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Editorial

"Comparative law is the disciplined, sensitive search for knowledge, is a particular way of finding out about others and ourselves".[1] *Bernhard Grossfeld* thus begins his masterly work on comparative legal semiotics. It is a unique journey into our world of languages and other sign systems (numbers, music, digital patterns), their cultural meaning and virtuality. *Grossfeld* invites us on that journey with the book title "Dreaming Law". This may sound astonishing. Law (German: *Recht*) and dream (*Traum*), two peculiar components and customary opposites, a common dimension: maybe the law as a dream?

Let us look to the courts, the great theatres of the law; and to illusions about the English language that fills the world with words. In order to "put the case", lawyers, like actors in a Shakespearian comedy or in ancient Athenian tragedies, had to learn the art of rhetoric and of performance.[2] In ancient Rome it was said that in court it is not the law that is disputed, but words. If you take a look today at the workshops of legislation (parliaments), bureaucracy (administrations) and jurisdiction (courts), you gain the impression that it is still all about "words & phrases". But of course, it is about much more. Remember the *septem artes liberales*, the epitome of education (of a "free man") as the pursuit of comprehensive knowledge, leading to the faculties of theology, jurisprudence and medicine.

So it is about the entirety. As *Johann Wolfgang Goethe*, the poet and jurist, put it timelessly in his "Faust": What holds the world together at its core. The tragedy of man in his search for knowledge in order to peacefully and sensibly organise the chaos of the world, to shape it entrepreneurially, on a small and a large scale. The articles in this issue of the CLL bear witness to this.[3] *Eduardo Tadeu Roque Amaral* addresses the issue of gender prejudice and discrimination by examining the linguistic and legal aspects of the inclusion of the preferred name (Brazilian Portuguese *nome social*) in the Brazilian legal system. *Cinzia Piciocchi* deals with the intensification of the legal protection of animals and its expansion into the different areas of the law, also running through definitions.

Ivo Petrů regards the institutional multilingualism in the European Union, which is dominated by one working language (English) despite 24 official languages with equal rights, as unlawful and in contradiction to European integration.[4] *Morad El Kadmiri* argues about semantic discordances in defining comparative law. *Filipe Venade de Sousa* addresses sign language comparatively as a *tertium genus* that specifies issues inherent to sign languages based on legal circumstances related to the rights of deaf people. *Michiel Luining* and *Aleksandra Kubinska* explore the reciprocal relationship between law and history, elucidating the influence of historical beliefs and narratives on political and legal decision-making according to modern examples in Hungary and Poland, two EU members.

[1] B. GROSSFELD, *Dreaming Law: Comparative Legal Semiotics*, Frankfurt, 2010, p. 1.
[2] P. ACKROYD, *Shakespeare: The Biography*, New York, 2006, p. 233.
[3] This issue is the result of a call for papers for young scholars. All articles published in this issue have undergone the standard double-blind peer review procedure.
[4] Cf. C. LUTTERMANN and K. LUTTERMANN, *Towards peace in Europe: on legal linguistics, prosperity and European identity – the European Reference Language System for the European Union*, in 6 *International Journal of Legal Discourse* 2021, pp. 7 - 41. Basic C. LUTTERMANN and K. LUTTERMANN, *Sprachenrecht für die Europäische Union*, Tübingen, 2020.

Comparative law, like any law, is about humanity, the basis of law, as *Albert Schweitzer* put it: "I am life that wants to live amongst of life that wants to live". Reconciling people and the environment. In the sense of jurisprudence, this means: law is practised ethics.[5] So that peace does not, as *Erasmus* teaches us, continue to wander around homelessly.[6] It is a rocky road, like *Dante's* journey through hell to righteousness (*Rechtschaffenheit*, Italian *rettitudine*). Reality and fiction go hand in hand, as with the legal person (corporation): a creation of the law and the epitome of our business world, which no one has ever seen – virtual reality. So what about peace? A common dream, which we can (only) realise together through the law.

Prof. Dr. Claus Luttermann (Catholic University of Eichstätt-Ingolstadt, Germany)

[5] C. LUTTERMANN, *Recht als praktizierte Ethik und unternehmerische Verantwortungskultur*, in E. WEBER (Ed.), A.SCHWEITZER – *Hundert Jahre Menschlichkeit: Spital Lambarene* (1913–2013), 2013, 74-76.
[6] *Erasmus of Rotterdam*, Querela Pacis, 1517, decorated with woodcuts after *Hans Holbein the Younger*.

Comparative Law and Language

Decoding sign language legal status: exploring a distinct category (or *tertium genus*) between recognition and officiality

A comparative analysis

Filipe Venade de Sousa [1]

Abstract: In various countries, languages that qualify as "recognised languages" are enshrined in their respective legal frameworks. This designation remains abstract and indeterminate, making it a challenge to precisely define the official status of such recognised languages, particularly in the case of sign languages. The analysis of various legislation related to sign languages highlights commonalities in the formulation of national laws in how they uphold fundamental principles. Sign languages may or may not benefit from features of linguistic officiality, both formally and materially, compared to officially proclaimed spoken languages. Additionally, sign languages align with distinctive elements of linguistic minority rights. In other words, they are not clearly qualified as genuine official languages, like spoken languages, and simultaneously, are not expressly considered minority languages, despite some analogies. It is argued that it is feasible to develop a legal theory called *asymmetric linguistic officiality of sign language*. Regarding the legal statuses of sign languages, treating them as a third legal category of linguistic officiality in an intersectional sense or, better yet, addressing them as a *tertium genus* that specifies issues inherent to sign languages based on legal circumstances related to the rights of deaf people.

Keywords: Sign language, Official language, recognised languages, *tertium genus*, Legal typology.

1. Introduction

Many countries enshrine in their respective legal frameworks languages qualified as official. Indeed, the notion of an official language is variable and subject to diverse legal and constitutional realities. Constitutions of different states provide for the definition of the official language or other terms materially equivalent to official languages. We observe that, in the field of studies related to language legislation, we can identify at least two basic legal categories commonly classified by the legal systems of various states. The first category, as a fundamental element of the state, pertains to linguistic officiality, which declares languages officially recognised with reinforced normative characteristics. Numerous constitutional references exist for languages considered official. The second category pertains to the legal status of regional and minority languages, possessing specific normative characteristics that have legal effects in certain contexts. And what about sign languages? In various European countries, when establishing legal frameworks for sign languages a "sign language" will encompass linguistic aspects to justify legal classification. Recent legislative developments in this area prompt reflections on their legal implications. National legislation however does not always qualify what the legal recognition of sign languages entails. Sign languages may (or may not) benefit from some features of linguistic officiality, compared to officially proclaimed spoken languages, and they also echo the

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characteristic elements of linguistic minority rights. In other words, sign languages are not clearly qualified as a genuine official language like spoken languages, and simultaneously, are not expressly considered a matter of minority languages, despite similarities. Examining the legal status of sign languages is necessary to determine whether a third category - to include "recognised languages" - exists and to understand its true essence in legal terms. It is therefore posited that this third category is a *tertium genus*: linguistic officiality in an intersectional sense.

Whether the third legal category, in the case of sign languages, can constitute a sufficiently grounded legal concept based on the fundamental principles inherent to linguistic officiality gives rise to a pertinent question. Is there a common denominator in the substantive notion of linguistic officiality for sign languages? To answer this question, studies conducted by RUIZ VIEYTEZ[2] and PONS PARERA[3] serve as a starting point for the analysis of legal frameworks related to sign languages in Europe. The various linguistic categorizations applied to spoken languages in the European context are relevant, enabling the classification of legal statuses attributed to sign languages.

We perform a comparative analysis of the legal statuses of sign languages in Europe, especially in legal typology (referring to the legal classification that qualifies various legal categories: official language, officially recognised language, or simply recognised language). We refer to legal sources in the European context to study the inherent meanings of legally proclaimed sign languages and the terminological diversity of the various legal and constitutional realities of countries that are part of the Council of Europe, to provide a comprehensive overview. Not only that, but we also systematize a common denominator of the officiality of sign languages formally recognised by the respective State with its own constitutional, legal, or regulatory nature. However, the categorization and legal identification of sign languages tend to be complex, particularly concerning recognition and official status, and this complexity is evident in different legal approaches where the status of sign language varies, raising questions about its equivalence to spoken languages and its official recognition. This investigation seeks not only to clarify the diversity of legal terms, but also to understand the criteria and concepts underlying the legal classification of sign languages in Europe. *Quid iuris?*

2. Preliminary conceptual considerations

The Convention on the Rights of Persons with Disabilities (the Convention) provides, in its article 21(b)(e), the relevant legal framework to clarify the meaning and legal nature of sign languages. This article carries a series of essential legal implications. In relation to the concepts of legal recognition and linguistic officiality that originate in the Convention, SOUSA affirms the use of these concepts in the context of sign languages.[4]

2.1. Legal recognition

The concept of legal recognition is a polysemic, evolving, dynamic, and multifunctional notion, dependent on the sociopolitical, sociocultural, and sociolinguistic circumstances of respective national legal systems.[5] According to the political competences of the respective States, these legal systems may declare and regulate potential legal frameworks for languages. Legal recognition of sign languages is, by its nature, a specific legal category, according to the Convention and national legal systems. This recognition involves the declaration,

[2] E. J. RUIZ VIEYTEZ, *La regulación constitucional del hecho lingüístico en Europa*, Revista de Llengua i Dret, Journal of Language and Law, 80, 2023, 193-205; E. J. RUIZ VIEYTEZ, *Lenguas y Constitución. Una visión del derecho lingüístico comparado en Europa*, Revista Vasca de Administración Pública, 72, 2005, 231-275.

[3] E. PONS PARERA, *L'oficialitat lingüística. Declaracions constitucionals i implicacions jurídiques i pràctiques*, Generalitat de Catalunya, Departament de Cultura, 2015.

[4] F. V. SOUSA, *Essential framework of the legal status of sign language: recognition and officiality*, in *Revista de Llengua i Dret*, 2022, 177-193.

[5] E. J. RUIZ VIEYTEZ, *op. cit.*, 193-205.

confirmation, and acknowledgment of the legal-linguistic reality of sign languages that are formally incorporated into the legal framework of the respective State. Consequently, legal recognition commits to shaping the potential legal status that regulates, defines, and determines the meaning and function of sign language. Thus, the legal recognition of sign languages is fundamentally characterized by the formal declaration of the State in the legislation concerning sign language and by the realization and implementation of the rights consecrated by this legal recognition declaration.

For a better understanding, the fundamental concept of legal recognition of sign language consists of affirming that it is a manifestation (or materialization) of state intentions, whereby the State declares and determines, through various legal sources, *a priori*, the meaning, scope, and effectiveness of the legal status of this language in accordance with its legal system.[6] Legal recognition of sign language has, at least, as its ultimate purpose its formal incorporation into the legal system that ensures and identifies the creation of necessary conditions to attribute the set of rights and obligations within the framework established by the State for this purpose.

Legal recognition is considered a *conditio sine qua non* for the state declaration regarding the legal status of sign language. In other words it is a fundamental, nuclear, and unconditional prerequisite for the state's assertion to establish the meaning and scope of sign languages' legal status.[7] The declaration of recognition can be *explicit* (wherein the State formally incorporates sign language into its legal system) or *implicit* (where despite not being formally consecrated, the State promotes and supports affirmative measures for the language, notably by fostering its learning within the educational system, for example).[8] The fundamental conceptual characteristic of this legal recognition lies in the state´s intentions to adopt, through available means, necessary measures in favour of a language with appropriate and effective legal treatment. [9]

2.2. Linguistic officiality

The conceptual characteristics of the legal recognition of sign languages naturally encompass the various types, degrees, and levels of legal protection granted. This necessarily implies the meaning and scope of linguistic officiality.[10] The multi-level and multifunctional concept of linguistic officiality is equally polysemic since it holds diverse meanings and scopes to meet the necessary condition of being an official language, contingent upon the sociopolitical and legal circumstances of their respective national legal systems, like the declaration of legal recognition. Therefore, the necessarily multifunctional and multi-level concept of linguistic officiality aims for the legal materialization of a legal framework to confer the necessary conditions for language functions (*e.g.* existence of standards that are sufficiently clear and objective to make the use of the language applicable with practical effects and, also, availability of necessary resources to comply with duly established legal parameters). In essence, linguistic officiality can be understood as follows: initially, the legal materialization of recognition aims at the officialization (*e.g.* legal formalization) of the status of sign language within the legal framework.

RUIZ VIEYTEZ writes that officialization is a "process of legitimization and institutionalization" of the respective language.[11] Furthermore, he considers that the officialization process "continues to be the most relevant political choice that law can make in favour" of that language.[12] In other words, *officialization* is the

[6] F. V. SOUSA, *op. cit*., 177-193.
[7] Ibidem.
[8] M. DE MEULDER, J. J. MURRAY; R. L. MCKEE, *The Legal Recognition of Sign Languages - Advocacy and Outcomes Around the World*, Bristol, 2019.
[9] F. V. SOUSA, *op. cit*., 177-193.
[10] Ibidem.
[11] S. MAY, *Language and minority rights. Ethnicity, nationalism and the politics of language*, New York, 2012, 161.
[12] E. J. RUIZ VIEYTEZ, *op. cit.*, 199.

political option. Officialization entails the "legal-linguistic accreditation"[13] of the meaning and legal nature of sign language. It implies a "metamorphosis or elevation of the formal status of the language through the legal system to that of a complete language,"[14] endowed with legal-linguistic capacity to be a fully-fledged language. Furthermore, it not only involves officialization, but also requires a material dimension - that is, the legal content of the established norms that regulate the set of rights of speakers and obligations of public authorities - strictly linked to the substance of linguistic officiality. Thus, linguistic officiality aims to establish essential conditions, namely effectiveness and applicability, enabling sign language to fulfil its functions. In other words, the functions mandated by law represent a legal acknowledgment of sign language as a language endowed with the necessary capabilities to become fully applicable, empowering it to produce practical effects across different social domains.

We identify constitutive characteristics of linguistic officiality: *(i)* the *substantive* dimension of officiality holds both positive and negative aspects. The positive aspect encompasses the formal declaration of sign language usage in various domains, legitimizing it as an authorized means of communication recognised by state authorities. The negative aspect defines the obligations of speakers to use the language in specific contexts as determined by legislation. And *(ii)* the *nominal* dimension of officiality refers to the categorization of the language by state authorities through legislation as an "official language" or "national language". This categorization influences the substantive meaning of officiality, allowing for different normative modulations based on specific circumstances of the declared languages.

The fundamental conceptual characteristics of legal recognition and linguistic officiality of sign language can be summarised as follows: legal recognition implies the existence of the finalistic element (*i.e.*, the object of legal recognition) in the legal-linguistic declaration of this recognition, whereby the immediate purpose of legal recognition of sign language consists of the formal incorporation of sign language into the legal framework, acquiring, *ex vi legis*, the functional conditions for the exercise of sign language use in various domains. On the other hand, linguistic officiality involves the primarily teleological element (*i.e.*, the aim of legal recognition) that provides for, *de jure et de facto*, the effectiveness of legal conditions to develop its attributed functions in various domains. In other words, legal recognition entails a generally finalistic treatment of the object concerning sign language issues, whereby linguistic officiality deals with the substantive issues of 'which' in defining its legal status and 'how' the nature and effectiveness of this legal status is to be implemented.

Therefore, it is evident that the concept of an official language is variably understood according to respective national legal systems. In general, concerning sign languages, in compliance with the Convention, the fundamental notion of an official language implies the existence of officiality (formal and/or material) of language use in various domains. On one hand, *formal officiality* refers to the legal status of sign language, determined and categorized by the national legal system, treated as an official language or other equivalent terms, provided it holds an official character with full juridical efficacy. On the other hand, *material officiality* implies that the legal status of sign language is determined according to the normative circumstances that provide for the legal content relating to obligations of public authorities and, above all, the different rights of speakers who can use the language in different domains.

3. Legal treatment of sign language

As previously mentioned, legal categorization is one of the various facets of the materialization of legal status that necessarily involves the formal issue of officialization, that is, defining the legal meaning of sign language as a precursor to its elevation to a legal-linguistic category and the formal sense and function assigned

[13] F. V. SOUSA, *op. cit*., 177-193.
[14] Ibidem.

to the language.

RUIZ VIEYTEZ[15] and PONS PARERA[16] outline various categories of recognised languages. The essential concept of linguistic categorization lies in asserting that it is a normative clause of diverse nature, whether constitutional, legal, or regulatory, that expressly or implicitly proclaims a specific legal category inherent to the respective language. In the case of spoken languages, various legal categories are found, including 'official language,' 'national language,' and 'state language'.

The consideration of sign languages in national legislation allows for a comparative and analytical understanding of the legal norms present in respective States and provide for a classification of legal categories attributed to sign languages and their inherent contents, and the author has undertaken such an exercise to determine the various legal categories used by States.

Table 1 provides a list of States that classify their national sign languages as either an 'official language,' a 'national language,' or as a 'means of communication,' and the year of officiality.

Table 1

Official Language Officially Recognised	Malta (2016) Lithuania (1995)
Recognised Language	Albania (2014) Belgium (Flemish Sign Language, 2006; Sign Language of French-speaking Belgium, 2003; German Sign Language, 2019) Bosnia and Herzegovina (2009) Bulgaria (2021) Cyprus (2006) Denmark (2014) Germany (2002) Greece (2000, 2017) Finland (1999, 2015) França (2005) Hungary (2009) Ireland (2017) Iceland (2011) Italy (2021) Latvia (2000) Luxembourg (2018) Norway (2022) Netherlands (2021) Poland (2011)

[15] E. J. RUIZ VIEYTEZ, *op. cit.*, 196-199.
[16] E. PONS PARERA, *op. cit.*, 2015.

	Portugal (1997) United Kingdom (2022) Romania (2020) Serbia (2015) Spain (Spanish Sign Language 2007; Catalan Sign Language 2010) Sweden (2009)
Means of Communication	Czech Republic (1998) Croatia (2015) Slovenia (2002) Slovakia (1995, 2017) Moldova (2012, 2014) North Macedonia (2009)

Table 2 sets out equally relevant categories that complement or clarify the multiple meanings of recognised language. This will allow us to consider the possibility of establishing a third intersectional category resulting from the normative intersectionality between the legal categories of official languages and minority languages.

Table 2

National Language	Norway (2022)
Natural Language	North Macedonia (2009) Slovenia (2002) Slovakia (1995, 2017)
Primary Language Main Language	Iceland (2011)
Own Language Specific Language	Belgium (Flemish Sign Language, 2006; Sign Language of French-speaking Belgium, 2003; German Sign Language, 2019) Spain (Catalan Sign Language 2010)
Independent Language Full-fledged Language Language in its Own Right	Austria (2005) Belgium (German Sign Language, 2019) Bulgaria (2021) Denmark (2014) Germany (2002) Estonia (2011) Finland (1999) France (2005)

	Hungary (2009) Luxembourg (2018) Romania (2020)
Minority Language	Hungary (2009) Romania (2020) Serbia (2015)
Native Language Mother Tongue First Language	Croatia (2015) Ireland (2017) Iceland (2011) Lithuania (1995) Romania (2020)

Having examined the most common aspects of the legal categories classifying the diverse legal statuses of sign languages, national legislation has introduced various terms or seemingly linguistic expressions such as 'mother tongue,' 'native language,' and 'primary language.' However, do these linguistic expressions have legal consequences in terms of their legal significance? Are these expressions comparable to the legal concept of official status (or official language or language)? The next step is to consider the legal approaches of States,[17] and the different meanings they use to deal with legal recognition and linguistic officiality.

3.1. Eastern Europe[18]

In Bulgaria, the law recognizes sign language as an "independent natural language". [19] The main objective of this law includes, among other goals, the "recognition of Bulgarian sign language as an independent natural language".[20] Thus, Bulgarian law categorizes sign language as an "independent language" that has essential similarities to the concept of linguistic officiality.

In the Czech Republic, its law categorizes sign language as "the basic communication system of deaf individuals in the Czech Republic, considering it their primary form of communication".[21] Furthermore, it considers this language as a "natural and complete communication system"[22], and consequently states that "Czech Sign Language has basic language attributes, such as gesturality, systematicity, dual segmentation, productivity, originality, and historical dimension, being stable in terms of lexical and grammatical aspects".[23]

In Hungary, Article H of the Hungarian Constitution declares that the Hungarian language is the 'official language.' Simultaneously, the same Constitution introduces a clause for the protection of Hungarian languages. It specifically declares Hungarian Sign Language as a 'part of Hungarian culture,'[24] and

[17] The group of European countries is usually identified by the United Nations only for investigative purposes and not for geopolitical reasons. We selected, whenever possible, legislative materials found from some – and not all – European countries - with different original translations to understand their meanings.
[18] Bulgaria; Czechia; Hungary; Poland; Republic of Moldova; Romania; Slovakia.
[19] Article 1(1) (our translation).
[20] Article 6(1) (our translation).
[21] Section 4(1) (our translation).
[22] Section 4(2) (our translation).
[23] Section 4(2) (our translation).
[24] Article H(3) (our translation).

'recognizing the cultural and community-forming power of sign language, in order to establish the language rights of the hearing impaired and deaf-blind individuals and to ensure their equal access to public services.'[25] The object of legal recognition is to enhance the 'linguistic status of Hungarian Sign Language,'[26], and 'Hungary recognizes Hungarian Sign Language as a natural and independent language.'[27] However, it does not explain what the legal category of sign language is and whether it holds equal legal status as the official language. It is not clear whether Hungarian Sign Language has implicitly received, if not expressly, linguistic officiality.

