83] See Green Paper, COM/2011/367, under "Language requirements".

[84] See X., *Roemeense en Bulgaarse verpleegkundigen brengen Britse patiënten in gevaar*, *Het Laatste Nieuws* (online), 9 September 2011 (own archive). In Belgium, an incident was reported involving a medical doctor in the emergency room of a Brussels hospital not speaking Dutch and only little French (X., *Taalkennis als voorwaarde voor beroepsuitoefening*, *Het Nieuwsblad* (online), 8 February 2011, available here.

[85] European Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and the Regulation on administrative cooperation through the Internal Market Information System, COM/2011/883 final of 19.12.2011 (hereafter referred to as "Commission Proposal COM/2011/883").

[86] Commission Proposal COM/2011/883, Explanatory Memorandum, pt. 1.1.

[87] Art. 53(3), Professional Qualifications Directive. The original Commission proposal limited this possibility even further. Indeed, the Commission suggested that, for professions with patient safety implications, checks could be organised only at explicit request by the national health care system, or for self-employed professionals not affiliated to the national health care system, by representative national patient organisations. The European Parliament, however, amended this provision. See also Article 7, which obliges a service provider for professions that have patient safety implications, to make a declaration about the applicant's knowledge of the language necessary for practising the profession in the host Member State.

[88] Art. 53(3), Professional Qualifications Directive.

[89] Art. 53(4), Professional Qualifications Directive.

to one language only, apparently conveys a clear reluctance by the European Commission to a general language testing scheme, as it fears that free movement might be hampered too much.

4. Beneficiaries of Social Benefits

4.1 Admissibility of Language Requirements

National authorities may also use the granting of social benefits as an incentive to further integration of newcomers in society, by making these benefits conditional on a specific level of proficiency in the local language.

First and foremost, it should be stressed that such a policy is by all means precluded for EU citizens as to the social benefits to which they are entitled.[90]

Likewise, third-country nationals who have acquired EU long-term resident status may not be subjected to any linguistic requirements, yet only with regard to *core* social benefits. The crucial assessment is therefore whether a specific social benefit is one of the *core* benefits within the meaning of article 11(4) of Directive 2003/109.[91] In actual fact, this is up to national courts and the European Court of justice to determine on a case-to-case basis.

Recently, the Court of Justice handed down a Judgment concerning a housing allowance in Austria, which was made conditional on proven proficiency in German.[92]

The case concerned a Turkish national (KV), who had lived since 1997, with his wife and their three children, in Austria where he had long-term resident status.[93] Up to the end of 2017, he received housing assistance pursuant to Austrian law. However, in 2018, the Austrian legislation was tightened and such aid for third-country nationals was made conditional upon proof of basic command of German. Failing to come up with the requisite proof, KV had been refused that social benefit.

KV brought his case before the Austrian courts. He argued that the language requirement put him at a disadvantage on the basis of his ethnic origin. He also argued that making the housing allowance dependent on knowledge of German was contrary to his status as a long-term resident, as this allowance was, according to him, a *core* social benefit.

On higher appeal, the Austrian judge asked guidance of the European Court of Justice as to the qualification of the housing allowance. The Court clearly leaned towards an affirmative answer as to the core nature of the allowance, yet left the final decision to the Austrian court.[94]

It was the first time that the Court explicitly confirmed that a language requirement for the granting of a core social benefit is contrary to the right to equal treatment of long-term residents. Hence, there may be no linguistic requirement of basic German for long-term residents, if the national judge decides that the housing allowance is a core social benefit.

However, an aspect of the case that has remained under the radar is that the Court implicitly confirmed that, as to third-country nationals (without long-term resident status), such a linguistic policy is, as a matter

[90] See Art. 4, Regulation (EC) No 883/2004 of the European parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166/1 of 30.4.2004.
[91] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44 of 23.1.2004.
[92] ECJ judgment of 10 June 2021, *Land Oberösterreich v KV*, case C-94/20, ECLI:EU:C:2021:477.
[93] Within the meaning of Art. 2(b) of Directive 2003/109.
[94] Pt. 43 of the judgment.

of fact, legally possible under EU law.[95] Indeed, the Court namely also confirmed that the language requirement is not an (indirect) discrimination based on ethnic origin.[96] The Austrian linguistic requirement is applicable to all third-country nationals without distinction, and hence does not place persons of a particular ethnic origin at a disadvantage, the Court holds.[97]

Ultimately, this leaves room for language requirements linked to social benefits for third-country nationals in the context of an integration policy. Indeed, EU law leaves this theme largely to the EU Member States, which can decide for themselves on integration paths for third-country nationals, whether or not in combination with language tests. In that regard, the Court seems to confirm earlier case law in which it confirmed the importance of language acquisition for newcomers and the policy scope for the EU Member States in that respect.[98]

4.2 Standard of Proof

The same case (C-94/20 KV Oberosterreich) also contains some elements as to the standard of proof of the required linguistic proficiency. The Austrian regulation may serve as an example in that regard, as it prescribes that the applicant must demonstrate the required language knowledge of German on the basis of, in short, an examination at an official body or a recognised language diploma/certificate of German at A2 level. Language knowledge is also considered proven if the person concerned has obtained a "satisfactory" mark for German during secondary education or has successfully completed a vocational training period.

Unfortunately, however, the Court does not assess the standard of proof. It is true that it is able to answer the national court's questions without a more in-depth assessment of that aspect of the case. By contrast, Advocate General Hogan does provide some insights. He asserts that the applicant has mastered German to the required level, but does not have the requested formal proof of his language knowledge.[99] The Advocate General argues that evidence through certain established certificates or diplomas is "*unsuitable*" if the knowledge can reasonably be established by any other equivalent means that is sound and lends itself to objective evidence. Regrettably, however, the Advocate General does not give any more concrete indication of possible equivalent evidence, which somewhat weakens his argument. Ultimately, he suggests leaving this matter to the referring court.[100]

5. Challenges and Recommendations

It clearly appears from the research undertaken in this article that a significant degree of legal insecurity surrounds linguistic proficiency requirement as to the free movement of professionals in the EU. More in particular, the following issues may be discerned.

---

[95] In 2012, the Court of Justice handed down a judgment about a housing benefit for low-income tenants in the Italian Region of Bozen/Bolzano, which was open to third-country residents only insofar sufficient funds were available. While the facts in this case were set agains the backdrop of the multilingual context of the Region, there was no direct link with any linguistic requirement (ECJ judgment of 24 April 2012, *Kamberaj*, case C-571/10, ECLI:EU:C:2012:233).

[96] Art. 2, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22 of 19.7.2000.

[97] Pt. 56-57 of the judgment.

[98] See ECJ judgment of 4 June 2015, *P and S v Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen*, case C-579/13, ECLI:EU:C:2015:369 (pt. 47) as to the importance of social cohesion and integration. See, in the same vein, ECJ judgment of 22 December 2022, *Udlændingenævnet*, case C-279/21, ECLI:EU:C:2022:1019, pt. 23.

[99] Pt. 24 of the Opinion. It is not clear on which evidence the Advocate General relies.

[100] Pt. 83 of the Opinion.

- *As to employees, a conditional national autonomy reigns (thanks to the European Court of Justice), but some degree of legal uncertainty nevertheless remains*

The important role the European Court of Justice has played in this context cannot be underestimated. Indeed, whereas EU secondary legislation considerably limits national autonomy with regard to language requirements for employment, not only in the private but also in the public sector, the Court has safeguarded public national language policies.

The reasoning of the Court seems to reflect ideas on the protection of national identity, which makes the landmark *Groener* Judgment (1989) surprisingly relevant and topical. The French Advocate General Marco Darmon, who delivered the Opinion in this case, clearly understood its potential ramifications, when he argued that: *"(t)he case before the Court today* (…), *relates to one of the most sensitive aspects of cultural identity. The importance of the Court's reply and its consequences for the Member States and for the diversity of the Community as a whole are so evident that I need not dwell upon them, for at issue here is the power of a State to protect and foster the use of a national language.*"[101]

In actual fact, the Court in essence simply discards the relevant provisions of the Regulation (492/2011). Instead, the Court's reasoning in *Groener* is based directly on the Treaty. Accordingly, the Court deems a language requirement of Irish to be justified (on the basis of the general and coherent Irish linguistic policy) and proportionate (if certain limited conditions are met). In sum, where the intention of the European legislator was to limit national autonomy, by making linguistic requirements conditional upon an established link with the employment that is sought, the Court moved completely in the opposite direction and simply assessed the justification of the linguistic policy as such.

Interestingly, at the time of the *Groener* judgment, in 1989, the principle of respect for linguistic diversity had not yet been enshrined in the Treaties. In recent judgments (such as *Boriss Cilevičs*),[102] the Court has referred to the latter principle, confirming that the objective of promoting and encouraging the national language(s), constitutes a legitimate interest which, in principle, justifies a restriction on the free movement of workers.[103]

It seems therefore that the *Groener* case law is alive and kicking, although there is still a precarious element to be reckoned with, in the sense that such a public language policy always falls within the scope of EU scrutiny (by the EU Court and national judges).[104] National autonomy in this regard is conditional at best. Furthermore, it would seem that the lenient view of the Court of Justice may be influenced by the apparent importance it attaches to the education system in connection with a given language policy. That element clearly transpires in both the *Groener* and *Boriss Cilevičs* judgments.[105]

---

[101] Pt. 1 of the Opinion.

[102] ECJ judgment of 7 September 2022, *Boriss Cilevičs and others*, case C-391/20, ECLI:EU:C:2022:638.

[103] *Groener* has been quoted in the major case law of the Court of Justice related to linguistic issues: ECJ judgment of 5 March 2009, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado*, case C-222/07, ECLI:EU:C:2009:124; ECJ judgment of 13 December 2007, *United Pan-Europe Communications Belgium SA and Others v Belgian State*, case C-250/06, ECLI:EU:C:2007:783; ECJ judgment of 21 June 2016, *New Valmar BVBA v Global Pharmacies Partner Health Srl*, case C-15/15, ECLI:EU:C:2016:464; see also other case law that has been discussed in this article (*Angonese*, *Commission/Belgium* (SELOR), C-317/14).

[104] Interestingly, the Latvian Constitutional Court held the obligation to teach exclusively in Latvian to be unconstitutional! (Constitutional Court, judgment of 11 June 2020, case 2019-12-01, available here.

[105] See also ECJ judgment of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxemburg*, case C-473/93, ECLI:EU:C:1996:263. See, in particular, pt. 35-36 of that judgment, in which the Court discards the possibility of excluding non-Luxembourgish nationals from jobs in education, yet explicitly mentioning that language requirements may still be imposed on Luxembourgish and non-Luxembourgish candidates for positions in the educational system. See also Advocate General STIX HACKL (Opinion in C-193/05, *Commission v Luxembourg*), who

If the assumption is correct that the case law of the Court of Justice essentially applies to employment in education, what then about other employment situations? Or employment in Member States in which there is no apparent public language policy, yet in cases in which private (or public) employers set out linguistic conditions for specific job vacancies?

Surprising as it may seem, the Court of Justice has never been interrogated on issues regarding linguistic requirements concerning purely private employment.[106] Obviously, the general principles and provisions of EU law on non-discrimination on the basis of nationality or other criteria should apply in such cases. In actual fact, this implies that the link with the specific job to be filled should be clearly established. Indeed, the (private) employer most likely has to prove that the linguistic requirements imposed on potential employees are indeed justified and needed. Yet, it may be safely assumed that diverging practices exist in the various EU Member States, which have not been tested through cases before the EU Courts. To give one example, in Denmark proficiency in the Danish language is reportedly required to obtain a bus driving licence, whereas other EU Member States may take a more lenient approach.[107] The issue does, by the way, not concern only the use of one or more local languages, but also the requirement of proficiency in English, which is, unsurprisingly, in high demand throughout the EU according to a recent OECD paper.[108]

In sum, one cannot fail to notice that there is a fair amount of legal insecurity as to what is compatible with EU law in this regard and what is not. Most of these issues probably remain under the legal radar.[109]

In this regard, I would recommend to amend the relevant provisions of Regulation 492/2011 in order to clarify them and bring them in line with the case law of the Court of Justice. It should be clearly stipulated that for employment involving the exercise of State authority (army, police, judges, …), but also with regard to education and maybe also public health (especially when patient safety is at stake), national autonomy should prevail. National (or regional) authorities should therefore be able to impose the linguistic requirements they deem necessary for employment in these sectors. Guiding principles should be public security, patient safety and consumer protection.

As to all other (private) employment, it should be made clear that the link between linguistic requirements and job vacancies must be firmly established, so as to prevent any cases of covert discrimination. The level of linguistic proficiency must not be unattainably high either and commensurate with the actual tasks (see, in this regard, infra, concerning the "native speaker" level).

---

argues that the reasoning of the Court in *Groener* "*was also based on the fact that through teaching and the privileged relationship which they had with their pupils, teachers had an essential role to play in the national policy of maintaining national identity and culture*". As to solicitors, however, that reasoning is not valid according to her (pt. 53).

[106] Admittedly, the case of Roman Angonese (see supra) concerned private employment, but the issue of linguistic proficiency as such was not dealt with by the Court of Justice, only the required proof.

[107] S. ADAMO, *What comes first, language or work? : linguistic barriers for accessing the labour market*, in S. DE VRIES, E. IORIATTI, P. GUARDA, E. PULICE (eds.), *EU citizens' economic rights in action*, 2018, p. 238.

[108] G. MARCONI, L. VERGOLINI, F. BORGONOVI, *The demand for language skills in the European labour market - Evidence from online job vacancies*, in *OECD Social, Employment and Migration Working Papers No. 294*, June 2023, available here. This paper investigates the demand for language skills in 27 EU Member States and the United Kingdom in 2021. Evidence indicates that although Europe remains a linguistically diverse labour market, knowing English confers unique advantages in certain occupations. Across countries, a knowledge of English was explicitly required in 22% of all vacancies and English was the sixth most required skill overall. A knowledge of German, Spanish, French and Mandarin Chinese was explicitly demanded in between 1% and 2% of all vacancies. On average, one in two positions advertised on line for managers or professionals required some knowledge of English.

[109] This is not a merely theoretical issue. Recent figures show that in Belgium 15% of workers have a non-Belgian background (B. HAECK, *Het probleem met de Roemeense tandarts*, in *De Tijd*, 23/8/2023, available here.

Furthermore, the scope of Regulation 492/2011, which is currently limited to public language policy seems rather artificial and inadequate. Rules should in principle apply across the board, that is to all migrating professionals in the EU (with the exception of regulated professions).

- *As to regulated medical professions, national autonomy should be increased as well*

It would appear that the degree of legal uncertainty as to linguistic requirements for regulated professions clearly exceeds that with regard to employees.

Within the scope of the Professional Qualifications Directive, linguistic requirements may be imposed, provided they are *necessary*. In the case of *Haim* (admittedly on the basis of an older version of the Directive and in rather specific circumstances), the Court showed itself quite lenient with regard to linguistic requirements for dentists.[110]

Yet, at the same time, EU law significantly restricts national autonomy to assess linguistic proficiency for (medical) service providers. Although the Professional Qualifications Directive was amended in 2013, the fact remains that only limited testing possibilities are available for national authorities (which are, moreover, mainly limited to professions with patient safety implications).

There is also some degree of legal uncertainty as to the timeline in that regard, i.e. the moment on which such (limited) linguistic assessment may be performed. At any rate it may not take place before the recognition procedure is completed, yet, it seems rather odd that a medical professional may start practicing without any assessment of his or her knowledge of the local language(s). In this regard, Advocate General Mischo offers some valuable considerations in his Opinion in the *Haim* case. He argues that "*there is no reason why such tests should not be carried out when an application for appointment as a* (…) *dental practitioner is being considered, but they could also be carried out on some other occasion (provided the applicant has had a reasonable amount of time to acquire the necessary knowledge)*." Yet, the Advocate General suggests it might be better to require a minimum knowledge of the language at an earlier stage, when authorisation is granted to practise in a particular Member State as a "*lack of understanding between a dentist and his patient may have dramatic consequences, whilst a lack of understanding between a dentist and the sickness fund would only lead to administrative problems*".[111]

In addition, the Professional Qualifications Directive does not give any indication about the level of linguistic skills which may be required.

Again, Advocate General Mischo offers some thoughts, arguing that it is essential in the relationship between a medical practitioner and the patient consulting him, that they can communicate. In clear terms the Advocate General asserts that "*no-one would attempt to deny that in order for a doctor or dentist to provide effective treatment to a patient it is essential both that the practitioner is able fully to understand the problem which the patient has described to him in order for it to be treated, and that the explanations provided as to the nature of the problem and the advice accompanying the recommended treatment should be fully understood by the patient so that he can assist his own recovery*".[112]

Furthermore, the Advocate General states that "*the quality of care, the central objective of any public health policy, depends on the possibility of a genuine dialogue between the practitioner and the patient*".[113] These are strong and convincing words of the Advocate General as it does indeed not seem unreasonable for patients to expect health practitioners and other service providers to be able to interact with them in their

[110] See, on the particular context of the *Haim* case, the Opinion of Advocate General STIX HACKL, pt. 54-58, C-193/05.
[111] Opinion of Advocate General MISCHO in the *Haim* case, see, in particular, pt. 95-96, 116, 118 and 120.
[112] Pt. 105 of the Opinion.
[113] Pt. 107 of the Opinion.

language, not least in light of the unavoidably unpleasant and stressful situations in which these services usually take place.[114]

Yet, what it essentially seems to come down to in practice is that it is entirely up to national authorities to establish a language assessment scheme at any time after the professional has taken up his or her activities (and as far as such assessments are admissible). Any proportionality assessment of such language assessments is also left to the national judicial spheres.

It may be regretted that there is no case law of the Court of Justice on this aspect of the topic at issue.

As it stands, EU law leaves a fair amount of legal insecurity which may lead to quite varying practices in the EU Member States. In Denmark, for instance, the linguistic practice seems quite stringent. Reportedly, although a prior certificate of proficiency in Danish is required only for non-EU medical professionals, before hiring EU medical professionals, the employer must always make sure that they have adequate proficiency in Danish for the job they are applying for. In cases where this expectation is not met, the employer is under the obligation to terminate the employment.[115] This rather broad interpretation of EU law has not been tested in national or EU Courts, yet does not seem to be incompatible *per se*.

At any rate, the topic is of great political relevance, not least in EU Member States with an important influx of foreign medical practitioners. In the current state of affairs, it is rather difficult to avoid the perception that EU law is more concerned with mobility (logically, the primary aim in creating the internal market) than with the quality of health care and the safety of patients.

Therefore, the Professional Requirement Directive should be amended and simply allow for linguistic assessments to be imposed, in a general and uniform manner, to be performed preferably *ex ante*, before granting permission to the professionals at issue to practise on the national territory, while also establishing clear and uniform criteria as to the level of linguistic proficiency which may be required.

- *As to regulated professions, outside the scope of the Professional Qualifications Directive, the situation is quite unclear*

For regulated professions which do not fall within the scope of the Professional Qualifications Directive, other secondary EU legislation may apply. This is the case for solicitors (whose situation is dealt with by Directive 98/5/EC on the profession of lawyer). Unfortunately, the latter Directive remains utterly silent on any linguistic requirements in the host country.

In its *Wilson* judgment, the Court of Justice made it very clear that EU Member States may not impose any additional (linguistic) conditions to the free exercise of the profession of solicitor, as the Directive fully harmonises entry to the profession. National autonomy is therefore completely restricted. Indeed, as B. de Witte aptly notes, whenever a field has been "occupied" by the European legislator, national autonomy concerning language requirements disappears.[116]

Admittedly, the *Wilson* judgment deals with the specific situation of European lawyers, operating under their home-country title. The idea that such a foreign title serves as a warning for potential clients that that particular lawyer does not necessarily speak any of the local languages may be convincing.

What remains highly unclear, however, is the situation of those European lawyers who have been operating under a foreign title for at least three years, and then ask to become fully integrated in the legal profession of the host country under the local title (a path provided for by the Directive). May national authorities in such cases still request evidence of linguistic proficiency?

[114] B. HAECK, *loc. cit.*
[115] S. ADAMO, *What comes first, language or work?: linguistic barriers for accessing the labour market*, cit., p. 235.
[116] B. DE WITTE, *Internal Market Law and National Language Policies*, cit., p. 428.

It may be recalled that in the follow-up of the *Wilson* judgment, the European Commission has, eventually, accepted that proficiency in at least one language (French) could be required from migrating lawyers to become fully-fledged *avocats* in Luxembourg. Although this interpretation seems to run counter to the judgment of the Court of Justice (the Directive does not stipulate any linguistic conditions), it does not seem to be unreasonable at all. Common sense indeed dictates that such a solicitor should be able to communicate at least at a basic level in a local language when he or she wants to be fully integrated and acquire a local title.

Most individual citizens and small businesses really may prefer a lawyer that speaks their language,[117] and may rightly expect all solicitors holding a local title to be able to cater for that need. The argument that many business lawyers work exclusively in English does not convince, as in that case, keeping their foreign title does not seem to be disproportionate.

The situation remains in any case unclear, and currently only Luxembourg (French) and Hungary (Hungarian) seem to check linguistic proficiency of solicitors choosing this path towards full integration.[118] Yet, command of the local language may, in actual fact, be an implied condition, as often tests of local legal knowledge is a requirement. As to Malta, for instance, it is clearly stated that non-Maltese legal professionals from other EU Member States wishing to practise their profession in Malta, will be able to do so without demonstrating linguistic proficiency in either English or Maltese, under their home-country professional title. However, should such professionals aspire full integration in the legal profession of Malta, they would have to apply for a local warrant.[119] The latter can, however, be obtained only by those who possess "*a full knowledge of the Maltese language as being the language of the Courts*".[120]

It is therefore suggested that Directive 98/5/EC on the profession of lawyers should be amended to align it with the Court's case law, on the one hand, and clarify the state of affairs as to linguistic requirements for those solicitors seeking full integration in the legal profession under a local title, on the other.

- *As to beneficiaries of social benefits, EU law leaves the matter of linguistic requirements largely to the Member States*

It is noteworthy that the Court of Justice seems to be very lenient as to linguistic conditions for obtaining social benefits. Indeed, as explained above, the Court has implicitly confirmed that a certain level of language knowledge may be required as a condition for the granting of non-core social benefits to long-term resident third-country nationals.[121] Moreover, even more far-reaching is the implicit recognition of the compatibility with EU law of language knowledge conditions for other third-country nationals (who have not obtained long-term resident status) in connection with the granting of social benefits.

It should be borne in mind, however, that national Constitutional Courts may look at this issue from a different legal angle and decide otherwise. As a matter of fact, in 2023, the Belgian Constitutional Court annulled a Flemish decree which made the granting of certain social allowances conditional upon obtaining an integration certificate (which included an assessment of proficiency at a basic level of Dutch). The Court found the condition to be discriminatory.[122] There could, therefore, be diverging legal decisions in various Member States, as EU law seems to leave that issue to the national level.

---

[117] S. CLAESSENS, M. VAN HAEFTEN, N. PHILIPSEN, B.J. BUISKOOL, H. SCHNEIDER, S. SCHOENMAECKERS, D.H. GRIJPSTRA, H.J. HELLWIG, *Evaluation of the Legal Framework for the Free Movement of Lawyers. Final Report*, Panteia and the University of Maastricht, Zoetermeer, 2012 (online), p. 8.

[118] See an overview in S. CLAESSENS and others, cit., pp. 109-110, pt. 3.7.

[119] See Chamber of Advocates of Malta, available here.

[120] Art. 81 of the Code of Organization and Civil Procedure (Cap. 12), under e).

[121] ECJ judgment of 10 June 2021, *Land Oberösterreich v KV*, case C-94/20, ECLI:EU:C:2021:477.

[122] Grondwettelijk Hof/Cour constitutionnelle, judgment of 20 July 2023, 7738, available here.

The question may be raised, therefore, whether it would not be better to have a uniform EU approach to this topical issue.

- *The lack of clear and uniform EU criteria on the standard of proof may lead to covert discrimination*

It clearly follows from the case law of the Court of Justice (in *Angonese*) that assessments of linguistic proficiency should not be based on one exclusive proof. Although the Italian regional *patentino* as a proof of Italian/German bilingualism was considered to be relevant, the bank in question was not allowed to assess the linguistic proficiency of potential employees solely on the basis of that certificate.

The question may be raised if this (older) case law is still entirely relevant. An important element in the Court's reasoning was the accessibility of the test in question for people not residing in the EU Member State at issue. That argument seems to be obsolete taking into account all the online testing possibilities currently available.

Interpreting the *Angonese* judgment, however, as requiring that an individual assessment is made and that different elements of proof should be taken into account, maintains its relevance.

Potential issues regarding student mobility may be mentioned in this respect.

Indeed, as internationalisation of higher education in the EU is still on the rise, a growing number of university bachelor's and master's programs in the EU are offered in English. During the screening of prospective students, higher education institutions therefore assess proficiency in English of potential students, often by imposing a specific language test.[123]

In light of the *Angonese* case law, accepting only one specific test could be problematic in that regard. It is true that the *Angonese* case related to a very specific language test. There could be other circumstances where the requirement of a specific test, which is more easily accessible (taken in different countries or institutes), would be acceptable. Yet, even when one or more international tests are taken into account, other equivalent evidence and qualifications such as (international) language certificates and diplomas may be relevant as well. Knowledge of language could possibly also be proven by previous education in English or even an English speaker family background. The question therefore arises whether in such cases sufficient room is left for an individual assessment, allowing a student to demonstrate the required language knowledge of English on the basis of other evidence and qualifications.

Pursuing this topic further, it must be mentioned that discrimination issues may also occur in this regard, as a Dutch Bill on selection tests for English taught university programs in the Netherlands demonstrated. The Bill provided that a prospective student with a Dutch diploma was automatically exempted from any English language test requirement if he or she had followed the appropriate prior education. However, it was not specified which prior education was the appropriate one, nor was it clarified what the (minimum) proportion of language instruction in English in that prior education should be. Some (EU) students with a foreign degree could also be exempted from taking a language test, if they had received their prior education in English, or if they held a diploma of secondary education from certain countries. While students from Belgium (Flemish education only), Denmark, Germany, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Norway, Austria, Romania, Slovakia and Sweden were automatically exempted, Italian, Spanish or Portuguese students, for instance, were not and had to pass the English language test. The Bill was based on the assumption that in the former countries the level of the teaching of English is adequate

[123] Such as the International English Language Testing System (IELTS), the Test or English as a Foreign Language (TOEFL), the Test of English for International Communication (TOEIC) and the Cambridge English grades & scale. Universities may also choose to use a test they establish themselves. In Belgium the universities of Antwerp, Brussels, Ghent and Leuven have established the Interuniversity test of academic English.

and sufficient. Arguably, such a general scheme does not leave sufficient room for individual assessments. Indeed, language knowledge may strongly depend on the individual background of a student. To give a random and hypothetical example to illustrate this point: an Italian student who, through self-study and travel has built up a very good level of English, will still have to take a language test, whereas a Finnish student who may have had many hours of English at a high level, but has no particular interest in languages, got very low grades and has a rather low level of English, would nevertheless in principle be exempted from the language test in order to begin university studies in the Netherlands.