Poland's case has some similarities to the Czech case. Polish law defines sign language as the "natural visual-spatial communication language for eligible individuals," *i.e.,* those "experiencing permanent or periodic difficulties in communication" eligible to use Polish sign language.[28]

Moldovan law refers to Article 21 of the Convention to include the same norm that recognizes and promotes "mimic-gestural language".[29] This legal framework is complemented by specific regulations that doubly categorize the status of the language: "The state, through current legislation, recognizes and promotes mimic-gestural language/sign language as a means of communication among individuals".[30]

In Romania, the law recognizes Romanian sign language as the "specific native language for deaf and/or hearing-impaired individuals"[31]. It also has a definition that characterizes Romanian sign language as an "independent language". This term is seen as a linguistic notion explaining that the language is characterized by various linguistic, lexical, and grammatical parameters. The law further states that "Romanian sign language" represents a "communication tool, a thinking tool, a learning tool, as well as an identity-building tool".[32] Moreover, it recognizes the deaf community using Romanian sign language as a "linguistic and cultural minority with the right to use, preserve, develop, and maintain deaf culture, to enhance and inherit their own mother tongue".[33]

In Slovakia, the law "respects and supports the linguistic and cultural identity of the deaf community and values its contribution to societal development. The goal of the law is to establish the use of sign language as the communication form of the deaf, thus ensuring conditions for its application in society".[34] In other words, Slovak sign language is the "communication form of the deaf." Additionally, Article 3 regulates sign communication forms: sign language is "a concrete realization of the sign language system"[35]; and, furthermore, it defines Slovak sign language as a "communication form used by deaf individuals in the Slovak Republic"[36], further categorizing it as the "natural language of the deaf community"[37]

3.2. Northern Europe[38]

In Denmark, Danish Sign Language is formally recognised in (functional) linguistic legislation, although the legal characterization of sign language is not defined in its legislation, which governs the attributions of

[25] Preamble, Act CXXV of 2009 (our translation).
[26] Section 1 (General provisions), Act CXXV of 2009 (our translation).
[27] Section 3(1), Act CXXV of 2009 (our translation).
[28] Article 3(2) (our translation).
[29] Article 25(1)(7)(8) (our translation).
[30] Chapter I(2) (our translation).
[31] Article 1 (our translation).
[32] Article 2(h) (our translation).
[33] Article 3 (our translation).
[34] Article 1 - Introductory provision (our translation).
[35] Article 3(1) (our translation).
[36] Article 3(2) (our translation).
[37] Article 3(3) (our translation).
[38] Denmark; Estonia; Finland; Iceland; Ireland; Latvia; Lithuania; Norway; Sweden; United Kingdom of Great Britain and Northern Ireland.

the Danish Sign Language Council, ensuring equal conditions for Danish (spoken) language under the same council. We find an explanatory document[39] of the bill explaining that Danish Sign Language is seen as an "independent language" with its linguistic characteristics distinct and autonomous from the Danish (spoken) language. It is also acknowledged that it is a part of the deaf identity and culture.

In Estonia, the language law defines Estonian as the "national language of Estonia." This means it is the official language used by public authorities and in public services, both orally and in writing.[40] Additionally, it includes the recognition of Estonian sign language and "Estonian sign".[41] The law under consideration has two corresponding definitions. Estonian sign language is considered an "independent language"[42], and "Estonian sign" is defined as "a representation of the Estonian language".[43] Furthermore, Article 8(2) regulates the right of deaf individuals to use sign language in various public services, with interpretation of that language.

Regarding Finland, the working group report explains the concept of sign language[44], a matter that is frequently common in definitions found in other European countries. They understand that the meaning of "independent language" relates to the distinct linguistic characteristics of the language used by deaf individuals, different from spoken languages. In addition to the linguistic perspective, the cultural perspective clarifies that sign language is an essential element of deaf culture and identity, a matter discussed in other European countries as well. From a legal perspective, the issue of sign language is constitutionally enshrined in that sign language speakers have their fundamental rights according to Article 17 of the Constitution to maintain and develop their own language. Moreover, this constitutional norm refers to a law that specifies the legal effects and establishes the legal framework for this sign language, particularly regarding interpretation and translation assistance. The Finnish report underscores the importance of ensuring fundamental rights, emphasizing their realization not only within legal frameworks but also in the day-to-day experiences of individuals. In practical terms, this entails an obligation for public authorities to enact legislation that genuinely facilitates the use of sign language by its speakers. Beyond legal provisions, the effective fulfilment of fundamental rights necessitates the allocation of financial resources and the integration of sign language considerations into all decision-making processes.

In Iceland, the language law declares the dual legal status of the Icelandic language as both an "official language" and a "national language". On the one hand, the notion of the national language implies that Icelandic is the "common language of the Icelandic people", guaranteed by public authorities for use in "all domains of society". [45] On the other hand, the concept of the official language implies that Icelandic is the language used by public authorities in various official domains of the public nature. The conceptual difference between these categories is, arguably, the national language as a symbolic element of Icelandic society and the official language as a political-identity element of the State itself. The legal category of Icelandic Sign Language is, indeed, formally considered the "first language"[46] for those individuals to express themselves in this language. It is promoted and supported by public authorities. Additionally, users of this language must have the opportunity to express themselves and learn this language. Furthermore, Icelandic Sign Language is recognised with the same legal protection as Icelandic as a "means of communication". Can we affirm that Icelandic Sign Language has the implicit notion of linguistic officiality as Icelandic, being both a "national language" and an "official language"? According to the explanatory document[47] that prepares the approval of

[39] Act no. 517 of 26/05/2014: Act amending the Act on the Danish Language Board (our translation).
[40] Article 3(1); Article 4 (our translation).
[41] Article 3(2) (our translation).
[42] Article 3(2) (our translation).
[43] Article 3(2) (our translation).
[44] Report of the working group preparing the Sign Language Act (2014) and Assessment memorandum on the need for a sign language law (2013).
[45] Act on the Status of the Icelandic language and Icelandic Sign Language.
[46] Act on the Status of the Icelandic language and Icelandic Sign Language.
[47] Act on the Status of the Icelandic language and Icelandic Sign Language.

this law, despite some conceptual ambiguity regarding sign language, on the one hand, to qualify the dual condition of the national language and the official language, Icelandic must be a "perfect language in the sense that it can be used in all areas of society, in administration [and others]." On the other hand, the explanatory report qualifies sign language as a matter of "official recognition" in the sense of acknowledging the language of deaf people. Therefore, this language is equated with the Icelandic language in communication. As a result, can we equate the same notion of the national language and the official language with Icelandic Sign Language? This is a question that might need consideration.

On the other hand, in Ireland[48], the initial legislative process aimed to recognize sign language as a "native and independent language"[49] and as the "primary means of communication for a considerable minority of the Irish population"[50]. However, the enacted legislation simplifies its legal categorization. It is interesting to compare, in future, the legal aspects of Irish Sign Language with the law relating to spoken languages[51]. Currently, the revision of this law includes a definition of the notion of official language: "means the Irish language (being the national language and the first official language) and the English language (being a second official language) as specified in Article 8 of the Constitution"[52].

In Latvia, the language law establishes Latvian as the official language.[53] Regarding Latvian sign language, Article 3(2) "ensures the development and use of Latvian sign language for communication with deaf individuals", without specifying other aspects related to the use of Latvian sign language.

The case of Lithuania is straightforward and concise. The only legal provision states that it "officially recognizes sign language as the mother tongue of the deaf in the Republic of Lithuania, giving them the opportunity to choose the language of their parents as their mother tongue."

Regarding the status of Norwegian Sign Language, it is legally recognised, establishing that government authorities have special obligations inherent to Norwegian Sign Language. Section 7 of the same law confers the "national" status of Norwegian Sign Language.[54] According to an expert report[55], the expression "national sign language" implies that it is a national and autonomous language with its own Norwegian linguistic characteristics distinct from other spoken languages. Additionally, the national status of this language as a

[48] Out of curiosity, this author studies the legal-constitutional aspects in linguistic matters regarding the official languages enshrined in the Irish Constitution. M. BLACAM, *Official language and constitutional interpretation,* , in *The Irish Jurist (New Series),* Vol. 52, 2014, 90-114; D. MAC SÍTHIGH, *Official status of languages in the United Kingdom and Ireland*, 2018, 77-102.
[49] Irish Sign Language Act.
[50] Irish Sign Language Act.
[51] Official Languages (Amendment) Act 2021.
[52] Official languages Act 2003 revised 2023 .
[53] Article 3(1) (our translation).
[54] Prop. 108 L (2019 – 2020) Proposal for legislation - Language Act. (text in Norwegian) In line with the preparatory work for drafting the Language Act, the report provides relevant and interesting explanations about sign language (13.4.1) offering Norwegian legal perspectives. They understand Norwegian Sign Language as "languages in their own right and should not be seen as an aid to people with reduced functional capacity". The Norwegian expression "fullverdige språk" can indicate the same meaning as "independent language" or "language in its own right". Furthermore, the Norwegian government's explanation (12.1.4) is clear in that it states that all languages protected by law have equal intrinsic value and equal value as languages of use. In other words, sign language "has a fundamental value in itself, among other things, as a mark of identity and genuine cultural expression for a linguistic minority in Norwegian society." Furthermore, it considers that sign language "is part of the Norwegian cultural heritage and the country's linguistic diversity that the public has a duty to protect and promote" sign language. Consequently, this expression implies that sign language is a "fully developed language" with inherent linguistic rules. And, furthermore, the concept of "national language" to sign language is justified in the sense that this language is the "complete language". In particular, the expression "national" emphasizes that Norwegian Sign Language "is not precisely a common and international language for deaf people throughout the world [...] Norwegian Sign Language is a separate language of Norwegian origin."
[55] NOU 2023:20 *Sign language for life - Proposal for a comprehensive policy for Norwegian sign language*. (text in Norwegian).

"linguistic and cultural expression"[56] is part of the national linguistic heritage, seen as an expression of national culture. According to the report, sign language that plays a cultural function can be seen as "support to society", particularly the deaf community. On the other hand, the law defines Norwegian Sign Language as "equivalent to Norwegian". It is an ambiguous term.[57] The report understands that this term implies that sign language, from a linguistic perspective and as a language issue, is a genuine language on an equal linguistic footing with the Norwegian language and has the linguistic conditions to be an authentic autonomous language distinct from Norwegian with its own linguistic characteristics. However, as highlighted in the report, recognizing Norwegian Sign Language as equal to Norwegian does not mean that this language has the same status and functions as Norwegian in society. On the contrary, Norwegian is seen as the "main language and a language supporting society". Norwegian Sign Language does not have these characteristics, nor is it considered a minority language, as the law itself distinguishes it from minority languages. It only acknowledges the symbolic value of the legal recognition of Norwegian Sign Language inscribed in the language law. It is up to public authorities to protect and promote this language in various domains through sectoral legislation, particularly in public services and education.

In Sweden, Swedish legislation distinguishes three legal categories[58]: *(i)* Swedish as the "main language" (a term equivalent to the declaration of official status), meaning that this language is seen as "the common language of society, which everyone residing in Sweden must have access to and must be able to use in all areas of society"[59]; *(ii)* national minority languages; *(iii)* Swedish Sign Language, which does not have a sufficiently clarified legal category or if it is considered an asymmetrical or implicit notion of officiality in comparison to Swedish, or if it is considered an intermediate legal category that generally acknowledges "individual access to the language", meaning that deaf individuals "must have the opportunity to learn, develop, and use Swedish Sign Language". [60] Consequently, this language is protected and promoted by state authorities who have obligations for this purpose. [61] In other words, the law does not define, in its Section 9, Swedish Sign Language as the "main language" or the "common language of society", despite acknowledging the importance of the cultural and identity belongingness of language users in its preparatory work for this law. It only establishes legally that public authorities have a special responsibility for the protection and promotion of this language. Furthermore, another legal norm regulating individual access to the language establishes that users of sign language "have the opportunity to learn, develop, and use Swedish Sign Language". [62]

On the other hand, the British Sign Language (BSL)[63] law defines this language as "a language of England,

[56] NOU 2023:20 *Sign language for life - Proposal for a comprehensive policy for Norwegian sign language*. (text in Norwegian).
[57] Prop. 108 L (2019 – 2020) Proposal for legislation - Language Act. (text in Norwegian) The Norwegian government explains that the equivalence of sign language to the Norwegian language "does not mean that Norwegian Sign language plays the same role in society as the Norwegian language, which is therefore the main language in Norway and an administrative language supporting the community". Although he further explains that sign language "has as much value as a language of use and cultural heritage that the Norwegian possesses and, in this case, also the Sami languages and the national minority languages." Consequently, the legal status of sign language in Norwegian legislation constitutes a "general linguistic act".
[58] M. LANDQVIST, J. SPETZ, *Ten years with the Swedish Language Act*, in *Current Issues in Language Planning*, Vol. 21, No. 5, 2020, 532–547. The authors study, with interest, the legal aspects of Swedish language (and Swedish sign language) law. The Swedish legislator's decision not to grant minority language status to sign language was based on political-linguistic reasons in the 1980s. Currently, the legal recognition of Swedish sign language "has assumed great symbolic significance, since the sign language is mentioned in a linguistic discourse." Therefore, it is recognised by society as a "linguistic group" with some advances in legal aspects.
[59] Articles 1 and 4 (our translation).
[60] Article 14 (our translation).
[61] Article 9 (our translation).
[62] Article 14 (our translation).
[63] D. PYPER, P. LOFT, *British Sign Language Bill*, Commons Library Research Briefing, 2022; BDA's report on 'Legal Status of BSL and ISL', 2014.

Wales, and Scotland". [64] However, it does not define its legal category; whether it is merely recognised as a language alongside other existing languages or if it implicitly holds official status like other languages? To compare with the Welsh Language Act[65], the Welsh language is recognised and attributed an "official language status". [66] This means that "official language status" requires that the official use of this language has legal effects in the public sphere, *e.g.*, public institutions recognize, guarantee, and promote the use of the language in their public domains. The meanings of "official status" and "recognition" do not have the same sense and scope. The BSL law itself conditions the effectiveness of recognition by virtue of paragraph 2 stating that "does not affect the operation of any decree or legal norm". Therefore, the content of recognition means that public authorities have obligations inherent to the "promotion and facilitation of the use of British Sign Language", but it does not have the same effect as the Welsh Language Act.

According to explanatory notes[67], British Sign Language is recognised "as a language of Great Britain in its own right". This norm has on the one hand, a linguistic dimension, implying that sign language is recognised as an autonomous language with its distinct linguistic characteristics compared to other (spoken) languages. [68] Furthermore, the status of British Sign Language has already been recognised by a ministerial written declaration to the House of Commons in 2003. This does not add new status to what is already recognised in the present British Sign Language law. On the other hand, the legal dimension, this law does not attribute, as the Welsh language does, the "official status", only "recognition" with different matrices in the implications of language use. This use of language refers to other sectoral legislations regulating the conditions of sign language use.

In Scotland[69], the specific law of sign language does not expressly define the "official status" of British Sign Language. This law specifically regulates functional, strategic, and organizational aspects in promoting and facilitating the use of this language. Within this scope, public authorities develop their periodic plans and report their progress.

3.3. Southern Europe[70]

The cases of Albania and Montenegro are challenging to identify the norms related to the use of their respective languages due to inherent linguistic reasons that hinder research.

The case of Bosnia and Herzegovina aligns with the normative model of Eastern European countries. Bosnian law recognizes the right of deaf individuals to use sign language.[71] The law defines the language as "the language of communication for the deaf, that is, a natural means of communication for the deaf", being

[64] British Sign Language Act 2022.
[65] Welsh Language (Wales) Measure 2011.
[66] Explanatory Notes: "8. This section makes provision about the official status of the Welsh language in Wales. 9.Subsection (1) states that the Welsh language has official status in Wales. 10.Subsection (2) provides that, without prejudice to the general principle of subsection (1), legal effect is given to the official status of the Welsh language by the enactments about: duties on bodies to use the Welsh language; the treatment of the Welsh language no less favourably than the English language; the validity of the use of the Welsh language; the promotion and facilitation of the use of the Welsh language; the freedom of persons wishing to use the Welsh language to do so with one another; the creation of the Welsh Language Commissioner and other matters relating to the Welsh language. 11.Subsection (3) refers to examples of the enactments which give legal effect to the official status of the Welsh language. 12.Subsection (4) states that the Measure does not affect the status of the English language in Wales."
[67] British Sign Language (BSL) Act 2022 and explanatory notes.
[68] British Sign Language (BSL) Act 2022, paragraphs 3 to 4 and 6.
[69] British Sign Language (Scotland) Act 2015.
[70] Albania; Bosnia and Herzegovina; Croatia; Cyprus; Greece; Italy; Malta; Montenegro; North Macedonia; Portugal; Serbia; Slovenia; Spain.
[71] Article 1 (our translation).

"a visual system" of sign language with inherent linguistic characteristics.[72]

In Croatia, Croatian law prescribes the rights of deaf individuals, deaf-blind, and others with communication difficulties. This law defines the communication systems that people can choose and use in a specific form of communication.[73] Croatian sign language is the "original language of the community of deaf and deaf-blind people in the Republic of Croatia, being a linguistic system with its own grammatical rules, completely independent of the language of hearing individuals".[74]

The Cypriot Sign Language Recognition Act defines, in its article 2, among other aspects, the Cypriot Sign Language as "a visual communication code, used both as the sole means of communication and as an additional means of communication between deaf individuals and others. It is based on the Greek Sign Language, as it has evolved and is used in Cyprus, regardless of the native language of these individuals (…)."[75] In other words, the law categorizes it as the "sole means of communication", "native language", and addresses the linguistic characteristics of this language, including, in this law, its unique manual alphabet.

Greek law 4488/2017 is based on the provisions of the Convention. Article 65(2) establishes that "The Greek Sign Language is recognized as equivalent to the Greek language. The state takes measures for its promotion, as well as for addressing all communication needs of deaf and hard-of-hearing citizens."[76] Does the legal recognition of Greek sign language imply, in legal terms, the equivalence of the legal status of the Greek language as an official language? What does equivalence imply? Does it have the same meaning, for example, as the Norwegian law? These questions remain open for future consideration.

In Italy[77], there have been several bills regulating the legal recognition of sign language. [78] The current law does not define it as an official language, but only "recognizes" the language, without categorizing its legal status. [79] The grounds invoked for the legal recognition of these languages are based on the Italian Constitution, the Charter of Fundamental Rights of the European Union, and the Convention on the Rights of Persons with Disabilities.

The case of Malta is relevant as it has an explicit legal category qualifying the official language attributed to Maltese sign language. Conceptually, Article 2 defines: ""Maltese Sign Language" means the visual and gestural language that is the first or preferred language in Malta of the distinct linguistic and cultural Deaf community." In other words, Maltese sign language is "the first or preferred language in Malta." Articles 3 and 4 are crucial to understanding the meaning and legal nature of Maltese sign language. On one hand, Article 3(1) establishes that "The Republic of Malta recognizes Maltese sign language as an expression of culture and endorsement for equal opportunities and inclusion. The purpose of this Act is to promote and maintain the use of Maltese Sign Language by declaring Maltese Sign Language to be an official language of Malta and empowering the making of regulations setting competency standards for the interpretation of Maltese Sign Language." On the other hand, Article 4 determines that "Maltese Sign Language is declared to be an official language of Malta, and the Government of Malta shall promote, through all possible means, the widest use of Maltese Sign Language in all government information and services, education, broadcasting, media, at the law

[72] Article 2(a) (our translation).
[73] Articles 1, 2, and 4 (our translation).
[74] Article 5(1) (our translation).
[75] Cypriot Sign Language Recognition Law of 2006.
[76] Law 4488/2017, codified with 5078/2023: State pension arrangements and other insurance provisions, strengthening the protection of employees, rights of persons with disabilities and other provisions.
[77] S. DARRETTA, *The Rights of deaf people and Sign language: the importance of the explicit recognition of sign language in Italy and in France*, in *Working Paper Series SOG-WP66/2021*, April 2021. Available at: https://sog.luiss.it/sites/sog.luiss.it/files/WP66_The%20Rights%20of%20deaf%20people%20and%20Sign%20language_V3.pdf .
[78] As a curiosity, there is the parliamentary process relating to several bills that regulate the legal recognition of sign language.
[79] Measures for the recognition of Italian sign language and the inclusion of people with hearing disabilities, 2021.

courts, and in political, administrative, economic, social and cultural life." At the same time, the official status of Maltese sign language is conditioned by specific circumstances and needs. Article 5 defines the limits of legal application: "The obligations under this Act are subject to such limits as circumstances make reasonable and necessary in terms of the Equal Opportunities (Persons with Disability) Act if all reasonable measures and plans for compliance with this Act have been taken or made."

In North Macedonia, the law related to sign language aligns with the normative model of Eastern Europe. Article 1 regulates the right of deaf individuals to use sign language. Article 2(1) recognizes sign language as a "fully natural means of communication, equal to spoken communication", and sign language is the language used by deaf people. It is a "natural means of communication"[80], and it defines the linguistic characteristics of sign language.[81]

In Portugal, Portuguese sign language is recognized in the Constitution. Article 74(2)(h) establishes that "Protecting and developing Portuguese sign language, as an expression of culture and an instrument for access to education and equal opportunities." The legal framework of Portuguese sign language is already studied in another scientific article. SOUSA explains in summary: "In Portugal, there is no specific legislation that defines and establishes the conditions for the exercise of the rights assigned and that is, by itself, sufficient to ensure constitutional recognition. Constitutional recognition and practical rights need to be made effective through a clear, objective, and enforceable legal framework that safeguards deaf speakers in communicative interactions with public authorities."[82]

In Serbia, following the same model as Eastern Europe, the law related to Serbian sign language categorizes sign language as a "natural form of deaf communication with its own linguistic properties"[83] and regulates the legal conditions for the exercise of the rights of deaf individuals in various domains.