It is suggested, therefore, that the European Commission provide general guidance as to linguistic requirements and testing concerning student mobility in the EU, as diverging practices may hamper student mobility and could have discriminatory effects.

- *The lack of clear and uniform EU criteria on the level of linguistic proficiency may also lead to covert discrimination*

A major grey area exists with regard to the level of the linguistic skills which may be required, in all contexts discussed in this article. The Court has consistently steered clear of any concrete indications. Likewise, relevant provisions of EU law provide, if anything, only vacuous definitions such as "necessary" knowledge. Yet, important issues of discrimination could occur, which are not easily detectable.[124] In that regard, conceivably, the frequently used requirement of *native speaker* in job advertisements, for instance, could very well constitute a form of indirect discrimination. The European Commission is of the opinion that an employer may not require that a specific language be the native tongue of an employee.[125] No case has, however, ever been brought before the European Court of Justice in that respect.

In essence, it all comes down to proportionality. The question may be raised if such an unclear situation does not unavoidably lead to diverging practices in the various EU Member States. As far as could be ascertained, only limited data or research is currently available on this topic.[126]

In a broader perspective, consideration should be given to a better alignment of language teaching in English in secondary education in the EU. The Bologna Declaration on the European Higher Education Area, the resulting unified bachelor/master educational structure and the transfer of study credits may serve as an example in this regard.[127] The starting point, in my view, should be that students who have completed a program consisting of a certain number of hours per week/year, expressed in credits, as part of language courses in secondary education, should in principle be sufficiently qualified to enrol in EU higher education institutions of the same language, or indeed, work in that language. However, as in practice the level of language teaching in the different Member States may vary considerably, schools in the EU could also offer students a (free) standardised language test at the end of the secondary education. These EU language tests (in various languages) should be developed by mutual agreement between the participating countries, following the example of the recognised international (commercial) tests. However, employers or educational establishments would still have the possibility to determine the level of linguistic proficiency and require a specific minimum score on the EU language test at issue.

---

[124] E. HULSTAERT, *Taal als struikelblok op de arbeidsmarkt: "Het wordt gebruikt als stok achter de deur"*, 11 August 2023, available here.

[125] Commission Communication on the free movement of workers: achieving the full benefits and potential, COM/2002/694 of 11.12.2002, 7, pt. 28: "*the Commission considers that while a very high level of language may, under certain strict conditions, be justifiable for certain jobs, a requirement to be mother tongue is not acceptable*".

[126] See S. ADAMO, T. BINDER, who express the fear that national legislators could interpret their discretion as to language requirements too broadly (Union citizens and the recognition of professional qualifications: where do we go from here?, in S. DE VRIES, E. IORIATTI, P. GUARDA, E. PULICE (eds.), cit., p. 55.

[127] The text of the Bologna Declaration is available here (last consulted on 9.9.2023).

In this way, every student who completes an EU secondary school curriculum would be able to demonstrate, in an objective manner, his or her level in the languages studied and would incur no special extra costs, thus making international language tests in the EU unnecessary. Implementation of such a scheme will, of course, take some time, but nothing is stopping certain EU Member States with a larger mobility of workforce and students, from taking the lead. Another advantage would be that such a scheme could give a renewed purpose and relevance to the study of languages in the EU, often in dire competition with scientific courses which are held in high(er) esteem in the current school systems.

- *The Paradox of EU multilingualism and the multilingual State*

It is clear that the linguistic burden for a professional aspiring to work in another EU Member State may increase if that Member State is multilingual. Indeed, a professional migrating to Belgium to work in the private sector must often master Dutch and French (apart from English). Likewise, in Luxembourg, it is very common to find job advertisements requiring French, German, Luxembourgish as well as English.

Yet, as to regulated professions, the Professional Qualifications Directive specifies that any tests to ascertain whether the foreign professional has the necessary language knowledge to practise in the host country must be limited to the knowledge of *one* official or administrative language of the host Member State, provided furthermore that the latter is also an EU official language.[128]

This restriction, which was introduced in 2013, is unnecessary, unfortunate and a clear regression compared to the previous version of the Directive. *Necessary* linguistic knowledge may after all also imply proficiency in more than one language.

The amendment may be quite understandable from an internal market perspective. Multilingualism can of course be a daunting obstacle. On the other hand, this limit interferes in the delicate sociological and linguistic balance of the Member States concerned, and admittedly (and paradoxically) also sits rather uneasily with the highly acclaimed value of multilingualism in the EU.

Furthermore, the position of those languages which do not have EU language status is quite unclear. The concept of an administrative language of an EU Member State is a novelty in EU law. This raises, for instance, the question whether the co-official languages in Spain may be considered official languages in the sense of this provision. If they fall under the concept of administrative language, testing is excluded, as they are certainly not EU official languages.[129] Likewise, the status of Luxembourgish as the national language of Luxembourg (yet without EU language status) remains to be seen.

Besides, the fact that knowledge of only one language of the host EU Member State may be tested, raises specific problems for other multilingual EU Member States. In Belgium, for instance, language requirements depend on the linguistic region in which the applicant seeks to provide services. In this regard, the Directive does not specify that the applicant must be proficient in the language of the specific language area in which practitioners aspire to provide their services. Amendments to remedy that were tabled by

[128] Art. 53(2), Professional Qualifications Directive. It was stressed that this should not preclude host Member States from "encouraging" professionals to acquire another language at a later stage if necessary for the professional activity to be pursued. Employers should also continue to play an important role in ascertaining the knowledge of languages necessary to carry out professional activities in their workplaces (see Position of the European Parliament, pt. 26).

[129] It follows clearly from the French language version that only the administrative language must be a language that enjoys EU official status: *"(…) soit limité à la connaissance d'une langue officielle de l'État membre d'accueil, ou d'une langue administrative de l'État membre d'accueil sous réserve que cette dernière soit également une langue officielle de l'Union*."

members of the European Parliament, but were not adopted.[130] It is therefore not clear whether the host EU Member State may impose a test of the local language or whether the applicant may freely choose one of the official languages of the host EU Member State. Significantly, the Commission's original proposal stipulated clearly that any language verification should be limited to the knowledge of only one of the official languages of the Member State according to the choice of the person concerned. The latter specification has, however, not been included in the final version.

The transposition of the Professional Qualifications Directive in Luxembourg seems to support the idea of one freely chosen language. In Luxembourg, for instance, it is a mandatory condition to have knowledge of *one* of the three national languages of Luxembourg (Luxembourgish, French or German) to obtain recognition of a qualification obtained in another EU Member State.[131] In Belgium, criticism has been voiced recently about the lack of linguistic skills of foreign health practitioners (the number of which is currently estimated at more than 10.000).[132] The competent minister has announced that he is preparing more stringent measures, without however imposing general tests. Linguistic knowledge will in any case be limited to one national language (French, Dutch or German) without, seemingly, an apparent link with the linguistic Region concerned.[133]

An unexplored issue may occur as well: could EU law provisions in this regard lead to "reverse" discrimination, in the sense that for own nationals (which have not made use of the free movement under EU law), in theory, multilingual requirements could be imposed, which may not be imposed on nationals of other EU Member States? Could a local medical doctor in Bozen/Bolzano, of Italian nationality, be asked to be bilingual (German/Italian), while his or her colleague from Austria may exercise the same profession in the same Region in one language only? On the basis of the current state of affairs, the answer seems to be affirmative.

Similarly, Ireland dropped the linguistic condition to be proficient in Irish to become a solicitor.[134] Indeed, such a linguistic requirement would be possible for purely domestic lawyers, yet would probably have been incompatible with EU law as to European lawyers acceding to the profession after having practised in Ireland for at least three years under their home country title.[135] Good news for lawyers'

[130] See European Parliament Report of 13 February 2013, Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC, amendment 130, amendments of the Committee on the environment, public health and food, nb. 7 and 82.

[131] Art. 26, Loi du 19 juin 2009 ayant pour objet la transposition de la Directive 2005/36/CE pour ce qui est a) du régime général de reconnaissance des titres de formation et des qualifications professionnelles et b) de la prestation temporaire de service; modifiant la loi du 17 juin 1963 ayant pour objet de protéger les titres de l'enseignement supérieur et abrogeant la loi du 13 juin 1992 portant a) transposition de la Directive du Conseil (89/48/CEE) relative à un système général de reconnaissance des diplômes d'enseignement supérieur qui sanctionnent des formations professionnelles d'une durée minimale de trois ans et b) création d'un service de coordination pour la reconnaissance de diplômes à des fins professionnelles (*Mémorial*, Partie A, 2009-07-02, n° 156, pp. 2310-2321, available here. Interestingly, for jobs in teaching, the linguistic requirements are stronger, as knowledge of all three national languages is required: "*Par dérogation, pour pouvoir bénéficier de la reconnaissance des qualifications professionnelles des professions réglementées de l'enseignement, les demandeurs doivent avoir la connaissance du luxembourgeois, de l'allemand et du français*" (Art 26.2). The question may arise if this is not a violation of the Directive as it stands.

[132] N. SCHILLEWAERT, *Recordaantal buitenlandse artsen actief in ons land: Goeie zaak, maar ze spreken vaak de taal niet*, 21/8/2023, VRT NWS, available here.

[133] A. WILLEMS, *Minister Vandenbroucke werkt aan striktere regels voor artsen: "Wie taal patiënt niet spreekt, kan erkenning verliezen"*, 21/8/2023, VRT NWS, available here.

[134] See also P. DUPARC PORTIER, A. MASSON, *op. cit.*, p. 353, at footnote 35.

[135] At present, there are no linguistic requirements in either English or Irish to become a solicitor in Ireland (see information on the website of the the Law Society of Ireland, available here and confirmed by Mr Nicola Kelly (Law Society of Ireland) by mail of 21/9/2023.

mobility, but not really enhancing Irish public language policy (which was, ironically, highly acclaimed in the landmark *Groener* judgment).

6. Concluding Remarks

The freedom of movement of workers, the freedom to provide services and of establishment, as well as the principle of non-discrimination on the basis of nationality are cornerstones of EU integration and have been well-established in EU law and case law of the European Court of Justice for decades. Yet, there is still one surprising legal elephant in the internal market room: linguistic obstacles.

EU legislation has always shied away from that delicate and potentially divisive issue. Relevant legal provisions remain vague, seeking to strike a balance between the aim to create a single internal market, while preserving the acclaimed language diversity. This has resulted in texts with rather limited practical relevance, leaving most issues that may arise to judges.

In a few landmark judgments (of which the unjustifiedly underrated *Groener* judgment), the European Court of Justice has laid a clear foundation for the protection of national language and identity and thus preserved the essence of national linguistic autonomy. Yet, its classical legal toolbox cannot provide for comprehensive answers. Although important guidance has been given by the Court, the fact remains that the EU legislator should act.

A more constitutional approach is needed, with a clearer division of competences between the EU and the Member States and above all clearer criteria for language requirements in all professional contexts.

In this article, it is suggested that a legislative overhaul be undertaken in this topical field. It should be clearly stipulated that for employment involving the exercise of State authority (army, police, judges, …), but also with regard to education and maybe also public health (especially when patient safety is at stake), national autonomy should prevail. National (or regional) authorities should therefore be able to impose the linguistic requirements they deem necessary for employment in these sectors. Guiding principles should be public security, the quality of health care and patient safety, as well as consumer protection.

The divisive potential of the issue is in my view underestimated and could lead to broad resentment among EU citizens (both, on the one hand, those aspiring to make use of their free movement and being thwarted by unclear and possibly discriminatory linguistic requirements, and those citizens, on the other, who, for instance as patients, not unreasonably expect to be able to interact with medical staff or other service providers in their own language).

Pursuing the metaphor from the animal world: the EU should leave its ostrich policy behind and look the (linguistic) elephant in the eye.

Bibliography

ADAMO S., *What comes first, language or work? : linguistic barriers for accessing the labour market*, in S. DE VRIES, E. IORIATTI, P. GURDA & E. PULICE (eds.), *EU citizens' economic rights in action*, 2018, pp. 227-241.

ADAMO S., BINDER T., U*nion citizens and the recognition of professional qualifications: where do we go from here?*, in S. S. DE VRIES, E. IORIATTI, P. GURDA & E. PULICE (eds.), *EU citizens' economic rights in action*, 2018, pp. 37-59.

ARGÜELLES VELEZ M., BENAVIDES GONZALEZ C., *Economic implications of linguistic pluralism within the European Union*, in S. DE VRIES, E. IORIATTI, P. GURDA & E. PULICE (eds.), *EU citizens' economic rights in action*, 2018, pp. 205-226.

BONBLED N., *Législation linguistique et liberté de circulation des travailleurs*, in *Journal des Tribunaux*, 2013, pp. 553-560.

CLAESSENS S., VAN HAEFTEN M., PHILIPSEN N., BUISKOOL B.J., SCHENIDER H., SCHOENMAECKERS S., GRIJPSTRA D.H., HELLWIG H.J., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, Final Report, Panteia and the University of Maastricht, Zoetermeer, 2012, https://ec.europa.eu/docsroom/documents/15035/attachments/1/translations/en/renditions/native.

CREECH R., *Law and language in the European Union: the paradox of a Babel "United in Diversity"*, Groningen, 2005.

DANIEL E., *La liberté de circulation des professionels face aux exigences linguistiques*, in *Revue des affaires européennes*, 2016/3, pp. 371-379.

DE WITTE B., *The impact of European Community Rules on Linguistic Policies of the Member States*, in F. COULMAS (ed.), *A Language Policy for the European Community. Prospects and Quandaries*, Berlin, 1991, pp. 163-177.

DE WITTE B., *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?*, in R.C. SMITH (ed.), *Culture and European Union Law*, New York, 2004, pp. 205-241.

DE WITTE B., *Internal Market Law and National Language Policies*, in K. PURNHAGEN, P. ROTT (eds.), *Varieties of European economic law and regulation: liber amicorum for Hans Micklitz*, 2014, pp. 419-435.

DUPARC PORTIER P., MASSON A., *Une meilleure gouvernance linguistique est-elle possible dans l'Union européenne*, in *Revue du marché commun et de l'Union européenne*, 2007, pp. 349-360.

DUPONG L., *Liberté d'établissement et pratique linguistique du pays d'accueil*, in B. FAVREAU (ed.), *L'avocat dans le droit européen*, Brussels, 2008, pp. 49-55.

IORIATTI E., DI MICCO D., *Linguistic Diversity and barriers to EU citizens' rights*, in S. SEUBERT, M. HOOGENBOOM, T. KNIJN, S. DE VRIES, F. VAN WAARDEN (eds.), *Moving beyond Barriers*, Cheltenham, 2018, pp. 261-279.

IORIATTI E., *EU legal language and economic rights interpretation in the Member States*, in S. DE VRIES, E. IORIATTI, P. GURDA & E. PULICE (eds.), *EU citizens' economic rights in action*, 2018, pp. 188-204.

KREPELKA F., *Language Aspects of Trade in Services and of its Liberalisation in the European Union*, in R. KNEZ (ed.), *Internal Market for Services*, Maribor, 2009, pp. 67-77.

MARCONI G., VERGOLINI L., BORGONOVI F., *The demand for language skills in the European labour market - Evidence from online job vacancies*, in *OECD Social, Employment and Migration Working Papers No. 294*, June 2023.

MÜLLER G., *Free Movement of Lawyers Within the EU Internal Market: Achievements and Remaining Challenges*, in *European Business Law Review*, 2016/3, pp. 355-390.

PLATON S., *Multilinguisme et droits fondamentaux en droit de l'Union européenne*, in *Revue des affaires européennes*, 2016/3, pp. 429-441.

PULICE E., *EU multilingualism and rivalries of rights: from barriers to plurilingualism*, in S. DE VRIES, E. IORIATTI, P. GURDA & E. PULICE (eds.), *EU citizens' economic rights in action*, 2018, pp. 262-280.

SHUIBHNE N. N., *EC law and minority language policy: culture, citizenship and fundamental rights*, The Hague, 2002.

THEWES M., *La profession d'avocat au Grand-Duché de Luxembourg*, Brussels, 2010.

VAN DER JEUGHT S., *EU Language Law*, Groningen, 2015.

VAN DER JEUGHT S., *The Loi Toubon and EU Law: a Happy or a Mismatched Couple?*, in *European Journal of Language Policy*, 2016, 139-152.

VAN DER JEUGHT S., *Territoriality and Freedom of Language: the Case of Belgium*, in *Current Issues in Language Planning*, vol. 18, 2016/2, pp. 1-18.

VAN DER JEUGHT S., *Regulatory Linguistic Requirements for Product Labelling in the Internal Market of the European Union*, in *Comparative Law and Language Journal*, 2022/1 https://doi.org/10.15168/cll.v1i1.2203.

VAN EYKEN H., MEYERMANS SPELMANS E., *Words travel worlds: language in the internal market and the national identity of Member States*, in *Comparative Law and Language Journal*, 2022/2, https://doi.org/10.15168/cll.v1i2.2396.

Le *Cestui que trust* en *Law French*

Quand les juristes anglais parlaient - et parlent encore - français … ou comment des termes aujourd'hui méconnus en droit français sont devenus la norme en anglais juridique moderne

Anne-Sophie Milard[1]

Résumé : Depuis les conquêtes normandes, le droit anglais utilise de nombreuses expressions que l'on dit souvent issues du vieux français. En réalité, au cours du Moyen-Âge, c'est une véritable langue, le *law French*, mêlant latin et anglo-normand, qui était utilisée dans les prétoires et par les professeurs, et cela jusqu'au XVIII[e] siècle. Il en va ainsi de l'expression c*estui que trust,* désignant encore de nos jours le bénéficiaire d'un *trust.* Symbole d'un monde juridique international avant l'heure, cette locution reste à bien des égards énigmatique. L'analyse du principe du *trust* nous permet néanmoins de comprendre le lien *trust – Equity – use* et de mieux appréhender l'expression *cestui que use*, ancêtre du *cestui que trust*. L'étymologie de la locution *cestui que trust* nous permet, quant à elle, de supposer, mais non d'affirmer, qu'elle tire ses origines du saxon, du latin et de l'anglo-normand.

Mots clés: *Law French*, droit anglais, anglo-normand, trust, *Cestui que use / Cestui que trust*, bénéficiaire

[1] Enseignante-chercheure contractuelle de Droit anglais et de Droit comparé à l'Université Paris-Saclay, rattachée à l'IRJS, Docteur en droit privé, Enseignante à l'ISIT - annesophiemilard@gmail.com .
L'auteur remercie les Professeurs Sophie Poirey et Pierre Larrivée, ainsi que Mme Pelletier-Guichard pour leur accueil à l'Université de Caen.

The *Cestui que trust* in Law French

When English lawyers spoke - and still speak - French ... or how terms now unknown in French law have become the norm in modern legal English

Abstract: Since the Norman conquests, English law has used many expressions that are often said to be derived from Old French. In fact, during the Middle Ages, a real language, Law French, combining Latin and Anglo-Norman, was used in the courts and by professors until the eighteenth century. The same is true of the expression the *cestui que trust*, still used today to designate the beneficiary of a trust. This expression, that we may consider a symbol of an international legal world before its time, remains enigmatic in many respects. However, by analysing the principle of trust, we can understand the link between trust - Equity - use and gain a better understanding of the expression the *cestui que use*, the ancestor of the *cestui que trust*. The etymology of the locution *cestui que trust* allows us to assume, but not to affirm, that its origins lie in Saxon, Latin and Anglo-Norman.

Key words: Law French - English law - Anglo-Norman - Trust - Cestui que use / Cestui que trust – Beneficiary

1. Introduction

Traduire un texte juridique est toujours un exercice périlleux, quelles que soient les langues source et cible, et les exemples de collision entre les divers systèmes juridiques ne manquent pas. Les droits français et anglais n'échappent pas à cette règle, et nombre de leurs termes et expressions juridiques peuvent mener à des maladresses, voire à des erreurs, de traduction et donc de compréhension. Pour ne citer qu'un seul exemple, il n'est pas rare de lire qu'un *magistrate* anglais est l'équivalent d'un *juge* français, bien que *magistrates* et *judges* soient, outre-Manche, deux institutions bien distinctes, à davantage rapprocher de la nuance établie entre un *conseiller* et un *juge/magistrat* de ce côté-ci de la Manche.

Quand à cette première difficulté s'ajoute celle de termes toujours usités mais issus de langues révolues, donc le plus souvent méconnues, le juriste contemporain, tant anglais que français, peut légitimement s'interroger non seulement sur la façon de prononcer le terme en question, mais surtout et plus globalement sur son sens et donc, potentiellement, sa traduction. Si l'on imagine bien le lien qu'il peut exister entre le *chattel* anglais et le *chatel* de l'ancien français (bien, possession, patrimoine) ou entre le *culprit* et le *culpable* (coupable), on reste plus circonspect quand apparaissent les doctrines de *cy-près* ou d'*estoppel*. Et que penser de la formule du *cestui que use*, déclinée en *cestui que trust* dans sa forme moderne ? Il est très simple, dans ce dernier cas, de la traduire par *the beneficiary of the trust*, le bénéficiaire du *trust*, et c'est d'ailleurs ainsi que la plupart des ouvrages, en particulier ceux dédiés aux étudiants, la présentent. Ce faisant, ils occultent une période de l'histoire où Angleterre, Normandie et France étaient étroitement liées, où l'on parlait « français » de part et d'autre de la Manche, où s'est développé un langage inédit, le *Law*

French, dont il reste des traces incontournables en droit anglais moderne (2.). Comprendre le *cestui que trust* (3.), cette expression juridique typiquement *Law French* et pourtant toujours d'actualité, est assurément l'occasion d'effectuer un voyage historique, étymologique et juridique hors norme.

2. Le Law French

3. Un exemple de Law French *:* le cestui que trust

2. Le Law French

Rares sont ceux qui ignorent les maximes « *Dieu et mon droit* » et « *Honi soit qui mal y pense* »[2], symboles, s'il en est, de la monarchie anglaise puis britannique et de l'ordre de la Jarretière. L'usage du français au sein du monde anglo-britannique est cependant loin de se réduire à ces deux seules devises. Ainsi, lorsqu'une loi doit être promulguée, le monarque doit donner son assentiment à ladite future loi en proclamant que « *Le Roy le veult* » ou, selon les règnes, que « *La Reigne le veult* ». Si les députés de la Chambre des communes expriment leur satisfaction par des « *Aye* » ou, à l'inverse, leur mécontentent par des « *No* », les membres de la Chambre des *Lords* continuent, quant à eux, de lancer des « *Content* » et des « *Not-content* »[3]. Le sentiment national n'étant pas un vain mot outre-Manche, on peut s'étonner que des *Lords* et encore plus un *Monarch* manient encore assez régulièrement la langue de leur voisin français, *that sweet enemy*. Comme souvent, afin de mieux comprendre la situation actuelle, il est nécessaire de remonter le temps, au-delà même de 1066, quand l'anglais n'existait pas sous la forme que nous lui connaissons aujourd'hui et qu'un idiome étranger, l'anglo-normand, a été introduit sur le sol anglais, s'y est développé, en particulier dans le monde juridique sous le nom de *Law French*,(2.1), pour s'éteindre doucement, tout en subsistant partiellement dans cette sphère à part qu'est le droit (2.2).

2.1. Émergence du Law French

2.2. Heurs et malheurs du Law French

2.1. Émergence du Law French

Avant l'arrivée des Normands en Angleterre, et contrairement aux tribus franques continentales qui rédigent leurs lois en latin, à l'instar de la *Lex Salica* instituée sous Clovis 1er [4], la cour des rois de Wessex (VI^{e} – X^{e} siècles) utilise « une variante standardisée du saxon de l'ouest »[5], ultérieurement désignée par les historiens comme « l'anglo-saxon » ou « l'ancien anglais »[6] (VI^{e}-XII^{e} siècle).

Entre cette période Wessex et le début du XIII^{e} siècle, on a longtemps cru qu'Édouard le Confesseur, fils d'Emma de Normandie, sacré roi en 1042, avait introduit à la cour une

[2] Et non pas « Honni soit qui mal y pense », en français moderne.

[3] H. MOISY, *Glossaire comparatif anglo-normand : donnant plus de 5,000 mots aujourd'hui bannis en français et qui sont communs au dialecte normand et à l'anglais*, Caen, 1889, page VII.

[4] L. LÖFSTEDT, *Notes on the beginning of Law French*, in *Romance Philology*, vol. 68, n. 2, 2014, p. 285.

[5] C. FLETCHER, *Langue et nation en Angleterre à la fin du moyen âge*, in *Revue Française d'Histoire des Idées Politiques*, 2012/2 (n° 36), p. 233.

[6] C. FLETCHER, *op. cit.,* p. 233.

nouvelle langue, le franc-normand[7], qui n'était autre que celle qu'il avait pratiquée dans sa jeunesse lorsqu'il vivait en Normandie. Toujours selon ce courant de pensée, l'aristocratie anglaise parlait donc déjà l'idiome normand à la mort du roi Édouard, ce que Guillaume, dit le Conquérant puis 1er du nom, n'aurait fait, à compter de 1066, qu'entériner, en proscrivant l'anglo-saxon, d'une part[8], et en imposant le latin, d'autre part, pour certains actes administratifs[9], comme l'illustreront par la suite les *Leges Henrici Primi*[10] et la fameuse *Magna Carta* de 1215. Toutefois, et en dépit de l'importance que pourra avoir le latin par la suite, le franco-normand serait demeuré la seule langue admise « pour la rédaction des actes de l'autorité publique et dans la discussion orale et écrite des litiges portés devant les cours et les tribunaux »[11].

Cette théorie a été ultérieurement remise en cause, en particulier par l'auteur de « *The language of English Law* »[12], George E. Woodbine : « Non seulement nous ne savons pas à quoi ressemblait le français de Guillaume Ier et de ses Normands lorsqu'il était parlé, mais nous ne savons même pas comment il était écrit. Pas un seul document dans cette langue n'est parvenu jusqu'à nous, que ce soit sous son règne ou sous celui de son successeur »[13]. L'auteur précise ainsi que « Pendant toute la période qui s'est écoulée depuis l'invasion de l'Angleterre par Guillaume Ier, les preuves indiquent constamment que l'anglais parlé a continué à être utilisé »[14] bien que la la langue française se soit également généralisée « mais pas dans la même mesure »[15]. Pour Woodbine, il n'existe ainsi « aucune preuve fiable montrant, ou impliquant, que le français a surpassé, ou même remplacé, l'anglais, que ce soit en tant que langue écrite ou parlée, à l'époque des rois normands »[16]. Le changement se serait opéré plus tard, avec l'arrivée de la dynastie des Angevins ou des Plantagenêt ; c'est alors qu'aurait véritablement commencée l'influence de plus en plus prégnante du français écrit « en ce qui concerne le droit et le gouvernement »[17], soit « quelque deux cents ans plus tard (après la conquête normande), à la suite de cette autre invasion française qui eut lieu après le mariage d'Henri III avec Éléonore de Provence »[18]. Plus récemment, J.H. Baker[19] a également insisté sur le fait que « Nous ne savons toujours pas quand le français a commencé à être utilisé comme langue de débat oral et de plaidoirie dans les cours royales. (…) En tout état de cause, nous ne disposons d'aucun texte français provenant des tribunaux avant les années 1250. C'est au moins un siècle après la disparition des distinctions ethniques entre les Anglais d'origine normande et ceux d'avant 1066, et au moins une génération après la perte de la Normandie continentale en 1204 »[20].

---

[7] H. MOISY, *op. cit.,* page V.
[8] *Ibid*.
[9] C. FLETCHER, *op. cit.*, p. 235.
[10] Document enregistrant les coutumes juridiques de l'Angleterre sous le roi Henri 1er (1100-1135), vers 1115. Cette collection privée contient des règles de droit, qui ne sont cependant pas considérés comme des actes administratifs en tant que tels (DOWNER L.J., *Introduction*, in DOWNER L.J, *Leges Henrici Primi*, Oxford, 1972, pp. 1-79.
[11] H. MOISY, *op. cit.,* page VI.
[12] WOODBINE G.E., *The Language of English Law*, in *Speculum, A journal of Medieval Studies*, Vol. XVIII, n° 4, 1943.
[13] WOODBINE G.E., *op. cit.*, p. 404.
[14] WOODBINE G.E., *op. cit.*, p. 415.
[15] WOODBINE G.E., *op. cit.*, p. 415
[16] WOODBINE G.E., *op. cit.*, p. 410.
[17] WOODBINE G.E., *op. cit.*, p. 403.
[18] WOODBINE G.E., *op. cit.*, p. 403. Le mariage a eu lieu en janvier 1236.
[19] BAKER J.H., *The Three Languages of the Common Law*, in *McGill Law Journal*, vol. 43, 1998, pp. 5-24.
[20] BAKER J.H., *op. cit.*, p. 16.

S'il est difficile donc d'affirmer quelle langue, de l'anglais ou du français, est prédominante en Angleterre aux XI^e^-XII^e^ siècles, il semble bien qu'à partir du XIII^e^ siècle, on y parle (le vieux) français même si on le parle « mal »[21]. Comme on se plaît à le dire à l'époque, ce n'est ni le « français de Paris » ni celui de la Loire, mais le « français de Normandie »[22], tout du moins jusqu'en 1204, date à laquelle le duché de Normandie est rattaché au domaine royal français. À compter de cet évènement, l'Angleterre et la Normandie française suivent des routes politiques divergentes ; pour autant, une petite mais puissante minorité[23], celle des aristocrates qui gravitent autour des monarques, continue à parler en Angleterre l'ancien normand, le vieux français et le français anglo-normand[24], en une fusion aujourd'hui communément désignée sous le terme d'anglo-normand, où l'on s'embarrasse de moins en moins du genre et du nombre (« *les proschein villes* »[25], « *un Alice, mere John* »[26]), où les erreurs phoniques se multiplient (*la* devient facilement *le*[27]), où le latin peut être introduit en plein milieu d'une phrase (« *Un Robert porta soun bref de dreit vers une Alice … par Pone qe voleit a la fin quod Alicia tunc sit ibi responsurus* »[28]).

En parallèle de l'évolution de l'anglo-normand, la fin du XIII^e^ siècle s'avère également une période de grands bouleversements pour la langue anglaise, qui passe « d'un système flexionnel avec un ordre des mots relativement libre à un système à flexion réduite avec un ordre des mots plus rigide »[29]. C'est également durant cette période dite du moyen-anglais (1150-1485) que la future langue de Shakespeare emprunte le plus au français : ainsi, « des 27.000 mots absorbés durant cette période, 22% étaient d'origine française »[30]. Cependant, si l'aspect « variable »[31] de la langue anglaise lui permet d'évoluer alors comme la « langue vernaculaire populaire »[32], elle demeure « peu prestigieuse »[33] aux yeux des puissants, qui lui préfèrent « le français qui se (prête) plus facilement, en dehors du latin, à la diffusion des nouvelles idées dans les sphères culturelles et administratives »[34].

Le monde juridique n'est pas en reste, loin s'en faut. C'est ainsi que dès le XIII^e^ siècle, les Provisions d'Oxford[35] (1258), visant à encadrer les pouvoirs du roi Henri III (1216-1272), ainsi que les *Casus Placitorum* (entre les années 1250 et 1270, voire un peu plus tard[36]), cette collection d'arrêts et de maximes juridiques, sont rédigés en français ; c'est bien cette langue que les rois Édouard I^er^ (1272-1307) puis Édouard II (1307-1327) utilisent

[21] C. FLETCHER, *op. cit.*, p. 236.
[22] H. MOISY, *op. cit.,* page XI.
[23] L. LÖFSTEDT, *op. cit.*, p. 286.
[24] C. LASKE, *Le Law French, un idiome protégeant les privilèges des juristes anglais entre 1250 et 1731*, https://doi.org/10.4000/corela.6773, § 1.
[25] L. LÖFSTEDT, *op. cit.*, p. 295, « Les prochaines villes ».
[26] L. LÖFSTEDT, *op. cit.*, p. 295. « Alice, mère de John ».
[27] L. LÖFSTEDT, *op. cit.*, p. 295.
[28] L. LÖFSTEDT, *op. cit.*, p. 295. « Robert porta son bref de droit contre Alice (par bref de) pone ; il voulait à la fin qu'Alice soit présente pour répondre ».
[29] S. HANCIL, *Histoire de la langue anglaise*, Mont Saint-Aignan, 2013, p. 37.
[30] C. LASKE, *op. cit.*, § 10.
[31] C. LASKE, *op. cit.*, § 7.
[32] C. LASKE, *op. cit.*, § 7.
[33] C. LASKE, *op. cit.*, § 7.
[34] C. LASKE, *op. cit.*, § 7.
[35] H. G. RICHARDSON, G. O. SAYLES, *The Provisions Of Oxford: A Forgotten Document And Some Comments,* in *Bulletin of the John Rylands Library*, *17 (2)*, 1933, po. 291-321 (texte p. 317 ff).
[36] G. L. HASKINS, *Casus Placitorum and Reports of Cases in the King's Courts, 1272–1278*, in *The American Historical Review*, Volume 58, Issue 3, 1953, pp. 597–598, https://doi.org/10.1086/ahr/58.3.597 / Publications of the Seiden Society, vol. LXIX, for the Year 1950, London, Bernard Quaritch, 1952.

pour écrire des lettres sous leur sceau privé[37] ; le premier Statut de Westminster[38], en date de 1275, est rédigé simultanément en latin et en français ; insensiblement, « le français rejoint le latin comme une des langues des archives du Parlement anglais, et comme langue utilisable dans les documents qu'on lui soumet, essentiellement des requêtes »[39]. Enfin, à compter de 1290, les « recueils des arguments et des plaidoiries produits de façon régulière » sont « regroupés sous le nom générique de *Year Books* »[40] et rédigés en français. Dans la mesure où ces *Year Books* sont des documents « officieux »[41], qui servent « probablement d'aide-mémoire et de documents pédagogiques plutôt que d'actes administratifs »[42], ils auraient pu être rédigés en moyen-anglais. Pour certains célèbres historiens et juristes anglais, tels Brand et Maitland, il faut cependant bien comprendre que « le français était une langue plus opérationnelle que l'anglais »[43] de part ses origines latines, ce qui a permis de « créer un vocabulaire juridique entièrement nouveau, la base même d'un nouveau système de droit »[44], « un ensemble de termes et de concepts à la fois très techniques et durables »[45]. Les auteurs Fletcher et Laske[46] insistent, quant à eux, sur le fait que « ce choix (de la langue française) (servait) à protéger les arcanes de la profession émergente des juristes »[47], aux alentours des années 1300[48].

Si le vieux français importé outre-Manche à partir du XI^e^ siècle, mais surtout à compter du XIII^e^ siècle, est donc initialement la langue de l'élite évoluant au sein de la cour des rois anglais – et le demeurera pendant encore plusieurs siècles – il donne insensiblement naissance à une branche baptisée *Law French*, réservée au seul monde juridique anglais et maniée par une minorité qui, au fur et à mesure, sera la seule à la maîtriser. Le fait même que l'expression *Law French* ne soit pas traduite en français et que le concept soit largement inconnu des sites de recherche grand public diffusés en langue française reflètent l'importance que cet idiome a eu – et a toujours en un sens – dans la sphère juridique strictement anglaise et par la suite, du monde dit du *Common Law*.

2.2. Heurs et malheurs du Law French

La pratique d'une langue extrêmement spécialisée et de plus en plus « incompréhensible au plus grand nombre »[49] va être progressivement sévèrement critiquée, sans que la situation évolue dans un premier temps. Il faut attendre le XIV^e^ siècle et trois évènements historiques pour que le *Law French* commence à voir sa suprématie contestée : l'émergence d'une classe moyenne, qui, influencée par le poète Chaucer et le philosophe Wycliff, aspire à parler (moyen-)anglais non seulement au quotidien mais également dans le monde des

[37] C. FLETCHER, *op. cit.*, p. 239.
[38] Le Statut de Westminster I a codifié le droit anglais en vigueur en 51 chapitres.
[39] C. FLETCHER, *op. cit.*, p. 239.
[40] C. LASKE, *op. cit*, § 14. L'expression *Year Books* n'est cependant pas utilisée avant le XVI^e^ siècle, lorsqu'on les imprimera année par année.
[41] C. LASKE, *op. cit*, § 14.
[42] C. LASKE, *op. cit*, § 14.
[43] C. LASKE, *op. cit*, § 12.
[44] P. BRAND, *The Language of the English Legal Profession: The Emergence of a Distinctive Legal Lexicon on Insular French*, in R. INGHAM (dir.) *The Anglo-Norman Language and its Contexts*, York, p. 100.
[45] F. MAITLAND, *Of the Anglo-French Language in the Early Year Books*, in *Introduction to Year Books of Edward II*, 17 Selden Society, 1903, XVIII.
[46] C. LASKE, *op. cit*.
[47] C. FLETCHER, *op. cit.*, p. 239.
[48] P. BRAND, *op. cit.*, p. 35.
[49] P. BRAND, *op. cit.*, pp. 239-240.

affaires ; les vagues d'épidémies – les tristement célèbres pestes noires – qui, tuant bon nombre de la population agricole, bouleversent en conséquence le marché du travail et entraînent des révoltes (en particulier en 1381) au cours desquelles il n'est plus question de parler le français des maîtres ; enfin, la Guerre de Cent Ans (de 1337 à 1453, période entrecoupée de trêves plus ou moins longues), qui achève la quête de l'identité nationale anglaise[50].

La première réelle estocade à l'encontre de l'anglo-normand mais plus spécifiquement du *Law French* est portée en 1362 avec le *Pleading in English Act*[51], loi également connue sous le nom de *Statute of Pleading* et adoptée sous le règne du roi Édouard III (1327-1377), qui proclame, paradoxalement en français, que la langue française doit céder la place à la langue anglaise, désormais reconnue langue nationale du royaume d'Angleterre[52]. L'argument essentiel est que[53] « *la lange Franceis* » est « *trop desconue en dit realme* » ; dorénavant, les plaidoiries doivent être « *conuz & mieulz entenduz en la lange usee en dit realme* », soit en anglais, ceci afin de favoriser « *chescun du dit realme* » qui, jusqu'alors, « *nont entendement ne conissance de ce qest dit p' eulx ne contre eulx p lour Sergeants & auts pledouts* »[54]. Par ailleurs, et en droite file de ce qui précède, les « *leyes custumes & estatutz du dit realme* »[55], c'est-à-dire l'activité même du Parlement, doivent également être adoptées en langue anglaise[56]. À ce stade, si le *Law French* peut sembler vaciller, il ne plie pas pour autant : en effet, la loi de 1362 vise « l'abolition de l'anglo-français dans les communications orales »[57], tant au niveau des débats parlementaires[58] que des plaidoiries ; les *Year Books* continuent d'être rédigés en anglo-normand[59], les *lectures* (conférences) et les *moots* (débats académiques) proposés aux futurs avocats (ces *barristers* qui sont d'ailleurs à cette époque désignés sous le nom d'*atornés*) des *Inns of Court* continuent d'être exposés en *Law French*[60].

Le *Law French* perdure donc, mais, avec le temps, l'anglo-normand du quotidien s'éteint, au profit du moyen-anglais qui lui-même va bientôt céder sa place à l'anglais moderne. Le XV^e^ siècle est à ce titre étonnant d'un point de vue linguistique en Angleterre : « l'anglo-normand n'est plus une langue d'usage, même parmi la noblesse »[61] et pourtant, « son utilisation dans le domaine du droit »[62] non seulement se maintient mais s'intensifie. En effet, l'accélération législative et juridique de l'époque implique de « créer de nouveaux

[50] A. CREPIN, *Quand les Anglais parlaient français*, in *Comptes rendus des séances de l'Académie des Inscriptions et Belles Lettres*, 148^e^ année, n° 4, 2004, pp. 1578-1579.
[51] *Pleading in English Act*, 1362.
[52] http://www.languageandlaw.org/TEXTS/STATS/PLEADING.HTM
[53] « La langue française est trop méconnue en ce royaume » ; les plaidoiries « doivent être connues et mieux comprises dans la langue utilisée dans ce royaume » ; « les habitants de ce royaume qui ne comprennent pas et ne connaissent pas ce qui est dit pour eux ou contre eux par les sergents et autres plaideurs » ; « Les lois, coutumes et ordonnances de ce royaume ».
[54] *Ibid.*,raduit en anglais par : « *all Pleas which shall be pleaded in [any] Courts whatsoever, before any of his Justices whatsoever, or in his other Places, or before any of His other Ministers whatsoever, or in the Courts and Places of any other Lords whatsoever within the Realm, shall be pleaded, shewed, defended, answered, debated, and judged in the English language, and that they be entered and inrolled in Latin.* »
[55] *Ibid.*
[56] A. CREPIN, *op. cit.*, p. 1579.
[57] C. LASKE, *op. cit.*, *op. cit.*, § 19.
[58] A. CREPIN, *op. cit.*, p. 1579.
[59] C. LASKE, *op. cit.*, § 19.
[60] R. INGHAM, *The transmission of Anglo-Norman language history and language acquisition*, Amsterdam, 2012, p. 25.
[61] C. LASKE, *op. cit.*, § 1.
[62] C. LASKE, *op. cit.*, § 1.

termes pour ne pas polluer le *Common Law* avec des concepts tirés soit de la société romaine soit du droit romain. Utiliser une langue vivante mais étrangère permet de définir des mots techniques comme on le veut, même si un francophone non-averti n'y aurait rien compris à moins de passer plusieurs mois dans les tribunaux royaux »[63]. Ce serait donc tout autant pour des raisons de conservatisme et de protectionnisme professionnels que pour des questions de techniques juridiques[64] que les juristes anglais auraient continué de maintenir le *Law French* et son vocabulaire bien sibyllin pour le profane et potentiel justiciable anglais.

Le deuxième coup porté au *Law French* date de cette période complexe qu'est le *Commonwealth* d'Angleterre, souvent qualifié de république, suivi du *Protectorate*, c'est-à-dire des années courant de 1649 à 1660, lorsque la monarchie anglaise est successivement abolie puis restaurée. Cromwell, persuadé que le bien commun doit être partagé par tous, pousse sa logique jusque sur le chemin linguistique et fait voter par le *Rump Parliament* la loi dite *for turning the Books of the Law, and all Process and Proceedings in Courts of Justice, into English*[65] le 22 novembre 1650. Comme en 1362, il y est déclaré que le latin et le français ne doivent plus avoir cours au sein du Parlement et dans les écrits des *Report-Books*, des décisions de justice, des *Year Books*, des *writs*, etc., sous peine d'une amende de vingt livres de l'époque[66]. Il semble que cette fois encore, le *Law French* arrive à résister, les juristes étant peu enthousiastes à l'idée de manier le droit anglais au moyen de la langue

[63] C. FLETCHER, *op. cit.*, p. 240.
[64] C. FLETCHER, *op. cit.*, p. 240.
[65] *An Act for turning the Books of the Law, and all Process and Proceedings in Courts of Justice, into English, 1650*, https://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp455-456 :

All Report-Books, and other Law-Books to be in English.

The Parliament have thought fit to Declare and Enact, and be it Declared and Enacted by this present Parliament, and by the Authority of the same, That all the Report-Books of the Resolutions of Judges, and other Books of the Law of England, shall be Translated into the English Tongue: And that from and after the First day of January, 1650, all Report-Books of the Resolutions of Judges, and all other Books of the Law of England, which shall be Printed, shall be in the English Tongue onely.

All Writs, Pleadings, Patents, &c. to be in English.

And be it further Enacted by the Authority aforesaid, That from and after the first Return of Easter Term, which shall be in the year One thousand six hundred fifty and one, all Writs, Proces and Returns thereof, and all Pleadings, Rules, Orders, Indictments, Inquisitions, Certificates; and all Patents, Commissions, Records, Judgements, Statutes, Recognizances, Rolls, Entries, and Proceedings of Courts Leet, Courts Baron, and Customary Courts, and all Proceedings whatsoever in any Courts of Justice within this Commonwealth, and which concerns the Law, and Administration of Justice, shall be in the English Tongue onely, and not in Latine or French, or any other Language then English, Any Law, Custom or Usage heretofore to the contrary notwithstanding. And that the same, and every of them, shall be written in an ordinary, usual and legible Hand and Character, and not in any Hand commonly called Court-hand.

Persons offending against this Law, to forfeit twenty pounds.

And be it lastly Enacted and Ordained, That all and every person and persons offending against this Law, shall for every such Offence lose and forfeit the full Sum of Twenty pounds of lawful English Money; the one moyety thereof to the use of the Commonwealth, and the other moyety to such person and persons as will sue for the same in any Court of Record, by Action of Debt, Suit, Bill, Plaint or Information; in which no Wager of Law, Essoyn, or other Delay shall be admitted or allowed.

[66] Somme conséquente pour l'époque, https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator

anglaise et continuant donc à utiliser le français[67]. Pour preuve, dès 1660, donc dès le retour de la monarchie, les recueils de jurisprudence sont à nouveau publiés en *Law French*[68].

Pourtant, et malgré les efforts des juristes anglais, les temps vont changer. Le royaume d'Angleterre va devenir le Royaume-Uni de Grande-Bretagne (1707-1800), la langue anglaise (moderne) va plus que jamais se diffuser dans le pays et finira par prendre « place dans le langage du *Common Law* »[69]. Quand le Parlement votera, en 1730, une loi interdisant totalement « l'usage du français dans les procédures judicaires et dans les actes publics »[70], elle ne produira pas d'électrochoc linguistique et ne fera que confirmer la fin, sans doute inéluctable, de l'usage du *Law French* en droit anglais[71].

Enfin … presque. À ce jour, certaines expressions sont restées telles quelles, à prononcer avec un léger accent français si possible : *force majeure*, *grand* ou *petit jury*, *en banc*, *oyer et terminer*, *the voir dire* pour n'en citer que quelques-unes. Si leur signification peut légèrement varier du droit anglais[72] au droit français, elles n'en demeurent pas moins facilement compréhensibles pour des juristes installés de part et d'autre de la Manche. D'autres termes font écho à ce passé linguistique commun mais s'avèrent plus compliquées à décrypter, le droit français ayant évolué soit pour ne plus les utiliser aujourd'hui, soit pour les conserver sous une forme autre : la doctrine des *laches* en *Common Law*, *i.e.* le manque de diligence à introduire une demande en justice, tire sa substance de l'anglo-normand *laschesse*, signifiant négligence ; celle des *escheat*, permettant le transfert de biens immobiliers d'une personne décédée sans héritier à la Couronne, nous rappelle qu'un droit

[67] C. LASKE, *op. cit.*, § 23.
[68] C. LASKE, *op. cit.*, § 23.
[69] C. LASKE, *op. cit.*, § 23.
[70] C. LASKE, *op. cit.*, § 23.
[71] *The Proceedings in Courts of Justice Act*, 1730 (4 Geo. 2. c. 26):

WHEREAS many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language, those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practising the law: to remedy these great mischiefs, and to protect the lives and fortunes of the subjects of that part of Great Britain called England, more effectually than heretofore, from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice, in an unknown language, be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons of Great Britain in parliament assembled, and by the authority of the same, that from and after the twenty-fifth day of March one thousand seven hundred and thirty-three, all writs, process and returns thereof, and proceedings thereon, and all pleadings, rules, orders, indictments, information, inquisitions, presentments, verdicts, prohibitions, certificates, and all patents, charters, pardons, commissions, records, judgments, statutes, recognizances, bonds, rolls, entries, fines and recoveries, and all proceedings relating thereunto, and all proceedings of courts leet, courts baron and customary courts, and all copies thereof, and all proceedings whatsoever, in any courts of justice within that part of Great Britain called England, and in the court of exchequer in Scotland, and which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever, and shall be written in such a common legible hand and character, as the acts of parliament are usually engrossed in, and the lines and words of the same to be written at least as close as the said acts usually are, and not in any hand commonly called court hand, and in words at length and not abbreviated; any law, custom or usage heretofore to the contrary thereof notwithstanding: and all and every persons or persons offending against this act, shall for every such offence forfeit and pay the sum of fifty pounds to any person who shall sue for the same by action of debt, bill, plaint or information in any of His Majesty's courts of record in Westminster Hall, or court of exchequer in Scotland respectively, wherein no essoin, protection or wager of law, or more than one imparlance, shall be allowed.

[72] Et par extension, des droits de *Common Law*.

peut *escheoir*. La liste des termes ayant recours au *Law French* étant plus longue qu'il n'y paraît[73], il nous a semblé intéressant de tenter de passer au crible fin l'un d'entre eux, le *cestui que trust*, dont l'origine et la signification restent relativement mystérieuses, bien que l'expression soit utilisée au quotidien par tout spécialiste du droit des *trusts* qui se respecte.

3. Un exemple de Law French : le cestui que trust

Au cours des siècles, l'anglo-normand qui s'était figé en *Law French* a donc cédé à son tour à l'anglais qui a alors incorporé en son sein la terminologie anglo-latine et anglo-normande[74] existante, d'où des expressions juridiques qui peuvent sembler singulières aussi bien aux yeux des juristes anglais que français. Le *cestui que trust* en est un bel exemple, et même si sa prononciation constitue un certain défi, il reste, même en 2023, incontournable aux yeux des juristes anglo-saxons quand il s'agit d'évoquer les bénéficiaires des *trusts*, (très) vague équivalent de la fiducie française. Quant à la signification exacte de l'expression, elle reste de prime abord bien énigmatique. S'il est difficile d'affirmer avec certitude d'où le principe du *trust* tire ses racines (droit romain, normand, anglais, français, autre), son analyse nous permet néanmoins de comprendre le lien *trust – Equity – use* et de mieux appréhender l'expression *cestui que use*, l'ancêtre du *cestui que trust* (3.1). L'étymologie de la locution *cestui que trust* nous permet, quant à elle, de supposer, mais non d'affirmer, qu'elle tire ses origines du saxon, du latin et de l'anglo-normand (3.2).

3.1. Le principe du trust

3.2. Les possibles étymologies de l'expression cestui que trust

3.1 Le principe du trust

Dans les systèmes juridiques dits de *Common Law*, un *trust* est une relation juridique – et non un contrat - par laquelle un bien est détenu et géré par une partie au profit d'une autre. Ce *trust* est légalement créé lorsqu'un *settlor*, un constituant, décide de transférer une partie ou la totalité de ses biens, qu'ils soient réels ou personnels, à un *trustee*, un fiduciaire, au profit de certaines personnes, y compris elles-mêmes, de telle sorte que le bénéfice réel des biens revienne, non pas au *trustee*, mais au(x) bénéficiaire(s). Ce dispositif est toujours couramment utilisé au Royaume-Uni et dans de nombreux autres pays de tradition de *Common Law* à des fins très diverses, notamment pour permettre à deux personnes, ou plus, de posséder des biens immobiliers (par exemple, un couple souhaitant acheter un bien immobilier en *leasehold*, en *freehold*, voire en *commonhold*)[75], pour promouvoir un objectif caritatif[76], pour éviter ou minimiser les conséquences de différentes formes d'imposition (en particulier en cas de succession)[77], mais également pour permettre à ses enfants d'aller à l'université le temps venu, pour protéger un mineur-majeur sous protection, pour générer des revenus au moment de la retraite[78] ou encore secourir une concubine lésée[79].

---

[73] C. LASKE, *op. cit.*, § 25.

[74] F. MÖHREN, *De l'isolement historique du Law French : le cas de la nouvelle dessaisine » in L'anglo-normand : spécificités culturelles d'une langue. À la mémoire d'André Crépin*, in R. MARTIN et M. ZINK (eds.), *Actes du colloque international organisé par l'AIBL le 29 mai 2015*, 2016, p. 95.

[75] *Re Vandervell's Trusts* (no.2)[1974] Ch 269.

[76] *Charities Act,* 2011.

[77] *Futter v HM Revenue and Customs* [2013] UKSC 26.

[78] *Houldsworth v Bridge Trustees Ltd* [2011] UKSC 42.

Le *trust* se caractérise avant tout par le principe de la dualité de propriété et la relation triangulaire – *settlor*/constituant, *trustee*/fiduciaire, *beneficiary*/bénéficiaire – qu'il induit.

Le rôle du *settlor*, de prime abord fondamental puisqu'il est à l'origine de la création du *trust*, devient inexistant à partir du moment où il cède son ou ses biens au *trustee* ; en effet, le *settlor* perd à cette occasion tout droit de propriété sur le bien en question et n'a plus sa place dans la relation *trustee* - *beneficiary*, sauf s'il est prévu qu'il soit le bénéficiaire du *trust* ou en certaines circonstances bien précises (en cas, en particulier, d'*automatic resulting trust*).

Le principe de dualité de propriété intervient donc entre le *trustee* et le *beneficiary* et consacre la division de la propriété du bien en question entre propriété légale et propriété équitable. C'est au *trustee* qu'échoit *the legal ownership*, la propriété légale du bien : il pourra vendre ce dernier, le louer, le réparer, l'investir, etc., en fonction de la nature dudit bien. Le but premier du *trustee* est clair : il doit faire fructifier le bien afin que tout bénéfice engrangé revienne au bénéficiaire, c'est-à-dire à celui qui possède *the equitable interest in the property*[80], l'intérêt équitable du bien[81]. En d'autres termes, si le *trustee* a un rôle vital dans la gestion du bien qu'il possède légalement, le bénéficiaire en a également la propriété mais, cette fois, en *Equity*[82], cette façon de juger née en Angleterre entre les XII^{e} et XIII^{e} siècles, fermement établie au XV^{e} siècle et confirmée par voie législative au XIX^{e} siècle[83].