Slovenian law defines sign language as a "language of communication for deaf individuals or the natural means of communication for deaf persons. Sign language is a visual-sign language system with specific hand and finger positions, movements, orientation, and facial expressions".[84] This law recognizes the right of deaf individuals to use sign language "as their natural language".[85]

In Spain[86], there are various legal norms of different natures, for example, at the statutory level, *i.e.*, the autonomy statutes that regulate the regional scope of the autonomous communities. These statutes provide for the legal recognition of sign language in their legal norms, which commonly express that public authorities promote the use of sign language through necessary measures in various areas, particularly in equal conditions, education, and public services. This language is the subject of education, protection, and respect. [87] It´s

[80] Article 2(2) (our translation).
[81] Article 2(3) (our translation).
[82] F. V. SOUSA, *What legal recognition? What does the official language declaration concerning sign language consist of?*, in *Revista de Llengua y Dret*, 2023, https://eapc-rld.blog.gencat.cat/2023/03/16/what-legal-recognition-what-does-the-official-language-declaration-concerning-sign-language-consist-of-filipe-venade-de-sousa/ .
[83] Article 3 (our translation).
[84] Article 2 (our translation).
[85] Article 3 (our translation).
[86] J. QUER, *Legal Pathways to the Recognition of Sign Languages: A Comparison of the Catalan and Spanish Sign Language Acts*, in *Sign Language Studies*, Volume 12, Number 4, Summer 2012, 565-582.
[87] In Spain, the different autonomous communities have their own autonomy statutes - a type of constitutionality block - which regulates the different aspects that apply to their respective territories.
ANDALUSIA: "Article 37 (Guiding principles) 1. The powers of the Autonomous Community will guide their public policies to guarantee and ensure the exercise of the rights recognised in the previous Chapter and achieve the basic objectives established in article 10, through the application effective of the following guiding principles: (…) 6. The use of Spanish sign language and the conditions that allow equality to be achieved for deaf people who choose this language, which will be the object of teaching, protection, and respect." (our translation).
ARAGON: "Article 25 (Promotion of personal autonomy) (…) 2. The Aragonese public authorities will promote the teaching and use of Spanish sign language that allows deaf people to achieve full equality of rights and duties." (our translation).

demonstrated that these statutory norms do not necessarily define sign language as an object of language law but are generally seen as a matter of social law. For example, in the cases of Aragon, Valencia, and Catalonia, these autonomous communities have their own (spoken) languages in their respective language regimes, but they do not specify sign languages in these language regimes. However, according to the statutory approach, the meaning and scope of "subject of education, protection, and respect" imply that public authorities must adopt the necessary and effective measures to define and assign the official use of sign language in various domains. Therefore, the statutory norms necessarily refer to the legal conditions that ensure the effectiveness of the official use of this language.

The Catalan sign language law states, in its preamble, that this language is the language of deaf people in Catalonia. The Catalan law recognizes sign language as the "own linguistic system"[88] of deaf and deaf-blind people in Catalonia. Therefore, the purpose of legal recognition is to acknowledge the Catalan sign language as a "linguistic system" within the scope of education and protection by the public authorities. However, what does "linguistic system" mean? Article 3(a) defines Catalan sign language as a "language or natural linguistic system of gestural and visual modality characteristic of Catalan deaf people, who also use, with different adaptations according to their sensory situation, deaf-blind people."[89] This language is defined doubly, on one hand, as a "language or linguistic system" and, on the other hand, as a means of communication.

According to the Spanish report[90], Law 27/2007 does not designate Spanish sign languages as "official language". In other words, it doesn´t establish formal and explicit official status because it only recognizes and regulates them as languages of deaf people. They argue that the official status of sign language "must manifest in its fullness, such as education, relations with public administration, audiovisual media, or interpretation services, which have not shown significant improvement since the promulgation of the Law". The jurisprudence of the Spanish Constitutional Court understands that the concept of an official language implies that it is a language declared as a "legally valid and effective communication instrument, and the core of that validity materializes in its use among citizens and in relations with (public) administrations." The decision to elevate a language to official status requires "the will of the legislator and is limited to acknowledging the reality of the use of a language, its influence on legal and social relations, and above all, the number of citizens who choose it as the main means of expression". Consequently, for them, the officiality (limited) of Spanish sign languages can be defined but with serious reservations because there is a need to consolidate reinforcement that guarantees the application of sign language as an official language, from a constitutionally

CATALONIA: "Article 50 (Promotion and dissemination of Catalan) (…) 6. Public authorities must guarantee the use of Catalan sign language and the conditions that allow achieving equality for deaf people who choose this language, which must be taught, protected, and respected." (our translation).
CASTILLA Y LEÓN: "Article 13 (Social rights): (…) 8. (…) The public authorities will promote the use of the Spanish sign language of deaf people, which must be the object of teaching, protection, and respect. In addition, the use by the Public Administrations of the Community of systems that allow communication to the sensory disabled will be implemented." (our translation).
VALENCIAN COMMUNITY: "Article 13: 4. The Generalitat will guarantee the use of the sign language of the deaf, which must be taught, protected, and respected." (our translation).
EXTREMADURA: "Article 7 (Guiding principles of Extremaduran public powers) Regional public powers: (…) 15. They will promote autonomy, equal opportunities, and the social and labour integration of people with disabilities, with special attention to its active contribution to society, to the teaching and use of Spanish sign language and to the elimination of physical barriers." (our translation) .
BALEARIC ISLANDS: "Article 19 (Rights in relation to dependent people) 3. The public administrations of the Balearic Islands will guarantee the use of the sign language of deaf people, which must be taught, protection and respect." (our translation).

[88] Article 50 (our translation).

[89] Law 17/2010, of June 3, on Catalan sign language. Article 3(c) (our translation).

[90] E. BELDA PÉREZ-PEDRERO; F. J. SIERRA FERNÁNDEZ, *Legal assessment report of Law 27/2007, of October 23, which recognizes Spanish sign languages and regulates the means of support for oral communication of deaf, hearing-impaired and deafblind people after 15 years*. 2023, 13-17 (our translation – original title in the bibliography). Available at: https://cnlse.es/es/recursos/publicaciones/informe_valoracion_juridica_ley27_2007.pdf .

supported statute. Nevertheless, the legal recognition of sign language can be seen from the perspective of "institutional guarantee", meaning it is "not based on specific content or on a scope of competencies previously established in a norm, but on the preservation of an institution recognizable to the image that social consciousness has at each time and place". [91] This is because the issue of sign language itself "summarizes the characteristics that make it an essential institution for the communication of the deaf, being its own natural language that, throughout its historical evolution, has demonstrated a vocation for permanence and has generated a sense of identity and social consciousness among deaf people and their living environments, such as family, work, associative movement (…)".[92]

3.4. Western Europe[93]

In Austria, the constitutional incorporation process of Austrian Sign Language had various projects to consider it as a legal category, as the "Austrian minority language", also explaining that this language is an "independent language"[94] with its own linguistic characteristics. Specifically, this language is "protected and respected as an independent language and as an expression of the deaf culture and as an instrument for access to education and equality of opportunities". [95] Consequently, the result was the formal incorporation of sign language into the Constitution, considering it as an "independent language", distinct from the official language, leaving it to the legislature to regulate its conditions of use. According to Austrian law, the concept of the official language is the German language *as per* Article 8 of the Constitution. The official language is understood as a language used by public and judicial authorities in various official domains and is also used between state authorities and citizens. Therefore, Austrian Sign Language does not have the same legal status as the German language and is distinct from constitutionally recognised statuses of Austrian minority languages according to their respective legislations.

In Belgium, there are three sign languages specific to their respective deaf communities with different linguistic territories. The case of Flemish Sign Language is not clearly stipulated as an "official language" with the same status as the spoken language in this Flemish region. It only designates sign language as a "recognised language", as a generic and undetermined legal category. In other words, the legal recognition´s meaning is generic in the sense that Flemish authorities acknowledge the existence of this language within the deaf community with a cultural significance but doesn't necessarily imply the existence of rights translated by this legal recognition. Instead, it is left to the legislature to define the legislative and administrative measures to establish and define the conditions of use of this language.

In France, the proposal for the constitutional incorporation of French Sign Language defines the recognition of this language as a full-fledged language of the Republic, alongside French as the language of the Republic in its Article 2. [96] The French report recognizes the constitutional value of sign language only implies, in addition to its basically symbolic nature, as a "form of recognition of higher prestige but does not necessarily grant the set of rights in itself". [97] The issue of recognition has been established since 1991 and, above all, in

[91] E. BELDA PEREZ-PEDRERO; F. J. SIERRA FERNANDEZ, *op. cit.*, 15, (our translation).
[92] E. BELDA PEREZ-PEDRERO; F. J. SIERRA FERNANDEZ, *op. cit.*, 15-16, (our translation).
[93] Austria; Belgium; France; Germany; Luxembourg; Netherlands; Switzerland.
[94] The German expression "*ist als eigenständige Sprache anerkannt'* means "is recognised as an independent language." In the context of Austrian and German law, this statement implies that the referenced sign language, whether German or Austrian, is legally acknowledged as a distinct form of communication, equivalent to an independent language. Thus, the expression underscores the significance of the legal recognition of sign language as a separate and independent entity within the legal frameworks of the German and Austrian systems.
[95] As proposed for constitutional incorporation within the scope of parliamentary discussions (our translation).
[96] Proposition de loi constitutionnelle n° 3895 visant à inscrire la langue des signes française dans la Constitution. Proposition de loi constitutionnelle n° 606 visant à inscrire la langue des signes française dans la Constitution.
[97] Rapport *Langue des Signes Française dans la Constitution de la République,* 2020. (Our translation) Out of curiosity, the Government responded to a parliamentary question stating that the legal recognition of sign language "is a concern

2005, legislating equal rights and opportunities for people with disabilities. This law defines sign language as a "language in its own right" in the educational context. [98]

In Germany, German Sign Language is legally recognised as an "independent language"[99] in sectoral legislation regulating the equality of persons with disabilities, generally acknowledging the right to use this language for communication with competent authorities. Interestingly, a study commissioned by the parliamentary commission explores whether German Sign Language should be considered a minority or official language. [100] This study considers the distinct linguistic characteristics that correspond to it being an "independent language". To determine if it corresponds to the legal category of an official or minority language, the study´s response is negative. On one hand, the official language is understood by German law like Austrian law. That is, an official language is perceived as a national language, both spoken and written, understood in German. Conclusively, "an official language cannot be limited to spoken or written language". [101] On the other hand, sign language is not considered a minority language as it doesn´t meet the criteria corresponding, in the view of German legal practices, to ethnic relevance. As a result, German Sign Language is only "a manual language" and lacks a "written language", making it unsuitable for use as an official language according to German law, which requires both spoken and written dimensions.

In Luxembourg, the law defines sign language as a "recognised language". Interestingly, the draft law intended to also consider it an "language in its own right". [102] The Luxembourgish approach considers the expression "language in its own right" as implying an "official status for sign language". Furthermore, recognizing it as a "language in its own right" implies that it "is not sufficient to increase the social participation of deaf people", and thus, the recognition of this official status "determines the rights resulting from this recognition". Moreover, it´s considered that the recognition of a "language in its own right" "also has a highly symbolic dimension for the Luxembourgish community" and "expresses equal treatment of a linguistic group". The justification for this recognition is based on Article 24 of the Convention and European-level recommendations. From a linguistic perspective, the German Sign Language is seen as an "autonomous language, just like spoken languages. It is a visual and gestural language with its own dactylology, grammar, syntax, and vocabulary".

In the Netherlands[103], Dutch Sign Language is legally recognised as a generic legal category of a "recognised language". At the same time, interestingly, the government itself considers this language "recognised as an official language"[104], although legislation does not formally consider this legal category. The explanatory memoranda[105] describe sign language as the "mother tongue of deaf people". Initially, the draft

for deaf people". The government considered that French sign language is recognised as a "language of France", alongside the French language, "national language, whose official character is enshrined in the Constitution". Recognition of sign language implies that "it is part of cultural identity and contributes to our country's creativity and cultural influence". Sign language is recognised as a "language in its own right, with the same degree of complexity and the same performance as an oral language" (our translation).

[98] Article 75. LOI n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées (1).

[99] The German expression "*ist als eigenständige Sprache anerkannt*" has a meaning that, on the one hand, implies the recognition of the language, and on the other hand, denotes its status as an "independent language."

[100] There was a study carried out in the German Parliament on the legal recognition of sign languages: *Rechtliche Stellung der Gebärdensprache in europäischen Staaten* 2020; Gebärdensprache als Amts als Amts- oder-Minderheitensprache oder Minderheitensp 2022.

[101] *Rechtliche Stellung der Gebärdensprache in europäischen Staaten* 2020; Gebärdensprache als Amts als Amts- oder-Minderheitensprache oder Minderheitensp 2022. (our translation).

[102] Law Project amending the law of February 24, 1984 on the language regime.

[103] S. MEEREBOER; K. MEEREBOER; O. SPIJKERS, *Recognition of Sign Language Under International Law: A Case Study of Dutch Sign Language in the Netherlands*, in F. AMTENBRINK, D. PRÉVOST, R. A. WESSEL (eds.) *Netherlands Yearbook of International Law*, Volume 48, 2017, p. 411.

[104] Initiative proposal for recognition of Dutch sign language (our translation).

[105] Initiative proposal for recognition of Dutch sign language (our translation).

law defined this language as an "official language", but eventually, this legal category was removed. The concept of recognition is understood in a way that this language is "an independent language" endowed with its own linguistic characteristics, as in other European countries. Generally, recognition "reinforces the position of sign language users" and "contributes to the full participation of these people in society". The authors of the draft law aimed to legislate the legal status of sign language to have practical consequences and not just symbolic purposes for the exercise of the rights of language users. The draft law intended to declare the recognition of this language as an "official language" in the Netherlands, alongside Dutch and Frisian. Although the currently adopted legislation does not explicitly define this category, according to the memoranda, the recognition of the use of this language implies, on the one hand, "more accessible governmental communication for deaf people" and, on the other hand, "makes deaf people and their communication needs more visible to the general public", *e.g.*, official speeches by government authorities transmitted in this language. Can we consider this as an implicit notion of material officiality? This remains an open question.

In Switzerland, according to the Swiss report[106], government authorities consider that the legal status of Swiss sign languages does not require the adoption of specific legislation. This is because there are federal and cantonal sectoral legislations developing their respective legal and political measures, notably concerning equality, non-discrimination, and access to public services. Swiss authorities believe that intending to legislate official recognition "would result in a disproportionate burden, which would not be justified considering the small number of people involved" and do not intend to "create new discriminations or inequalities" through cantonal legislation. Therefore, according to the Swiss report, the main effect of the intended legal recognition of Swiss sign languages in the context of linguistic freedom is limited. This is because the categories of national language and official language *"*would have far-reaching political repercussions and raise new issues regarding the status of other languages and the practicability of this recognition". Additionally, they believe that recognizing Swiss sign languages as official languages "is probably not realistic" due to inherent constitutional procedures. Furthermore, they assert that "the cost of translation for sign language alone would be disproportionate to the size of the language user group". In conclusion, Swiss authorities indicate that legal recognition "does not constitute a compulsory condition to continue encouraging and improving the participation of deaf and hard of hearing people in society". However, this does not imply that sign languages are irrelevant. On the contrary, according to Swiss authorities, they are "uncontested at the political level", understanding that the goal of recognition is to improve the participation of deaf people in social life and reduce existing barriers.

3.5. Intermediate considerations: comparative analysis of the legal status of sign languages

Comparative analysis of legislations concerning sign languages demonstrates that their legal recognition serves both instrumental and symbolic functions. This recognition is critical not only symbolically for the deaf community, but also as a tool for its use in different domains with varying legal efficacies. Systematic interpretation of these legislations enables the identification of essential characteristics contributing to the gradual and differentiated notion of sign language officiality.

National legislations often categorize sign language as "independent language" (or "full-fledged language"). This categorization stems from socio-historical and sociopolitical claims made by deaf communities. However, it is crucial to highlight that sign languages surpass the mere designation of "independent languages". When compared to spoken languages, they possess socio-historical complexity and significance that may be diminished by such a simplistic and ambiguous categorization.

[106] REGULA; LOHR; ROMANO; REYNARD, Rapport du Conseil fédéral *Possibilités de reconnaissance juridique des langues des signes suisses,* 2019 ; Rapport du Conseil-exécutif relatif à la motion 161-2019 « *Reconnaissance officielle de la langue des signes* » 2023.

From a legal perspective, these designations demand careful consideration within national le-gal systems. While they may be classified as "independent languages", such classification may not equate to linguistic officiality or adequately capture the essential features of an official language. Nevertheless, these designations may establish the groundwork to achieve a functional equivalence to officiality through appropriate legislation. These expressions often reveal a vague or generic definition, complicating their interpretation as a legal concept of officiality. The indeterminacy of these definitions can influence the legal effectiveness of sign language usage, resulting in ambiguous or undefined meaning.

We note that the countries studied frequently identify sign languages as a recognised means of communication by the State, identifying the linguistic element that translates sign language as a bearer of deaf culture. The legal statuses of sign languages may exist according to their legal systems and their respective interpretations carried out by public authorities to explore the legal meanings of sign languages. These statuses are hardly able to be confused with the formal notion of linguistic officiality. However, they can approximate or identify the main characteristics of linguistic officiality with different legal efficacies.

4. The normative substance of linguistic officiality

4.1. The sense and scope of legislation regarding sign languages

The term "legislation regarding sign language" refers to the formulation of linguistically generic legislation, whether directly or through sectoral, referential, or secondary legal frameworks, addressing specific issues concerning sign language. Therefore, linguistic legislation is the legal framework regulating the meaning, nature, and function attributed to sign language within its respective spheres, in line with the normative circumstances of each state´s legal systems. The legal definition of legislation concerning the meaning, scope, and legal nature of sign language varies, presenting different legal meanings inherent in the legal categorization.

DE MEULDER distinguished five categories: [107] constitutional recognition; general linguistic legislation; specific linguistic legislation; other laws regulating sign languages and communication means; organizational laws (of national language councils). However, in our view, constitutional recognition is indeed a matter of (general or specific) linguistic legislation. This is because the notion of legislation is broad and flexible, depending on the respective legal systems of different cultures. It is not possible to isolate constitutional recognition from other legal sources as they are mutually interconnected. Consequently, legal issues concerning sign languages implicated by constitutional recognition are also rigorously treated as constitutional legislation regarding language matters, with generic, specific, determined, or referential legal norms. On the other hand, BUSATTA [108] understands, in a simplified manner, three categories: specific legislation; sectorial legislation; mere administrative acts or lack of legislation. According to this author, constitutional recognition generally has a "strongly symbolic nature". [109] Therefore, "it does not imply, per se, a solid legal status for the rights of people using this language". [110] Consequently, constitutional recognition requires necessary legislative measures to complement the meaning and scope of constitutional recognition. Furthermore, according to this author, the implicit recognition of sign language by a State consists of fully recognizing the existence of a national sign language - or multiple sign languages - used by the national deaf community as a means of communication. Symbolic recognition does not imply the adoption of a legal measure, the exp licit statement

[107] M. DE MEULDER, *The Legal Recognition of Sign Languages*, in *Sign Language Studies*, Vol. 15, No. 4, Special Issue: Language Planning and Sign Language Rights (Summer 2015), pp. 498-506.
[108] L. BUSATTA, *The legal recognition of sign languages in an intersectional perspective*, Comparative Law and Language, Vol. 1 No. 1, 2022, 74-87.
[109] Ibidem.
[110] Ibidem.

of a constitutional provision, and hence a written appreciation of sign language. Therefore, it does not imply the recognition of specific benefits or improvements in the lives of sign language users. This is the case in Italy.

In our view, regardless of the categories proposed by the authors, the legal status of sign languages can be regulated by any source of constitutional, statutory, legal, or regulatory nature. For this study, the typology of legal statuses of various constitutional, legal, or regulatory sources is simplified. In other words, it involves linguistic legislation regarding the legal status of sign language that can be flexibly legislated according to the respective Constitution with various applied norms, frequently referring to the legislator to define, through specific or sectoral legislation, the legal status of sign language. Therefore, it is linguistic legislation because issues related to sign language are generally legislated from the perspective of equality, non-discrimination based on language, and inherent accessibility to language use. Indeed, it is a multi-level and interconnected formulation of various legal norms that select legal sources to regulate this legal status according to their respective national legal systems.

It is distinctly emphasized that the national legal framework of sign languages is established according to their respective legal systems of different States. For example, in the cases of Finland, Hungary, and Portugal, the incorporation of these sign languages into constitutional law is often endowed with reinforced constitutional value but limited legal efficacy of a declaratory and symbolic nature. This is because this constitutional declaration often refers to the law specifying the meaning and scope of the constitutional status of sign language. It is clearly emphasized that constitutional law generally imposes obligations on public authorities to consider the constitutionally regulated status of sign language, specified in the law with the necessary legal efficacy to grant and specify the clearly linguistic rights of speakers. Indeed, constitutional law, which incorporates sign languages into its constitutions, operates as a *norm normarum* to define the basic conception of sign language as an object of constitutional protection. This conception typically has a relatively generic (and to some extent, clear) meaning and scope (to have legal efficacy) to stipulate, grant, and arrange the status and use of constitutionally protected sign language in accordance with constitutional purposes. However, the constitutional status of sign language conveys symbolic constitutional significance that allows and demands that the national legal system considers the legal consequences of the constitutionally protected status and use of sign language.