Il est intéressant de noter que le mécanisme du *trust* est de fait intimement lié à l'institution de l'*Equity* pensée dans sa globalité, et non uniquement sous l'angle de l'intérêt équitable du bien. Pour un certain nombre d'auteurs, le *trust* serait à rapprocher de la période des croisades, à une époque où les probabilités de revenir de telles expéditions étaient minces et où le pèlerin-guerrier cherchait à protéger sa famille et, donc, son patrimoine : « Le *trust* est, à l'origine, un arrangement médiéval qui permet au chevalier partant en croisade de mettre son fief entre les mains d'un pair, charge à ce dernier de veiller à l'entretien de sa famille »[84]. La solution, pour intéressante qu'elle ait pu être de prime abord, pouvait cependant générer un certain nombre de problèmes, l'ami de confiance chargé de la gestion du patrimoine du croisé pouvant refuser de verser à la famille de ce dernier les droits féodaux lui revenant ou refusant de restituer au croisé revenu bien vivant en Angleterre le(s) bien(s) en question. Les cours royales n'entendant nullement revenir sur ce qu'elles considéraient comme un contrat en bonne et due forme entre le croisé et le gestionnaire, c'est vers le *Lord Chancellor* que se tournèrent les chevaliers s'estimant dépouillés de leurs biens. Contre toute entente, ce qui aurait pu n'être qu'un recours compensatoire provisoire se mua avec le temps en une véritable institution, le *Lord Chancellor* érigeant un nouveau tribunal, la *Court of Chancery*, appliquant non plus les règles du *Common Law* mais de l'*Equity*, sur la base donc non plus de règles de droit *stricto sensu* mais de ce qu'il fallait considéré comme étant juste ou injuste, *fair* ou *unfair*. Ainsi, l'*Equity* visait à l'époque de son avènement à « rendre une justice plus parfaite et plus complète que celle qui résulterait de l'abandon par les parties de leurs recours en *Common Law* »[85], jugé pendant des siècles

[79] *Eves v Eves* [1975] 1 WLR 1338.

[80] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, HL.

[81] Cela signifie par ailleurs qu'il est strictement interdit au *trustee* de profiter des bénéfices générés par sa gestion du *trust* (*the non-profit rule*) : *Bray v Ford* [1896] AC 44.

[82] Ensemble de règles dégagées par les tribunaux anglais à compter du XV^{e} siècle, qui venaient/viennent combler les lacunes des règles du *Common Law*.

[83] *Judicature Acts*, 1873-1875.

[84] S. MONTAGNE, in *Chapitre 2. Histoire du trust*, in S. MONTAGNE (dir.) *Fonds de pension. Entre protection sociale et spéculation financière*, 2006, p. 41.

[85] *Wilson v Northampton and Banbury Junction Railway Co*, [1874] LR 9 Ch App 279.

souvent inadapté. Contrairement au système de *Common Law*, l'*Equity* accorde aux juges la possibilité d'user d'un certain pouvoir discrétionnaire (mais non arbitraire) afin de rendre une décision plus juste encore, tenant compte, par exemple, du comportement des deux parties[86]. L'*Equity* « représente un développement ultérieur du droit, posant un ensemble de règles supplémentaires par rapport au *Common Law* existant qui, dans la majorité des cas, fournit un remède adéquat. L'*Equity* ne détruit donc pas le droit, ni ne le crée, mais l'assiste »[87].

L'*Equity* a donc vu le jour en cherchant à résoudre l'équation 'arrangement - chevalier - gestionnaire – patrimoine' vis-à-vis de laquelle les tribunaux traditionnels de l'époque n'apportaient pas de réponse satisfaisante, voire pas de réponse du tout. La question s'est longtemps posée, et se pose toujours, de comprendre sur quels principes se fondit la *Court of Chancery* afin de développer le mécanisme du *trust*.

Même si les origines de ce dispositif juridique font toujours débat à ce jour, il est désormais clair que le principe même du *trust* existait bien avant le Moyen Âge anglais et qu'il pourrait tirer ses sources du droit romain, germanique, romano-germanique, voire islamique[88]. Pendant longtemps, les juristes pensaient que « le *fideicommissum* romain avait inspiré le *trust* »[89] : en effet, cette disposition du droit romain permettait à « un testateur de léguer un bien à un bénéficiaire juridiquement incapable en transmettant le bien à un légataire capable. Le légataire devait alors tenir sa promesse de remettre le bien au bénéficiaire autrement inéligible »[90]. Par la suite, il a été suggéré que le *trust* serait en réalité fondé sur le principe salique du *Salmannus*, par lequel « un tiers (…) acceptait d'exécuter les souhaits spécifiques d'un cédant de biens, soit du vivant du cédant, soit *post mortem* »[91]. De manière plus récente, l'hypothèse que le *trust* pourrait reposer sur le *waqf* islamique a été mise en avant. Le fait que le droit des *trusts* anglais ait réellement pris forme au XIII^{e} siècle, et plus précisément à l'époque des croisades, c'est-à-dire quand des chevaliers anglais, inquiets pour la transmission de leurs biens en cas de décès à ce qui était alors l'autre bout de la planète, sont entrés, par la force des choses, en contact avec le monde arabo-musulman, peut être vu comme une simple coïncidence. Ce n'est cependant pas l'opinion de tous les auteurs pour qui le hasard ne peut en être un : « La coïncidence entre la "Renaissance" du XIII^{e} siècle et la période des croisades est frappante, et il serait téméraire de nier l'explosion de l'énergie intellectuelle qui marque le XIII^{e} siècle aux idées nouvelles et à la vision élargie de ceux qui, partis en croisade, ont vu le monde des hommes et des choses d'une manière à laquelle la société des dixième et onzième siècles n'avait pas pensé »[92]. Selon cette théorie, le concept du *waqf* aurait été importé en Angleterre par les Frères franciscains[93] à leur retour de Terre sainte. Un *waqf* peut être créé dans le cadre soit de dotations familiales, soit de donations caritatives ; il est alors possible de mettre à disposition un bien initialement détenu par le donateur à disposition de bénéficiaires désignés, sous la supervisions d'un fiduciaire, lui-même contrôlé par un juge local[94].

[86] Selon, par exemple, les maximes « *He who comes to Equity must come with clean hands* » (Qui demande réparation doit avoir les mains propres) et « *He who seeks Equity must do Equity* » (Celui qui demande l'Équité doit pratiquer l'Équité lui-même).

[87] *Lord Dudley v Lady Dudley* [1705] Prec. Ch. 241, 244.

[88] A. AVINI, *Origins of the modern English trust revisited*, in *Tulane Law Review*, 1996, 70(4), p. 1140.

[89] A. AVINI, *op. cit.*, p. 1140.

[90] A. AVINI, *op. cit.*, p. 1141.

[91] A. AVINI, *op. cit.*, p. 1141.

[92] E. J. PASSANT, *The Effects of the Crusades upon Western Europe*, in *Cambridge Medieval History*, pp. 320, 331.

[93] M. RAMJOHN, *Unlocking Equity and Trusts,* London and New York, 2017, § 1.1.4.

[94] M. RAMJOHN, *op. cit.*, § 1.1.4.

Lorsque son propriétaire déclare que « les revenus de la propriété doivent être réservés de façon permanente à un usage spécifique ; alors, son droit de propriété est 'arrêté' ou 'retenu' »[95]. Une fois établi, le *waqf* devient perpétuel, ne pouvant être révoqué, et rend le bien inaliénable[96].

Si les sources juridiques du principe du *trust* restent incertaines, il en va différemment de son développement et de sa mise en œuvre. Entre le moment[97] de la création du principe du *trust* par la *Court of Chancery* et 1535, date clé car constituant un tournant en droit des *trusts*, le mécanisme juridique connu aujourd'hui sous le nom de *trust* est alors qualifié de *use* – un terme difficile à traduire car pourvu de nombreuses subtilités (plus ou moins l'équivalent d'usage, nue propriété, démembrement, selon les contextes modernes). On trouve cette notion en Angleterre « dans les premières coutumes, dans un sens similaire à celui d'utiliser, de faire confiance ou de se fier à quelqu'un d'autre, plutôt que dans les sens ecclésiastiques ou juridiques ultérieurs. Ainsi, la coutume sociale primitive consistant à confier ou à utiliser les choses d'autrui doit être considérée dès le départ comme l'évolution d'un mécanisme extra-juridique, qui a finalement effacé son origine informelle pour justifier sa légitimité juridique »[98]. En tout état de cause, le *use* implique le transfert du titre légal, l'*enfeoffment*, soit l'acte de confier son bien à quelqu'un, à une personne qui doit détenir le bien, le *feoffee to uses*, la personne à qui a été cédé la terre, pour l'usage d'un tiers, au profit d'un autre, le *cestui que use*[99].

Selon certains auteurs, ce dispositif juridique serait directement inspiré du droit romain et de son système d'*usufructus*[100] et de *fideicommissum*[101] ; il aurait été introduit en Angleterre par les Romains lors de leur conquête du territoire au I^er^ siècle de notre ère, et s'y serait ultérieurement pleinement développé durant le féodalisme[102] (XI^e^-XVI^e^ siècle) afin de lutter contre les services féodaux[103] dus, en particulier, au seigneur, en permettant de transmettre la terre à l'usage d'une autre personne qui n'était pas, elle, redevable à ce même suzerain, ou à un autre. Ce faisant, les parties en présence pouvaient, entre autres, espérer échapper à la mainmorte (*the mortmain*) seigneuriale, en une stratégie d'évitement[104] de « l'impossibilité de tester »[105] librement. Dans le même ordre d'idée, et en particulier à la suite de l'adoption des *Statutes of Mortmain*[106] à la fin du XIII^e^ siècle, l'Église avait également souvent recours à ce système de *use*, afin de circonscrire les seigneurs et de recevoir le bénéfice de la terre[107] : « L'avènement de l'*use* a ainsi rendu possible la transmission des terres à un individu afin qu'il soit utilisé par l'ordre religieux. Les clercs pouvaient donc avoir le bénéfice de la terre, mais pas en *seisin*[108] ». Si ce mode de procéder revêtait donc bien des

[95] A. AVINI, *op. cit.*, p. 1153.
[96] A. AVINI, *op. cit.*, 1154.
[97] Ce moment est difficile de dater car faisant l'objet d'ajustements et d'évolutions au fil du temps.
[98] T.ZARTALOUDIS, *Theories of origin as to the progenitor of the trust*, in *Divus Thomas*, vol. 115, n° 2, 2012, p. 172.
[99] A. AVINI, *op. cit.*, p. 1143.
[100] W. HOLDSWORTH, *A History of English Law*, Brown, 1924, pp. 410-411.
[101] A. AVINI, *op. cit.*, p. 1148.
[102] A. AVINI, *op. cit.*, p. 1148.
[103] M. RAMJOHN, *op. cit.*, § 1.1.4.
[104] V. CORRIOL, *Études sur la condition servile au Moyen Âge*, Rennes, 2022, p. 273.
[105] V. CORRIOL, *op. cit.*, p. 273.
[106] Les *Statutes of Mortmain*, en 1279 puis en 1290, interdisaient le clergé de recevoir des dons sous forme de biens immobiliers.
[107] A. AVINI, *op. cit.*, p. 1144.
[108] *Ibid.* : le terme "seisin" est le vieux terme juridique anglais qui désigne la possession d'un bien immobilier sous la forme d'un droit de propriété (*freehold estate*).

avantages pour certains, il était également utilisé, comme le précisera Bacon, « pour frustrer bien des gens de leurs droits justes et raisonnables. Un homme qui avait des réclamations à faire sur un bien fonds ne savait quel en était le propriétaire ou contre qui devraient être dirigées ses poursuites ; la femme était frustrée de son tiers[109] ; le mari de son droit de *curtesy*[110] ; le seigneur de ses droits de tutelle[111], de relief[112], de hériot [113] et d'*escheat*[114] ; le créancier du droit de saisie pour sa créance ; et le pauvre fermier de son état de possession »[115].

Au fil du temps, ces *uses* étant devenus aussi bien des instruments de fraude que des sources d'insatisfaction, de nombreux rois cherchèrent en limiter leurs utilisations mais il faut attendre véritablement 1535, sous le règne d'Henry VIII, pour que le Parlement adopte le *Statute of Uses*[116] imposant de convertir tous ces *uses* en *legal estate* (propriété légale) et prévoyant que, « dès la création d'un *trust*, le titre légal du bien dévolu au *cestui que use* et tout intérêt du *trustee* sont abolis »[117].

L'adoption de la loi sur les *uses* n'a pas eu l'effet escompté[118] et le droit des *trusts* a continué à se développer pour devenir aujourd'hui incontournable, au-delà même des frontières anglaises. Il a intégré un vocabulaire très spécifique, hérité de l'époque où l'on parlait anglais, français et latin, dont il reste de nombreuses traces[119], en particulier avec l'expression *cestui que use*, qui n'a pas disparu du jour au lendemain de l'adoption de la loi anti-*use* de 1535. Ainsi, en 1864, le juge Erle évoque un arrêt de 1582 dans le lequel il est précisé que le « *cestui que use at this day is immediately and actually seized and in possession of the land* »[120]. L'expression *cestui que use* va cependant laisser insensiblement place à celle de *cestui que trust*, le bénéficiaire du *trust*, seule utilisée de nos jours. S'il est difficile d'affirmer la provenance du mécanisme du *trust*, il est tout aussi complexe de prouver l'étymologie de l'expression, qui s'avère en fin de compte un savant mélange de diverses langues.

3.2. Les possibles étymologies de l'expression cestui que trust

Les deux premiers mots de l'expression, *cestui* et *que*, ne posent guère de difficulté. Il est en effet assez simple de rapprocher *cestui* du pronom démonstratif 'celui' décliné, en vieux français, en *cil*, *cist* et *ço*[121], qui évolue à partir du XII[e] siècle en *ces'tui* lorsqu'il est utilisé à l'accusatif et au datif[122]. Quant au pronom relatif 'qui', il se transforme, également à

[109] C'est-à-dire de bénéficier, dans le cadre d'une succession, d'un tiers des biens amassés pendant le mariage.
[110] Droit du mari sur le patrimoine du conjoint décédé.
[111] Sur les veuves et les orphelins.
[112] Droit seigneurial sur les mutations de propriétés nobles ou roturières.
[113] Droit de hériot ou de meilleur catel, donnait au seigneur la faculté de prendre la meilleure tête de bétail.
[114] En cas de succession tombée en déshérence.
[115] F. BACON, *Use of the Law*, Farmington Hills, 2005, p. 153.
[116] *Statute of Uses*, 1535.
[117] A. AVINI, *op. cit.*, p. 1146.
[118] M. RAMJOHN, *op. cit.*, *Unlocking Equity and Trusts*, *op. cit.*, § 1.1.7.
[119] Pour en citer quelques-unes : en latin : *pari passu, ex parte, inter vivos, bona fide, causa causans* – en français : *chose in action, cy-près, feoffee, trustee de son tort*.
[120] R.G. USHER, *The Significance and Early Interpretation of the Statute of Uses*, in *3 St. Louis L. Rev*. 205, 1919, p. 213.
[121] P. K. POPE, *From Latin to modern French with especial consideration of Anglo-Norman; phonology and morphology*, Manchester, 1934, p. 325.
[122] P. K. POPE, *op. cit.*, p. 325. Héritage du latin, le vieux français utilisait quelques déclinaisons.

compter du XII[e] siècle, en 'que'[123]. Il semble donc possible, non pas d'affirmer, mais de souligner la proximité frappante et sans doute réelle entre le début de l'expression *cestui que trust* et l'anglo-normand du XII[e] siècle.

Le terme *trust* est en revanche étymologiquement beaucoup plus complexe.

=> La théorie germanique

A priori, il n'est pas déraisonnable de vouloir rapprocher le mot *trust* du gothique *Triggua*, signifiant confiance, sécurité, et ayant donné *Treue (trewe, truce)* en anglo-normand, que l'on peut traduire par trêve, répit, délai[124]. Le terme est utilisé en ce sens dans l'Ancienne Coutume de Normandie qui évoque, en son chapitre III, « *Et si (le justicier) doit faire donner treues à ceulx qui les demandent par devant luy, car c'est assurance de paix* »[125] ; les Chroniques de Normandie recommandent, quant à elles, « *E vos r'allez dreit à Baiues, N'aiez od eus ne paiz ne treues* »[126]. Il semble que l'anglais, en sa forme ancienne, ait phonétiquement combiné les deux mots tout en gardant la seule signification gothique : en effet, on trouve ce terme et cette définition dans les *Ancrene Wisse*, cet ensemble de règles monastiques rédigées vers 1225, « *me haueõ truste to Goddes helpe* »[127]. On pourra considérer l'ancrage du mot *trust - confiance* comme ayant abouti lorsque Shakespeare proclamera : « *Ha, ha, what a Foole Honestie is ! And Trust (his sworne brother) a very simple gentleman* »[128]. Le mot *trust* aurait donc une origine germanique (déduction sensée dans la mesure où une partie des occupants de l'Angleterre avant 1066 descendent des Jutes, des Angles et des Frisons venus s'installer sur les terres d'outre-Manche[129]), signifierait confiance, et aurait vu sa prononciation altérée par l'anglo-normand ; en fin de compte, le *cestui que trust* désignerait donc « celui qui a confiance ».

La situation se complexifie cependant si, au lieu de se référer à *Triggua*, on se rapporte au terme *Trost*, mot également d'origine germanique signifiant consolation, secours. Or, selon le Formulaire de Marculf (VII[e] siècle) et certains auteurs[130], il serait possible de faire coïncider *Trost*, *Trustis*, *Fidelitas* et *Solatium* : en conséquence, et « en admettant la synonymie de *solatium* et de *trustis*, on peut considérer la *trustis regia, dominica*, comme une troupe, une suite de guerriers attachés à la défense du roi par un serment solennel de fidélité et prêts à le servir en toute occasion, isolés ou réunis, non seulement à l'armée mais encore dans ses querelles et ses vengeances. (…) Le mot *trustis* aurait en outre été employé pour indiquer « la condition, l'état » de celui qui a promis au roi l'assistance »[131]. Si la *Trustis* disparaît avant la fin du IX[e] siècle[132], la question se pose de savoir si l'on peut établir un rapport entre le *cestui que trust* et cette institution germanique, auquel cas on pourrait comprendre le *cestui que trust* comme étant « quelqu'un à qui on a juré de porter secours ».

[123] P. K. POPE, *op. cit.*, p. 325.
[124] H. MOISY, *op. cit.*, p. 62.
[125] H. MOISY, *op. cit.*, p. 62. « Et si le justicier doit faire donner la trêve à ceux qui la demandent par devant lui, car c'est assurance de paix ».
[126] H. MOISY, *op. cit.*, p. 62. « (…) ni paix ni trêve ».
[127] D. Ó MUIRITH, *From the Viking word-hoard: a dictionary of Scandinavian words in the language of Britain and Ireland,* Dublin, Portland, 2010, à la lettre T.
[128] D. Ó MUIRITH, *op. cit.*, à la lettre T. « Ah ! Ah ! quelle folle que l'honnêteté ! et la confiance, sa sœur jurée, quelle simple créature ! ».
[129] H. WALTER, *L'aventure des langues en Occident*, Paris, 1994, p. 440.
[130] M. DELOCHE, *La Trustis et l'antrustion royale sous les deux premières races*, Paris, 1873, p. 160.
[131] M. DELOCHE, *op. cit.*, p. 160.
[132] M. DELOCHE, *op. cit.*, p. 163.

Il n'est, de fait, pas impossible que les juristes anglais aient, consciemment ou non, associé l'instrument du *trust* aux notions de confiance et de secours. En effet, le principe même du *trust* est, comme nous l'avons vu, intrinsèquement lié à l'*Equity*, qui se veut synonyme de justice et d'équité, et qui accorde donc une potentielle forme de protection supplémentaire au justiciable. Selon la logique ainsi exposée, le *cestui que trust* serait donc l'équivalent du bénéficiaire qui a confiance et que l'on doit protéger.

L'explication germanique de l'expression *cestui que trust* est donc tentante - et concluante en ce qui concerne l'une des définitions du mot *trust*, signifiant de fait 'confiance' en anglais moderne[133] - pour autant, elle doit être davantage approfondie en droit des *trusts*. En complément de ce qui précède, il n'est pas impossible de rattacher le *trust* au principe germanique du *Salman*, dans lequel un tiers, le *salmannus*, « détenait le bien "pour le compte ou à l'usage d'autrui" et était "tenu de remplir ses obligations" »[134]. L'institution du *Salman* et du *salmannus* n'existant pas originellement en droit anglo-saxon, elle aurait pu être introduite en Angleterre bien avant la conquête normande, par l'intermédiaire des tribus germaniques (et de leurs principes saliques), arrivées sur le sol anglais dès le V^{e} siècle, bien que cela ne soit apparemment pas attesté dans les lois anglo-saxonnes. De manière intéressante pour notre sujet, le terme *Salman* peut être remplacé par celui de *Treuhand*[135], traduit en français par « fiducie » ou « fiduciaire ». On serait donc tenté de voir en la notion du *Salman-Treuhand*, aujourd'hui oubliée en Angleterre (sauf en ce concerne le vocabulaire de la vente, *to sell*), l'ancêtre du *trust* des systèmes juridiques de *Common Law*. Cette déduction est loin d'être saugrenue mais ne peut pour autant être affirmée, d'autres thèses pouvant être avancées en ce domaine, dont l'une nous ramène au *Law French*.

=> *La théorie romaine et le Law French*

En effet, si le bénéficiaire du *trust* est aujourd'hui communément désigné sous le nom de *cestui que trust*, il ne faut pas oublier que, pendant longtemps avant comme après 1535, il était également possible de qualifier ce dernier de *cestui que*, de *cestuy que*, de *cestui a que*, de *cestui que vie* ou encore de *cestui que use*, toutes ces expressions étant des abréviations interchangeables du principe énoncé sous la formule suivante : « *cestui a que use le feoffment fuit fait* », soit « la personne pour l'usage de laquelle quelque chose a été fait », formule nous renvoyant à la fois au moyen « élaboré au Moyen-Âge pour échapper à certains attributs de la tenure féodale en limitant le nombre d'occasion où il y avait transmission de saisine »[136] et à « un intérêt foncier reconnu en *Equity* »[137] précédemment décrits, comme expliqué précédemment.

=> *La théorie romano-germanique*

On doit à Frederic William Maitland, célèbre historien et juriste britannique, une troisième voie, combinant les deux thèses précédentes[138] : le *use* serait « un arrangement

[133] Définition du dictionnaire *Oxford* : « croyance ferme en la fiabilité, la vérité ou la capacité de quelqu'un ou de quelque chose ». Synonymes : confiance, conviction, foi.
[134] A. AVINI, *op. cit.*, p. 1150.
[135] B. F. BROWN, *Ecclesiastical Origin of the Use*, in *Notre Dame Law Review,* volume 10, issue 4, p. 357.
[136] G. SNOW, *Le use de la common law : étude terminologique*, in *Meta Journal des traducteurs*, vol. 47, n° 2, 2002, p. 189.
[137] G. SNOW, *op. cit.*, p. 190.
[138] F. POLLOCK, F. W. MAITLAND, *The History of English Law before the time of Edward I*, Cambridge, 1898, 2 volumes.

fiduciaire extra-légal donnant lieu à un droit de propriété indéterminé en faveur d'un destinataire »[139]. Par ailleurs, l'origine du terme *use* trouverait son fondement dans la déformation de *ad opus*[140], signifiant 'en faveur de', 'pour le bénéfice de'. Pour preuve de la double origine du mot *use*, l'expression *ad opus* se retrouverait, d'une part, aussi bien chez les Francs et les Lombards que dans le Livre du Jugement Dernier[141] de Guillaume le Conquérant[142], ce qui pourrait expliquer son incorporation ultérieure en droit anglais ; d'autre part, toujours selon Maitland, le terme *ad opus* serait à rapprocher cette fois de l'*usus* romain, et non pas du *fideicommissum*, l'*ad opus-usus* s'étant transformé avec le temps en *use*[143]. Ainsi que le résume Maitland, « le mot *use* ne vient pas du latin *usus* mais du latin *opus* dans l'expression *ad opus* (en son nom), par l'intermédiaire de l'ancien français *Aal oes* ou *al uses* et donc A en a le *use* : ainsi, une terre peut être transmise à A et à ses héritiers pour le *use* de B et de ses héritiers, alors qu'aujourd'hui nous devrions dire A en *trust* pour B »[144].

Quelle que soit l'origine étymologique du terme, il semble que le mot *trust* fasse son apparition dans le lexique juridique anglais dès le XV[e] siècle : ainsi, en 1452, deux arrêts, publiés ultérieurement en 1490, utilisent de manière concomitante les mots *trust* et *use*[145] ; le terme *trust* est parfois remplacé par *confidence*, le mot anglais pour confiance[146], quand les deux ne sont pas réunis en une seule et même expression « *by trust and confidence* »[147]. On notera que les juristes de l'époque utilisaient également le mot français *affiance* « pour exprimer la notion de confiance, comme dans le cas de la confiance d'un acheteur en un vendeur affirmant qu'un cheval est sain »[148] ou comme dans l'expression « *pur affiance que jay en vous* »[149]. En tout état de cause, l'*affiance* française a aujourd'hui laissé place au *trust a priori* germanique, occultant également la *confidence* anglaise.

Si le *cestui que trust* n'a pas livré tous ses secrets, il est clair que des liens existe entre cette expression et la formule du « *cestui a que use le feoffment fuit fait* » ; l'abolition des *uses* en 1535 a fait disparaître la fin de la formule pour ne garder que le début, en y ajoutant le mot *trust*, en un mélange linguistique et juridique finalement très européen avant l'heure. *In legalis varietate concordia.*

4. Conclusion

Ce court exposé dédié au *Law French*, au *trust* et à l'un de ses acteurs, le *cestui que trust*, nous aura permis de remonter le temps, à la recherche non seulement de l'origine étymologique de l'expression mais également du fondement juridique du *trust*. En fin de compte, il n'apporte, hélas, aucune certitude, si ce n'est que Rome ne s'est pas fait en un jour et qu'à l'instar de ce qui se passe en géologie, une strate juridique en recouvre bien souvent une autre jusqu'à ce qu'un phénomène de déformation vienne rendre possible des

[139] A. AVINI, *op. cit.*, p. 1151.
[140] F. POLLOCK, F. W. MAITLAND, *op. cit.*, volume 2, p. 231.
[141] Le *Domesday Book* de 1086.
[142] A. AVINI, *op. cit.*, p. 1152.
[143] A. AVINI, *op. cit.*,
[144] MEGARRY R.E., W.R. WADE, *The Law of Real Property*, 4[e] édition, London, 1972-1975, p. 152.
[145] D. J. SEIPP, *Trust and Fiduciary Duty in the Early Common Law*, in *Boston University Law Review*, 91, n° 3, 2011, p. 1024.
[146] D. J. SEIPP, *op. cit.*, p. 1024.
[147] D. J. SEIPP, *op. cit.*, p. 1024.
[148] D. J. SEIPP, *op. cit.*, p. 1024.
[149] D. J. SEIPP, *op. cit.*, p. 1024.

incorporations et des inclusions. Difficile donc d'affirmer que le *cestui que trust*, ce bénéficiaire du *trust*, est bien une expression germanique, latine ou anglo-normande, tant le temps et les circonstances ont brouillé les pistes. Il n'en reste pas moins aujourd'hui que cette formule aux accents à la fois singuliers et mystérieux, symbole même de l'évolution de diverses langues et de concepts juridiques pluriels, nous est parvenue à ce jour avec une certaine forme de constance, ce qui en soi n'est pas le moindre de ses mérites.

Les juristes linguistes l'auront bien compris, traduisons donc tout simplement le *cestui que trust* par le 'bénéficiaire du *trust*' ; mais à l'inverse, en thème, utilisons le *cestui que trust* pour ce même 'bénéficiaire', le lectorat anglophone en sera reconnaissant, même s'il ne sait plus ce qu'a été le *Law French* !

Bibliographie :

AVINI, A., *Origins of the modern English trust revisited*, in *Tulane Law Review*, 70(4), 1996, pp. 1139-1163.

BAKER, J.H., *The Three Languages of the Common Law*, in *McGill Law Journal*, vol. 43, 1998, pp. 5-24.

BRAND, P. A., *The Language of the English Legal Profession: The Emergence of a Distinctive Legal Lexicon on Insular French*, in INGHAM, R. (dir.), *The Anglo-Norman Language and its Contexts*, York, 2010.

BRAND, P. A, *The Origins of the English Legal Profession*, in *Law and History Review*, vol. 5, n° 1, 1987, pp. 31 – 50.

BROWN, B. F., *Ecclesiastical Origin of the Use*, in *Notre Dame Law Review*, vol. 10, issue 4, 1935, pp. 353-366.

CREPIN, A., « Quand les Anglais parlaient français » in Comptes rendus des séances de l'Académie des Inscriptions et Belles Lettres, 148e année, n° 4, 2004.

CORRIOL, V., *Études sur la condition servile au Moyen Âge*, Rennes, 2022.

DELOCHE, M., *La Trustis et l'antrustion royale sous les deux premières races*, Paris, 1873.

FLETCHER, C., *Langue et nation en Angleterre à la fin du moyen âge*, in *Revue Française d'Histoire des Idées Politiques*, 2012/2 (n° 36), 2012, pp. 233-252.

HANCIL, S., *Histoire de la langue anglaise*, Mont Saint-Aignan, 2013.

HASKINS, G. L., *Casus Placitorum and Reports of Cases in the King's Courts, 1272–1278*, in *The American Historical Review*, Vol. 58, Issue 3, April 1953, Publications of the Seiden Society, vol. LXIX for the Year 1950, London, 1952.

HOLDSWORTH, W., *A History of English Law*, 1924.

INGHAM, R., *The transmission of Anglo-Norman language history and language acquisition*, Amsterdam, 2012.

LASKE, C., *Le Law French, un idiome protégeant les privilèges des juristes anglais entre 1250 et 1731*, https://doi.org/10.4000/corela.6773.

LÖFSTEDT, L., *Notes on the beginning of Law French*, in *Romance Philology*, vol. 68, n. 2, 2014, pp. 285-337.

MAITLAND, F., *Of the Anglo-French Language in the Early Year Books*, in *Introduction to Year Books of Edward II*, 17 Selden Society, 1903, XVIII.

MOISY, H., *Glossaire comparatif anglo-normand : donnant plus de 5,000 mots aujourd'hui bannis en français et qui sont communs au dialecte normand et à l'anglais*, Caen, 1889.

MÖHREN, F., *De l'isolement historique du Law French : le cas de la nouvelle dessaisine*, in MARTIN, R., ZINK, M. (eds.), *L'anglo-normand : spécificités culturelles d'une langue. À la mémoire d'André Crépin*, in *Actes du colloque international organisé par l'AIBL le 29 mai 2015,* 2016.

Ó MUIRITH, D., *From the Viking word-hoard: a dictionary of Scandinavian words in the language of Britain and Ireland*, Dublin, Portland, 2010.

PASSANT, E.J., *The Effects of the Crusades upon Western Europe*, in *Cambridge Medieval History*, Cambridge, 1929.

POLLOCK, F., MAITLAND, F. W., *The History of English Law before the time of Edward I*, Cambridge, 1898, 2 volumes.

POPE, P. K., *From Latin to modern French with especial consideration of Anglo-Norman; phonology and morphology*, Manchester, 1934.

RAMJOHN, M., *Unlocking Equity and Trusts*, London, New York, 2017.

RICHARDSON, H. G., SAYLES, G. O., *The Provisions Of Oxford: A Forgotten Document And Some Comments*, in *Bulletin of the John Rylands Library*, 17 (2), 1933, pp. 291-321.

WALTER, H., *L'aventure des langues en Occident*, Paris, 1994.

WOODBINE G.E., *The Language of English Law*, in *Speculum, A journal of Medieval Studies*, Vol. XVIII, n° 4, 1943.

ZARTALOUDIS T., *Theories of origin as to the progenitor of the trust*, in *Divus Thomas*, vol. 115, n° 2, 2012, pp. 167-228.

Les mots intraduisibles en droit à travers la comparaison entre les éléments du système juridique britannique, français et polonais

***Agata de Laforcade*[1]**

Résumé : Il existe un lien étroit entre la langue et le droit. La linguistique juridique nous invite à étudier le langage du droit, langage spécialisé puisque le droit donne un sens particulier à certains mots. De la relation entre droit et langue découle l'interaction entre droit et traduction. Traduire le droit est une opération délicate. Le vocabulaire et les discours du droit sont construits pour exprimer les spécificités propres à chaque système juridique. Ainsi, la traduction juridique renvoie vers de multiples systèmes juridiques. Elle suppose l'emploi des concepts qui peuvent varier d'un système juridique à l'autre ou encore qui peuvent être purement et simplement inconnus dans un droit ou dans l'autre. Le traducteur se trouve confronté à des mots intraduisibles. Différentes techniques ont été proposées face aux mots intraduisibles en droit. L'objectif de cette communication est de les aborder en insistant sur la belle aventure comparatiste à laquelle invitent les mots intraduisibles en droit. En effet, la comparaison juridique des termes est le moyen le plus fiable pour parvenir à leur traduction. Enfin, l'existence des mots intraduisibles en droit est bel et bien la preuve que face à la globalisation et la mondialisation, la diversité des cultures juridiques a pu être préservée.

Mots clés : linguistique juridique, traduction juridique, intraduisible, droit comparé, culture juridique.

Sommaire : 1. Introduction ; 2. Les mots intraduisibles illustrant la diversité des traditions juridiques ; 2.1. La résistance des traditions juridiques française, polonaise et anglaise face à la globalisation ; 2.2. Les illustrations des difficultés dans la traduction juridique ; 2.2.1. Concepts ; 2.2.2. Institutions ; 2.2.3. Acteurs juridiques ; 3. Les solutions face aux mots intraduisibles en droit ;3.1. Les méthodes face aux mots intraduisibles ; 3.2. Les mots intraduisibles et le droit compare

[1] PhD, Academic Director at ISIT, *Department of Law, Languages and Intercultural Challenges*, delaforcade.agata@isitparis.eu.

Untranslatable words in law: a comparison of elements of the British, French and Polish legal systems

Summary: There is a close link between language and law. Legal linguistics invites us to study the language of law, a specialised language since law gives a particular meaning to certain words. The relationship between law and language gives rise to the interaction between law and translation. Translating law is a delicate operation. The vocabulary and discourse of law are constructed to express the specific features of each legal system. Legal translation therefore refers to multiple legal systems. It requires the use of concepts that may vary from one legal system to another, or that may simply be unknown in one legal system or another. The translator is faced with untranslatable words. Various techniques have been proposed for dealing with untranslatable words in law. The aim of this paper is to address them by emphasising the wonderful comparative adventure to which untranslatable words in law invite us. Indeed, legal comparison of terms is the most reliable way of arriving at their translation. Finally, the existence of untranslatable words in law is proof that, in the face of globalisation, the diversity of legal cultures has been preserved.

Keywords: legal linguistics, legal translation, untranslatability, comparative law, legal culture.

1. Introduction

Le droit est indissociable du langage juridique, par lequel il s'exprime. Le vocabulaire juridique est un vocabulaire technique, souvent difficile à comprendre surtout pour le profane[2]. Depuis fort longtemps, de nombreuses accusations sont formulées dans ce contexte. Actuellement, le vocabulaire juridique est devenu extrêmement riche et composé de termes à la fois savants (forclusion, intimé, répétition de l'indu), de formules latines (*lex posteriori*, *non bis in idem*) et de mots du langage courant, pris ou non dans leur sens usuel (propriété, possession, désintéressé, créancier)[3].

La langue n'est pas seulement un moyen de communication, mais elle a aussi une fonction symbolique, reflétant la culture, le mode de pensée, voire l'identité individuelle et nationale. La langue influence les concepts juridiques. Le droit, de son côté, peut être perçu comme un langage, car il est un

[2] Déjà, en 1917, H. CAPITANT déplorait : « *Ecrits dans une langue simple, précise, ponctués avec soin, divisés en alinéas courts et peu nombreux, ses articles [code civile] sont faciles à lire et à comprendre, même pour des personnes non versées dans ma science du droit. Clarté, précision, concision, mesure, ce sont là les qualités qui le distinguent, et en font un modèle qui n'a jamais été surpassé. (…) Malheureusement ces belles qualités de notre code sont en train de disparaitre, et cela par la faute du législateur moderne* », H. CAPITANT, *Comment on fait les lois aujourd'hui*, in *Revue politique et parlementaire*, 1917, vol. 91, p. 305.

[3] I. PINGEL, *Les intraduisibles en droit*, in S. BALDO DE BREBISSON ET S. GENTY (dir.), *Les intraduisibles. Les méandres de la traduction,* Arras, 2019, p. 175. ; I. CENNAMO, A. DE LAFOCARDE, D. SAIZ NAVARRO (dir.) *Clear Legal Writing: a Pluridisciplinary Approach*, 2020, vol. 7, n°1, https://www.ledonline.it/index.php/LCM-Journal/issue/view/129 (24/08/2021)

système de signes institutionnalisés, autorisant entre ceux qui l'utilisent un échange, une communication[4]. La linguistique juridique invite à étudier le langage du droit, langage spécialisé puisque le droit donne un sens particulier à certains mots[5]. Les juristes se servent de la langue pour faire comprendre le droit aux particuliers. La structure et le contenu des règles de droit sont déterminés par les facultés d'expression de la langue elle-même.

De la relation entre le droit et la langue découle l'interaction entre le droit et la traduction[6]. La traduction invite à « *dire la même chose autrement* »[7]. Elle consiste à chercher de la correspondance entre deux expressions à traduire tirées de deux langues différentes. Cette correspondance existe seulement si les deux expressions se rapportent à un seul concept. Ainsi, traduire le droit est une opération délicate et la traduction juridique génère de nombreuses difficultés. Elle renvoie vers de multiples systèmes juridiques, ce qui suppose l'emploi des concepts qui peuvent révéler lever des régimes juridiques différents, varier d'un système juridique à l'autre ou encore qui peuvent être purement et simplement inconnus dans un droit ou dans l'autre. Selon R. Sacco, « *il faut admettre qu'il existe des expressions intraduisibles. On peut aller plus loin et poser la question de savoir s'il existe des expression vraiment traduisibles* »[8].

Cette hyperbole doit être nuancée, bien que les difficultés dans la traduction juridique soient une évidence, les juristes partout dans le monde retrouvent les concepts et institutions similaires ce qui leur facilite la communication à premier abord. Il reste que le dialogue peut se compliquer par la suite, puisque les termes ne relèvent pas du même régime juridique. Les différences dans les régimes juridiques encadrant les concepts peuvent être tellement importantes qu'en réalité non seulement les termes qui devaient être équivalents ne les sont pas mais que de plus il est impossible de trouver un équivalent. Ainsi, les traducteurs juridiques se trouvent face aux mots intraduisibles. Goethe écrivait : « *Dans la traduction, on doit parvenir jusqu'à l'intraductible ; c'est alors seulement que l'on prend conscience de la nation étrangère et de la langue étrangère* »[9]. Sans chercher très loin, la comparaison entre le système juridique français, polonais et britannique illustre bien ces propos. Les deux premiers issus du droit romain présentent de nombreuses ressemblances, il en est différemment pour le droit britannique qui fait partie de la famille de *common law*. Un grand juriste-comparatiste R. David a pu affirmer : « *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* »[10].

Cependant, le traducteur juridique (et surtout judiciaire) quel que soit la difficulté à laquelle il doit faire face, y compris en cas de confrontation avec les mots intraduisibles[11], doit relever le défi de la traduction[12]. Dans le domaine juridique, où des problèmes sociaux essentiels sont en cause, la communication internationale est indispensable et le constat d'intraduisibilité peut s'avérer extrêmement dangereux. M. Harvey affirme à ce titre : « *si la traduction était aussi difficile que certains le prétendent,*

[4] H. GUILLOREL, G. KOUBI (dir.), *Langues et Droits ; Langues du droit, droit des langues*, Bruxelles, 1999 ; J.-M. PONTIER, *Droit de la langue française*, Paris, 1997 ; R. SACCO, *Langue et droit*, in R. SACCO ET L. CASTELLANI (dir.), *Les Multiples Langues du droit européen uniforme,* Paris, 1999, p. 163 ; S. CHATILLON, *Droit et langue*, in *Revue Internationale du droit comparé*, 2002, p. 687.

[5] G. CORNU, *Linguistique juridique*, Paris, 2005.

[6] J.-P. RELMY, *Le droit de la traduction. Contribution à l'étude du droit du langage*, thèse, Université Paris-Sud XI, 2007.

[7] P. RICOEUR, *Le Juste 2,* Paris, 2001, p. 136.

[8] R. SACCO, *La comparaison juridique au service de la connaissance du droit,* Economica, 1991, p. 18.

[9] J.W. von GOETHE, *Maximen und Reflexionen*, in H. BOHLAU (dir.), *Goethes Werke*, Weimar, 1907, vol. 1/42, t.2, p. 251.

[10] R. DAVID, *Les Grands Systèmes de droit contemporains*, Paris, 1974, p. 346.

[11] Mme Cassin a pu affirmer : « *Un intraduisible est symptôme de la différence des langues, non pas ce qu'on ne traduit pas, mais ce qu'on ne cesse pas de (ne pas) traduire* », B. CASSIN, *Traduire les intraduisibles, un état des lieux*, in *Cliniques méditerranées*, 2014, n°90, p. 25.

[12] I. PINGEL, *Les intraduisibles en droit, op.cit.,* p. 175.

la mondialisation du commerce et internationalisation de la justice en seraient sérieusement compromises »[13]. Il reste que lorsque le traducteur est confronté avec les textes qui doivent produire des effets juridiques (comme une convention internationale, un contrat international…), il se trouve face aux exigences de qualité alourdies, sa traduction doit être d'autant plus fiable et fidèle. La spécificité du langage juridique réside dans le fait qu'il sert à orienter la conduite des individus que ce soit par l'intermédiaire d'une loi, d'une décision de justice, ou d'un contrat[14]. Selon M. Gemar, le seul « *statut de la norme juridique par rapport aux autres normes sociales confère à la traduction juridique une spécificité que l'on ne retrouve dans aucun autre domaine de la traduction* »[15].

Ainsi, la traduction proposée peut toujours être soumise à des critiques et le résultat n'est jamais pleinement satisfaisant, car le traducteur doit chercher l'équivalence sans identité ni adéquation[16]. L'opération traduisante est une opération approximative, avec des risques de perte de sens, voire de contresens. Le vocabulaire et les discours du droit sont construits pour exprimer les spécificités propres à chaque système juridique. La traduction juridique quant à elle vise à déterminer une équivalence entre les expressions linguistiques comparées. Equivalence qui ne soit pas que linguistique mais également systématique, fonctionnelle et téléologique[17]. Il s'agit de parler le droit de l'un dans la langue de l'autre[18]. Le travail du traducteur juridique consiste à s'efforcer à restituer un sens et un contexte. Le terme « équivalence » en traduction juridique n'a pas de sens mathématique d'une correspondance exacte entre deux entités, mais celui plus pragmatique d'une traduction possible dont l'acceptabilité est soumise à un certain nombre de variables[19] comme le destinateur du texte (juriste ou profane) et/ou la fonction du texte (production des effets juridiques ou texte à titre informatif). Afin de mieux cerner les mots intraduisibles en droit il faut les aborder non pas comme une fatalité mais plutôt comme une belle illustration de la diversité des traductions juridiques dans notre monde globalisé (2), il est pertinent également de s'interroger sur les solutions envisageables pour traiter les mots intraduisibles tout en insistant sur la place particulière qui devrait être réservée au droit comparé dans ce contexte (3).

2. Les mots intraduisibles illustrant la diversité des traditions juridiques

Le mot intraduisible en droit sera le mot pour lequel le traducteur aura du mal à trouver un équivalent à la fois satisfaisant pour lui mais également acceptable pour le destinateur du texte. Afin de démontrer comment les mots intraduisibles en droit mettent en évidence la résistance des traditions juridiques française, polonaise et britannique face à la globalisation omniprésente (2.1.), il est pertinent d'examiner certains exemples (2.2.).

2.1. La résistance des traditions juridiques française, polonaise et anglaise face à la globalisation

Le point de départ sera une constatation assez évidente : les mots intraduisibles en droit existent bel et bien puisque chaque pays possède sa propre culture juridique et son propre système juridique avec des mots et des concepts qui ne trouvent pas d'équivalence dans d'autres cultures et systèmes juridiques. La question d'interculturel se pose avec force lorsque nous abordons le sujet de traduction juridique. En effet, le rapport entre le mot et le concept est tributaire de la diversité des traditions juridiques et les langues des différents pays souvent expriment des concepts qui ne se valent pas. Selon M. Sacco, « *c'est seulement à une époque récente, que le juriste a compris que le droit est le produit d'une culture et que la langue du droit étant créée à l'intérieur de cette culture, ne parle que de ce droit. Cette prise de*

[13] M. HARVEY, *Incroyable mais vraie : la traduction juridique*, in R. GREESTEIN (dir.), *La langue, le discours et la culture en anglais du droit,* Paris, 2005, p. 58.
[14] S. GLANERT, *De la traductabilité du droit,* thèse, Paris, 2011, p.150.
[15] J.-C. GEMAR, *Traduire ou l'art d'interpréter*, vol. II, Québec, 1995, p. 145.
[16] F. OST, *Les détours de Babel*, in J.-J. SUEUR (dir.), *Interpréter et traduire*, Bruxelles, 2007, p. 26.
[17] M.-J. CAMPANA, *Vers un langage juridique commun en Europe ?,* in R. SACCO et L. CASTELLANI,(dir.), *Les Multiples Langues du droit européen uniforme,* Paris, 1999, p. 17.
[18] B. THIRY, *Equivalence bilingue en traduction et en terminologie juridiques : Qu'est-ce que traduire en droit*, 2000, www.tradulex.com.
[19] M. HARVEY, *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, in *Revue de l'Institut des langues et cultures d'Europe, Amérique, Afrique, Asie et Australie*, n°2, 2002, p. 39.

conscience a pu faire croire que le discours juridique soit intraduisible »[20]. Chaque culture juridique a ses particularités, qui donnent lieu à des termes spécifiques. Tout ordre juridique national dispose de sa propre rationalité, à l'aune de laquelle peut être compris le sens d'une institution ou d'un concept juridique particulier[21]. Toute traduction, en induisant une qualification, déclenche l'application d'un régime juridique étranger. Ainsi, Mme Niboyet affirme, « *l'intraduisible dérange (…) non pas tant parce que c'est un échec que parce que l'on reste au milieu du gué »*[22]. Pour certains termes, il est possible de trouver un référent comparable, même s'il présente des différences, parfois significatives, pour d'autres, aucun cas référent comparable et admissible n'existe.

Ces différences interculturelles tout en constituant une véritable difficulté pour les traducteurs juridiques[23], sont bel et bien la preuve concrète de la résistance des traditions juridiques face à la mondialisation. Elles illustrent les limites de la globalisation juridique, car malgré la tendance récente à l'harmonisation des systèmes juridiques notamment grâce au droit de l'Union européenne, mais également aux conventions internationales universelles et régionales, la diversité juridique persiste et est une source, non seulement des difficultés, mais également de richesse qui doit être respectée pendant l'opération traduisante. Ainsi, les difficultés dans la traduction juridiques devraient être considérées comme faisaient partie intégrante de la tâche du traducteur, qui malgré les techniques qui sont mises à sa disposition et qui seront abordées *Infra* restera impuissant dans certaines situations, c'est-à-dire sans solutions réellement satisfaisantes. De plus, cet état permettra de mettre en exergue la richesse de nos systèmes juridiques qui possèdent de nombreuses expressions, notions, concepts insolites.

2.2. Les illustrations des difficultés dans la traduction juridique

Les exemples des mots intraduisibles en droit sont nombreux, mais il est possible de distinguer trois catégories des mots qui posent beaucoup de difficultés aux traducteurs[24] : concepts, institutions, acteurs juridiques.

2.2.1. Concepts

Dans la première catégorie, ils se trouvent des concepts qui n'ont pas d'équivalent dans d'autres systèmes juridiques. Le concept est une notion particulièrement compliquée à cerner puisqu'on y trouve de nombreuses polysémies déjà au niveau national. Le même mot pourra avoir des significations différentes en fonction de la branche du droit. Ainsi, en droit français la notion de faute sera abordée différemment en droit civil et en droit pénal. En droit civil, il s'agit d'une attitude d'une personne qui par négligence, imprudence ou malveillance ne respecte pas ses engagements contractuels ou son devoir de ne causer aucun dommage à autrui, alors qu'en droit pénal, on songe à l'élément moral des délits non intentionnels. On comprend aisément que les choses vont se compliquées davantage lorsque nous allons chercher des équivalents entre les différents systèmes juridiques.

A titre d'exemple, dans les pays de droit civil, en France comme en Pologne, la victime d'une infraction pénale peut déclencher les poursuites en se constituant partie civile et ensuite s'associer au procureur pour poursuivre avec lui ou à sa place l'auteur de l'infraction[25]. Dans les pays de *common law*, la victime est plutôt considérée comme témoin. Au Royaume Uni, elle reçoit la communication d'informations et on lui présente des éléments de preuve. En revanche, elle ne acquiert pas la qualification de

[20] R. SACCO, *Aperçus historiques et philosophique des relations entre droit et traduction*, in M. CORNU, M. MOREAU (dir.), *Traduction du droit et droit de la traduction,* Paris, 2011, p. 13.
[21] T. RAMBAUD, *Introduction au droit comparé. Les grandes traditions juridiques dans le monde*, Paris, 2017, p. 43.
[22] F. NIBOYET, *La formation à la traduction juridique et le droit comparé*, in M. CORNU, M. MOREAU (dir.), *Traduction du droit et droit de la traduction,* Paris, 2011, p. 293 (p. 299).
[23] M. HARVEY, *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, *op. cit.*, p. 39.
[24] M. HARVEY, *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, *op. cit.*, p. 39.
[25] En droit polonais, *oskarżyciel posiłkowy* (partie civile) peut poursuivre avec ou à la place du procureur (article 53 du Code de procédure pénale polonaise), en droit français, la victime peut déclencher les poursuites qui seront exercées par la suite par le parquet.

« partie », ce statut étant réservé à l'accusation et à la défense. Ainsi, les prérogatives différentes des victimes dans ces systèmes juridiques peuvent prêter à confusion dans les textes traduits. Dans le même sens, *equity*, c'est-à-dire l'ensemble des règles juridiques séparés de *common law*, et jouant le rôle de remède en cas de dysfonctionnement de *common law*, ne trouve pas d'équivalent dans les pays de droit écrit. Bien que le juge français puisse se prononcer dans certaines hypothèses en tant qu'amiable compositeur en statuant sur l'équité il serait trompeur de penser qu'il s'agit d'*equity*. Un autre concept très ancien et propre au système de *common law* est l'*habeas corpus*, il garantit la liberté individuelle, en évitant l'arbitrairede la détention sans une justification judiciaire. Il est souvent traduit par « sois maître de ton corps ». Force est de constater que cette traduction ne renvoie pas à un concept juridique reconnu par le droit français.

On peut poursuivre avec *trust*, qui est un acte juridique unilatéral sanctionné par l'*equity*, dans lequel un individu ou une personne morale (*settlor*) transfère des actifs au *trust* et confère le contrôle de ces biens à un (ou plusieurs) tiers ou à une (ou plusieurs) institution (*trustee(s))* pour le compte du ou des bénéficiaire(s). Le *trust* n'est pas le synonyme d'une fiducie qui existe en droit français, car les biens mis en fiducie font partie du patrimoine du fiduciant, alors que dans le cas du trust, les biens ne font pas partie du patrimoine du trustee. Mais, il y a également une différence entre les deux dans la manière de constituer ces entités. Le *trust* n'est pas créé par un contrat mais par un acte juridique unilatéral du *settlor*, du vivant ou au décès du *settlor*. Pour ces raisons, traduire le mot *trust* par le mot *fiducie* n'est pas exact. Quant au droit polonais, il ne connait pas le concept du *trust*[26] et le mot reste intraduisible.

Le système de *common law* reconnait *dissenting opinion*, c'est-à-dire l'opinion divergente d'un juge qui ne partage pas celle de la majorité des juges qui rendent la décision, cette opinion sera rendue publique. Ce concept n'est pas reconnu en France où les délibérations restent secrètes et la traduction du concept n'est pas aisée. Le droit polonais a introduit le concept de *votum separatum* ou *zdanie odrębne* en 1928 devant toutes les juridictions, depuis 1969 *votum separatum* est publié et à l'origine d'une obligation de motivation de la décision de justice[27].