4.2. The essential content of linguistic officiality

Basing on the criteria of RUIZ VIEYTEZ and PONS PARERA[111], the inherent content of linguistic officiality presents a dual positive and negative dimension to systematically contribute to the substance of sign language´s officiality. On one hand, the *positive dimension* encompasses issues related to language use (*e.g*., public services and education) normatively described in their legal norms that express the set of recognised rights for speakers. Lastly, albeit less frequently, the *negative dimension* implies the obligations of speakers to use a specific language in various public and private spheres. Numerous legal statutes of sign languages already display asymmetric modulations inherent in their normative contents, signifying the notion of linguistic officiality and, to some extent, reflecting the recognition of certain linguistic rights.

Legislation concerning the legal recognition of sign languages is subject to contextualization and the pursued purposes of these laws. Various factors can determine the sense and scope of legal norms, which can be understood in a generic or specified manner that can be translated into practical effectiveness. The legal model of legal recognition of sign languages implies a multi-level paradigm, in accordance with the respective national legal systems, which consists of observing and assessing the diversity of legal determinations of various constitutional, legislative, or regulatory natures that are necessarily characterized by their respective

[111] E. J. RUIZ VIEYTEZ, *op. cit*., 2023, 231-275; E. PONS PARERA, *op. cit*., 2015.

normative contents.

The common systematic structure of legal statuses of sign languages is often characterized as follows:

4.2.1. General provisions

These are legal norms regulating general provisions, *e.g.*, the designation assigned to the official name of the language and the definition of the law´s object, and its respective purposes pursued by the legal recognition of these languages.

Regarding the *law`s object*, sign language is referenced or proclaimed in terms of legislation of diverse nature (constitutional, legal, or regulatory) that has a generic or specified purpose based on the treated law`s object and sufficiently determined substance or normative content that grants or not legal efficacy to the recognition of sign language itself or specifically specifies linguistic rights.

Regarding the *formal nomenclature* of sign language, the language`s name is referenced or nominally proclaimed by virtue of legislation of diverse nature (constitutional, legal, or regulatory) that aims to assign the formal nomenclature inherent to the principle of nominal intelligibility. The issue of the language`s designation is one of the legally treated matters. This issue is essentially framed as a glossonym from a sociolinguistic point of view, contributing to the clarification of the language`s legal name. The essential notion of the glossonym is the study of names given to certain languages by their respective communities or territories where the language is designated by the community. Furthermore, legislation may or may not require a specific acronym for the designations of sign languages with their own characteristics. Thus, the question arises of understanding and defining what a given language is or designated by a community endowed with legitimacy and consent to designate its language`s name. What can be observed, essentially, is the linguistic notion of the language as a linguistic system, which is distinct from the sociopolitical notion of language from a glossonymic and ethnonymic perspective. Therefore, the glossonym may consider not only strictly linguistic considerations but mainly the issues inherent to the language policy of the legitimized and recognised community within its respective community. In other words, the designated language name may be a politically legitimized denomination. Linguistic issues may not be the “core” of consideration because sociolinguistic and sociopolitical issues seek to understand the ideological delineation of the name of a particular language, which can properly assert itself in the sense of being a singularly symbolic element that traces its foundations based on its idiosyncratic and ontological nature of the designated language. Any language has its own name; it becomes an essential object of language policy itself.

Regarding the *legal notion* of sign language, sign language is normatively defined in an explanatory way that signifies sign language in legal terms and is inherent to the principle of conceptual intelligibility. In fact, legislation may not necessarily have strictly linguistic definitions in the legal framework that pertinently clarifies the meaning and scope of sign language because the language itself is a means of communication that historicizes its historical idiosyncrasy within the deaf community. In other words, the linguistic definition of sign language in numerous legislations has to do with the recognition of the deaf community`s historicity, which, throughout its various historical periods, has faced the marginalization of sign language compared to spoken languages. Indeed, the historical function of sign language is closely related to the deaf community and its cultural and linguistic idiosyncrasies legally objectified and referenced in a legal framework that has a purpose (at least implicit) to condition attempts to weaken or marginalize the essences of sign languages compared to spoken languages. The essence of sign language is not isolated or independent of its inherent historical contexts. Many legislations that regulate and define sign languages have, so to speak, a historically rehabilitative purpose and legally acknowledge the dual linguistic and legal legitimacy of sign languages on equal linguistic terms with other spoken languages.

4.2.2. Substantive provisions

These are configuring norms that establish, to some extent, the catalogue of attributed rights that they can enjoy and exercise. Substantive provisions are usually legislated as follows: invocation of fundamental principles, definition of a set of obligations of state authorities, and determination and identification of the legally recognised and conferred rights to the holders of these rights, in addition to recognised rights, there may be guarantees for the exercise of these rights, for instance. First, based on the normative content of the respective law, the legal status that consecrates the recognition and use of sign language invokes, among others, fundamental principles (dignity, equality, non-discrimination, accessibility, among others) to substantiate the legislator's reasons for granting legal recognition. Secondly, these are norms provided by the legal statuses of sign languages that determine the set of obligations of public authorities of any nature to ensure, secure, or promote sign language. Thirdly, the legal statuses of sign languages foresee the legal norms that express the recognition of linguistic rights for holders using sign language in various contexts. Finally, among others, these are legal norms that foresee or express the legal guarantee of assistance regarding language in certain cases where assistance is needed to facilitate and express sign language (*e.g*., in judicial contexts).

4.2.3. Institutional or organizational provisions

These are other legal provisions of diverse institutional, procedural, functional, or organizational nature that refer to the legal regime of sign language use by public institutions that safeguard, promote, or determine the institution responsible for language policies, particularly concerning the vitality and preservation of sign language (*e.g*., Sign Language Advisory Councils or other entities legally created for this purpose).

4.3. The level of the legal status of sign languages

The relationship between the notion of linguistic officiality and the legal effectiveness conceived by national legislations is derived from the various formulations of legal norms that establish and identify legal effects. The main difficulty is not only identifying the notion of the language`s official status but also objectively delimiting, based on the national legislations themselves, the normative content inherent in the notion of linguistic officiality, *i.e*., determining the set of linguistic rights resulting from linguistic officiality.

According to RUIZ VIEYTEZ criteria[112], we attempt to classify different legal natures inherent in their respective legal statuses of sign languages. It is not only pertinent to categorize the legal nature of sign languages defined by their legal statuses that establish their respective contents expressing their legal norms inherent in the recognition of their linguistic rights, but it is also pertinent, beyond categorization, to take into account the effectiveness of the legal status of sign languages by its "real operability" [113] to ensure the effectiveness and efficacy of enjoying and exercising the rights inherent in linguistic officiality. In this way, we systematize the type and degree of effectiveness of the inherent officiality in their respective legal status according to the different national legal systems that consecrate the legal statuses of sign languages and, above all, the contents of linguistic officiality inherent in the legal status expressed in their legal norms. In general, the multi-level extension of linguistic officiality can be understood as follows:

(i) Minimal level of linguistic officiality refers to the existence of generic content inherent in the catalogue of human rights and fundamental freedoms (*e.g*., freedom of expression and equality and non-discrimination based on language). This is a generic conception of the right to language. The legal status recognizes sign language as a cultural or identity element with tendencies towards cultural purposes, lacking the juridical definition to determine the notion and substance of linguistic officiality inherent in recognizing certain

[112] E. J. RUIZ VIEYTEZ, *op. cit*., 2023, 231-275.
[113] Ibidem (our translation).

linguistic rights in various domains, or serving as mere programmatic purposes (and not prescriptive) directed at public authorities aimed at promoting the use of sign language. The analysed data does not seem to identify cases that correspond to the first level of linguistic officiality. This depends on the normative circumstances of the respective countries analysed in their own contexts. By way of example, the case of France may share some elements, as France formally recognizes sign language, especially in the educational sphere. However, fundamental rights in the French Constitution generally apply, including the right to freedom of expression, for instance.

(ii) Intermediate (or conditioned) level of linguistic officiality implies that legal status recognizes the use of sign language as a fully-fledged language but with limited legal effects due to legal circumstances that hinder real effectiveness, stemming from normative content that fails to express the set of linguistic rights, or the normative content is not sufficiently determined or operationally feasible for the effectiveness of language use in various contexts. This case is frequently identified in numerous legislations relating to sign languages. For example, the case of the United Kingdom.

(iii) High level of linguistic officiality implies that state authorities establish the set of various linguistic rights recognised and attributed by their respective legal frameworks that determine the sense and scope of their linguistic rights that clearly categorize the condition of being the "official language" of the State. This is a fundamental conception of the right to a language considered official, distinguishing it from the right to language, which is a general conception of individual freedom. Following the data analysis, with due caution given the susceptibility to internal sociopolitical circumstances, the examples provided by Eastern Europe can be used as a starting point to consider their normative specificities. They seem to ensure a high level of linguistic officiality, especially regarding the official use of the language and the exercise of linguistic rights. Furthermore, the cases of Malta and Finland stand out in a broader comparative perspective.

4.3.1. The asymmetric linguistic officiality: case of sign language

We can affirm that *asymmetric level* of linguistic officiality is the main constituent assumption of the notion of the officiality of sign language, which is frequently common in numerous national legislations regulating sign languages. In other words, the sense and scope of the officiality of sign language are asymmetric and do not share the same notion as the official language attributed to the spoken language in various spheres. In this sense, it emphasizes that it cannot be understood as a symmetrical or identical notion of the state language's officiality to the specificities of the sign language`s status, but with some characteristics of linguistic officiality in an analogous (and not similar) sense. We can also distinguish different modulations to the content inherent in their respective legal statuses of sign languages based on the notion of linguistic officiality, implying that the condition of being a fully-fledged language with official or full status or conditioned. Often, as observed, the notion of the officiality of sign language in their legal statuses is conditioned; that is, there are limitations of officiality on the nature and scope of the legal status of sign language. This may imply either a purely symbolic (or proclamatory) nature without legal support to enforce the official use of sign language or an operationally functional nature with different legal implications for the effectiveness and efficacy of enjoying and exercising rights inherent in the notion of officiality. Consequently, numerous legal statuses provide a generic or lacking notion of officiality that condition the legally fragile or restricted category based on the contents of their respective legal statuses that establish the minimum (or none) notion of linguistic officiality, under penalty of becoming, as RUIZ VIEYTEZ[114] rightly states, an *"*empty officiality", that is, "would constitute a fraudulent legal category" in an artificial and abstract way that does not translate the effectiveness of the legal recognition of its rights inherent in linguistic officiality, both in the formal dimension and in the material dimension.

[114] Ibidem (our translation).

5. Conclusions

The concept of sign language official status stands as a distinctive and intricate legal idea distinct from spoken languages, possessing its unique inherent legal aspects. It remains an abstract and indeterminate notion, making it challenging to precisely define the officiality that involves the legal acknowledgment of sign language. However, it´s discernible that the notion of officiality embodies, at the very least, a dual aspect — instrumental and symbolic. From an instrumental perspective, the official status of sign language represents the embodiment and utilization of legal recognition. It signifies the commitment of state authorities to ensure, respect, and safeguard the juridical-linguistic intricacies integral to the legal framework that protects sign language. This recognition establishes sign language as an officially recognised language or, in equivalent terms, a language with recognised official uses across various domains. These differing legal effects indicate the effectiveness of exercising certain linguistic rights, precisely outlined within the legal framework for individuals. On the other hand, the declaration of officiality entails a symbolic function. It denotes the ultimate objective behind the legal recognition of sign language, emphasizing its role as a symbol for cultural, identity, and linguistic cohesion among individuals who share and express their socio-linguistic distinctiveness. This acknowledgment is duly safeguarded and promoted, fostering a sense of unity and coherence. In some national legislations, the concept of an official language is introduced, primarily pertaining to spoken languages. However, these laws inadvertently or implicitly exclude sign languages, failing to provide them with a similar legal standing as the official spoken languages. Even though these legislations align their legal norms with their respective Constitutions, which initially might not have envisaged the notion of an official language for sign languages, this exclusion is not insurmountable. Legislators have the prerogative to attribute the concept of an official language to sign languages as a legal category at a legislative or regulatory level, albeit with less symbolic significance compared to the constitutional value of declared languages.

The compilation of diverse legislations related to sign languages illustrates commonalities in formulating national legislations that uphold fundamental principles. These laws embody the realization of legal recognition for sign language, integrating it into the legal framework, thereby elevating its recognised status and diverse juridical effectiveness. The impact extends across various public spheres, notably in communication, education, and public service sectors catering to sign language speakers. These legislations meticulously consider their contextual relevance within national legal frameworks and the implications of norms determined therein. Consequently, interpretations of these norms vary depending on the context and objectives pursued. Generally, these laws not only address the language itself but also regulate recognised linguistic rights, impacting the daily lives of language speakers. The clarity and precision of the legal definition of sign language´s officiality remains ambiguous and not adequately determined within the legal systems of various States. Achieving uniformity in legal responses concerning the status of sign languages poses challenges. However, it`s feasible to compile and systematize the legal responses of respective States, aiming to identify fundamental principles that are shared across different national legal frameworks. Such alignment should be in harmony with the essential parameters of the Convention, particularly articulated in its article 21 of Convention.

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Preferred Name in the Brazilian Legal System:

Creating an Institution to Combat Prejudice and Discrimination

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Abstract: The purpose of this paper is to address the issue of gender prejudice and discrimination by examining the linguistic and legal aspects of the inclusion of the preferred name (*nome social*, in Brazilian Portuguese) in the Brazilian legal system. A preferred name refers to the name chosen by a transgender person to be used in place of their registered name. In this discussion, we analyze federal bills, legal decisions, and regulations that have, from 2006 to 2022, contributed to the incorporation of the preferred name into various types of texts in Brazil. We also consider the results of studies that have examined the use of preferred names in the Brazilian media. The data analysis demonstrates that, despite the history of the establishment of this institution being marked by various instances of discrimination and violence, both in legal documents and in the media, the norms related to preferred names have simultaneously represented a significant stride for the public authorities and society to pay more attention to recognizing the rights of transgender individuals. In the case of legal decisions, there has also been a shift in the resolution of conflicts, favoring the principles of free name choice, self-identity determination, and human dignity.

Keywords: discrimination; gender prejudice. transgender rights; preferred name; Brazilian legal system.

Summary: 1. Introduction; 2. The insertion of the preferred name in the Brazilian legal system; 3. The reference to transgender individuals and to preferred names in the news; 4. Discussion: principles in adopting or rejecting preferred names; 5. Final remarks.

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1. Introduction

The name registration is widespread among written culture and the civil name is fundamental for any administrative or legal act. It constitutes the anthroponym most used in formal situations. The choice of the civil name is made, most of the time, by parents or guardians. In countries with a civil law system, the right to have a name, as well as its registration, is provided for by law. However, there are several situations in which one may want to change their name throughout their lives. According to Varennes & Kuzborska[1], it is now increasingly accepted that individuals are entitled to have their names recognized and used, including names in a language that may not be the official language of the nation in which they live. One of the situations of changing names is observed with transgender people, who can change the civil name or adopt the preferred name (*nome social*, in Brazilian Portuguese)[2].

Paula and Benevides[3] analyze responses from transgender people who answered, in April 2022, a questionnaire about civil registration rectification. Of 1,658 responses from transgender people, 631 (38.4) had rectified their civil registration and 1,011 (62%) had not. Among the former, the majority (75%) had done it administratively. Among those, 94% rectified both name and gender, i.e., a small group rectified only the name or only the gender. In the case of the latter, 91% use the preferred name, which, according to the authors, "demonstrates that the policy of respect and use of the preferred name remains current and extremely important for the guarantee of inclusion, maintenance and confrontation of transphobic violence in the interpersonal treatment of trans people".[4]

Regarding linguistic aspects, new studies have shown that Brazilian preferred names present innovative graphic properties and tend to have a smaller extension than other anthroponyms. In certain cases, it presents marks of identity and traits related to the social context of the bearer.[5] However, the social acceptance of this name has been controversial in Brazilian society. In the press, for example, the use of the preferred name exhibits marks of prejudice and discrimination.[6]

The aim of this work is to analyse signs of prejudice and discrimination through linguistic and legal aspects in the inclusion process of the preferred name in the Brazilian legal system. The analysis is based on the interface between linguistic studies on proper names with law studies.[7] The text is organized as follows: firstly, we analyse the incorporation of the preferred name within the Brazilian legal system, taking into account some federal legal instruments and court decisions; secondly, we comment some strategies for referring to transgender people in news; thirdly, a comprehensive discussion on these topics is presented, followed by the inclusion of our final remarks.

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[1] F. VARENNES, E. KUZBORSKA, *Human rights and a person's name: legal trends and challenges*, in *Human Rights Quarterly*, 37/4, 2015, pp. 977–1023, http://www.jstor.org/stable/24519122.

[2] As an anthroponomic category and according to Federal Decree No. 8,727/2016, the *preferred name* (or *chosen name*) corresponds to the name by which the transgender person identifies him- or herself and is socially recognized. See E. T. R. AMARAL, *Onomastics and Law Interface: Contributions to the Studies of Brazilian Anthroponomy*, in *Domínios da Lingu@gem*, 15/2, 2020, pp. 446–473, https://seer.ufu.br/index.php/dominiosdelinguagem/article/view/56675/30332 and E. T. R. AMARAL, M. S. SEIDE, *Personal names: an Introduction to Brazilian Anthroponymy*, Araraquara, 2022, https://www.letraria.net/wp-content/uploads/2022/04/Personal-Names-an-introduction-to-Brazilian-anthroponymy-Letraria.pdf.

[3] A. W. M. PAULA, B. BENEVIDES, *Resultados e análises*, in *ANTRA - Associação Nacional de Travestis e Transexuais. Diagnóstico sobre o acesso à retificação de nome e gênero de travestis e demais pessoas trans no Brasil*, Brasília, 2022, pp. 45-81, https://antrabrasil.files.wordpress.com/2022/11/diagnostico-retificao-antra2022.pdf.

[4] A. W. M. PAULA, B. BENEVIDES, *op. cit.*, p. 60.

[5] E. T. R. AMARAL, C. B. TIMPANI, *O nome social de candidatos a cargos eletivos no Brasil*, in *Acta Scientiarum. Language and Culture*, *45*/1, 2023, e66511. https://doi.org/10.4025/actascilangcult.v45i1.66511 and J. M. A. SOUZA, N. C. PRADO, *Formação e estilização ortográfica de nomes sociais de pessoas transgêneros: questões de identidade linguística e de gênero*, in *Domínios de Lingu@gem*, 15/3, 2021, pp. 637-677, https://doi.org/10.14393/DL47-v15n3a2021-2.

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[7] T. AINIALA, *Names in society*, in C. HOUGH (ed.), *The Oxford Handbook of Names and Naming*, Oxford, 2016, pp. 371–381, E. T. R. AMARAL, *op. cit.*, and A. TEUTSCH, *Names and Law*, in C. HOUGH (ed.), *The Oxford Handbook of Names and Naming*, Oxford, 2016, pp. 554-571.

2. The insertion of the preferred name in the Brazilian legal system

The process of recognition of the right to a preferred name for transgender people has come a long way in Brazil, often posing challenges for those seeking recognition from both the State and society. To understand how this process has occurred in the country, it is important to observe how the publication of standards over the past decades has developed.

First, it is worth remembering that neither the 1988 Constitution of the Republic nor the 2022 Civil Code mention the preferred name.[8] However, since the first years of the 21st century, several bills have been presented, especially in the House of Representatives, that aimed to guarantee transgender people the right to use their preferred name. In opposition to these propositions, several legislative reactions arose to bar this right – already in 2005, a bill proposed by deputy Elimar Máximo Damasceno (Prona/SP), PL 5,872/2005, intended to prohibit the change of name of transsexual individuals. In a justification based much more on moral and religious concepts, the parliamentarian defended: "The transsexual, by removing the sexual characters with which nature has endowed him, throws his revolt at God. We cannot condone these abominations. The law must urgently prevent the Judiciary branch from allowing these follies [name changes]".[9]

In 2006, in the House of Representatives, the justification of PL 6,655/2006, authored by Congressman Luciano Zica (PT/SP), was based on the need for recognition of the preferred name of transsexual people, although still, as Bento[10] recalls, from a pathologizing perspective.[11] The bill 2,976/2008, authored by Representative Cida Diogo (PT/RJ), is set to make it possible, for the first time, to include the term *nome social* (‘preferred name’) in legal proposals. The deputy's bill intended to create the possibility for people with a transvestite gender orientation, male or female, to use, next to their official name, a preferred name. Since 2008 until the year 2022, at least 15 bills have started to be processed in this Legislative House that explicitly recognize the existence of the preferred name and seek, most of the time, to expand the rights of transgender people[12]. Table 1 shows the data from these projects.

Bill (PL) number and year	**Author (Party/State)**	**Synopsis of the decision. Status as of May 13, 2023.**
Bill 2,976/2008	Cida Diogo (PT/RJ)	Adds Article 58-A to the text of Law No. 6,015, of December 31, 1973, which provides for public registries and other provisions, creating the possibility for people who have a male or female transvestite gender orientation to use a preferred name next to their official name and first name. Attached to bill 5,872/2005.
Bill 5,002/2013	Jean Wyllys (PSOL/RJ)	Provides the right to gender identity and changes Article 58 of Law No. 6,015 of December 31, 1973. Filed.
Bill 6,000/2016	André Amaral (PMDB/PB)	It defines general rules and objectives for the National High School Exam (ENEM), establishes the rights of its participants, and makes other provisions. Filed.
Bill 8,174/2017	André Amaral (PMDB/PB)	Adds a sole paragraph to Article 1 of Law No. 13,444, of May 11, 2017. Allows the use of the preferred name in identity documents. Filed.

[8] It is also important to mention that in Brazil, unlike countries such as Spain with the recent Law No. 4/2023, there is no specific federal legislation that protects the rights of LGBT+ individuals.

[9] E. M. DAMASCENO, *Bill No. 5,872, 9 September 2005*, p. 3, https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=338727&filename=Tramitacao-PL%205872/2005.

[10] B. BENTO, *Nome social para pessoas trans: cidadania precária e gambiarra legal*, in *Contemporânea – Revista de Sociologia da UFSCar*, 4/1, 2014, pp. 165–182.

[11] This is also how the author characterizes the Bill of Supplementary Law 658/2011, by former senator Marta Suplicy, presented in the Senate. See also C. M. BAHIA, M. V. L. CANCELIER, *Nome social: direito da personalidade de um grupo vulnerável ou arremedo de cidadania?* in *Revista Húmus*, 7/19, 2017, p. 102–123.

[12] In the Senate, the issue did not motivate many propositions. Besides the aforementioned bill 658/2011, it is worth mentioning the bill 2,649/2023, by Senator Alessandro Vieira (PSDB/SE), which provides for the right to use the preferred name in the public and private health services network.

Bill 8,614/2017	Flavinho (PSB/SP)	Prohibits the insertion of the preferred name in official documents. Amends Law No. 7,116 of 1983. Attached to bill 8,174/2017.
Bill 2,653/2019	David Miranda (PSOL/RJ)	Provides for the protection of people in situations of violence based on sexual orientation, gender identity, gender expression, or biological or sexual characteristics. Awaiting Temporary Committee Creation by the Board.
Bill 144/2021	Alexandre Padilha (PT/SP)	Provides for the reservation of job openings or internships for transsexual women, transvestites, and transsexual men in private companies, and makes other provisions. Joined to bill 5,593/2020.
Bill 2,345/2021	Natália Bonavides (PT/RN)	Creates the National Policy of Employment and Income for the Trans Population - TransCitizenship, aimed at promoting the citizenship of transvestites and transsexuals in situations of social vulnerability. Attached to Bill 144/2021.
Bill of Supplementary Law 111/2021	Jhonatan de Jesus (REPUBLIC/RR)	Establishes the Electoral Code. Withdrawn by Author.
Bill of Supplementary Law 112/2021	Soraya Santos (PL/RJ), Jhonatan de Jesus (REPUBLIC/RR), Paulo Teixeira (PT/SP) and others	Establishes the Electoral Code. Awaiting examination by the Federal Senate.
Bill 3,213/2021	Erika Kokay - (PT/DF), Vivi Reis (PSOL/PA), David Miranda (PSOL/RJ)	Provides for the right to self-determination of gender identity and gender expression and protection of the sexual characteristics of each person and makes other provisions. Attached to Bill 4,241/2012.
Bill 3,227/2021	Executive Branch	Amends Law No. 12,965 of April 23, 2014, and Law No. 9,610 of February 19, 1998, to provide for the use of social media. Awaiting order from the President of the Chamber of Deputies.
Bill 3,311/2021	Natália Bonavides (PT/RN)	Amends Law No. 9,265, of February 12, 1996, and Law No. 6,015, of December 31, 1973, to guarantee the right to free rectification and registration of the civil name and self-perceived gender of transvestites, transsexuals, transgenders, and non-binary people. Attached to Bill 3,667/2020.
Bill 4,346/2021	Vivi Reis (PSOL/PA)	Establishes the National Guidelines for the Promotion and Defense of the Human Rights of Public Security Professionals. Filed.
Bill 1,777/2022	Vivi Reis (PSOL/PA)	Amends Decree-Law No. 3,689, of October 3, 1941 (Code of Criminal Procedure) to institute protection measures for victims of sexual violence. Attached to 5117/2020.

Table 1. Bills and Bills of Supplementary Law from the House of Representatives whose original text acknowledges the preferred name as an element in legal proposals (chronological order).[13]

Although most of the bills have sought to guarantee the possibility of using the preferred name, there are contrary initiatives. For instance, bill 8,614/2017 seeks to prohibit the insertion of preferred names in official documents, on the grounds that it could "cause legal wrangling and endless confusion".[14] With the contention of ensuring legal security, the author creates a hypothetical situation in which one could change the name on the registry to a preferred name in order to defraud a purchase and a sales agreement. Nevertheless, from our point of view, the congressman's argument seems to fall short of acknowledging the fact that there are different

[13] CHAMBER OF DEPUTIES, *Propostas legislativas*, 2023, https://www.camara.leg.br/busca-portal/proposicoes/pesquisa-simplificada.

[14] FLAVINHO, *Bill No. 8,614, 29 September 2017*, https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2152055.

legal and administrative measures to prevent such fraud. Furthermore, it may be unfair to deny a right that should be granted to transgender individuals because of fraud that could be prevented through other means.

In any case, despite the myriads of bills on the issue, it's worth noting that there is currently no federal legislation addressing preferred names[15]. On the other hand, there have been several initiatives in the Executive Branch in this regard that are intended to fill this legislative gap. During the first decade of the 21st century, the federal government's public policies, which were oriented toward human rights protection, aimed to reduce inequalities in the rights of the LGBT+ population, among other goals. To this end, agendas such as civil unions, the recognition of homoparental families, the reduction of violence, as well as the guarantee of sexual and reproductive rights, among other situations of rights inequality, have become components of the governmental political agendas.

In 2004, the "Brazil without Homophobia - Program to Combat Violence and Discrimination against LGBTs and to Promote Homosexual Citizenship" was established by the Special Secretariat for Human Rights (SEDH) of the Presidency of the Republic.[16] In 2006, an Ordinance from the Ministry of Health approved the *Charter of Rights of Health Users*, which consolidates the rights and duties of citizenship in health care throughout the country. Although the text ensured that citizens could be identified by the name they preferred to be called, regardless of their civil registry name, the term *nome social* ('preferred name') was not yet introduced.[17] Three years later, this normative instrument was revoked by Ordinance No. 1,820 of August 13, 2009, which, for the first time, cited the preferred name as a means of individual identification: "There should be in every document of the user a field for registering the preferred name, regardless of the civil registration, and the use of the preferred name must be ensured, and individuals should not be identified by number, their legal name, disease codes or any other disrespectful or prejudiced methods".[18] For many transgender individuals, the card became their first official document, displaying only their preferred name, while their registered name remained within internal systems.[19] For us, this action can also be seen as a possibility to reduce discrimination against transgender individuals.

In 2010, Ordinance No. 233, issued by the Ministry of Planning, Budget, and Management (MPOG) on May 18, ensured that public servants within the Federal Public Administration could use their preferred names. According to the normative text, in the case of functional identification for internal use by the agency (badge), the preferred name should be written on the obverse side and the civil name on the back of the functional identification. The following year, Ordinance No. 2,836/2011, issued by the Ministry of Health (MS), established that the National LGBT Integral Health Policy had as one of its objectives to guarantee the use of the preferred name of transvestites and transsexuals.[20] In the same year, 2011, Ordinance No. 1,612/2011, issued by the Ministry of Education (MEC), ensured transgender and transvestite individuals the right to include their preferred name in acts and procedures conducted within the executive body. In the case of functional identification for internal use by the agency (badge), this ordinance established that the preferred name should be written on the front side, and the civil name on the back of the functional identification.

It can be argued that public policies regarding the preferred name gained more prominence starting in 2016. This shift was prompted by Decree No. 8,727/2016, issued by President Dilma Roussef, which recognizes the gender identity of transvestites and transsexuals and mandates the use of the preferred name within the direct federal public administration, as well as in autarchic and foundational entities.[21] In the process of including the preferred name in federal administrative acts, in 2018, Decree 9,278/2018 was issued. It regulates the issuance

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[15] At the municipal level, some noteworthy examples include Law No. 12,691/2017 from the municipality of Uberlândia (see UBERLÂNDIA, *Law No. 12,691, 17 May 2017*, http://leismunicipa.is/qephv).

[16] NATIONAL COUNCIL TO COMBAT DISCRIMINATION, *Brasil Sem Homofobia: Programa de combate à violência e à discriminação contra GLTB e promoção da cidadania homossexual*, Brasília, 2004, https://bvsms.saude.gov.br/bvs/publicacoes/brasil_sem_homofobia.pdf.

[17] BRAZIL, Ministry of Health, *Ordinance No. 675, 30 March 2006*, http://bvsms.saude.gov.br/bvs/saudelegis/gm/2006/prt0675_30_03_2006.html.

[18] BRAZIL, Ministry of Health, *Ordinance No. 1,820, de 13 August 2009*, https://bvsms.saude.gov.br/bvs/saudelegis/gm/2009/prt1820_13_08_2009.html.

[19] B. BENEVIDES, I. VIRGÍNIA, V. DANDARA, *Introdução*, in *ANTRA - Associação Nacional de Travestis e Transexuais. Diagnóstico sobre o acesso à retificação de nome e gênero de travestis e demais pessoas trans no Brasil*, Brasília, 2022, pp. 6–13, https://antrabrasil.files.wordpress.com/2022/11/diagnostico-retificao-antra2022.pdf.

[20] BRAZIL, Ministry of Health, *Ordinance No. 2,836, 1st December 2011*, https://bvsms.saude.gov.br/bvs/saudelegis/gm/2011/prt2836_01_12_2011.html.

[21] BRAZIL, Presidency of the Republic, *Decree No. 8,727, 28 April 2016*, https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/d8727.htm.

of the Identity Card and ensures the inclusion of the preferred name in the document of transgender individuals upon request, without any need for supporting documentation.[22, 23] Although this Decree was revoked four years later by Decree No. 10,977/2022, this last one continued to provide for the inclusion of the preferred name in the identification document.[24] We will return to this issue later.

Table 2 presents a list of national norms that have contributed to the recognition and guarantee of the use of the preferred name. However, it is important to note that even before the national norms, there had already been norms from various entities or bodies of the Public Administration that recognized the right to use the preferred name.[25] In the state of Pará, Ordinance No. 16/2008, issued by the Secretary of State for Education, established that, effective from January 2, 2009, all public school units should include the preferred names of transvestites and transgender individuals when registering students. Also in 2008, in the city of Belo Horizonte, a resolution from the Municipal Council of Education already published the guidelines for including the preferred name of transvestites and transsexuals in school records.[26] In the following year, 2009, the Federal University of Amapá issued an ordinance allowing the inclusion of the preferred name of transvestites and transsexuals in the academic records of the institution.[27] Even though the university ordinance was founded with the goal of inclusivity for this group, it required that the preferred name be recorded in parentheses followed by the civil name on internal documents. Such a norm, in our point of view, could be more unfavorable to the inclusion process, a topic that will be taken up later. Over the following years, other federal universities issued internal rules on preferred name[28].

Year	Issuer	Normative text	Topics / Content
2006	Ministry of Health	Ordinance No. 675, of March 30, 2006.	Charter on the Rights of Health Care Users.
2009	Ministry of Health	Ordinance No. 1,820, of August 13, 2009.	Provides on the rights and duties of health care users.
2010	Ministry of Planning, Development and Management (now Ministry of Planning and Budget)	Ordinance No. 233, of May 18, 2010.	Ensures that public servants within the direct federal, autonomous, and foundational public administration have the right to use their preferred name.
2011	Ministry of Education	Ordinance No. 1,612, of November 18, 2011.	Ensures transsexual and transvestite individuals the right to choose their preferred name in acts and procedures promoted by the Ministry of Education.

[22] BRAZIL, Presidency of the Republic, *Decree No. 9,278, 5 February 2018*, http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/decreto/D9278.htm.

[23] When it comes to the Judiciary Branch, it is worth mentioning Resolution No. 270/2018 of the National Council of Justice, which provides for the use of the preferred name by people using judicial services, as well as by members, servants, interns, and outsourced workers of Brazilian courts (see NATIONAL COUNCIL OF JUSTICE, *Resolution No. 270, 11 December 2018*, https://atos.cnj.jus.br/files/resolucao_270_11122018_12122018112523.pdf). Additionally, the TSE enables the inclusion of the preferred name in the electoral register (See SUPERIOR ELECTORAL COURT, *Resolution No. 23,562, 22 March 2018*, https://www.tse.jus.br/legislacao/compilada/res/2018/resolucao-no-23-562-de-22-de-marco-de-2018).

[24] BRAZIL, *Law No. 14,382*, 27 June 2022, http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2022/Lei/L14382.htm#art11.

[25] J. A. SILVA JÚNIOR, *Direitos à meia luz: regulamentação do uso nome social de estudantes travestis e transexuais nas instituições escolares*, in *Revista da FAEEBA – Educação e Contemporaneidade*, 25/45, 2016, pp. 173-189, http://revistas.uneb.br/index.php/faeeba/article/view/2293.

[26] BELO HORIZONTE, *Resolution CME/BH No. 002/2008*, 18 December 2008, http://portal6.pbh.gov.br/dom/iniciaEdicao.do?method=DetalheArtigo&pk=1000854.

[27] FEDERAL UNIVERSITY OF AMAPÁ, *Resolution No. 13*, 19 October 2009, https://www2.unifap.br/consu/files/2011/07/Resolu%c3%a7%c3%a3o-013-09-Travestis-e-Transexuais.pdf.

[28] For a review of reports on preferred name inclusion in academic records, see C. A. BUTKOVSKY JUNIOR, *Identidade de gênero e reconhecimento: o registro do nome social no meio acadêmico (um estudo de caso na UFES)*, Master's thesis, Federal University of Espírito Santo, 2017, https://sucupira.capes.gov.br/sucupira/public/consultas/coleta/trabalhoConclusao/viewTrabalhoConclusao.jsf?popup=true&id_trabalho=5074017.

2011	Ministry of Health	Ordinance No. 2,836, of December 1, 2011.	It institutes, within the scope of the Brazilian National Health System (SUS), the National Policy for Integral Health of Lesbians, Gays, Bisexuals, Transvestites and Transsexuals (LGBT National Policy for Integral Health).
2014	Secretariat for Human Rights of the Presidency of the Republic / (currently Ministry of Human Rights and Citizenship)	Resolution No. 11, of December 18, 2014.	Establishes parameters for the inclusion of the items "sexual orientation", "gender identity", and "preferred name" in occurrence reports issued by police authorities in Brazil.
2015	Secretariat for Human Rights of the Presidency of the Republic (currently Ministry of Human Rights and Citizenship)	Resolution No. 12 of January 16, 2015.	Sets forth parameters to guarantee access and permanence conditions for transvestites and transsexuals – and all those who do not have their gender identity recognized in different social spaces – in the educational systems and institutions, formulating guidelines for the institutional recognition of gender identity and its operationalization.
2016	Presidency of the Republic	Decree No. 8,727 of April 28, 2016.	Provides for the use of the preferred name and the recognition of the gender identity of transvestites and transsexuals within the scope of the direct federal public administration.
2018	Ministry of Education	Ordinance No. 33, of January 17, 2018 and Resolution CNE/CP No. 1/2018.	Ratifies the Opinion CNE/CP No. 14/2017, of the Full Council (*Conselho Pleno*, CP) of the National Education Council (*Conselho Nacional de Educação*, CNE), approved in the Public Session of September 12, 2017, which, together with the Resolution Project attached to it, defines the use of the preferred name of transvestites and transsexuals in the school records of Basic Education in the Country, for students over 18 years of age.
2022	Presidency of the Republic	Decree No. 10,977 of February 23, 2022[29].	Sets forth the procedures and requirements for the expedition of the Identity Card, which will include, upon request, the preferred name.

Table 2. National norms relevant to the recognition and guarantee of the use of the preferred name (chronological order)

As shown in Table 2, despite the absence of a law guaranteeing transgender people the use of a name in accordance with their gender identity, the State began issuing several norms from different bodies, which gradually gave greater visibility to the subject. Such norms originate within the Ministry of Health, with the aim of promoting equality and reducing violence, and they were subsequently extended to Education, Public Administration, and other sectors.

Unarguably, the evolution of the rules on the preferred name has not been peaceful, and opposition has become more pronounced in recent years. It's worth noting that a significant number of proposals aimed at restricting the implementation of policies for recognizing and adopting the preferred name have gained attention. Following the issuance of Resolutions No. 11/2014 and No. 12/2015, there were a significant number of legislative decree projects seeking to halt the effects of the application of either one, the other, or both, namely: Bill of Legislative Decree PDC 16/2015 (Pr. Marco Feliciano - PSC/SP); PDC 17/2015 (Pr. Marco

[29] It is noteworthy that Resolution No. 11/2023, published in the Official Gazette of the Union on 04/10/23, establishes a Technical Work Group to present a Minute of alteration to Decree No. 10,977, of February 23, 2022, regarding the disposition of the "gender" and "preferred name" fields in the National Identity Card (see BRAZIL, Presidency of the Republic, *Resolution No. 11*, 6 April 2023, https://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=10/04/2023&jornal=515&pagina=4&totalArquivos=280.). Until the completion of this paper, the result of the report of the work of this group had not been released.

Feliciano - PSC/SP); PDC 18/2015 (Jair Bolsonaro - PP/RJ); PDC 26/2015 (Ezequiel Teixeira - SD/RJ); PDC 30/2015 (Eros Biondini - PTB/MG, Fausto Pinato - PRB/SP, Josué Bengtson - PTB/PA and others); PDC 61/2015 (Silas Câmara - PSD/AM); PDC 90/2015 (Alan Rick - PRB/AC). In 2016, the Bill of Legislative Decree PDC 395/2016 was introduced by several authors (João Campos - PRB/GO, Evandro Gussi - PV/SP, Paulo Freire Costa - PR/SP and others). It seeks to halt Decree No. 8,727/2016. In 2018, PDC 898/2018 was introduced (Professor Victório Galli - PSC/MT), which aims to halt MEC Ordinance No. 33/2018.

In the justifications of several legislative decree projects, one can observe a rationale based on the argument that the Executive Branch lacks the authority to issue a regulation concerning names. In the justification of Legislative Decree Bill PDC 16/2015, which aims to annul Resolution 12/2015, Representative Marco Feliciano (PSC/SP), for instance, classifies the transgender rights guarantee policy as "absurd". He also asserts that proposed changes should be addressed through civil legislation rather than by the Executive. In our interpretation, his argument does not hold up, as the published norms do not modify the public records law. The discourse presented by these Representatives is more of a veiled way of revealing discrimination against the transgender population.

Another example contrary to the presidential norm can be found in Bill 8,614/2017, according to which "If someone wishes to change their name [...], they should approach the Judiciary with reasons they find plausible and within the legal framework in force, along with the necessary evidence, and their request will undoubtedly be granted".[30] We can observe that the author, besides distorting the purpose of the Decree, seems to go against any progress related to names.

As far as jurisprudence on the subject is concerned, it is not possible here to present an exhaustive survey. However, some court decisions provide insights into how the preferred name institution (and its conception) has been integrated into judicial rulings[31]. An initial example is a special appeal filed by a transsexual with the Superior Court of Justice (*Superior Tribunal de Justiça*, STJ) against a decision of the São Paulo Court of Justice. This decision had upheld the appeal filed by the Public Prosecutor's Office of the State of São Paulo (*Ministério Público do Estado de São Paulo* – MPSP) to overturn a judgment that had approved the request of a transsexual to change her name from *Clauderson* to *Patrícia* and to alter her gender designation from male to female. In this case, the plaintiff had undergone transgenitalization surgery, and her request was elevated to a higher court due to the arguments presented by the MPSP. The arguments claimed that the intended change did not fall within the exceptions for rectification provided for in the public records law and that, consequently, the rule of name unchangeability should prevail. The STJ rapporteur, Nancy Andrighi, supported by other ministers in a 2009 decision, accepted the initial request based on the principle of human dignity. The magistrate granted the applicant's claim and ordered the change in their birth certificate.[32]

The cited judgment served as a parameter for later judgments of the same Court, including one that judged a request for name change without the plaintiff having had the surgery. In this case, the decision of the Court of origin (Court of Justice of São Paulo) acknowledged the plaintiff's right to change her first name but did not fully recognize it. The court only permitted the addition of a female first name, creating a compound name that the plaintiff did not identify with.[33] In the initial decision, the judge had only authorized the addition of the female first name "C." before the male first name "N.", and the plaintiff should be called C. N. da S., instead of de N. da S. Therefore, this led to a peculiar situation in which a court decision imposed a name on a competent adult, rather than allowing them to choose their preferred name. In the STJ's decision, the court acknowledged that not all transsexual individuals desire surgery, and some may not wish to undergo surgical intervention. The final decision, delivered in 2020, favored the plaintiff's request.[34] Earlier, however, the Supreme Federal Court (*Supremo Tribunal Federal* - STF) had already ruled on the Direct Action of

[30] FLAVINHO, *Bill No. 8,614, 29 September 2017*, https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2152055.

[31] See also Cidade and Bicalho, who analyze requests for civil registration rectification (name and sex/gender declaration) in TJ-RJ cases (M. L. R. CIDADE, P. P. G. BICALHO, *A racionalidade médico-jurídica dos processos de alteração do registro civil de pessoas trans no estado do Rio de Janeiro*, in *Revista de Direito*, 9/2, 2017, pp. 161–203, https://periodicos.ufv.br/revistadir/article/view/1920).

[32] SUPERIOR COURT OF JUSTICE, *Special Appeal No. 1.008.398 - SP (2007/0273360-5)*, 15 October 2009, https://processo.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=200702733605&dt_publicacao=18/11/2009.

[33] It is worth noting that, unlike the previous case, the reference to transsexual is made using grammatical forms in the feminine.

[34] SUPERIOR COURT OF JUSTICE, *Special Appeal No. 1.860.649 - SP (2018/0335830-4)*, 12 May 2020, https://processo.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=201803358304&dt_publicacao=18/05/2020.