En outre, certains concepts en droit, bien qu'ils soient reconnus universellement et qu'ils trouvent l'équivalent dans d'autres systèmes juridiques, n'auront pas ni le même contenu, ni le même régime juridique, ni la même qualification, à titre d'exemple l'homicide, le crime contre l'humanité, le crime, la loi, la jurisprudence seront définis différemment en France, en Pologne et au Royaume Uni. Le crime est selon le droit français une infraction la plus grave punie d'une peine de réclusion criminelle ou de la détention criminelle. En droit anglais, l'équivalent du crime sera *indictable offence* qui sera juge devant Crown Court avec le jury populaire. En droit polonais, le crime (*zbrodnia*) sont les infractions les plus graves avec la peine minimale de trois ans de privation de liberté contre 15 ans de réclusion criminelle en France.

2.2.2. Institutions

Deuxième catégorie des mots qui présentent des difficultés significatives sont les institutions. A titre d'exemple, chaque système juridique possède ses propres juridictions, de sorte qu'il n'est pas facile de traduire le mot *tribunal correctionnel* ou *Conseil d'Etat*, *sąd okręgowy*[28], *sądy szczególne*[29], *County Court*[30] ou *Queen's Bench Division*[31].

---

[26] K. SOBCZAK,, *Polskie prawo i polski jezyk nie lubia trustow*, 2018, www.prawo.pl Polski język i polskie prawo nie lubią trustów .

[27] J. GUJDA, Zdanie odrębne jako forma « krytyki » wyroku sadowego w procesie karnym, in *Iustitia,* 2015, n° 3(21), Zdanie odrębne jako forma „krytyki" wyroku sądowego w procesie karnym | IUSTITIA – Kwartalnik Stowarzyszenia Sędziów Polskich (kwartalnikiustitia.pl) (24/08/2021)

[28] *Sad okręgowy* est une juridiction de droit commun en Pologne qui peut être amenée à se prononcer en première instance ou en appel.

[29] *Sądy szczególne* est une catégorie des juridictions polonaises qui regroupe les juridictions administratives et militaires.

[30] *County Court* est une juridiction au Royaume Uni compétente pour juger les auteurs des infractions peu graves.

[31] *Queen's Bench Division* sont des tribunaux supérieurs chargés d'entendre les litiges d'une certaine importance en matière civile.

2.2.3. Acteurs juridiques

Troisième catégorie des mots fâcheux à traduire en raison des différences entre les traditions juridiques sont les acteurs juridiques. Même si pour cette catégorie, il est souvent possible de trouver un équivalent plus ou moins lointain, certains acteurs sont propres à tel ou tel système juridique. A titre d'exemple le terme « magistrat » désigne les hommes et femmes qui rendent la justice en France**.** Il existe deux catégories de magistrat : les juges qui forment la magistrature assise ou dite « du siège », et les procureurs et leurs substituts qui forment la magistrature dite « debout » ou du parquet. Au Royaume Uni et en Pologne, les deux fonctions sont séparées, de sorte qu'il peut être compliqué de traduire le mot « magistrat ». Il en est de même pour le juge d'instruction[32], témoin assisté[33], qui ne trouvent pas d'équivalent de l'autre côté de la Manche ni en Pologne.

Dans l'Outre-Manche, le *solicitor*[34] et le *barrister*[35] sont les termes propres au système de *common law*. L'équivalent du solicitor en France et en Pologne peut-être parfois un avocat ou encore un notaire, quant au *barrister*, cet acteur n'est pas d'équivalent en droit français même si on peut faire un rapprochement avec les avocats au Conseil d'Etat ou à la Cour de cassation, de même le *barrister* n'a pas d'équivalent en droit polonais[36].

Dans le système juridique polonais, les juristes exercent en tant que *radca prawny* ou *adwokat*. Les traductions proposées vers anglais pour ces termes peuvent être multiples[37]. *Radca prawny* peut être traduit comme *legal counsellor, counsellor at law, counsel, counsellor, solicitor. Adwokat* peut être traduit comme *attorney-at-law, barrister, solicitor.* Il faut ajouter qu'aucune traduction pour les deux termes n'est pleinement satisfaisante, encore une fois, en raison d'absence d'équivalence dans le système de *common law.* La traduction vers le français pose moins de difficultés, surtout pour le deuxième terme.

Plus généralement, il n'est pas facile de traduire le terme *common law* en français et en polonais. D'ailleurs, la plupart du temps, le terme restera introduit dans ces langues. De plus, il faut signaler que le terme « droit commun », qui pourrait être la traduction en français existe déjà en droit français et désigne un régime ordinaire par opposition du droit d'exception, dérogatoire ou spécial.

Ainsi, rien que la traduction juridique entre la langue française, la langue polonaise et la langue anglaise est très délicate. Les juristes de common law et de droit civil (ou droit écrit, droit roman) sont confrontés avec les frontières linguistiques et juridiques. C'est d'ailleurs la confrontation historique de l'anglais et du français et leur contact prolongé en Amérique du Nord qui vont donner naissance à une nouvelle discipline jurilinguisme, dont les pionniers sont les Canadiens (grâce à leur situation de bilinguisme et bijuridisme)[38].

Cependant, la situation n'est pas vraiment si critique, puisque face à de nombreuses difficultés qui peuvent être rencontrées dans la traduction juridique, et dont il n'est pas question de les négliger, nombreuses sont également des solutions qui peuvent être proposées pour y remédier.

3. Les solutions face aux mots intraduisibles en droit

[32] En France, le juge d'instruction est un magistrat qui rassemble les preuves à charge et à décharge pendant la phase d'instruction et qui va décider si l'affaire est en état pour être envoyée devant une juridiction de jugement.
[33] Le témoin assisté est en droit français une personne mise en cause, contre laquelle existent des charges. Il s'agit d'un statut intermédiaire entre témoin simple et personne mise en examen qui est poursuivie.
[34] *Solicitor* est un terme propre au common law désigne un type d'avocat qui pratique le conseil, la rédaction d'actes juridiques et de pièces de procédure, la négociation immobilière, et toute autre fonction extrajudiciaire.
[35] *Barrister* est un type d'avocat de haut niveau exerçant son métier dans un pays de common law qui conseille, conduit le procès et défend la cause par la plaidoirie et par l'écrit.
[36] 5261 (umk.pl)
[37] 5261 (umk.pl)
[38] J.-C. GEMAR, *L'analyse jurilinguistique en traduction, exercice de droit comparé. Traduire la lettre ou « L'esprit des loirs » ? Le cas du code Napoléon*, in *Comparative Legilinguistics*, 2019, vol. 37, p.9.

A la lumière de ces exigences de qualité, force est de constater qu'il n'y ait pas de méthode universelle idéale, il reste que les différentes techniques peuvent être employées en traduction juridique. Il est possible d'en identifier quatre particulièrement utiles face aux mots intraduisibles en droit : l'équivalence fonctionnelle, l'équivalence formelle, la transcription et la traduction explicative[39] (3.1.), ces techniques à elles-mêmes ne sont pas suffisantes et doivent être complétées ou plutôt précédées par les recherches en droit comparé (3.2.).

3.1. Les méthodes face aux mots intraduisibles

Tout d'abord, l'équivalence fonctionnelle consiste à trouver dans la langue cible un référent qui remplit une fonction similaire[40] (Cour d'Assises – *Sąd Okręgowy*, *Crown Court*, ; intime conviction – *całokształt okoliczności ujawnionych w toku rozprawy głównej*[41], *being satisfied beyond reasonable doubt*). Le traducteur doit identifier les différences entre la langue source, et le terme la plus proche parmi ceux qu'existent dans la langue cible et s'assure que ces différences qui subsistent sont acceptables dans un contexte donné. Cette technique permet de créer une illusion de compréhension. La méthode est très pratique pour les textes destinés au grand public (comme un roman avec une problématique juridique, ou un article du journal sur les actualités juridique). Cependant, dans le contexte de la traduction juridique destinée aux juristes, cette technique peut créer des confusions et peut être source d'imprécisions et d'ambiguïtés (certains termes juridiques sont non interchangeables : avocat général, *Prokurator Krajowy* et *Queen's Counsel* ; Cour d'Assises, *Sąd Okręgowy* et *Crown Court* ; juge d'instruction, *sędzia śledczy* et *examing magistrate*).

Deuxièmement, l'équivalence formelle consiste à traduire de manière aussi littérale que possible (Conseil constitutionnel – *Constitutionnal Council – Rada Constytucyjna* ; cour d'appel – *court of appeal – sąd apelacyjny* ; tribunal de police – *police court – trybunał policyjny* ; cour d'assises – *Assize Court*). Cette technique assure plus de transparence ; elle permet facilement de retrouver le terme d'origine dans la langue source ; elle respecte la culture et la langue du texte de départ. Il reste qu'elle peut créer un sentiment d'étrangeté et des difficultés de lecture, la traduction sera difficile à comprendre même pour les juristes, par exemple en utilisant les termes comme *delicts, contraventions, preventive detention*…. En autre, parfois elle nécessité de créer des néologismes dans la langue cible. Enfin, certains termes ne se prêtent pas facilement à une telle traduction, par exemple comment traduire en français en appliquant l'équivalence formelle le mot *solicitor* ou encore la cour d'assises en polonais. Ainsi, en se limitant à cette technique, nous allons nous retrouver face à un certain nombre des mots intraduisibles. Il faut noter que malgré les inconvénients de cette technique, la traduction littéraliste, qui est basée sur l'équivalence formelle, était pendant longtemps, de loin, la plus appréciée par les juristes, puisqu'elle est censée d'assurer la fidélité au texte source. Cependant, aujourd'hui, les jurilinguistes mettent l'accent non pas sur l'identité de la formulation, mais sur l'identité des effets juridiques dans les deux versions du même texte[42].

La troisième technique est la transcription. Elle consiste à reproduire le terme d'origine, en ajoutant éventuellement une glose lors de la première occurrence. Si le terme est clair ou expliqué dans le contexte, la glose n'est pas nécessaire. Cette technique ne crée aucun risque d'ambiguïté dans la mesure où le terme n'est pas traduit. Elle peut être utile voir nécessaire lorsque le document est adressé au spécialiste, pour qui la précision prime sur l'élégance et la concision. Souvent, les manuels de droit français en anglais ou en polonais, et vice-versa, emploient cette technique. Elle peut paraître comme une solution idéale face aux mots intraduisibles en droit, mais ne-t-elle pas un aveu d'échec du traducteur ? En outre, elle peut décourager le lecteur en raison de sa lourdeur surtout pour les langues avec les autres systèmes d'écriture comme l'alphabète consonantique pour l'hébreu ou l'arabe ou le système Sémantophonétique pour le chinois.

Enfin, la technique de traduction descriptive consiste à expliquer les spécificités culturelles en utilisant des termes génériques. Par exemple, la trilogie française « contraventions, délits et crimes » est

[39] M. HARVEY, *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, *op. cit.*, p. 39.
[40] Les exemples de traduction seront donnés pour les combinaisons FR/ANG et FR/PL.
[41] Całokształt okoliczności ujawnionych w toku rozprawy głównej : ensemble des circonstances relevées lors de la procédure principale.
[42] M. HARVEY, *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, *op. cit.*, p. 39.

traduite en anglais par *minor offences*, *major offences* et *serious crimes,* en polonais par *wykroczenie, wystepek*, *zbrodnia*,[43]. Lorsqu'on arrive à trouver une traduction concise et claire, cette technique permet d'assurer la précision et la facilité de la lecture. Elle peut convenir aux spécialistes et aux néophytes. Elle constitue un compromis entre la traduction sourcière et l'équivalence fonctionnelle. L'inconvénient de cette technique est qu'il est souvent difficile de trouver une formulation succincte et sans ambigüité. Elle peut également poser des problèmes en cas de rétrotraduction de chaque terme, pour cette raison, il est prudent de garder le terme d'origine entre parenthèses.

Afin de choisir la technique la plus adaptée, il faut prendre en compte l'identité et les attentes du destinataire (surtout son niveau de connaissance en droit) et la fonction du document traduit. Par exemple, si le texte traduit est destiné à produire des effets juridiques, le traducteur orientera sa stratégie vers la langue d'arrivée. En revanche, si la traduction répond juste au besoin d'information, il est préférable d'orienter les formulations vers la langue de départ[44]. Il faut insister sur l'adéquation entre la technique choisie et la situation de communication[45], ainsi que sur la nécessité de chercher une équivalence juridique la plus ajustée au cas d'espèce.

La démonstration de différentes techniques employées en traduction juridique permet d'affirmer, avec Mme Pingel, qu'en droit à condition d'accepter l'imperfection de la traduction, il est plus exact de parler des mots intraduits (en raison du choix du traducteur, ces mots demeurent dans la langue source) que des mots intraduisibles (au sens qu'ils seraient impropres à la traduction) qui sont véritablement la minorité du vocabulaire juridique[46]. Finalement, les mots intraduisibles invitent les traducteurs juridiques à rester humbles en les mettant face aux limités qu'ils ne peuvent pas dépasser. Traduire les mots intraduisibles implique à accepter l'imperfection de la traduction effectuée, car quelle que soit la technique de traduction employée, l'équivalence parfaite sera souvent une fiction, impossible à atteindre. Les efforts doivent se focaliser sur le choix de la technique la plus adaptée au cas d'espèce et qui contient le moins d'inconvénients. Afin que ce choix soit bien effectué, la traduction juridique devrait être abordée en concentration avec le droit comparé. Autrement dit, les mots intraduisibles nous incitent à vivre une belle aventure comparatiste.

3.2. Les mots intraduisibles et le droit comparé

Les mots intraduisibles en droit invitent à explorer le droit comparé. Le droit comparé peut être définit comme une discipline qui vise à la création d'une cartographie juridique mondiale qui rend compréhensible l'opération qui établit les différences et les ressemblances existantes entre les règles ou institutions juridiques appartenant à deux ou plusieurs ordres juridiques nationaux[47]. Le comparatiste a pour tâche principale de rendre intelligible (en ayant un recours à des mots) un droit formulé dans une autre langue[48]. Ainsi, le droit comparé est une discipline du droit qui invite à la rencontre de l'Autre[49]. Selon M. Moreau, « *S'il existe une vérité, elle réside dans la découverte de la pluralité, en dehors de laquelle il ne peut y avoir de recherche d'une identité véritable. Il n'y a pas de découverte de sa propre identité sans le franchissement des frontières du moi* »[50]. Le métier du traducteur est en parfaite adéquation avec ces mots, car qui plus que le traducteur est plongé dans cette pluralité impliquant la rencontre des autres cultures, y compris des cultures juridiques.

[43] Les traductions proposées en polonais renvoient vers les réelles catégories des infractions prévues par le Code pénal, mais il faut mentionner que les peines de référence sont différentes qu'un droit français (art. 7 du Code pénal polonais).

[44] M. HARVEY, *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, in *op. cit.*, p. 39.

[45] M. HARVEY, *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, *op. cit.*, p. 39.

[46] I. PINGEL, *Les intraduisibles en droit, op. cit.,* p. 175.

[47] T. RAMBAUD, *Introduction au droit comparé. Les grandes traditions juridiques dans le monde, op. cit.*, p. 11.

[48] S. GLANERT, *De la traductabilité du droit*, *op. cit.*, p.10.

[49] T. RAMBAUD, *Introduction au droit comparé. Les grandes traditions juridiques dans le monde, op. cit.*, p. 3.

[50] O. MORETEAU, *Les frontières de la langue et du droit : vers une méthodologique de la traduction juridique*, in *Revue internationale du droit comparé*, 2009, p. 695 (p. 700).

Le droit comparé entretient les relations privilégiées avec la traduction juridique. D'un côté, le droit comparé est une invitation à la traduction, car toute étude juridique comparative est précédé et se fonde sur un acte de traduction[51], d'ailleurs, la traduction des expressions juridiques est l'un des grands problèmes de la comparaison juridique[52]. De l'autre côté, la traduction juridique impose d'avoir une véritable vision comparatiste afin de ne pas dénaturer le texte à traduire[53]. Il s'agit ici d'insister surtout sur ce deuxième aspect. La traduction juridique est une rencontre entre langues, cultures et droits[54]. Les connaissances en droit comparé sont très utiles (pour ne pas dire nécessaires) pour pouvoir proposer des solutions face aux mots intraduisibles. Toute traduction juridique nécessite à la fois la sensibilité culturelle, mais également un savoir juridique suffisant[55]. La comparaison juridique des termes et des concepts est le moyen le plus faible de parvenir à leur traduction[56], de sorte que la connaissance du droit est requise pour chercher une équivalence juridique. Afin de favoriser la meilleure qualité de la traduction juridique, le traducteur doit non seulement cerner la notion, mais aussi son régime juridique, ses effets. Ainsi, le traducteur juridique doit avoir à la fois une excellente maîtrise de ses langues de travail, et également des connaissances approfondies des cultures juridiques en cause[57]. Selon R. Sacco, « *la traduction comporte sûrement la recherche de la signification d'une phrase juridique dans une première langue, et la recherche de la phrase qui est appropriée pour exprimer, dans une deuxième langue, cette signification. La première partie de l'opération est l'œuvre du juriste ; la deuxième partie est également l'œuvre du juriste ; l'opération tout entière appartient au comparatiste, qui est seul compétent pour établir si deux idées, appartenant à deux systèmes juridiques différents, se correspondent ou non, et si une différence des règles emporte une différence dans les catégories* »[58].

Ainsi, la traduction, surtout en employant la technique d'équivalence fonctionnelle, doit être effectuée après la comparaison des systèmes juridiques concernés. Les connaissances en droit comparé sont indispensables non seulement pour traduire le texte, mais également pour bien cerner son sens. La traduction juridique peut être considérée comme une opération en trois temps : la compréhension, la comparaison et le transfert[59]. Comparer avant de traduire revient à rendre le droit comparé utile, voire essentiel, pour la traduction juridique[60], l'opération de traduction devient notamment un exercice de droit comparé[61]. Le comparatiste est appelé à se demander si la traduction d'une langue juridique à l'autre est réalisable. S'il estime que tel est le cas, il doit choisir une technique de traduction convenant le mieux à la comparaison des droits[62]. Cette approche favorise une meilleure qualité de la traduction juridique.

Donner la place au droit comparé dans l'opération traduisante aura pour conséquence également de réaliser l'imperfectionner de la traduction juridique qui dans la plupart du cas ne pourra pas être totalement adéquate. Il est vrai qu'il est possible de traduire mieux les concepts du droit international qui est universel que les concepts du droit pénal propre à chaque système juridique. Les traducteurs seront également amenés à choisir à l'intérieur de la langue française, la langue utilisée en France, en Suisse, en Belgique, au Canada ou encore dans les institutions internationales est souvent différente. La même

---

[51] S. GLANERT, *Comparaison et traduction des droits : à l'impossibilité tous sont tenus*, in P. LEGRAND (dir.), *Comparer les droits, résolument,* Paris, 2009, p. 279.

[52] R. SACCO, *La comparaison juridique au service de la connaissance du droit, op. cit.*, p. 18.

[53] F. NIBOYET, *La formation à la traduction juridique et le droit comparé*, in M. CORNU, M. MOREAU (dir.), *Traduction du droit et droit de la traduction,* Paris, 2011, p. 293.

[54] J.-C. GEMAR, *L'analyse jurilinguistique en traduction, exercice de droit comparé. Traduire la lettre ou « L'esprit des loirs » ? Le cas du code Napoléon*, *op. cit.*, p.9.

[55] I. PINGEL, *Les intraduisibles en droit, op. cit.,* p. 175.

[56] S. MONJEAN-DECAUDIN, *La traduction du droit dans la procédure judiciaire*, in *Les cahiers de la justice*, 2012, n° 2, p. 127 ; A. POPOVICI, L. SMITH, R. TREMBLAY (dir.), *Les intraduisibles en droit civil*, Montréal, 2014.

[57] J. DARBELNET, *Réflexions sur le discours juridique*, in *Meta,* 1979, vol. 24, n°1, p.26 (p. 31) : « *Le discours juridique dispose naturellement d'un très grand nombre de termes techniques que seul le juriste peut manier avec sûreté, puisque c'est une caractéristique de tout terme technique de n'être compris que si on connait de première main la réalité qu'il recouvre, ce qui exige naturellement une formation spécialisée* ».

[58] R. SACCO, *La comparaison juridique au service de la connaissance du droit, op. cit*., p. 21.

[59] S. GLANERT, *De la traductabilité du droit*, *op. cit.*, p.196.

[60] S. MONJEAN-DECAUDIN, *La traduction du droit dans la procédure judiciaire, op. cit.,* p. 127.

[61] J.-C. GEMAR, *L'analyse jurilinguistique en traduction, exercice de droit comparé. Traduire la lettre ou « L'esprit des loirs » ? Le cas du code Napoléon*, *op. cit.*, p. 9.

[62] S. GLANERT, *De la traductabilité du droit, op. cit.*, p.10.

opération s'appliquer à la langue anglaise avec les disparités encore plus fortes entre la langue anglaise de common law ou de droit écrit.

Traduire l'intraduisible en droit est une tâche audacieuse qui doit conduire au dialogue entre les traditions juridiques. Ce dialogue favorise le rayonnement du droit comparé notamment grâce à la constitution d'un répertoire des idées juridiques qui existent en dehors de leurs manifestations particulières dans des systèmes juridiques donnés. Malheureusement, les juristes et linguistes ne travaillent pas assez ensemble[63]. Il y a pourtant un grand avenir pour la jurilinguistique[64]. Il faut se réjouir que ces dernières années, la place de la langue dans le contexte de la comparaison des droits devient une préoccupation importante au niveau de la recherche[65] mais également dans l'enseignement supérieur.

Bibliographie

CAMPANA, M.-J., *Vers un langage juridique commun en Europe ?*, in R. SACCO et L. CASTELLANI (dir.), *Les Multiples Langues du droit européen uniforme*, Paris, 1999.

CAPITANT, H., *Comment on fait les lois aujourd'hui*, in *Revue politique et parlementaire*, 1917, vol. 91.

CASSIN, B., *Traduire les intraduisibles, un état des lieux*, in *Cliniques méditerranées*, 2014/2 n° 90.

CENNAMO, I., DE LAFORCADE, A., SAIZ NAVARRO, D. (dir.) *Clear Legal Writing: a Pluridisciplinary Approach*, 2020, vol. 7, n°1, https://www.ledonline.it/index.php/LCM-Journal/issue/view/129 (24/08/2021)

CHATILLON, S., *Droit et langue*, in *Revue Internationale du droit comparé*, 54-3, 2002, pp. 687-715.

CORNU, G., *Linguistique juridique*, Paris, 2005.

DARBELNET, J. *Réflexions sur le discours juridique*, in *Meta*, vol. 24, n°1, 1979, pp. 26-34.

DAVID, R., *Les Grands Systèmes de droit contemporains*, Paris, 1974.

GEMAR, J.-C., *Traduire ou l'art d'interpréter*, vol. II, Québec, 1995.

GEMAR, J.-C., *L'analyse jurilinguistique en traduction, exercice de droit comparé. Traduire la lettre ou « L'esprit des loirs » ? Le cas du code Napoléon*, in *Comparative Legilinguistics*, vol. 37 (1), 2019, pp. 9-61.

GLANERT, S., *Comparaison et traduction des droits : à l'impossibilité tous sont tenus*, in P. LEGRAND (dir.), *Comparer les droits, résolument*, Paris, 2009.

GLANERT, S., *De la traductabilité du droit*, thèse, Paris, 2011.

GOETHE VON, J.W. *Maximen und Reflexionen*, in H. BOHLAU (dir.), *Goethes Werke*, 1907, Weimar, vol. 1/42, t.2.

GUILLOREL, H., KOUBI, G. (dir.), *Langues et Droits ; Langues du droit, droit des langues*, Bruxelles, 1999.

[63] S. GLANERT, *De la traductabilité du droit, op. cit.*, p.14 : « *La conception que se font de nombreux juristes, notamment européens, de la primauté du droit par rapport à d'autres domaines de la connaissance jugés moins prestigieux contribue sans doute (…) à expliquer leur manque d'intérêt pour les recherches qu'ils envisagent comme étant, pour ainsi dire, parajuridiques, voir sous-juridiques* ».

[64] S. GLANERT, *De la traductabilité du droit, op. cit.* ; D. JUTRAS, *Enoncer l'indicible : le droit entre langues et traditions,* in *Revue internationale du droit comparé,* 2000, p. 781 ; O. MORETEAU, *Les frontières de la langue et du droit : vers une méthodologique de la traduction juridique*, in *Revue internationale du droit comparé,* 2009, p. 695.

[65] F. OST, *Traduire : défense et illustration du multilinguisme*, Paris, 2009.

GUJDA, J., *Zdanie odrębne jako forma « krytyki » wyroku sadowego w procesie karnym*, in *Iustitia*, 2015, n° 3(21), Zdanie odrębne jako forma „krytyki" wyroku sądowego w procesie karnym | IUSTITIA – Kwartalnik Stowarzyszenia Sędziów Polskich (kwartalnikiustitia.pl) (24/08/2021).

HARVEY, M., *Traduire intraduisible. Stratégie d'équivalence dans la traduction juridique*, in *Revue de l'Institut des langues et cultures d'Europe, Amérique, Afrique, Asie et Australie*, 3, 2002, pp. 39-49.

HARVEY, M., *Incroyable mais vraie : la traduction juridique*, in R. GREENSTEIN (dir.), *La langue, le discours et la culture en anglais du droit*, Paris, 2005.

JUTRAS, D., *Enoncer l'indicible : le droit entre langues et traditions*, in *Revue internationale du droit comparé*, 52-4, 2000, pp. 781-796.

MONJEAN-DECAUDIN, S., *La traduction du droit dans la procédure judiciaire*, in *Les cahiers de la justice*, n° 2, 2012, pp. 127-140.

MORETEAU, O., *Les frontières de la langue et du droit : vers une méthodologique de la traduction juridique*, in *Revue internationale du droit comparé*, 61-4, 2009, pp. 695-71.

NIBOYET, F., *La formation à la traduction juridique et le droit comparé*, in M. CORNU et M. MOREAU (dir.), *Traduction du droit et droit de la traduction*, Paris, 2011.

OST, F, *Les détours de Babel*, in J.-J. SUEUR (dir.), *Interpréter et traduire*, Bruxelles, 2007.

OST, F., *Traduire : défense et illustration du multilinguisme*, Paris, 2009.

PINGEL, I., *Les intraduisibles en droit*, in S. BALDO DE BREBISSON et S. GENTY (dir.), *Les intraduisibles. Les méandres de la traduction*, Arras, 2019.

PONTIER, J.-M., *Droit de la langue française*, Paris, 1997.

POPOVICI, A., SMITH, L., TREMBLAY R. (dir.), *Les intraduisibles en droit civil*, Montréal, 2014.

RAMBAUD, T., *Introduction au droit comparé. Les grandes traditions juridiques dans le monde*, Paris, 2017.

RELMY, J.-P., *Le droit de la traduction. Contribution à l'étude du droit du langage*, thèse, Université Paris-Sud XI, 2007.

RICOEUR, P., *Le Juste 2*, Paris, 2001.

SACCO, R., *La comparaison juridique au service de la connaissance du droit*, Economica, 1991.