Unconstitutionality.[35] In this lawsuit, the Court granted the action to provide an interpretation in accordance with the Constitution and the Pact of San Jose da Costa Rica to Article 58 of Law No. 6,015/1973. This interpretation recognized the right of transgender individuals, who desire such changes, to have their name and sex directly substituted in the civil register, without the requirement of transgenitalization surgery or hormone treatment, or any pathologizing treatments. The lawsuit was initiated in 2009 and, as a result, had been in progress for nine years within the country's highest court.

The examples above illustrate cases that have reached the country's superior courts to address the name change and the consolidation of the preferred name. Due to legislation not keeping pace with social change, the decisions of higher courts have made it much more challenging for transgender individuals who wish to adopt their preferred name. It is worth noting that some individuals who successfully rectified their name on their birth certificate later encountered difficulties in updating their documents, including facing inquiries from public institutions regarding the certificate's authenticity.[36] Paula and Benevides mention cases of transphobia by notary public employees. Some examples of transgender individuals' accounts are as follows:

(1) "When I entered the rectification request, the employee who attended me treated me as male several times and there was a moment when we went to a room so that I could state with certainty that I wanted to rectify not being possible later a new change".[37]

(2) "There was a somewhat awkward moment, but it seemed like a usual part of the process, when I was interviewed by the Notary with questions about how sure I was about the decision I was making, whether I would like to have any surgery, whether I would hormone myself and so on".[38]

(3) "At the registrar's office in São Paulo, even though I presented my case and the way I would like to be called, they continued using my dead name throughout the process of reviewing the documents...".[39]

(4) "they asked me for thousands of things without need, such as medical report, social network prints, bank accounts where I use my preferred name, hearing with 3 witnesses to prove that I am trans and even though I said I was wrong, I sent everything because I just wanted the process to be fast".[40]

In 2022, the modification in the public records law facilitated name changes. Following the amendments introduced by Law No. 14,382/2022, anyone can now, for the first time, make a name change in an extrajudicial manner.[41] However, this change does not prevent the adoption of a preferred name when an individual chooses not to rectify their civil register.

3. The reference to transgender individuals and to preferred names in the news

Over the past two decades, the press has played a crucial role in promoting the recognition of the preferred name as a new right. However, respect for the dignity of transgender individuals and their adoption of new names did not immediately align with the evolving norms. In recent years, studies have demonstrated how the press can disseminate and sometimes reinforce prejudice and discrimination.

From a lexical studies perspective, Amaral and Oliveira[42] clarified that, in their survey of the *Folha de*

[35] SUPREME FEDERAL COURT, *Direct Action of Unconstitutionality No. 4,275, 1st March 2018*, https://portal.stf.jus.br/processos/downloadPeca.asp?id=15339649246&ext=.pdf.
[36] See the cases mentioned on M. L. R. CIDADE, *Nomes (Im)próprios: Registro civil, norma cisgênera e racionalidades do Sistema Judiciário*, Master's thesis, Federal University of de Janeiro, https://sucupira.capes.gov.br/sucupira/public/consultas/coleta/trabalhoConclusao/viewTrabalhoConclusao.jsf?popup=true&id_trabalho=3072295.
[37] A. W. M. PAULA, B. BENEVIDES, *op. cit.*, p. 79.
[38] A. W. M. PAULA, B. BENEVIDES, *op. cit.*, p. 80.
[39] A. W. M. PAULA, B. BENEVIDES, *op. cit.*, p. 81.
[40] A. W. M. PAULA, B. BENEVIDES, *op. cit.*, p. 81.
[41] BRAZIL, *Law No. 14,382*, 27 June 2022, http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2022/Lei/L14382.htm#art11.
[42] E. T. R. AMARAL, I. OLIVEIRA, *O nome social como uma categoria antroponímica para a garantia do princípio da dignidade da pessoa humana / Preferred Name as an Anthroponymic Category for Guaranteeing the Principle of Human Dignity*, in *Caligrama: Revista de Estudos Românicos*, 24/3, 2019, pp. 25–46. http://dx.doi.org/10.17851/2238-3824.24.3.25-46.

S.Paulo database, one of the main newspapers with national circulation, the term *nome social* ('preferred name') began to be used in the year 2009, which corresponds with its inclusion in legislative proposals at that time, as discussed in the previous section. Based on this information as well as on the regulations on the subject, the authors conducted an analysis of 196 cases of reference to transgender people's names cited in news stories published on the Internet from 2008 to 2017. In their findings, they highlight several strategies for including the preferred name of transgender individuals in journalistic texts. The most frequent constructions included (*best*) *known as*, *being called*, *identified as*, *used the name of*, among others, as in (5). The authors found occurrences of the term '*nome social*' in approximately 5% of the cases, as exemplified in (6).

(5) murder of transvestite P. J. I. P.[43], 27, *known as* P.[44]

(6) The act started around 6:30pm at Largo do Rosário and the group walked to the Metropolitan Cathedral where tributes were paid to J. G. B., who *used the preferred name of* G. B.[45]

It is worth noting that in (5) and (6), as well as in several cases cited by the authors, both civil name and the preferred name were presented together, indicating a lack of awareness about the need to omit the registered name and prioritize the name chosen by individuals. After all, we can question, what would be the importance or relevance to the reader in knowing the dead name of the transgender person?

In the authors' data, there are occurrences that consider the preferred name as a *nickname* (sometimes with a negative connotation) or even explicitly use pejorative forms, as seen in (7), where the term *alias* is employed. Furthermore, in nearly 38% of the occurrences analyzed by Amaral and Oliveira, lexical or grammatical items in the masculine form were used when referring to female transgender individuals, as illustrated in (8). This is a common occurrence in the experiences of transgender individuals, who frequently endure the inappropriate use of grammatical elements that do not align with the gender they identify with. It undoubtedly reflects a significant lack of respect for their self-perceived gender identity.

(7) The victim, identified as C. S. S., 30 years old, alias "C.", was a resident of the same street where he was killed[46]

(8) In Bauru, hairdresser J. F. S., alias "S.", was executed with five shots on January 8[47]

In recent times, the ways of reference to transgender people in the press have evolved, signifying greater respect for their dignity. This change has also been influenced by the recent General Law on Personal Data Protection (Law No. 13,709/2018). In contemporary news, media outlets have been using the preferred name without including the civil register name and making use of grammatical elements in the gender identified by the transgender person. Regardless of the authorship of each journalistic text, which is worth researching in another study, examples from two different outlets are as follows. In the first case, these are news reports by Folha Vitória about the murder of the transvestite Laura Vermont. In 2015, the newspaper reported the crime by referring to the victim with her registered name, alongside her preferred name, as shown in (9). Recently, when publicizing the conviction of the guilty, the same outlet mentions only the name of the victim (10).

(9) **D. L. A.**, a transvestite **known as Laura Vermont**, 18, died after being beaten in the east side of São Paulo, in the early hours of last Saturday (20).[48]

(10) Three of the five men accused for the death **of transvestite Laura Vermont**, 18, in 2015 were

[43] Names were not abbreviated in the original.
[44] E. T. R. AMARAL, I. OLIVEIRA, *op. cit.*, p. 37.
[45] IBIDEM, p. 37
[46] IBIDEM, p. 37.
[47] E. T. R. AMARAL, I. OLIVEIRA, *op. cit.*, p. 38. In the original text, the article *o* ("**o** cabelereir**o")** and the suffix *-o* ("foi executad**o**") indicate male gender.
[48] FOLHA VITÓRIA, *Travesti é espancada, bate cabeça em ônibus ao fugir e não resiste aos ferimentos*, 22 June 2015, https://www.folhavitoria.com.br/policia/noticia/06/2015/travesti-e-espancada-bate-cabeca-em-onibus-ao-fugir-e-nao-resiste-aos-ferimentos.

convicted of light bodily injury on Friday, 12, after a decision by the 1st Jury Court of the Capital City of São Paulo.[49]

A similar example is the case of another transvestite who was also murdered in 2015 in Goiás. At the time, the news published by the G1 Goiás portal included the victim's registered name and male article (*um travesti*), as can be seen in (11). In 2023, when reporting the arrest of one of the convicted individuals, the same vehicle started using feminine grammatical forms and no longer mentions the victim's legal name, as shown in example (12).

(11) The Civil Police of Goiás presented on Tuesday (15) two suspects of killing **a transvestite**, in Goiânia. Lucas Ferreira, 29, and Dionata Guimarães, 24, confessed to the crime. According to investigations, the victim, **A. J. C. J**., 27, was stoned to death after a disagreement with one of the suspects.[50]

(12) This Thursday (6), in Marabá, Pará, one of those convicted of the murder of **a transvestite**, which occurred in July 2015, was arrested. (...) At the time, according to the delegate in charge of the case, Valdemir Pereira da Silva, after having sex, there was a disagreement between the pair and the victim. In the aftermath, the convicts stoned **the transvestite** to death.[51]

Applying the theoretical principles of Discourse Analysis, some scholars have also examined how the norms regarding the preferred name have been conveyed in the press.[52] Overall, the studies reveal prejudice against individuals that request the use of their preferred names in public spaces. Both Cunha and Guilherme analyze Monteiro's text,[53] which presents the conservative and discriminatory position of Congressman João Campos in *online* press. Campos regarded the preferred name as an equivalent to a nickname and argued that straight people should also have the right to a preferred name. At the time, the discussion surrounding the presentation of Bill of Legislative Decree PDC 395/2016 was ongoing. In the rapporteur's vote, issued by Congressman Lincoln Portela (PR-MG), Decree No. 8,727/2016 would be exorbitant legislative competence since it is up to the Union to legislate on civil law rules and on public records. Once again, as we can see, the argument is fallacious, since the Decree is limited to regulating the use of preferred names within the federal public administration.

Cunha also highlights the use of terms like *family* and *God* by parliamentarians to justify prejudice and discrimination. In many cases, the arguments of opponents to the norms regarding preferred names are reiterated, reaffirming that LGBT+ individuals are privileged and might be occupying spaces intended for women or with the intention of violence against them. Benevides[54] rightly reminds us that it is unlikely (and even fanciful) to believe that a cis-hetero man would go through a whole transition process, or even a name change, in order to rape women.

[49] FOLHA VITÓRIA, *Assassinos da travesti Laura Vermont são condenados por lesão leve e pena é extinta*, 13 May 2023, https://www.folhavitoria.com.br/geral/noticia/05/2023/assassinos-da-travesti-laura-vermont-sao-condenadospor-lesao-leve-e-pena-e-extinta.

[50] M. VELASCO, *Caminhoneiro e colega são presos suspeitos de matar travesti em Goiás*, in *G1 GO*, 15 September 2015, https://g1.globo.com/goias/noticia/2015/09/caminhoneiro-e-colega-sao-presos-suspeitos-de-matar-travesti-em-goias.html.

[51] M. DAL BOSCO, 7 Abril 2023, *Condenado por torturar e matar travesti a pedradas em Goiânia é preso no Pará*, in *G1 Goiás*, https://g1.globo.com/go/goias/noticia/2023/04/07/condenado-por-torturar-e-matar-travesti-a-pedradas-em-goiania-e-preso-no-para.ghtml.

[52] M. L. F. GUILHERME, *Reflexões sobre a identidade de pessoas trans em notícias online: Uma análise do conteúdo temático*, in *Revista X*, 14/4, 2019, pp. 107–119, https://revistas.ufpr.br/revistax/article/view/66062 and S. R. P. CUNHA, *Nome social e a (des)construção identitária do sujeito*, Master's thesis, Federal Universtity of Tocantins, 2021.

[53] M. MONTEIRO, *Deputado goiano compara nome social a "apelido" e pede direito igual para héteros*, in *Jornal Opção*, 20 July 2017, https://www.jornalopcao.com.br/ultimas-noticias/deputado-goiano-compara-nome-social-apelido-e-pede-direito-igual-para-heteros-100358/.

[54] B. G. BENEVIDES, *A autodeclaração de gênero de mulheres trans expõe mulheres cis a predadores sexuais?*, in *Medium*, 28 February 2021, https://brunabenevidex.medium.com/a-autodeclara%C3%A7%C3%A3o-de-g%C3%AAnero-de-mulheres-trans-exp%C3%B5e-mulheres-cis-a-predadores-sexuais-11b27e1ff85e.

4. Discussion: principles in adopting or rejecting preferred names

At the beginning of this paper, the inertia of the Legislative Branch nationwide to recognize the right of transgender individuals to use their preferred name was discussed. As a result, many older court decisions that considered name change and gender marker requests denied the plaintiffs' petitions. Over the past few years, despite numerous obstacles and persistent discourses of prejudice and discrimination, the principles that underpin legislative proposals and decisions have been evolving, not without revealing an (apparent) *conflict* of principles.

On the one hand, the principle of legal security and the principle of legality were defended, based on which court decisions refused to grant requests for registration changes, even in individuals who had already undergone redesignation surgery.[55] On the other hand, the principles of human dignity and personal identity, along with the principles of free name choice and gender self-determination, were advocated. However, in many cases of opposition, this collision of principles, as defined in Alexy's[56] classic sense, is only apparent. It aims to circumvent the necessity of favoring a minority group, thus denying them a right that can contribute to their greater dignity. Considering contemporary interpretations that value the latest principles, favorable to transgender people, it might seem difficult to understand how it could have taken so long for the changes to happen. However, this gradual change is nothing new in Brazilian society.[57]

Bento[58], in analyzing the proliferation of norms related to social naming in microspheres such as schools, universities and public offices, argues that the country has repeated a history of "precarious citizenship". In this history, the voting/approval of laws guaranteeing achievements for the marginalized, including economic, sexual and gender dissidents, has been achieved in baby steps, piece by piece. According to this argument, the author considers the implementation of the preferred name as a legal "quick fix". In any case, this process has created a new institution within the Brazilian legal system that has become one of the key issues for transgender individuals in their fight for their rights.

This trickle-down evolution becomes evident when examining the changes in national identification documents. Since the transgender community has consistently advocated for legal name recognition, and this was not accomplished through federal law, various units of the federation began issuing documents that included the preferred name, as exemplified in the DF model shown in Figure 1.[59]

Fig. 1. Model of identity card with preferred name from the Federal District

In a federal government decree published in 2022 during the Bolsonaro administration, the model in Figure

[55] M. L. R. CIDADE., *op. cit.*

[56] R. ALEXY, *Teoría de los derechos fundamentales*, Madrid, 1993.

[57] It is worth noting that Brazilian lexicography has not yet been fully updated. Even though the term *nome social* ('preferred name'), with the meaning adopted in this work, has been used in normative documents since at least 2008 and in the press since at least 2009, not all contemporary dictionaries include it in their entries. While MDBLP already includes an entry for it, DAD, on the other hand, does not, and neither does DHLP.

[58] B. BENTO, *Nome social para pessoas trans: cidadania precária e gambiarra legal*, in *Contemporânea – Revista de Sociologia da UFSCar*, 4/1, 2014, pp. 165–182.

[59] M. MARQUES, P. ALVES, *Travestis e transexuais podem usar nome social em carteira de identidade no DF; saiba como funciona*, *G1 DF*, 12 September 2019, https://g1.globo.com/df/distrito-federal/noticia/2019/09/12/travestis-e-transexuais-podem-usar-nome-social-em-carteira-de-identidade-no-df-saiba-como-funciona.ghtml.

2 was presented, which would expose the preferred name after the civil registration name.[60]

Fig. 2. Model established by Decree 10,977/2022

After demands from transgender collectives, the current government team, led by President Lula, proposed the model in Figure 3, which includes only one name. In this context, the distinction of two names in a single document would be eliminated, avoiding a source of embarrassment for transgender individuals.[61]

Fig. 3. New model proposed by Ministry of Management and Innovation in Public Services

The alteration in the format of identification documents issuance is a clear reflection of how prejudice and discrimination against the transgender population permeate in administrative decisions, adding to what has been previously discussed in terms of legislative proposals and legal decisions. Faced with the need to comply with Decree No. 8,727/2016 issued by President Dilma and not repealed by the National Congress, despite various parliamentary attempts, as seen above, the government under then-President Jair Bolsonaro decided to introduce a document that would include the preferred name after the civil registration name, as well as the gender marker. Promptly, there were protests from organizations advocating LGBT+ rights. In a public civil action, they claimed that the proposed model could potentially expose the transgender population to increased risk of violence and human rights violations. The Lula government team recognized that the exposure of the civil register name before the preferred name would, in effect, constitute a form to discrimination against the transgender population, which is already vulnerable to physical violence and discrimination. Consequently, they proposed a normative change. However, the last model has not yet been implemented, leaving the issue unresolved and keeping the debate open, including in legal actions related to the subject.

As we can see, the clash between political forces, many of them with arguments based on prejudice, discrimination, and hate speeches, ends up hindering the achievement of basic rights by vulnerable groups. This conflict is often veiled behind the defense of principles that offer limited contributions to the reduction of

[60] BRAZIL, *Law No. 14.382*, 27 June 2022, http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2022/Lei/L14382.htm#art11.

[61] MINISTRY OF MANAGEMENT AND INNOVATION IN PUBLIC SERVICES, *Novos modelos da CIN*, 18 May 2023. https://www.gov.br/gestao/pt-br/imagem/novos-modelos-da-cin.

violence and inequality.

5. Final remarks

Nearly two decades after the inception of the preferred name in micro regulations, it must be acknowledged that the adopted procedures, while not ideal, represented a step forward in making both the public authorities and society more aware of the importance of recognizing the rights of transgender individuals. This conclusion is reinforced by the assertion of Paula and Benevides, who argue advocating for a policy regarding preferred names that meets the needs of transgender individuals should be a commitment of the entire society. According to the same authors, efforts should be "made so that the preferred name is implemented and properly used in all actions and public policies for these people".[62]

The results of the discussion above provide evidence of increased acceptance of preferred names in recent years. The development of this institution can be linked to social and legal changes that have taken place from the second half of the 20th century onwards, as well as the broader expansion of human rights in recent decades, including the right to choose one's own name, as discussed by Varennes and Kuzborska.[63] In fact, the data presented above provides evidence that the historical progression of recognizing preferred names within the Brazilian Legislative, Judicial, and Executive Branches is intricately tied to an important battle for the expansion of rights. Despite the opposition, the establishment of the preferred name institution in the country holds profound significance that has no parallel in other nations. [64]

Undoubtedly, it would have been more ideal and dignified to recognize the rights of transgender people as soon as they were requested. However, with a National Congress permeated by projects that represent advances and, at the same time, setbacks in human rights, it has not been possible to make parliamentarians act in a more agile way to recognize the rights of vulnerable groups. As Benevides states, "whenever any right is thought of, discussed, or won for trans people, a perspective of fraud or risk to others is placed in the defense of denying that right".[65] Under the shadow of flimsy arguments, prejudices are hidden that end up discouraging the fight against physical violence against transgender people. Such prejudices in themselves constitute a process that is also violent and dehumanizing against this group.

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[62] A. W. M. PAULA, B. BENEVIDES, *op. cit.*, p. 60.

[63] F. VARENNES, E. KUZBORSKA, *Human rights and a person's name: legal trends and challenges*, in *Human Rights Quarterly*, 37/4, 2015, pp. 977–1023, http://www.jstor.org/stable/24519122.

[64] We are unaware of comparative studies on the preferred name across countries. For the situation in Germany and Spain, see, for example, LIND, M. *How to do gender with names. The name changes of trans individuals as performative speech acts*, in *Journal of Language and Sexuality*, 2/1, 2023, pp. 1-22. https://doi.org/10.1075/jls.21002.lin and HIDALGO GARCÍA, S. *Transexualidad: Sexo, Género e Identidad Jurídica. LGTBIQ+ y la "Ley Trans" de 2023*, Pamplona, 2023, respectively.

[65] B. G. BENEVIDES, op. cit.

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« Splendeur et misère » du multilinguisme institutionnel de l'Union européenne

Ivo Petrů[1]

Résumé : Fière de son régime multilingue unique, qui garantit l'accès à la législation européenne dans 24 versions linguistiques égales, l'Union européenne apparaît au monde extérieur comme un idéal du multilinguisme. La consécration claire du régime linguistique multilingue égalitaire dans les actes du droit primaire et secondaire de l'UE représente sa « splendeur ». Toutefois, considéré de l'intérieur, cette image idyllique s'estompe. En effet, le multilinguisme préconisé par les textes est en train de disparaître dans les faits, l'anglais étant devenu la langue de travail avec une prédominance écrasante au sein des institutions de l'UE, comme le montre le Rapport Lequesne préparé par la présidence française au Conseil de l'UE en 2022. La « misère » de la pratique monolingue n'est pourtant pas majoritairement ressentie comme problématique, mais comme une approche pragmatique dictée par diverses contraintes du régime linguistique théorique se manifestant notamment au niveau technique et budgétaire. Or, ladite situation est non seulement contraire aux règles, mais elle va également à l'encontre de l'intégration européenne en tant que telle.

Mots clés : Multilinguisme de l'UE, Législation linguistique, Pratique linguistique institutionnelle, Monolinguisme anglophone, Rapport Lequesne.

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“Splendour and Misery” of Institutional Multilingualism of the European Union

Summary: Proud of its unique multilingual regime, which guarantees access to European legislation in 24 equal language versions, the European Union appears to the outside world as an ideal of multilingualism. The clear enshrinement of the equal multilingual regime in the EU's primary and secondary legislation is its splendid face. However, seen from the inside, this idyllic image fades. In fact, the multilingualism advocated by the texts is in the process of disappearing in practice, as English has become the overwhelmingly predominant working language within the EU institutions, as shown by the *Lequesne* Report prepared by the French Presidency for the Council of the EU in 2022. However, the majority of people do not see this miserable monolingual practice as a problem, but rather as a pragmatic approach dictated by various constraints on the theoretical language regime, particularly at technical and budgetary level. This situation is not only contrary to the rules, it also runs counter to European integration as such.