SACCO, R., *Langue et droit*, in R. SACCO et L. CASTELLANI (dir.), *Les Multiples Langues du droit européen uniforme*, Paris, 1999.

SACCO, R., *Aperçus historiques et philosophique des relations entre droit et traduction*, in M. CORNU et M. MOREAU (dir.), *Traduction du droit et droit de la traduction*, Paris, 2011.

SOBCZAK, K., *Polskie prawo i polski jezyk nie lubia trustow*, 2018, www.prawo.pl Polski język i polskie prawo nie lubią trustów.

THIRY, B., *Equivalence bilingue en traduction et en terminologie juridiques : Qu'est-ce que traduire en droit*, 2000, www.tradulex.com.

Comparative Law and Language

La *parola* e il diritto dell'Unione europea: riflessioni sparse[1]

Elena Ioriatti*

Abstract: Il saggio esplora il rapporto tra lingua e diritto nell'Unione Europea (UE) attraverso una lente focalizzata sul termine "parola". Il contributo intende sottolineare il ruolo del multilinguismo effettivo come elemento fondamentale di tutela non solo delle lingue nazionali, bensì dello stesso diritto dell'Unione europea; la storia insegna infatti come il multilinguismo funga da argine a modelli nazionali veicolati all'interno del diritto UE attraverso una lingua franca prevalente.

Il contributo affronta le sfide insite nel multilinguismo, ed esplora il processo sfumato di traduzione e adattamento, in cui i concetti legali sono oggetto calchi semantici.

Evidenziando gli sforzi collaborativi tra giuristi e linguisti per affrontare le sfide nei quadri legali multilinguistici si intende sottolineare anche come il percorso per la creazione di una lingua legale condivisa ispiri dialoghi non solo all'interno dell'UE, bensì globali.

Parole chiave: Linguaggio giuridico, diritto comparato, linguistica, multilinguismo europeo, circolazione modelli giuridici

Indice: 1. Introducendo; 2. Le origini: il multilinguismo formale; 3. Il francese al comando; 4. Il multilinguismo effettivo; 5. L'Unione europea e la parola multilingue; 6. Law and language; 7. La lingua giuridica europea come modello

[1] Il presente saggio costituisce in parte la riproduzione dell'intervento tenuto all'Accademia Nazionale dei Lincei di Roma il 9 marzo 2017, nell'ambito del ciclo di seminari "Approfondimenti" e della relazione dal titolo "La parola e i Trattati. Il contributo del comparatista e dell'esperto alla riflessione sul linguaggio giuridico dell'Unione europea", tenuto il 19 giugno 2017 in Campidoglio (Roma), in occasione della celebrazione dei sessant'anni dei Trattati di Roma.

* Professore ordinario, Facoltà di Giurisprudenza, Università di Trento, elena.ioriatti@unitn.it .

The *word (parola)* and the law of the European Union: scattered reflections

Abstract: The essay explores the relationship between language and law in the European Union (EU) through a lens focused on the term *parola* (*la parole*, word). The article intends to underline the role of effective multilingualism as a fundamental element of protection not only of national languages, but of European Union law itself; history teaches how multilingualism works as a barrier to national juridical models conveyed within EU law through a prevailing lingua franca.

It addresses the challenges inherent in multilingualism, and explores the nuanced process of translation and adaptation, in which legal concepts are subject to semantic casts.

Highlighting the collaborative efforts among jurists and linguists to address the challenges in multilingual legal frameworks, it is also intended to underline how the path towards a shared legal language inspires not only intra-EU, but global dialogues.

Keywords: Legal Language, Comparative Law, Linguistics, European Multilingualism, Circulation of Legal Models

1. Introducendo.

L'*incipit* di questo saggio ruota attorno al termine "parola", in un titolo che preannuncia un discorso sul linguaggio dei Trattati e del diritto secondario dell'Unione europea. "Parola", da intendersi non in termini Saussuriani[2], ossia quale componente sociale del segno linguistico, bensì come unità espressiva del diritto dell'Unione europea, che, in quanto tale, è *fatto* di lingua, ma, allo stesso tempo, prescinde da uno specifico idioma.

Nell'immaginario collettivo, multilinguismo europeo è termine evocativo di una composizione linguistica multistrato, come se ogni lingua fosse una parte di un tutto, al pari degli ingredienti necessari alla realizzazione di una ricetta complessa[3]. Questa metafora ci consente di cogliere l'essenza di ciò che *non è* la parola in un contesto multilingue, lemma sostanziale e suggestivo allo stesso tempo, che è invece espressione di un diritto che può esistere, preesistere o non esistere affatto negli atti dell'Unione europea, in modo del tutto indipendente dalla sua forma linguistica e dalle sue componenti.

Nel diritto europeo *parola* e *multilinguismo* sono infatti legati da fili inaspettati, da collegamenti meno visibili rispetto a quanto stabilito nell'art. 4 del Regolamento n. 1, 1958[4] ossia l'obbligo di redazione del diritto primario e secondario in tutte le lingue ufficiali dell'Unione. L'ipotesi suggerita in questo scritto è che nonostante la funzione dichiarata del multilinguismo sia la protezione delle lingue nazionali, la sola sua declinazione operativa non sia solo quella di trasmettere il diritto dell'Unione europea in tutte le lingue ufficiali. Come vedremo, vi rientra anche il rapporto con gli idiomi che, ciclicamente nella storia dell'Unione europea, hanno assunto il ruolo di lingua franca e quindi, necessariamente, una posizione prevalente[5].

[2] F. DE SAUSSURE, *Corso di Linguistica Generale*, Bari-Roma, 2021.

[3] Si rinvia a U. ECO, *La ricerca della lingua perfetta nella cultura europea*, Bari-Roma, 2017.

[4] Regolamento 15 aprile 1958, n. 1, Regolamento (Euratom) che stabilisce il regime linguistico della Comunità Europea dell'Energia Atomica; Trattato Istitutivo della Comunità Economica Europea (CEE), firmato a Roma il 25 marzo 1957, entrato in vigore il 1° gennaio 1958, art. 4: "I regolamenti e gli altri testi di portata generale sono redatti nelle lingue ufficiali".

[5] L'autrice è riconoscente alla dott.ssa Manuela Guggeis, capo unità dei giuristi linguisti del Consiglio UE, per le utili informazioni che ha saputo fornire e per la sua esperienza, che si intravede nelle parole di questo scritto.

2. *Le origini: il multilinguismo formale*

Come per ogni storia, è bene cominciare dal principio. L'Unione europea non è nata multilingue. È noto come il testo del Trattato di Parigi6 non contesse alcuna disposizione sulla lingua e venne redatto in lingua francese.

Solo in un secondo momento il regime linguistico dell'allora Comunità Economica Europea (CEE) trovò riconoscimento nel Trattato che la istituì7, il cui testo, tuttavia, venne a sua volta negoziato e redatto in francese.

L'esperienza europea ha quindi origine sotto il segno del monolinguismo, con la scelta della lingua che all'epoca costituiva l'idioma di riferimento della diplomazia europea.

Così, il Trattato istitutivo della CEE parla la lingua dell'aristocrazia, dei salotti, sceglie la *koinè* internazionale. Inevitabilmente, le parole dei Trattati trasmettono una visione strutturale e culturale delle cose "alla francese", un modo di vedere il mondo che pare avere il suo punto di osservazione a Parigi.

Di questa visione, traccia permanente è l'impianto dei Trattati, che si ispira al diritto pubblico francese e solo in piccola parte a quello tedesco, limitatamente all'esperienza della suddivisione dello Stato in Federazione e Länder.

In alcuni passaggi lo stesso linguaggio del diritto primario sembra formulato "a colpi" di prestiti e metafore, evocativi di simbologie francesi non del tutto innocue nelle loro conseguenze giuridiche. Fra queste spicca la parola "Parlement", prestito con forte valenza evocativa di un potere dello Stato che in Francia è emblema di democrazia e rappresentanza del popolo.

Tuttavia, come è noto, nel Trattato di Roma l'istituzione "Parlamento" è ben presto sinonimo di deficit democratico, non avendo l'istituzione europea significativi poteri in ambito legislativo. La parola "Parlement" nasconde quindi una vera e propria insidia ermeneutica, che finisce per distorcere il significato di un concetto giuridico cardine del diritto costituzionale francese e della sua funzione conoscitiva, che affonda le sue radici nella Francia della separazione dei poteri di Montesquieu. Come è noto, solo con il Trattato di Lisbona[8] e il rafforzamento della procedura di co-decisione questa istituzione ha acquisito maggior potere legislativo.

Ulteriore esempio sono le parole francesi *règlement* e *directive* (*regolamento* e *direttiva)*, scelte linguistiche che intendono introdurre una sorta di gerarchia tra le suddette fonti europee. Anche in questo caso, di là del potere evocativo, questo rapporto gerarchico non ha trovato riscontro sul piano giuridico nel diritto europeo; allo stato, ad esclusione dei criteri di specialità e successione nel tempo tra norme di pari rango, nei Trattati non è dato individuare un ordine di priorità tra le fonti secondarie, né una scala di valori formali grazie alla quale una norma prevalga sull'altra. Lo stesso Trattato di Lisbona non enuncia alcuna disposizione che possa far pensare a fondamento normativo della subordinazione delle direttive ai regolamenti[9].

In via incidentale, è tuttavia utile ricordare che la funzione evocativa della lingua dei Trattati non debba essere sottovalutata: si pensi solo a quale peso abbiano avuto nell'aggregazione del consenso sul testo del Trattato di Lisbona l'espunzione di elementi dotati di forte intensità emotiva quali la bandiera, l'inno e il motto europeo, originariamente previsti nel testo dell'abortita Costituzione europea.

Di matrice francese sono inoltre alcuni principi ispiratori che si collocano alla base dei Trattati, come ad esempio la nozione "contrattuale", così definita da Michael Gaudet[10]: nei Trattati istitutivi delle istituzioni europee è infatti sotteso il concetto di "decisioni comuni", ossia di impegni assunti e portati a termine *insieme* dagli Stati membri[11].

---

[6] Trattato istitutivo della Comunità Europea del Carbone e dell'Acciaio (CECA), firmato a Parigi, 18 aprile 1951, entrato in vigore il 23 luglio 1952 (estinto il 23 luglio 2002).

[7] Trattato Istitutivo della Comunità Economica Europea (CEE), firmato a Roma il 25 marzo 1957, entrato in vigore il 1° gennaio 1958.

[8] Trattato sul Funzionamento dell'Unione europea, firmato a Lisbona il 13 dicembre 2007 ed entrato in vigore il 1° dicembre 2009.

[9] L'art. 288 TFUE, così come le norme primarie precedenti, consentendo l'emanazione di *Regolamenti* e *Direttive*, oltre ad atti non vincolanti quali *Decisioni*, *Raccomandazioni* e *Pareri*, si limita a definire le caratteristiche e gli effetti degli atti, ponendoli quindi implicitamente su di un piano di parità.

[10] Direttore generale dei servizi giuridici della CECA e della Comunità economica europea. Michel Gaudet ha fatto parte del Comité de Rédaction, organo al quale, parallelamente ai negoziati, era affidato il compito di redazione e di scelta dei termini giuridici, verificandone nel contempo la coerenza. G. BUSSAUT, *Interview with Michael Gaudet,* Voice on Europe collection, Historical Archives of the European Union, 10 gennaio 1998.

[11] Così ricorda Gaudet.

Il diritto dell'Unione europea, pragmaticamente, si è inoltre servito di "parole – immagine" persino al fine di orientare la gerarchia dei poteri all'interno delle costituende istituzioni, escludendola. A questo proposito, Gaudet ricorda come il messaggio sotteso alla parola "comunità" fosse quello dell'esistenza di domini nei quali il bisogno di sentirsi solidali e, di conseguenza, di agire in comunità fosse, e dovesse rimanere, la priorità. Questa comunanza di obiettivi e di ideali - una novità con pochissimi precedenti nel diritto internazionale - è così tracciata dalla parola "comunità", che ben presto sostituisce il termine "sovranazionale", inizialmente proposto nel corso dei negoziati.

3. *Il francese al comando*

Sul piano istituzionale, la lingua francese quale unica lingua *de facto* della Comunità economica europea è ben presto contestata. In seno alla Conferenza dei Ministri degli Esteri del luglio 1952, su richiesta del Governo dei Paesi Bassi, viene assunta la decisione di individuare le lingue ufficiali e di lavoro della neonata Comunità nelle lingue nazionali di ogni Stato membro[12]. Al testo francese si affiancano così le traduzioni in lingua tedesca, italiana e nederlandese, alle quali, tuttavia, non è attribuito valore normativo[13].

Il francese rimane così la "vera" lingua dei Trattati. Le altre lingue sono ancillari e il giudice, l'interprete, vi ricorre a conferma del significato della parola francese. Il problema delle possibili divergenze tra versioni linguistiche è attutito non solo in forza di un'inconsapevole sudditanza dell'interprete al francese, ma anche in ragione del limitato valore che all'epoca ancora si attribuiva all'attività di traduzione dei termini giuridici.

In questo procedere, l'interprete del Trattato è confortato dal clima dell'epoca in cui hanno vissuto i Padri fondatori dell'Europa unita. All'inizio del secolo scorso, la traduzione veniva infatti considerata compito strumentale ed esecutivo del giurista, in quanto si riteneva consistere semplicemente nel recitare in diverse lingue un concetto unico e translinguistico. Si traduceva il diritto in un clima "oggettivistico", nel quale il testo aveva un significato unico, appunto oggettivo, garantito dal valore stesso del concetto espresso dalla parola, seppur in diverse lingue [14]. Il concetto giuridico è quindi unico ed oggettivo, e, in quanto tale, capace di essere trasmesso attraverso le lingue senza perdere il significato originario[15]. Ne consegue che per l'interprete dell'epoca le lingue dei Trattati diverse dal francese trasmettono la parola forgiata in quella lingua.

Anche le caratteristiche della lingua francese rafforzano questo pensiero: il francese dell'epoca è lingua franca, internazionale, ma è non il *globish*[16] che oggi è l'inglese. Il francese è la lingua della Francia e del *Code Civil* e, come tale, ne riflette il prestigio.

In questo clima confortante, il francese mantiene così stretto il ruolo di lingua di riferimento del testo del diritto primario, almeno fino al Trattato di Maastricht (1992)[17]: le norme continuano ad essere redatte in francese e il testo rimane la versione di riferimento per le altre lingue, seppur su di un piano non ufficiale, bensì per semplice prassi. Simmetricamente, il linguaggio dei negoziati rimane il francese.

A far data dal Trattato di Amsterdam (1997)[18] a questa lingua si affianca l'inglese[19].

L'allargamento ad est dell'Unione rende l'inglese necessario, ma segna l'entrata di altre lingue nella stanza dei bottoni. La lingua dei Trattati si attualizza, aggiungendo nuovi idiomi. Le lingue cambiano *la parola.*

Un esempio significativo è il termine "Mercato comune", che non solo simboleggia, ma etichetta giuridicamente quello che rappresenta l'obiettivo primario del Trattato. Nel corso del tempo, e dei Trattati, aumentano le competenze dell'UE, le lingue e così il divario tra *parola* ed espressione linguistica. E il tessuto

[12] D.E. TOSI, *Diritto alla lingua in Europa*, Torino, 2017, p. 319.

[13] Idem, p. 319.

[14] *Ibidem*.

[15] R. SACCO, *Dall'interpretazione alla traduzione*, in E. IORIATTI FERRARI (ed.), *Interpretazione e traduzione del diritto*, Padova, 2008, p. 5. Fra gli avvenimenti che hanno favorito l'abbandono dell'idea che il testo abbia un solo significato oggettivo vanno ricordate la linguistica strutturale di Ferdinand De Saussurre e l'ermeneutica di Gadamer e di Esser, *Ibidem*.

[16] D. DI MICCO, "Voce" *Globalizzazione*, Digesto IV, Milano, 2013.

[17] Trattato sull'Unione europea (TUE), firmato a Maastricht il 7 febbraio 1992 ed entrato in vigore il 1º novembre 1993.

[18] Trattato di Amsterdam, che modifica il trattato sull'Unione europea e i trattati che istituiscono le Comunità europee, firmato a Amsterdam il 2 ottobre 1997 ed entrato in vigore il 1° maggio 1999.

[19] Dato riferito da Manuela Guggeis. La fonte è Teresa Blanchè collaboratrice di Jen-Claud Piris, redattore Trattato di Lisbona.

normativo del diritto primario si colma e si adegua aggiungendo parole nuove: non più Mercato Comune, ma Mercato Unico prima, Mercato Interno, poi.

Man mano anche i Trattati si impregnano di nuove lingue, le diverse versioni linguistiche strutturano le parole del diritto primario. È l'avanzata del multilinguismo.

4. Il multilinguismo effettivo

La letteratura specializzata[20] considera la formulazione del diritto in lingue diverse un obiettivo ideale, ma sfuggente. Si è consapevoli che, nella maggior parte dei casi, il tentativo di riprodurre i medesimi concetti in lingue diverse produca effetti giuridici uniformi del tutto relativi. In questo senso, il multilinguismo è tensione verso un diritto espressione di diversi linguaggi, non, di per sé, risultato. Ma pur sempre un passo avanti nel processo di creazione di un diritto unico europeo. La storia della lingua dei Trattati, che qui sopra è stata brevemente tratteggiata, dimostra quindi come un'importante conquista del multilinguismo effettivo è la sua capacità di sventare il rischio che la parola rimanga, de facto, mono lingua – francese – e che il diritto venga solo apparentemente espresso in lingue diverse.

Le lingue rappresentano un potere. È naturale che in qualsiasi confronto dialettico, la padronanza della lingua costituisce un vantaggio innegabile[21].

Il multilinguismo ha quindi la capacità di arginare gli effetti distorsivi che conseguono all'uso di una lingua prevalente; sa smantellare le parole che, grazie a questa lingua, sono inclusive della cultura giuridica e dei valori propri del sistema giuridico che si esprime in quell'idioma. Ulteriore effetto benefico del multilinguismo è quello di spezzare le dinamiche di potere che, nel corso dei negoziati, possano piegare il linguaggio e, di conseguenza, le scelte a vantaggio di chi utilizza la propria lingua madre.

Entrambi questi aspetti sono particolarmente importanti in riferimento al diritto primario, che formula norme destinate a lunga durata[22].

In questo contesto, il multilinguismo, come dato costitutivo fondamentale dell'Unione, declina così la protezione delle identità linguistiche e giuridiche nazionali[23], come contrappeso all'uso del francese nei testi dei Trattati.

Oggi che il francese - così come è stato per il latino e per molte altre lingue franche del passato - ha iniziato il suo tramonto a favore dell'inglese, il multilinguismo effettivo rimane garante di democrazia e di uguaglianza, nell'ineludibile presenza di una lingua prevalente.

5. L'Unione europea e la parola multilingue

L'Unione europea è un fenomeno interessante e originale, frutto di una situazione sociale, istituzionale e costituzionale in continua evoluzione[24]. Se osservato fin dalle sue origini, l'edificio europeo assomiglia ad un "cantiere" perenne, che appoggia le proprie fondamenta nella solida tradizione degli Stati membri e che edifica progressivamente un'architettura linguistico-giuridica[25] propria. Un ordinamento giuridico realizzato per tappe e per attribuzioni di competenze. E quindi proprio il dato della diversità linguistica non poteva non trovare, ben presto, evidenti riscontri nelle regole di funzionamento delle sue Istituzioni. È nato così il principio del multilinguismo, ai sensi del quale le lingue dei Paesi membri sono lingue ufficiali dell'Unione.

Questa plurale condizione linguistica dell'UE evoca l'idea della traduzione. Si immagina che ogni parola, ogni concetto siano il risultato di un'attività di traduzione, che avviene contemporaneamente, o quasi, in tutte

[20] C.D. ROBERTSON, *Multilingual Law. A framework for analysis and understanding,* London, 2016.

[21] S. VANVOLSEM, *Il multilinguismo come presa di coscienza e di identità*, in P. MARTINO (a cura di), *L'identità europea: lingua e cultura*, Roma, 2008, p. 110.

[22] A. GAMBARO, *Categorie del diritto privato e linguaggio delle Carte dei diritti fondamentali*, in *Riv. Dir. Civ*., 2016, p. 1225 ss. Diverso il discorso per il diritto secondario, che ha carattere frammentario, interventista, dettagliato e transeunte. In alcune aree del diritto UE, l'armonizzazione potrebbe non essere incompatibile con l'utilizzo di una sola lingua, franca. Una lingua *strumento.* Sul punto: E. IORIATTI, D. DI MICCO, *Language as a cultural and practical barrier*, in S. SEUBERT., F. VAN WAARDEN (eds.), *Barriers towards European Citizenship*, Aldershot, 2018.

[23] P.G. MONATERI, *Strategie e contrasti: diritto, lingua, identità nella crisi europea*?, in V. JACOMETTI, B. POZZO (eds.), *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento*, Milano, 2006, p. 306.

[24] J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione europea*, Bologna, 2013.

[25] D. MANF, K. MALACEK, É. MUIR, *Langues et construction européenne*, Bruxelles, 2010.

le lingue ufficiali, dopo una meditata ricerca della parola che costituisce il corrispondente funzionale in ognuna delle ventiquattro lingue ufficiali.

L'Unione europea rimanda così l'immagine del più raffinato ed efficiente laboratorio di traduzione del mondo.

In realtà la lingua dell'UE è frutto di un'operazione linguistica che vede una parola originale, già esistente in una lingua – spesso l'inglese - riprodursi in una serie di calchi semantici in tutte le altre ventitré lingue.

Un esempio è la parola inglese *globalization*, il cui calco tedesco è *Globalisierung*, l'italiano *globalizzazione*, lo spagnolo *globalizaćion* (il portoghese *globalização*, il russo - qui traslitterato a sua volta – *globalizatsiya* e molti altri esempi potrebbero seguire).

Per poter raggiungere una collettività così vasta e culturalmente variegata, l'Unione europea innesca così infiniti adattamenti linguistici, che vedono la parola originale riprodursi in una serie di calchi spesso così ben riusciti da sembrare presenti da tempo in ciascuna delle lingue importatrici.

Nel corso del tempo il legislatore europeo ha esteso questa stessa operazione linguistica alle parole del diritto[26], con la conseguenza che anche il linguaggio specialistico del diritto multilingue è formulato a mezzo di calchi semantici, sui quali il legislatore innesta un nuovo significato giuridico europeo. E così l'italiano *sussidiarietà*, il francese *subsidiarieté*, l'inglese *subsidiarity* e via di seguito, le altre lingue.

Il giurista comparatista denomina questa simmetria di effetti "traduzione garantita"[27] e attribuisce una corrispondenza permanente tra più espressioni giuridiche grazie a questo calco artificiale.

Il calco di una parola della lingua ordinaria porta con sé elementi di tipo culturale, che favoriscono l'assimilazione della nuova parola nella lingua nel quale è trasposta. Si può dire che, se l'operazione di assimilazione ha successo, la parola cammina con le proprie gambe e si diffonde in modo spontaneo, senza bisogno di alcun intervento da parte della collettività che la riceve.

Diversamente, a un calco della lingua giuridica – concetto conseguono uno o più effetti giuridici. A differenza delle parole della lingua ordinaria, il concetto giuridico europeo non cammina con le sue gambe, ma con quelle del giudice nazionale, tenuto a interpretarne il significato e ad applicarlo nell'ordinamento giuridico interno. Non è la prima volta nella storia che l'interprete è chiamato ad attribuire un significato, un effetto giuridico a un concetto che gli è estraneo, in quanto formulato al di fuori dei confini nazionali e che non riconosce nelle categorie giuridiche ordinanti che gli sono familiari e alle quali è stato formato.

Come insegna Rodolfo Sacco, ciò è accaduto, ad esempio quando, nel ventesimo secolo, gli italiani hanno imitato i modelli giuridici tedeschi. All'epoca il giudice italiano era facilitato nell'interpretazione dal fatto che la parola tedesca che esprimeva il concetto giuridico era legata a un'idea forte: una scuola prestigiosa e riconosciuta, la Pandettistica tedesca, elaborava concetti giuridici di nuovo conio, i neologismi. Ogni concetto veniva identificato con una parola, con precisione tale per cui ad ogni parola corrispondeva un unico concetto giuridico. La parola trasportava così un significato unico, garantito dallo stesso concetto giuridico espresso, che era quindi capace di passare indenne attraverso le diverse lingue[28]. L'esempio è un classico: "Rechtgeschäft", il cui neologismo in italiano è noto: "negozio giuridico".

Il cuore del problema dei concetti europei si trova qui: per poter trasmettere lo stesso concetto giuridico attraverso diverse lingue, una lingua giuridica presuppone un legame tra le parole e le idee[29].

È proprio ciò che non avviene nei concetti giuridici europei, termini di nuovo conio, che non fanno riferimento a un sistema giuridico preesistente, a una tradizione giuridica consolidata, e che non sono quindi radicati in un tessuto culturale di idee forti e stabilizzate.

E così, se osserviamo la lingua giuridica europeo dall'interno, orizzontalmente fra le varie lingue, la parola europea può trasportare concetti giuridici diversi a seconda del contesto nel quale è utilizzata dal legislatore. In un regolamento europeo la parola "danno" può significare "danno patrimoniale" in un diverso regolamento il significato può essere "danno patrimoniale e morale"[30].

---

[26] A. GAMBARO, *Jura et Leges nel processo di edificazione di un diritto privato europeo*, *Europa e Diritto Privato*, 1998, p. 993-1018. A. GAMBARO, *A proposito del plurilinguismo legislativo*, in *Rivista Trimestrale di Diritto e Procedura Civile,* 2004, p. 287-300.

[27] R. SACCO, P. ROSSI, *Introduzione al diritto comparato*, Milano, 2019.

[28] R. SACCO, *Language and Law*, in G. ZACCARIA, (Hrsg./ed.), Übersetzung im Recht / Translation in Law, in *Ars interpretandi,* 2000.

[29] Idem.

[30] E. IORIATTI, *Linguistic Precedent and Nomadic Meanings in EC Private Law*, in *Revista General de Derecho Pùblico Comparado*, 2009.

Se invece osserviamo la lingua giuridica dall'esterno, in senso verticale – ossia dall'Unione Europea, ove essa è formulata, verso gli Stati membri, nei quali produce effetti giuridici - la parola europea può non trasmettere un unico concetto giuridico: non portando con sé un significato oggettivo, gli interpreti, i giudici, tendono ad attribuirle un significato – e quindi effetti giuridici - diversi a seconde del contesto giuridico – culturale di riferimento.

La difficoltà di integrazione della parola europea negli ordinamenti giuridici nazionali è inoltre acuita dal fatto che gli istituti europei, a volte, possono venire disapplicati a livello nazionale, quasi fossero dei "trapianti concettuali", respinti con fenomeni di rigetto che ricordano la fisicità, e ai quali il mondo del diritto non è estraneo.