Key words: EU multilingualism, Language legislation, Institutional language practice, Monolingualism anglophone, *Lequesne* Report.

1. Introduction

Le principe du multilinguisme est consacré *de jure* dans le droit de l'Union européenne (ci-après « UE »). Néanmoins, sa pratique *de facto* au sein des institutions et organes de l'UE s'avère différente, ainsi l'emprunt à Balzac[2] est approprié pour résumer l'état du multilinguisme de l'UE. Fière de son régime multilingue unique, qui garantit l'accès à la législation européenne dans 24 versions linguistiques égales, l'UE peut apparaître au monde extérieur comme un idéal de multilinguisme. Toutefois, l'état du multilinguisme de l'UE doit également être considéré de l'intérieur. Sous cet angle, le multilinguisme de l'UE peut sembler un peu moins idyllique ; la diversité linguistique annoncée en théorie est en train de disparaître, l'anglais étant devenu la langue de travail prédominante dans les institutions de l'UE.

Cette situation ambiguë passe pourtant presque inaperçue aux yeux de différents acteurs de l'intégration européenne et n'attire qu'une attention restreinte des chercheurs[3]. En réalité, seulement certains États membres prêtent attention à cet enjeu, dont la France qui a fait de la relance du multilinguisme institutionnel l'une des priorités de sa présidence au Conseil de l'UE en 2022[4]. À ses fins, une analyse de la pratique linguistique au sein des institutions a été commanditée. Cette analyse riche en données statistiques chiffrées, préparée par un groupe d'experts présidé par Christian Lequesne, professeur à Sciences Politiques, Paris, se conclut par la proposition de 26 recommandations pour un nouveau départ du multilinguisme dans les institutions européennes (ci-après « Rapport Lequesne »)[5].

En fait, l'ambivalence mentionnée de l'UE relativement au multilinguisme peut être traitée sous différents angles, des approches économico-pragmatiques[6] aux approches idéologiques[7]. Nous en mentionnerons quelques-unes, mais nous souhaitons principalement nous en tenir aux faits pratiques et réalités juridiques. Cela veut dire qu'après avoir clarifié les termes clés et avoir donné un aperçu succinct de la situation linguistique de l'UE actuelle, nous présenterons les instruments juridiques établissant le régime linguistique de l'UE en général et des institutions choisies en particulier[8]. Ensuite, nous confronterons cette base juridique théorique avec les données statistiques, issues notamment du Rapport Lequesne, sur l'utilisation réelle des langues de travail au sein de ces institutions.

Nous entendons, dans un premier temps, dresser un tableau aussi objectif que possible du multilinguisme tel que pratiqué dans les institutions de l'UE. Dans un second temps, nous aimerions proposer une réflexion sur cet état de fait par rapport aux valeurs sur lesquelles repose l'intégration européenne et contribuer ainsi au débat sur le multilinguisme de l'UE.

1.1 Première remarque liminaire

À titre liminaire, nous tenons d'abord à préciser les deux mots clés utilisés dans le domaine de notre recherche, à savoir le multilinguisme et le plurilinguisme. En fait, ces deux termes représentent les deux faces de la diversité linguistique que l'UE utilise souvent *promiscue*. Pourtant, à l'instar du Conseil de l'Europe (ci-après « COE »), il est judicieux de les distinguer.

Selon ladite organisation, le multilinguisme réfère à un territoire, à une zone géographique déterminée présentant une variété de langues, tandis que le plurilinguisme renvoie aux personnes et à leur capacité de

[2] Nous avons pris la liberté de nous référer à l'œuvre d'Honoré de Balzac, *Splendeurs et misères des courtisanes*, trouvant son intitulé pertinent, avec une certaine exagération, pour exprimer l'état du multilinguisme de l'UE.

[3] La base juridique du régime linguistique de l'UE fait évidemment partie de tous les travaux portant sur le droit institutionnel de l'UE. Néanmoins, à notre connaissance, moins d´attention est prêtée à la pratique linguistique institutionnelle interne. Voir entre autres D. HANF, K. MALACEK, K., E. MUIR (eds.), *Langues et construction européenne*, Bruxelles, 2010, S. VAN DER JEUGHT, *EU Language Law*, Groningen, 2015, ou I. PINGEL (ed.), *Le multilinguisme dans l'Union européenne*, Paris, 2016.

[4] Voir https://presidence-francaise.consilium.europa.eu/media/zeqny1y5/fr_programme-pfue-v2-5.pdf

[5] CH. LEQUESNE, *Diversité linguistique et langue française en Europe,* Paris, 2021. Disponible ici.

[6] Voir par exemple: M. GAZZOLA, *Language Policy and Linguistic Justice in the European Union: The Socio-Economic Effects of Multilingualism,* SSRN [on-line]. Disponible ici.

[7] Voir par exemple : L. ORBAN, *Langues et traduction : une politique cruciale pour l'Union européenne.* In *Hermès, La revue, 2010/1.* Disponible ici.

[8] Le droit primaire de l'UE distingue 7 institutions principales, énumérées dans l'article 13 du Traité sur l'UE, des autres organes, agences et services auxiliaires. Dans cette étude, nous nous intéresserons seulement aux cinq premières institutions de la liste, en l'occurrence aux institutions « les plus importantes », censées « donner l'exemple » à tout le reste et pas seulement dans le domaine du multilinguisme.

manier plusieurs langues, c'est un répertoire de langues utilisées par un individu[9]. Cette distinction est pertinente, car il en ressort que la préservation et la promotion du multilinguisme sont l'affaire de la législation, tandis que la préservation et la promotion du plurilinguisme sont l'affaire de l'éducation. La première activité consiste à reconnaître un statut officiel à plusieurs langues coexistant dans la zone géographique en question, la seconde est la politique de soutien de l'enseignement et de l'apprentissage des langues étrangères. Il est louable que les deux volets de la diversité linguistique soient au cœur de la politique linguistique des deux organisations européennes depuis des années[10].

1.2 Deuxième remarque liminaire

Ensuite, toujours en amont de l'étude à proprement parler, nous aimerions présenter quelques chiffres donnant une image réaliste de la situation linguistique qui règne dans l'UE. Il est évident que l'UE est une zone multilingue par excellence qui soutient l'utilisation et l'apprentissage des langues, de 24 langues officielles en premier lieu, mais également de quelques 60 langues minoritaires et régionales[11] en second lieu, sans ignorer l'existence sur son territoire de quelque 175 autres langues d'immigrés[12].

Parmi toutes ces langues utilisées dans l'UE, l'anglais est devenu une langue minoritaire. En effet, après le départ du Royaume-Uni de l'UE, l'anglais n'est plus parlé que par quelque 7 millions de locuteurs natifs sur quelque 450 millions d'habitants, soit un peu plus de 1 %[13]. Par conséquent vu sous cette perspective, l'anglais est dépassé non seulement par les grandes langues internationales comme l'allemand ou le français, les deux plus grandes langues maternelles parlées dans l'UE[14], mais par beaucoup d'autres langues nationales qui souffrent d'un certain complexe d'infériorité comme le tchèque, pourtant parlé par presque 11 millions d'habitants[15].

Toutefois, l'anglais reste de loin la seconde langue la plus parlée par les Européens, car au moins quelque 38 % d'entre eux confirment la connaître[16] et ce chiffre va croissant vu le fait que l'anglais est de loin la langue étrangère la plus enseignée dans les écoles de l'UE[17].

Les chiffres donnés ci-dessus montrent que la situation linguistique de l'UE est plus complexe qu'on la décrit souvent. D'une part, cela montre qu'il n'y a pas seulement les langues officiellement reconnues, mais également d'autres langues souvent très importantes au niveau démographique, même en comparaison avec les langues officielles. L'exemple certainement le mieux connu est le catalan avec ses quelque 8 millions de locuteurs natifs vivant des deux côtés de la frontière franco-espagnole[18]. D'autre part, cela montre qu'il faut se méfier des clichés trop souvent pris pour la vérité, comme la conviction largement répandue sur la prédominance démographique de l'anglais. Néanmoins, pour les besoins de notre étude, nous laisserons ces questions, certes intéressantes, de côté et, comme annoncé, nous nous focaliserons sur le multilinguisme tel que pratiqué dans les institutions de l'UE.

2. Situation de jure

La législation linguistique travaillée dès les débuts de l'intégration du continent dans les années cinquante du 20e siècle est impressionnante. Le respect de la diversité linguistique est désormais consacré dans les plus

[9] Conseil de l'Europe, *Guide pour l'élaboration des politiques linguistiques éducatives en Europe*. Disponible ici.
[10] Rappelons notamment les grands jalons de la politique linguistique du COE, certainement moins connue que celle de l'UE, pourtant responsable des principales réalisations dans le domaine : signature de la Convention culturelle européenne (1954) et de la Charte des langues minoritaires et régionales (1992), création du Centre européen pour les langues vivantes (1994) et du Cadre européen commun de référence pour les langues (2001) entre autres.
[11] Dans le sens de la Charte des langues régionales et minoritaires du COE susmentionnée.
[12] Voir https://education.ec.europa.eu/fr/focus-topics/improving-quality/multilingualism/linguistic-diversity.
[13] J. QUATREMER, *UE : après le Brexit, la fin de l'unilinguisme anglophone ?,* in *Libération, 16.2.2022.* Disponible ici.
[14] Avant le Brexit, les chiffres pour l'allemand et le français comme langues maternelles étaient respectivement 16 % et 12 % des locuteurs natifs, selon le rapport Eurobarometre spécial n° 386/2012, *Europeans and their Languages*, le dernier sondage traitant de cette problématique au niveau de l'UE. Disponible, sans surprise seulement en anglais, ici.
[15] 10, 85 millions en 2023 selon Eurostat. Disponible ici.https://ec.europa.eu/eurostat/databrowser/view/DEMO_GIND__custom_7127262/default/table
[16] Voir le rapport Eurobaromètre spécial n° 386/2012 précité.
[17] Voir le rapport Euridice, *Chiffres clés de l'enseignement des langues en Europe,* 2017, disponible ici
[18] Voir https://www.worlddata.info/languages/catalan.php.

importants actes du droit primaire de l'UE, dans le Traité sur l'UE (ci-après « TUE »)[19], comme dans la Charte des droits fondamentaux de l'UE (ci-après « Charte »)[20]. Le TUE instaure également dans son article 55 le principe de l'égalité des langues authentiques[21], tandis que le second traité constitutif, Traité sur le fonctionnement de l'UE (ci-après « TFUE »), assure le droit aux citoyens de communiquer avec les institutions et organes de l'UE dans ces langues[22] et invite dans son article 342 le Conseil à fixer les règles du régime linguistique intérieur *« à l'unanimité par voie de règlements* ».

2.1 Règlement n°1

Il est notoire que ladite institution a répondu à cet appel sans délai par l'adoption du règlement n° 1/1958 portant fixation du régime linguistique de la Communauté Économique européenne, (ci-après « Règlement n° 1 »)[23]. Cet instrument du droit secondaire[24], adopté le 15 avril 1958, assure le multilinguisme de l'UE tel que nous la connaissons aujourd'hui, mettant les langues officielles sur un pied d'égalité. Il est connu que ces langues sont désormais au nombre de 24 (art. 1), que les individus peuvent s'adresser aux institutions de l'UE dans toutes ces langues et que les institutions sont obligées d'y répondre dans la même langue (art. 2), que les textes de portée générale comme les règlements sont rédigés (art. 4) et publiés dans le Journal officiel de l'UE (art. 5) dans toutes ces langues. Par contre, il est moins connu que ledit article 1 confond les langues officielles et les langues de travail. C'est-à-dire que les 24 langues pourraient s'utiliser dans les institutions de l'UE dans leur travail quotidien.

Toutefois, on en est loin. Une telle pratique est-elle conforme aux règles? Cela pourrait être le cas, si les institutions avaient bénéficié de leur droit prévu par l'article 6 dudit règlement qui permet de déterminer de manière différente les modalités d'application du régime linguistique des institutions respectives dans leurs règlements intérieurs (ci-après « RI »). Néanmoins, cette possibilité n'a été que rarement saisie par les institutions. Bien au contraire, les textes des RI montrent habituellement un plein respect du multilinguisme égalitaire sur le plan juridique, comme l'illustrent les exemples suivants.

2.2 Règlements intérieurs

Dans le cas du « créateur » du régime linguistique de l'UE, anciennement Conseil des ministres devenu Conseil de l'UE actuellement (ci-après « le Conseil »), nous pouvons lire dans l'article 14 de son RI[25] que « *le Conseil ne délibère et ne décide que sur la base de documents et projets établis dans les langues prévues par le régime linguistique en vigueur* », c'est-à-dire dans les 24 langues reconnues par le Règlement n° 1. Le même libellé est repris dans l'article 9-1 du RI[26] du second conseil existant dans l'UE – Conseil européen, plus connu comme « sommet », car réunissant les chefs d'États membres. Cela a pour effet que toutes les versions linguistiques de l'acte en question sont disponibles au moment de son adoption et le régime intégral de l'interprétation (24/23) est de règle pour les délibérations des plus hauts représentants des États membres.

En ce qui concerne le Parlement européen (ci-après « le Parlement »), l'article 167 (2) de son RI[27] assure un multilinguisme intégral prévoyant sans exception que « *tous les députés ont le droit […] de s'exprimer dans la langue officielle de leur choix. Les interventions […] sont interprétées simultanément dans chacune des autres langues officielles […]* ». En fait, on peut vraiment entendre des discours dans toutes langues officielles y compris les plus minoritaires au Parlement.

Quant à la Commission européenne (ci-après « la Commission »), le nombre de langues internes de travail

[19] Voir son article 3-3.
[20] Voir son article 22.
[21] Les langues authentiques sont les langues des traités – du droit primaire. À distinguer des langues officielles (et de travail) telles qu'instaurées par droit secondaire, même si actuellement ces deux catégories comprennent les mêmes langues ce qui historiquement n'était pas toujours le cas.
[22] Voir ses articles 20-2 d) et 24.
[23] *Règlement n° 1/1958 portant fixation du régime linguistique de la Communauté Économique européenne*, disponible ici.
[24] Cette nature fragile, car facilement modifiable de la base juridique du régime linguistique de l'UE est à souligner comme le fait S. VAN DER JEUGHT, *Le statut des langues dans l'Union européenne*, in *Journal des Tribunaux*, 109/2004, p. 130.
[25] *Décision du Conseil du 1 er décembre 2009 portant adoption de son règlement intérieur*, disponible ici
[26] *Décision du Conseil européen du 1 er décembre 2009 portant adoption de son règlement intérieur*, disponible ici.
[27] *Règlement intérieur du Parlement européen – 9e législature*, disponible ici.

n'a jamais été officiellement réduit à trois langues dites « procédurales » allemand, anglais et français, aucune disposition de ce genre ne figure pas dans le RI de la Commission[28]. En fait, son RI est curieusement presque silencieux sur la question linguistique. La seule mention dans ce sens figure à l'article 17, phrase 5, de ce RI[29] où nous pouvons lire qu'« *on entend par langues faisant foi toutes les langues officielles de l'UE […] lorsqu'il s'agit d'actes de portée générale* ». Cette confirmation du multilinguisme égalitaire reprise du TUE[30] a pour conséquence pratique que toutes les versions linguistiques des actes contraignants sont égales, officiellement on ne distingue pas l'original et les traductions. Ce constat vaut d'ailleurs pour les textes issus de toutes les institutions susmentionnées.

En revanche, l'une des rares exceptions, et pas seulement à cette dernière règle, est représentée par la Cour de justice de l'UE (ci-après « la Cour ») qui a adopté dans son règlement de procédure un régime linguistique *sui generis*. Pour des raisons d'ordre pratique, l'organe judiciaire suprême de l'UE a abandonné le régime de multilinguisme intégral pour se doter du régime que nous pouvons désigner de « monolinguisme procédural ». En fait, selon l'article 41 du RI de la Cour seuls « *[l]es textes rédigés dans la langue de procédure […] font foi* ». Cette langue de procédure faisant foi « *dans les recours directs […] est choisie par le requérant […] ; dans les procédures préjudicielles, la langue de procédure est celle de la juridiction de renvoi* ». Certes, toute langue officielle peut en l'occurrence devenir la langue de procédure, cela n'empêche que, à la différence d'autres institutions, en ce qui concerne les documents de la Cour, il faut faire la distinction entre l'original rédigé dans la langue de procédure et ses traductions vers les autres langues.

3. Situation de facto

Après avoir parcouru les instruments juridiques de l'UE, notamment les RI des institutions sélectionnées, consacrant, à une exception près, le multilinguisme intégral égalitaire dans les droits primaire et secondaire de l'UE, étudions maintenant la pratique institutionnelle. En effet, si l'on se penche sur les chiffres relatifs à l'utilisation réelle des langues au sein des institutions, l'image impressionnante du cadre juridique du multilinguisme européen commence à se fissurer, car un observateur neutre doit constater que la pratique du multilinguisme stagne, voire est en train de disparaître.

3.1 Regard externe

Vu de l'extérieur, force est de constater que les différentes stratégies de l'UE pour la promotion du multilinguisme[31] restent trop souvent « lettre morte » n'étant pas suivies par des actions concrètes en faveur du multilinguisme. Au contraire, les ressources allouées au respect des règles du régime linguistique, *in concreto* des ressources pour la traduction et interprétation, se voient diminuer[32]. De manière similaire, le portefeuille indépendant dédié au multilinguisme à la Commission dans le passé n'existe plus en son sein depuis 2009, ce domaine faisant désormais partie des multiples préoccupations de la DG EAC (Direction générale de l'éducation, de la culture, de la jeunesse et des sports).

Même un observateur non-spécialiste cherchant à se renseigner sur l'UE devra constater les lacunes de cette diversité linguistique saluée dans les textes. Ne pouvant lire les communiqués de presse des institutions que presque exclusivement en anglais, ne pouvant suivre les réseaux sociaux des institutions très majoritairement qu'en anglais et consultant leurs sites web d'habitude seulement en anglais également, notamment lorsqu'il s'enfonce plus profondément dans la navigation[33], il devra constater que le multilinguisme égalitaire intégral préconisé en théorie fait défaut en pratique dans la communication extérieure[34]. Sans parler du fait quelque peu scandaleux que certains organes ont décidé délibérément de recourir dans leur communication à l'anglais

[28] *Règlement intérieur de la Commission du 8 décembre 2000*, disponible ici.
[29] *Règlement de procédure de la Cour de justice du 29 septembre 2012*, disponible ici.
[30] Voir la note de bas de page n° 15.
[31] Pour illustration, voir *la Résolution du Conseil du 21 novembre 2008 relative à une stratégie européenne en faveur du multilinguisme*, disponible ici.
[32] CH. LEQUESNE, op. cit., p. 57 et s., ainsi que l'Annexe n° 2.
[33] Voir dans ce sens le site général de l'UE: https://european-union.europa.eu, ainsi que les sites web des institutions étudiées.
[34] En revanche, il est possible d'observer que le recours aux nouvelles technologies linguistiques, notamment à l'outil de traduction automatique E-translation, s'avère prometteur pour un meilleur avenir sur ce plan. Par exemple, le site de la Banque centrale européenne https://www.ecb.europa.eu critiqué dans le Rapport Lequesne comme l'un des cas flagrants du monolinguisme anglophone, propose désormais une partie d'informations dans les 24 langues officielles.

seul[35]. C'est une vraie « misère », néanmoins, la question qui nous intéresse davantage dans cette étude est où en sont les institutions dans leur fonctionnement intérieur?

3.2 Fonctionnement interne

Dans cette perspective, la situation la plus préoccupante règne un peu étonnamment au sein des Conseils, dont on pourrait s'attendre à ce qu'ils soient plus sensibles au multilinguisme étant donné qu'ils représenent les États membres, pourtant 95 % de leurs documents sources[36] étaient rédigés en 2018 en anglais uniquement. Certes, les chefs d'État au Conseil européen, ainsi que les ministres au Conseil jouissent du régime d'interprétation intégral, toutefois la situation dans les instances préparatoires est bien différente. Le Comité des représentants permanents (COREPER) qui prépare réellement les délibérations des représentants politiques des États membres, s'est doté d'un régime trilingue (allemand, anglais et français), néanmoins les groupes Martens et Antici travaillant encore en amont ne disposent pas d'interprétation et les débats ont lieu majoritairement en anglais[37]. Encore plus flagrante est la situation dans des groupes de travail, de vrais « ouvriers » de l'intégration européenne, dont seuls 20 sur 150 jouissent du régime d'interprétation intégral, les autres groupes ne disposant de l'interprétation partielle que sur demande voire pas du tout[38].

En ce qui concerne le Parlement, cette dernière institution se montre apparemment comme le plus grand défenseur du multilinguisme, lors des débats parlementaires ouverts au grand public notamment. Ses membres, les députés, utilisent toutes les langues officielles, le régime d'interprétation intégral (24/23) étant assuré par des cohortes d'interprètes. Néanmoins, même au niveau oral, tout n'est pas idéal, par exemple les trilogues, les débats sur les projets des actes législatifs entre des représentants du Parlement, du Conseil et de la Commission, ne se déroulent qu'en anglais. Sans parler de l'écrit où le déclin du multilinguisme suit le pas du Conseil, car la quasi-totalité des documents sources parlementaires ne sont plus rédigés qu'en anglais[39].