Un esempio è l'Africa. La colonizzazione ha imposto il Codice civile francese in alcuni Stati africani, modello che spesso è stato mantenuto anche una volta concluso il periodo coloniale; ma la quotidianità è largamente disciplinata dal diritto tradizionale, non garantito da alcuna fonte scritta. E così il risarcimento del danno subito non è riconosciuto in forza della norma del Codice civile a modello francese, bensì della "vendetta" ritualizzata, istituto del diritto tradizionale africano.

Anche gli istituti europei possono essere respinti dall'interprete. L'Europa ha creato il "mandato di arresto europeo"[31], istituto che impone che ciascuna autorità giudiziaria nazionale di riconoscere ed eseguire, dopo controlli minimi ed entro tempistiche rapide, la domanda di consegna di una persona che ha commesso un reato in uno Stato membro, domanda formulata dall'autorità giudiziaria del paese dell'UE dove la persona si trova[32]. In alcuni Stati, l'Italia fra questi, il mandato di arresto europeo è applicato in forza di norme giuridiche, ma altresì prassi burocratiche interne, che ne hanno svilito la corretta attuazione, sicché il "vecchio" istituto dell'estradizione ha continuato ad essere utilizzato in modo prevalente. Per lungo tempo il modello europeo è stato respinto, disapplicato, e la parola "mandato di arresto europeo" ha faticato a entrare a far parte del tessuto della lingua e della cultura giuridica italiana.

6. Law and language

In soccorso dell'interprete nazionale alcuni studiosi, sparsi nel mondo, si interessano al diritto multilingue. Oggetto del loro studio, del loro sogno, è creare le condizioni per cui la norma, accoccolata nelle diverse versioni linguistiche, possa essere interpretata ed applicata dalle corti nazionali in modo da produrre ovunque gli stessi effetti giuridici, da trasmettere gli stessi diritti. Una nuova disciplina sta nascendo, ha un nome inglese "Law and Language"[33], ma è un sapere con vocazione globale. Un sapere interdisciplinare, al quale contribuiscono linguisti, giuristi, cognitivisti, e funzionari coinvolti nel processo di redazione di norme multilingue e rappresentanti di altre discipline.

Un sapere intersistemico in quanto non osserva solo il diritto multilingue nella tradizione giuridica occidentale, ma in quella asiatica e in molte altre realtà, anche laddove la lingua dei segni è riconosciuta quale lingua ufficiale, come in Nuova Zelanda.

---

[31] Decisione Quadro2002/584/GAI del Consiglio dell'Unione Europea del 13/06/2002, in materia di mandato di arresto europeo e di procedure di consegna tra Stati membri.

[32] "*Decisione giudiziaria emessa da uno Stato membro dell'Unione Europea in vista dell'arresto di una persona, al fine dell'esercizio di azioni giudiziarie in materia penale o dell'esecuzione di una pena o di una misura di sicurezza privativa della libertà personale"*.

[33] C.J., BAAIJ, *Legal Integration and Language Diversity. Rethinking translation in EU lawmaking*, New York, 2018; I. SCHÜBEL-PFISTER, *Sprache und Gemeinschaftsrecht – Die Auslegung der Mehrsprachig verbindlichen Rechtstexte durch del Europäischen Gerichtshof*, Berlin, 2004; R. CREECH, *Law and Language in the European Union: The Paradox of a Babel "United in Diversity"*, Amsterdam, 2005; M. DERLÉN, *A Castle in the Air: The Complexity of the Multilingual Interpretation of European Community Law*, Umeå (Sweden), 2007; E. PAUNIO, *Legal certainty in multilingual EU law. Language, discourse and reasoning at the European Court of Justice*, Farnham, Surrey (UK), 2013; E. IORIATTI, *Interpretazione comparante e multilinguismo europeo*, Padova, 2013; E. IORIATTI, *EU Legal Concepts and Common Contexts of Meaning: Opening the Pandora's Box?*, in *International Journal for the Semiotics of Law*, 2022; S. VAN DER JEUGHT, *EU Language and Law, Europa Law Publishing*, Groningen (NL), 2015; C.D. ROBERTSON, *Multilingual Law. A Framework for analysis and understanding*, New York, 2016; J. ENGBERG, *Autonomous EU Concepts – Fact or Fiction?,* in S. ŠARČEVIĆ (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives*, Aldershot, 2015, pp. 169; C. BERGOMI, *Exploring Judicial Interpretation: Comparative Law Methodology and the Hybridisation Paradigm*, in *Global Jurist*, 2023. https://doi.org/10.1515/gj-2023-0119.

Un sapere che mette a disposizione gli strumenti delle sue diverse discipline, così da accrescere la conoscenza del linguaggio giuridico multilingue e la consapevolezza dei problemi che lo assediano. Fra questi problemi il più visibile, il più studiato è certamente quello terminologico, ossia il problema dell'interpretazione ed applicazione del concetto giuridico europeo negli Stati membri.

Gli studi hanno evidenziato come, in primo luogo, esista un rimedio naturale a questo problema: il tempo.

Molte volte si è assistito a un lento, discreto, ma infine definitivo adattamento del concetto europeo alla cultura giuridica dell'ordinamento nazionale di arrivo, e quindi nel suo linguaggio giuridico. Se il giurista italiano del secolo scorso non sentiva proprio il concetto europeo "responsabilità genitoriale", nato dal calco "parental responsibility", oggi applica con disinvoltura l'omonimo istituto, entrato ormai a far parte del reticolato normativo squisitamente nazionale, così come la parola europea che ad esso si riferisce fa ormai parte della lingua giuridica italiana.

L'Unione europea formula le parole del diritto attraverso un'operazione linguistica, creando calchi semantici che il giurista chiama neologismi. Questi neologismi, una volta lanciati negli Stati membri devono essere interpretati, applicati, a volte vengono respinti, insieme all'istituto al quale si riferiscono, ma spesso con il tempo la trasposizione ha successo e queste parole del diritto europeo vengono assimilate nel linguaggio giuridico nazionale e il significato, espandendosi a macchia d'olio, si armonizza orizzontalmente tra le diverse versioni linguistiche.

Come è stato dimostrato altrove[34], sotto la superficie del linguaggio giuridico dell'UE si intravedono così, norme giurisprudenziali comuni a diversi sistemi giuridici dell'UE, anche se incapsulate in modelli linguistici latenti. Queste norme rivelano contesti di significato comuni, attribuiti ai concetti giuridici dell'UE dai giudici nazionali o dai legislatori che recepiscono il diritto dell'UE, che sono più permanenti che visibili. Un flusso costante e dinamico tra le norme legislative sovranazionali e il profilo giuridico culturale di ciascun ordinamento, si presenta spesso come un elemento comune tra la parola europea e il suo significato in diversi ordinamenti nazionali.

Non è quindi, in assoluto, la traduzione a garantire che la parola europea sia tale in tutti gli ordinamenti giuridici nazionali, ma la sua assimilazione spontanea in un linguaggio che con il tempo diviene la narrativa comune dell'Europa.

Ne consegue che, a livello mondiale l'Unione europea non è forse "il" modello di traduzione giuridica, ma il processo di formulazione di una possibile, futura lingua giuridica dell'Unione europea è ormai divenuta un modello.

7. La lingua giuridica europea come modello

In Asia è da tempo allo studio la creazione di una lingua giuridica asiatica uniforme. Per questa ragione, alcuni anni fa, giuristi asiatici - cinese e giapponesi - hanno attraversato il globo per confrontarsi con la dottrina europea che si interessa al linguaggio dell'Unione europea[35]. Cina[36] e Giappone[37] hanno in comune con l'Europa il fatto di affidare la propria produzione giuridica alla forma scritta. Come è noto, questi ordinamenti ricorrono a due diversi sistemi di scrittura: ideografico i primi, fonetico la seconda. Gli ideogrammi compongono un sistema di scrittura nel quale le parole sono rappresentate da segni non correlati (o solo parzialmente correlati) al suono delle parole stesse; la comunicazione avviene quindi principalmente attraverso l'aspetto visivo. Nei sistemi fonetici, diversamente, le parole sono espresse attraverso la lingua.

---

[34] E. IORIATTI, *A Twenty-First Century Approach to Law and Language in Europe,* in O. MORÉTEAU and A. PARISE (eds.), *Comparative Perspectives on Law and Language*, Maastricht, 2022.

[35] "Comparing legal languages and creating common/uniform terminologies" incontro di studio tra comparatisti italiani e studiosi cinesi e giapponesi, Università di Bologna, Facoltà di Giurisprudenza, 2016.

[36] M. TIMOTEO, *Il diritto per immagini. Aspetti del linguaggio giuridico cinese contemporaneo, in B. POZZO (ed.), Lingua e diritto: oltre l'Europa*, Milano, 2014 pp. 83 ss. D. CAO, *Chinese law. A language perspective*, Aldershot, 2004; D. CAO, *Translating Law*, Bristol, 2007.

[37] Si veda A. ORTOLANI, *Riflessioni in materia di diritto e lingua in Giappone*, in B. POZZO (ed.), *Lingua e diritto: oltre l'Europa,* Milano, 2014, pp. 103 *et seq.* and A. ORTOLANI, *La lingua del diritto in Giappone*, in G. AJANI, A. SERAFINO, M. TIMOTEO (eds.), *Il diritto dell'Asia Orientale* (in *Trattato di Diritto Comparato* diretto da Rodolfo Sacco), Torino, 2007, pp. 24-43. I. KITAMURA, *La traduction juridique. Un point de vue japonais*, in *Les Cahiers de droit*, Vol. 28, No. 4 (1987), in *Materiali per una storia della cultura giuridica*, 2/2003, pp. 359-405 ; Y. HORIE, *The roots of Japanese legal terminology, Comparative Legilinguistics 4*, 2010, pp. 81 ss.

Nei due sistemi di scrittura, Asiatico ed Europeo, la formulazione della norma è quindi diversa tanto nella comunicazione (grafica o linguistica), quanto nel modo in cui il precetto viene comunicato (visivo o fonetico).

Ci si può allora chiedere sotto quale profilo ordinamenti giuridici che utilizzano sistemi di scrittura del diritto tanto diversi possano costituire reciprocamente dei modelli per la creazione di un linguaggio giuridico uniforme.

Ciò che accomuna i due sistemi è il ruolo attribuito alla forma nella comunicazione scritta del diritto multilingue, comunanza che emerge se osservata attraverso la semiotica. Questa scienza fa ricorso all'uso dei segni, intesi come immagini mentali che comunicano un significato.

È facile pensare agli ideogrammi che compongono una lingua giuridica asiatica uniforme in termini di segni (grafici) che complessivamente intesi portano con sé un unico significato. All'interno dei sistemi giuridici asiatici la creazione di una terminologia giuridica comune porta a un'esperienza specifica di uniformazione, in cui il ruolo dell'ideogramma è attribuire una forma grafica delle parole giuridiche (forma grafica del significante o significante del segno grafico) e di un nuovo concetto, (uniforme in quanto comune alle diverse lingue giuridiche cinese, giapponese...) che si suppone trasmetta lo stesso contenuto in tutte le versioni linguistiche.

A parere di chi scrive, anche i calchi semantici che compongo la lingua giuridica europea sono dei segni (linguistici) che, orizzontalmente, attraversano le ventiquattro lingue ufficiali[38]. Se osservati attraverso gli strumenti della semiotica, i termini giuridici dell'UE formano a loro volta un sistema orizzontale di segni linguistici, in cui ciascun segno veicola formalmente e idealmente lo stesso concetto giuridico, in quanto ognuno contiene un sinonimo interlinguistico. Tocca alla forma attribuire medesimo significato a ogni nuovo concetto multilingue, espresso in tutte le lingue ufficiali.

Indipendentemente dalla differenza tra il sistema ideografico e quello fonetico del diritto scritto, il linguaggio giuridico dell'UE e quello asiatico sono accomunati dal fatto che la forma, rappresentata da un segno linguistico o grafico, è parte della sostanza. Da un punto di vista linguistico sia i segni asiatici che quelli europei sono finalizzati a strutturare un significato giuridico, un meta-concetto[39], che trasmette la regola comune, uniforme e autonoma.

Se la lingua uniforme europea e asiatica è osservata da un punto di vista semiotico come insiemi di segni (fonetici o grafici) emerge che i problemi interpretativi ed applicativi che il giudice incontra in entrambi i continenti sono simili e possono essere studiati da giuristi con formazione molto diversa, in collaborazione, e da una posizione privilegiata di terzietà.

Gli asiatici hanno così imparato che le parole che compongono un linguaggio giuridico uniforme, anche se verranno rappresentate con un unico ideogramma, non trasporteranno un unico carico di significati oggettivi nelle diverse lingue, ma una ricca e molteplice varietà di sfumature.

L'esperienza degli europei ha anche chiarito che i segni sono contenitivi. Se non hanno un significato oggettivo, essi hanno, perlomeno, la funzione di escludere i significati che il segno linguistico o grafico lascia fuori dal proprio ambito semantico. Il giudice nazionale può non riuscire ad attribuire un significato giuridico certo alla parola europea "tort/delict", ma questo segno linguistico gli consentirà di muoversi all'interno di ambiti semantici e quindi categoriali conosciuti.

Sotto questo aspetto la lingua dell'Unione europea ricorda il sistema giuridico inglese, ove a partire dall'undicesimo secolo, il diritto è stato creato attraverso le parole formulate dai giudici e le parole sono gradualmente divenute sistema. Così oggi il giudice applica le parole del diritto inglese orientandosi nel sistema giuridico in base a come quelle delle parole sono state riprodotte nelle sentenze pronunciate in precedenza da altri giuridici.

Le corti degli Stati membri applicano le parole del diritto europeo orientandosi nel sistema giuridico in base a come quelle parole sono state riprodotte nelle diverse lingue. È la stessa Corte di Giustizia dell'UE ad insegnare alle corti degli Stati che il significato di un concetto europeo si evince dall'insieme delle parole di tutte le versioni linguistiche[40].

[38] E. IORIATTI, *EU legal language and comparative law. Towards a European Restatement?*, in *Global Jurist*, 21 (2), 2021, pp. 305–340, 2021.

[39] E. IORIATTI, *A Twenty-First Century Approach to Law and Language in Europe*, cit.

40 Case 283/81. Judgment of the Court of 6 October 1982. - Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health.

Ancora. Le lingue giuridiche cinese e giapponese si sono sviluppate, nel corso del tempo, attraverso mutua circolazione di modelli (ideogrammi), così come attraverso traduzioni infra e interlinguistiche[41]. Termini giuridici circolati dal cinese al giapponese e poi nuovamente dal giapponese al cinese. Termini che all'interno della stessa lingua (es. cinese) vengono ripresi e ad essi viene attribuito un diverso significato (come il termine *hexie*, armonia, ripreso da un concetto della antica tradizione cinese)[42].

Gli asiatici da tempo si esercitano ad inseguire il concetto, la norma giuridica, i significati giuridici impliciti attraverso gli ideogrammi. L'Europeo può imparare?

L'autrice di questo scritto, ha suggerito che esiste una scienza, la comparazione giuridica[43], attrezzata a ritrovare norme giuridiche smarrite in alcune versioni linguistiche, perché quella lingua non è attrezzata per esprimere quel meta - concetto, seppur la cultura giuridica che si esprime in quella lingua ben conosce quel concetto, quella norma, quell'istituto giuridico. Può allora accadere che una norma, un concetto, sia esplicito in una versione linguistica, è implicito in altre, anche se quelle culture giuridiche conoscono quel concetto.

La lingua dell'Unione europea è quindi un modello. L'Europa, contestata, lacerata, ma sempre unita nell'UE sembra avere ancora qualcosa da insegnare, sembra avere ancora *parole* da spendere.

Bibliografia

BAAIJ C.J., *Legal Integration and Language Diversity. Rethinking translation in EU lawmaking*, New York, 2018.

BERGOMI C., *Exploring Judicial Interpretation: Comparative Law Methodology and the Hybridisation Paradigm*, in *Global Jurist*, 2023. https://doi.org/10.1515/gj-2023-0119.

BUSSAUT G., *Interview with Michael Gaudet,* Voice on Europe collection, Historical Archives of the European Union, 10 gennaio 1998.

CAO D., *Chinese law. A language perspective*, Aldershot, 2004.

CAO D., *Translating Law*, Bristol, 2007.

CREECH R., *Law and Language in the European Union: The Paradox of a Babel "United in Diversity"*, Amsterdam, 2005.

DERLÉN M., *A Castle in the Air: The Complexity of the Multilingual Interpretation of European Community Law*, Umeå (Sweden), 2007.

DI MICCO D., "Voce" *Globalizzazione*, Digesto IV, Torino, 2013.

ECO U., *La ricerca della lingua perfetta nella cultura europea*, Bari-Roma, 2017.

ENGBERG J., *Autonomous EU Concepts – Fact or Fiction?*, in S. ŠARČEVIĆ (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives*, Aldershot, 2015.

GAMBARO A., *Jura et Leges nel processo di edificazione di un diritto privato europeo*, *Europa e Diritto Privato*, 1998, pp. 993-1018.

GAMBARO A., *A proposito del plurilinguismo legislativo*, in *Rivista Trimestrale di Diritto e Procedura Civile*, 2004, pp. 287-300.

41 M. TIMOTEO, *Il diritto per immagini. Aspetti del linguaggio giuridico cinese contemporaneo, in B. Pozzo, Lingua e Diritto, oltre l'Europa*, Milano, 2014.

42 Ibidem.

43 E. IORIATTI, *A Twenty-First Century Approach to Law and Language in Europe*, cit.

GAMBARO A., *Categorie del diritto privato e linguaggio delle Carte dei diritti fondamentali*, in *Riv. Dir. Civ.*, 2016, pp. 1225 ss.

HORIE Y., *The roots of Japanese legal terminology*, in *Comparative Legilinguistics 4*, 2010.

IORIATTI E., *Linguistic Precedent and Nomadic Meanings in EC Private Law*, in *Revista General de Derecho Pùblico Comparado*, 2009.

IORIATTI E., *Interpretazione comparante e multilinguismo europeo*, Padova, 2013.

IORIATTI E., D. DI MICCO, *Language as a cultural and practical barrier*, in S. SEUBERT., F. VAN WAARDEN (eds.), *Barriers towards European Citizenship*, Cheltenham, 2018.

IORIATTI E., *EU legal language and comparative law. Towards a European Restatement?*, in *Global Jurist*, 21 (2), 2021, pp. 305–340.

IORIATTI E., *A Twenty-First Century Approach to Law and Language in Europe*, in O. MORÉTEAU and A. PARISE (eds.), *Comparative Perspectives on Law and Language*, Maastricht, 2022.

IORIATTI E., *EU Legal Concepts and Common Contexts of Meaning: Opening the Pandora's Box?*, in *International Journal for the Semiotics of Law*, 2022.

KITAMURA I., *La traduction juridique. Un point de vue japonais*, in *Les Cahiers de droit*, Vol. 28, No. 4 (1987), in *Materiali per una storia della cultura giuridica*, 2/2003, pp. 359-405.

MANF D., K. MALACEK, É. MUIR, *Langues et construction européenne*, Bruxelles, 2010.

MONATERI P.G., *Strategie e contrasti: diritto, lingua, identità nella crisi europea*?, in V. JACOMETTI, B. POZZO (eds.), *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento*, Milano, 2006.

ORTOLANI A., *La lingua del diritto in Giappone*, in G. AJANI, A. SERAFINO, M. TIMOTEO (eds.), *Il diritto dell'Asia Orientale* (in *Trattato di Diritto Comparato* diretto da Rodolfo Sacco), Torino, 2007, pp. 24-43.

ORTOLANI A., *Riflessioni in materia di diritto e lingua in Giappone*, in B. POZZO (ed.), *Lingua e diritto: oltre l'Europa,* Milano, 2014, pp. 103 *et seq.*

PAUNIO E., *Legal certainty in multilingual EU law. Language, discourse and reasoning at the European Court of Justice*, Farnham, Surrey (UK), 2013.

ROBERTSON C.D., *Multilingual Law. A framework for analysis and understanding*, London, 2016.

SACCO R., *Language and Law*, in G. ZACCARIA, (Hrsg./ed.), *Übersetzung im Recht / Translation in Law*, in *Ars interpretandi*, 2000.

SACCO R., *Dall'interpretazione alla traduzione*, in E. IORIATTI FERRARI (ed.), *Interpretazione e traduzione del diritto*, Padova, 2008.

SACCO R., P. ROSSI, *Introduzione al diritto comparato*, Milano, 2019.

SAUSSURE DE F., *Corso di Linguistica Generale*, Bari-Roma, 2021.

SCHÜBEL-PFISTER, I., *Sprache und Gemeinschaftsrecht – Die Auslegung der Mehrsprachig verbindlichen Rechtstexte durch der Europäischen Gerichtshof*, Berlin, 2004.

TIMOTEO M., *Il diritto per immagini. Aspetti del linguaggio giuridico cinese contemporaneo*, in B. POZZO (ed.), *Lingua e Diritto, oltre l'Europa*, Milano, 2014.

TOSI D.E., *Diritto alla lingua in Europa*, Torino, 2017.

VAN DER JEUGHT S., *EU Language and Law, Europa Law Publishing*, Groningen (NL), 2015.

VANVOLSEM S., *Il multilinguismo come presa di coscienza e di identità*, in P. MARTINO (a cura di), *L'identità europea: lingua e cultura*, Roma, 2008.

ZILLER J., *Diritto delle politiche e delle istituzioni dell'Unione europea*, Bologna, 2013.

Lessons on legal bilingualism from Malaysia and beyond

Book Review: Language Choice in Postcolonial Law - Lessons from Malaysia's Bilingual Legal System by Richard Powell, Singapore: Springer, 2020. 300 pp.

***Alexander Teutsch*[1]**

When bilingual speakers are faced with the task of choosing a language while communicating, they might decide based on their ability to express a certain concept or perform a specific task better in one or the other language. Maybe their life experience will induce them to choose language A, while their education would tempt them to favor language B. Perhaps their interlocutor seems to prefer a specific language, the geographical area they are in is known to rather use one of the languages, or a particular topic is just so much easier to deal with in that specific language rather than the other.

In his book *Language Choice in Postcolonial Law - Lessons from Malaysia's Bilingual Legal System*, edited by Springer in 2020, Richard Powell aptly guides the reader through the complex reasoning and the multifaceted constrains concerning language choice in a postcolonial bilingual legal system. Needless to say, choosing a language in the realm of the law is far more intricate and involves vastly more variables and elements than the mere personal ability of expressing and understanding a specific language. This holds particularly truth when there is a disparity in status and use between two languages that have been in practice for decades or even centuries, as it is the case, in Malaysia, for the colonial language, English, and the most prominent of local languages, Malay. The former is an expression of a long-lasting legal tradition, the common law, with a consolidated and widespread terminology used in numerous jurisdictions all over the world, the latter is an attempt to "vernacularize" the legal system, i.e., operate a shift from an elite to a more widely spoken medium, as to make it accessible to as many citizens as possible.

It is this laborious attempt to vernacularize the Malaysian legal system and the opportunities and resistances it bears, that stand at the core of this book. In roughly 300 pages, divided into eleven sections, the author illustrates the many factors and actors involved in this intricate process by digging into the political, social, and economic discourse surrounding bilingualism in Malaysia, and contrasting it with everyday legal practice on the ground. Accordingly, after an introductory section, carefully laying down the theoretical concepts the analysis draws on, and the second section, providing an overview on Malaysian colonial history and its impact on ethnicity, language, and law, the following sections can be thematically divided into three parts.

Chapters three to six focus on the background of language use and its structural factors, being status, corpus, acquisition as well as discourse planning in the medium Malay. These chapters move from general linguistic issues to the particular aspect of legal language, and the impact political decision-making has on crucial topics, such as legal education or access to justice.

The following chapters, seven to nine, cover various settings, and show how legal vernacularization plays out in practice. The order of chapters can be seen as chronological: first, language policy and practice in legal education, where law is taught and apprehended; then, bilingualism in law offices, where legal concerns are discussed and thought through; finally, at the heart of the legal process, the place were legal matters are decided: courtrooms.

Methodologically, the book combines a rich wealth of disciplines, methods, and data, which makes this study robust and particularly valuable. It draws from and builds on studies conducted in sociolinguistics, language policy, and anthropology of language, among many others. The book combines a legal analysis of rules, guidelines, and court decisions concerning language use with a careful analysis of how these are construed and applied in legal practice. Therefore, next to an overview on the most relevant case law, which merely constitutes the background of the study at hand, an

[1] *Research and teaching assistant, Faculty of Law, University of Vienna, Austria, alexander.teutsch@univie.ac.at*

extensive amount of interviews with law students, law lecturers, attorneys, legal trainees, and administrators in legal affairs have been conducted. Moreover, a participant observation in Malaysian courtrooms was carried out to investigate language use during judicial proceedings. Finally, to reconstruct the political debate surrounding the development of language use in the legal realm, a careful analysis of national newspapers was inserted in the book.

Yet, the most informative and enriching part of the book comes at its end, as, in the last two chapters, the author embeds the meticulous description of bilingualism within the Malaysian legal system in a more global and comparative reflection. In Chapter 10, Powell shows common paths and issues faced by different multilingual jurisdictions worldwide, connected to the expansion of the common law and the postcolonial quest for vernacularization. By comparing several jurisdictions, India, Botswana, Canada, and Ireland, among many others, the chapter provides a thorough overview on status and corpus planning in LOTE (languages other than English) as well as their use in legal education. Also, common conceptions concerning aspects that hinder the use of LOTE, such as the inextricable link between the English language and the common law, and the persisting importance of English for legal research, are discussed.

While this could raise the assumption that the Malaysian case is not that special after all, potentially not even worthy of being investigated individually, Powell convincingly proves the opposite in the final section of the book. In section eleven, he links the general issues, faced by postcolonial settings on a global scale, back to the Malaysian context, and shows what can be learned from this particular legal system, by summarizing the main points highlighted in the previous chapters.

At the very end of the book, the author pauses to make the case for bilingual law, in a subsection titled “In Support of Bilingual Law” (subsection 11.7.). Here, he makes a quite accurate and alarming statement that sits well with the general approach of the book, i.e., contrasting the background of language use, represented by language policy, with concrete aspects of legal practice. He states (p. 290): “The status, and then the corpus, of legal languages are routinely prioritized over the needs of the people who use them”.

In fairness, however, this last subsection is actually the only minor pitfall of a quite impressive contribution, in that the case made for bilingual law is quite brief and draws on rather generalized remarks. To be sure, the book itself was never meant to be written “in support of bilingual law”, but rather to highlight the many lessons one might want to draw from a bilingual legal system, which it does more than adequately. Still, this final section could have profited from a more extensive elaboration on the benefits of a bilingual legal system as reflection of a bilingual culture, an aspect that otherwise emerges quite clearly throughout the book.