Nous avons déjà observé que le moteur de l'intégration européenne, la Commission, recourt – sans fondement juridique – aux trois langues dites « procédurales ». Mais juste en théorie, car en pratique, l'allemand n'est quasiment jamais utilisé, d'ailleurs même la présidente Ursula von der Leyen d'origine allemande ne s'exprime presque jamais dans sa langue maternelle. Le français utilisé jadis plus ou moins dans les mêmes proportions que l'anglais, lui a cédé le pas ces dernières années, l'anglais étant devenu la langue source en 2019 de 86 % des documents de Commission[40]. Et que penser du fait que les notes de service en interne ne sont rédigées qu'en anglais ou du fait que des réunions des groupes d'experts et des comités affiliés à la Commission (la comitologie) se font quasi uniquement en anglais[41]?

Dans le cas de la Cour, en ce qui concerne son multilinguisme interne, nous aimerions constater quelque chose de mieux. Certes, elle fait traduire ses arrêts et d'autres documents judiciaires dans le Recueil de jurisprudence dans toutes les langues. Certes, elle veille au respect du régime linguistique multilingue en sanctionnant différentes infractions ponctuelles à ses règles comme dans le domaine des concours de recrutement des fonctionnaires européens[42]. Ces efforts louables sont toutefois assombris par le fait que la justice européenne recourt – à nouveau sans fondement juridique – à une seule langue choisie, cette fois au français, traditionnellement utilisé comme la langue des délibérés des juges. Par conséquent, la version de l'acte rédigé dans la langue de procédure n'est que l'original *de jure*, toutefois l'original réel, c'est la version française établie à la suite des délibérations des juges et servant de base pour la traduction vers la langue de procédure et vers toutes les autres langues officielles.

4. Contraintes et bénéfices du multilinguisme institutionnel

À la lumière des observations qui précèdent, force est de constater que le multilinguisme réellement pratiqué à l'intérieur des institutions est loin d'être à la hauteur des textes juridiques. Les causes de cette situation sont typiquement d'ordre pratique. En effet, il est difficile de respecter le multilinguisme pleinement,

[35] Pour illustration, voir le site web de European Public Prosecutor's Office: https://www.eppo.europa.eu.
[36] CH. LEQUESNE, op. cit., p. 46.
[37] CH. LEQUESNE, op. cit, p. 47.
[38] CH. LEQUESNE, op. cit, p. 48 et notamment l'Annexe n° 1 détaillant les régimes d'interprétation de différents groupes de travail.
[39] CH. LEQUESNE, op. cit., p. 49.
[40] CH. LEQUESNE, op. cit., p. 50.
[41] CH. LEQUESNE, op. cit., p. 52.
[42] CH. LEQUESNE, op. cit., p. 66.

compte tenu des contraintes administratives, techniques, et – non des moindres – budgétaires.

4.1 Contraintes

Le fait que la surreprésentation de l'anglais au sein des institutions n'est pas réellement considérée comme un problème, s'explique en premier lieu par un le côté « confortable » de cette situation pour l'administration européenne. Pour les eurocrates, pourtant plurilingues voire polyglottes dans beaucoup de cas individuels, la priorisation d'une seule langue dans leur travail, en l'occurrence de l'anglais, s'avère avant tout pratique. Communiquer dans une seule langue sans l'intermédiaire de la traduction ou de l'interprétation rend leur travail plus rapide et plus efficace, mais notamment, dans certaines circonstances, tout simplement possible.

Car, il faut l'avouer, même avec quelque 4300 traducteurs employés par les institutions de l'UE[43] dont 2000 à la Commission[44], et avec quelque 800 interprètes[45] dont 600 à la Commission [46], renforcés par des milliers de collaborateurs externes, il est objectivement impossible d'assurer la traduction et l'interprétation entre les 552 combinaisons linguistiques générées par l'existence de 24 langues officielles dans le temps réel (pour l'interprétation) ou dans les délais impartis (pour la traduction). En effet, pour certaines combinaisons linguistiques, il n'y a pas assez, voire pas du tout de personnel qualifié[47].

En comparaison avec ce « casse-tête » technique et de personnel, les contraintes financières ne sont que relatives. Évidemment, même le multilinguisme imparfait décrit ci-dessus génère des coûts dépassant la somme d'un milliard d'euros, soit 1 % du budget de l'UE[48]. Toutefois, lorsqu'on la divise par le chiffre de 446 millions d'habitants européens, on arrive environ à 2,5 euros par tête. C'est le coût réel de la devise « unie dans la diversité » – linguistique. Cela en vaut-il la peine ?

4.2 Bénéfices

La réponse à cette question dépend évidemment de la volonté politique de relever les défis indiqués du multilinguisme intégral égalitaire ou pas. Or, les éléments soutenant une réponse positive ne sont pas compliqués à trouver, à commencer premièrement par l'élément identitaire. En effet, la diversité linguistique fait partie des pierres angulaires de la citoyenneté de l'UE, c'est l'une de ses caractéristiques principales[49]. Une personne peut difficilement éprouver un sentiment d'appartenance à un ensemble, un lien vis-à-vis d'une entité supra-étatique en germes, si elle y est privée de sa langue. Dans une telle situation au contraire, la personne serait éliminée de la communication, sa participation à l'intégration européenne serait exclue[50]. Comme le met en avant à juste titre le Rapport Lequesne, « *le monolinguisme [...] renforce le sentiment d'une distance des élites européennes avec les citoyens...* »[51]. Seul le multilinguisme reflétant la diversité linguistique et culturelle des États membres permet un dialogue véritable au sein de l'UE, c'est donc un prérequis pour la légitimité du projet de l'intégration européenne.

Deuxièmement, le multilinguisme est une valeur très importante qui conditionne en grande partie le caractère démocratique de l'UE. La possibilité d'utiliser sa propre langue dans la communication avec les institutions est un droit fondamental[52] à respecter coûte que coûte. Dans le cas contraire, on violerait non seulement les principes juridiques comme celui d'égalité devant la loi ou celui de la sécurité juridique, cela serait avant tout une attaque au caractère démocratique de l'UE en tant que telle. Le multilinguisme est donc

[43] Voir https://epthinktank.eu/2018/07/25/translators-and-interpreters-what-europe-does-for-you/.
[44] À la Direction générale de la traduction. Voir *European Commission HR Key figures*, disponible ici
[45] Voir https://epthinktank.eu/2018/07/25/translators-and-interpreters-what-europe-does-for-you/.
[46] À la Direction générale de l'interprétation, connue sous acronyme SCIC. Voir *European Commission HR Key figures*, disponible ici.
[47] Ce défi est traité par le recours généralisé au système de relais – la traduction ou interprétation d'une langue vers une autre (langue de petite diffusion) en passant par une troisième (langue de grande diffusion).
[48] 1,1 milliards d'euros en 2019 selon S. BUZMANIUK, *Parler européen*, in *Question d'Europe*, 541/2019. Disponible ici.
[49] Voir la note de bas de page n° 17.
[50] Plusieurs penseurs dont J.-M. FERRY, *Comprendre l'Union européenne en un sens cosmopolitique, Quelle participation civique?*, in *Archives de Philosophie*, T 75, 3/2012, soulignent l'importance de l'implication des citoyens de l'UE comme une *condition sine qua non* de la construction européenne.
[51] CH. LEQUESNE, op. cit., p. 84.
[52] Une analyse détaillée dans ce sens est proposée par S. PLATON, *Multilinguisme et droits fondamentaux en droit de l'Union européenne*. *Revue des affaires européennes*, 3/2016. Disponible ici.

un prérequis pour pouvoir considérer l'UE comme un État de droit.

Le troisième élément soutenant la réponse positive à la question du respect du multilinguisme égalitaire intégral en dépit des contraintes susmentionnées est moins « noble », mais d'autant plus pratique. Des études prouvent que le multilinguisme territorial et le plurilinguisme individuel sont des facteurs socio-économiques positifs non négligeables[53]. La diversité y compris la diversité linguistique, fonctionne comme multiplicateur des chances pour le développement personnel et sociétal, pour la créativité et l'innovation. Par conséquent, le multilinguisme est un prérequis pour la prospérité économique de l'UE.

5. Conclusion

Nous avons tenté de montrer les deux côtés « splendide et misérable » du régime linguistique existant au sein des institutions de l'UE. D'une part, le cadre juridique présente le « côté fort » du multilinguisme européen institutionnel. Celui-ci repose sur un socle très solide d'actes de droit primaire et secondaire tout en étant contrôlé par la justice européenne vigilante. D'autre part, il y a « la face cachée de la lune », le monolinguisme réel pratiqué à l'intérieur des institutions.

Cette pratique institutionnelle, sans aucun doute contraire aux textes, qui peut s'observer même de l'extérieur, se dégrade à la vitesse des nouvelles adhésions et l'ajout de nouvelles langues officielles. La question du plein respect des règles n'est pourtant que rarement soulevée, le monolinguisme anglophone étant considéré comme un fait accompli. L'une des rares voix invitant à le faire a retenti dans le Rapport Lequesne cité qui propose des mesures juridiques, administratives et notamment techniques liées au progrès des nouvelles technologies, qui permettraient d'assurer la relance du multilinguisme au sein des institutions de l'UE.

Or, en tant qu'élément identitaire et assurance du fonctionnement démocratique de l'UE, le multilinguisme égalitaire intégral mérite d'être respecté à tout prix. Comme des sages l'ont dit avant nous, rappelons pour terminer que le multilinguisme et la traduction sont le prix à payer pour l'Europe[54].

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[53] Certains de ces textes sont cités dans l'étude de la DGT, *Contribution de la traduction à la société multilingue dans l'Union européenne,* disponible ici .https://op.europa.eu/fr/publication-detail/-/publication/7d0a5d03-5c81-44df-9861-430a3d1c535f/

[54] Phrase attribuée à Jacques Delors, entre autres par R. VANCAMPENHOUT*, L'anglais n'est pas la langue de l'Union européenne, Défense de la langue française,* n° 231/2009. Disponible ici.

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Law is trapped in history and history is trapped in law:

Historical narratives in illiberal legal practices in Hungary and Poland

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Abstract: This paper explores the reciprocal relationship between law and history, highlighting how historical beliefs influence political and legal decision-making. This interdependence is evident in the historical development of legal systems, the incorporation of historical discourse in legal texts, and the legal governance of historical matters. The paper illustrates the integration of historical dimensions and myths into constitutional imaginaries, particularly in Hungary and Poland. There, historical beliefs have driven transformations towards illiberal national myths, influencing political and legal reforms. The study underscores the relevance for legal and constitutional scholars not to overlook the reciprocal relationship between law and history.

Keywords: History, Myth, Legal language, Illiberal regimes, EU, Constitutional identity

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1. *Introduction*

An Advocate General at the CJEU recently emphasized the power of narratives, drawing from Harari's popular history book to argue that "human beings are bound together by stories, something that doesn't exist. Law is the perfect example"[2]. This also aligns with her legal realist perspective, challenging the notion of a singular answer to legal questions as a myth. Despite adjudication conventions and text as a corrective force, objectivity in legal rulings is compromised by ideology and bias, especially when faced with multiple options, leading to decisions based on subjective notions of "good".

Her remarks reveal a dynamic and reciprocal interrelationship between the domains of law and history, whether consciously or subconsciously undertaken by legal actors, and whether considered preferable or not. It suggests that the stories we tell and the legal norms we introduce are inextricably intertwined; the narratives embedded in our collective consciousness not only reflect in our legal systems but also actively contribute to their evolution. The symbiotic influence of law and history, encompassing considerations of morality, memory, myth, and narrative, manifests itself particularly once we look at the contemporary socio-political landscape, characterized by the rise of populism and semi-authoritarianism. It signifies a noticeable transition from the post-war "memory and democracy" era to an epoch now characterized by the dominance of "populism and memory" since the early 2000s.

Exploring how historical beliefs influence political and legal decision-making remains a relatively uncharted territory. While traditionally a domain of the humanities, social and political scientists have increasingly turned their attention to this exploration. Legal and constitutional scholars should not overlook this trend.[3] Despite the dominance of other incentives in politics and legal practice, dismissing 'the past' as inconsequential is a mistake, especially with the rise of 'identity' discourse since the 1990s.[4]

Against this backdrop, our paper explores the significant role of history and storytelling in legal reforms and adjudication within the contemporary hybrid regimes of Hungary and Poland. Commencing by highlighting the (growing) significance of the politics of history in law, our paper engages first in a theoretical exploration of these dimensions within the EU context (section 2). Subsequently, we delve into the two case studies: the first examines the integration of historical narratives into Hungary's new legal lexicon, encompassing the "Hungarian historical constitution" and its conflicts with the EU regarding asylum and migration policy (section 3). The second case study explores how historical narratives have pre-dated and shaped legal reforms in Poland (section 4). The selection of these case studies is warranted. A distinctive feature of hybrid regimes in the CEE region is to use historical narratives for the 'reconstruction' of societies. Concluding (section 5), our analysis reveals how history is deeply entwined with constitutional practice, shedding light on its complexity and impact on (EU) law. Our paper enhances comprehension of this interplay's significance and risks, particularly given the rise of semi-authoritarian trends in the EU.

2. *Law is trapped in history and history is trapped in law*

This section delves into the reciprocal influence of law and history. The exploration begins by contemplating the historical and particular evolution of law within societies (2.1.). It then transitions to an examination of how myth - encompassing imagination, collective memory and historical narrative - contributes to and surrounds the construction of law (2.2.). Furthermore, attention is drawn to the observation that the field of history can become increasingly subject to legal regulation in the dynamic interplay between historical discourse and law (2.3.). Lastly, the section reflects on dilemmas arising from these relationships (2.4.)

2.1. *Historical particular development of law*

The foundational premise of law includes the ideals of objectivity and a certain detachment from societal influences, seeking impartiality to safeguard the well-being of both individuals and civil society.[5] In practice,

[2] https://www.europafelix.eu/2027039/12515050

[3] F. KRAWATZEK, G. SOROKA, *Circulation, Conditions, Claims: examining the Politics of Historical Memory in Eastern Europe*, in *East European Politics and Societies,* Vol.36, 2022, pp. 198–224, p. 218.

[4] M.R. SOMERS, *The narrative constitution of identity: A relational and network approach*, in *Theory and Society*, *vol. 23*(5), 1994, pp. 605-649. The idea that identity guides our action (e.g. 'I act because who I am' as opposed to a rational interest of power) has gained importance, one in which identity is narratively constructed and experienced.

[5] A. SLAUGHTER, *A liberal theory of international law*, in *Proceedings of the ASIL Annual Meeting 94,* 2000, pp.240–249; L. CHENG & D. MACHIN, *The law and critical discourse studies*, in *Critical Discourse Studies*, 20:3, 2023, pp.243-61

however, law often becomes a series of compromises aimed at sustaining the legitimacy of a specific social order, evolving as interest groups in society reframe it. It permeates everyday life and is subject to policing and moralization by intermediaries. Despite its formal role in enforcing common norms, law intricately intertwines with prevailing knowledge systems and societal positioning.[6]

This realization prompts a critical perspective that raises concerns about the imposition of 'Western' or 'universal' values that may impose "false universalities", which may inadvertently suppress diverse local or national identities. It also warns against law "starving in a vacuum of abstraction,"[7] neglecting the diverse cultural and historical contexts that shape legal principles. These concerns have permeated legal discourse. For instance, the explicit introduction of the concept of respect for national constitutional identity in the EU reflects an attempt to navigate this delicate balance between universal legal principles and the preservation of locally developed historical applications of the law, serving as a mechanism to legally articulate national identity within the EU's constitutional multi-level dialogue.[8]

2.2. Historical story in legal discourse

Concerns regarding law existing in a "vacuum of abstraction" echo a broader critique of a technical perspective on law, progressively articulated through concepts like constitutional imagination and the imaginary.[9] This critique posits that the potential of imagination in shaping legal frameworks is often underestimated, particularly neglecting the cultural, symbolic, and imaginative dimensions embedded in constitutions. In light of constitutional imaginaries, "constitutions ought to be understood as much more fragile, open to contestation, and in need of a much higher level of societal identification and adherence, than often presumed by constitutional 'engineers' as well as by political actors in general."[10]

In fact, in ensuring the stability and effectiveness of constitutional frameworks, modern constitutions seem to increasingly incorporate historical references.[11] Preambles explicitly articulate narratives, expressing historical foundational goals such as independence, self-governance, liberty, and overcoming historical adversity. Narrative dimensions also shape the substantive content of constitutional provisions.[12]

The constitutional imagination actively employs historical narrative, symbols, collective memory, ritual, and myth to form political reality[13]— a practice termed "mythopoetic legitimation" by Bennet, referring to the use of myth as a form of legitimation through history.[14] Legitimation, defined as a process through which actions and actors gain legitimacy or are marked by illegitimacy based on socially constructed values and norms, involves constructing a narrative that resonates with constituents.[15] Myths, in this context, aim to moralize and make sense of historic-reality, offering valid[16] sacred, and true sense-making stories.[17]

As narrative tools, myths contribute to constructing a shared reality, i.e. society, influencing perceptions of

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255, p. 243.

[6] G. TURKEL, *Michel Foucault: Law, Power, and Knowledge*, in *Journal of Law and Society*, vol. 17(2), 1990, pp.170–193; CHENG & MARTIN, *op. cit.*, p. 244.

[7] SOMERS, *op.cit.*, p. 612.

[8] L.F.M. BESSELINK, National and constitutional identity before and after Lisbon, in *Utrecht Law Review*, 2010, vol. 6(3), pp. 36-49.

[9] P. BLOKKER, *Political and Constitutional Imaginaries*, in *Social Imaginaries series Rowman and Littlefield*, 2021, Available at SSRN: https://ssrn.com/abstract=3784225; M. LOUGHLIN, *The constitutional imagination*, in *The Modern Law Review*, Vol. 78(1), 2015, pp. 1–25.

[10] P. BLOKKER, *op. cit.*

[11] N. M. LAZAR, *Time Framing in the Rhetoric of Constitutional Preambles*, in *Law & Literature*, Vol. 33(1), 2021, pp. 1-21.

[12] L. FONTAINE, *The Constitutional Imaginary versus the Fiction of Constitutional Law*, in *Jurisprudence, Revue Critique*, vol. 2, 2016, p.2; P. Blokker, *op. cit.*, p.12: These "norms and rules are often equally grounded in 'fictional concepts' that relate directly to reality, but at the same time reinvent that reality".

[13] M. LOUGHLIN *op. cit.*, p.3.

[14] S. BENNET, *Mythopoetic legitimation and the recontextualisation of Europe's foundational myth*, in *Journal of Language and Politics*, Vol. 21(2), 2022, pp. 370-389. Mythopoesis is a form of legitimation through "narratives of history that are taken as truth and accepted as canonical stories that are the bedrock of social groupings", p.371.

[15] S. BENNET, *op. cit.*, pp. 370-72.

[16] C. FLOOD, Political Myth, New York, 2002, p.5.

[17] S. BENNET, *op. cit.*, p. 373.

the past, present, and future. They guide, sustain, and legitimize structures and actions of contemporary political and legal institutions. Consider the substantial body of literature about the role of myths in nation-building, as exemplified by Anderson's (1983) well-referenced work, Imagined Communities.[18] Anderson proposes that nations and their political embodiment, the state, are intentionally constructed to be perceived and experienced as immortal, absolute, and concrete.[19] This perspective undeniably influenced initially a perception of international law as a system of independent unitary states and its nations, demanding the utmost respect[20].

Invoking myths is not only characteristic for national legal systems. EU law itself harbors an etiological European myth. One of European cooperation initiated in the 1950s that marks a departure from its previous history, particularly the wars of the twentieth century. This entails a "claim of common experience of suffering, with the Holocaust being constructed as a European tragedy".[21] The EU consistently asserts that this "moral drama" of the early to mid-twentieth century serves as the valid justification for its existence rather than mere economic integration, emphasizing shared European values and moral imperatives for reconciliation and overcoming historical conflicts. In doing so, the EU challenges the primacy of individual national identities in favor of a more cohesive European identity. This EU story is anti-nationalistic, and for some it is anti-national as well.[22]

The EU also subscribes to secondary myths, including a commitment to human rights, which partly stems from the shared experience of the Holocaust. Within and beyond the EU myth-making, this experience contributed to the decay of self-congratulatory national narratives and to the formation of a 'cosmopolitan' memory centered on the shared tragedy of the Holocaust and other crimes against humanity. Informed by the concept of state repentance for past wrongs[23], the Western European history of human rights portrays the 'nation state' as the archetypal wrongdoer.[24] The postwar antifascist legislation that forms the core of international human rights law have been born of this culture of memory.[25]

Another example of a secondary myth is European exceptionalism, rooted in a common European space, ancient history, the enlightenment, the renaissance, and modernity.[26] As Tuori described, the proclaimed universal human rights regime that developed post-WWII in Europe, as well as European integration, involved a narrative of reconnecting to Roman law tradition and a shared European heritage. 'Universal' liberal democracy was conveyed through a European historical identity narrative.[27]

2.3. Legal governance of history

While historical discourse can inspire legal discourse, a parallel trend is emerging wherein history itself is progressively falling under the purview of legal regulation.[28] This dual dynamic is particularly evident in the initial Holocaust denial laws. Through criminalizing the denial of Holocaust-related facts, they have contributed to the establishment of a collective memory that is distinctly humanistic and centers around the victims of historical atrocities and the concept of state repentance. The legal regulation of history also entails

[18] B. ANDERSON, *Imagined Communities*, London, 1983.
[19] S. BENNET, *op. cit.*, p.374.
[20] E.g. W. WILSON, Fourteen Points, Washington D.C., 1918.
[21] S. BENNET, *op. cit.*, p.377.
[22] S. BENNET, *op. cit.*, p. 377; U. BECK, *Understanding the Real Europe*, in *Dissent*, 2003; As noted by Kølvraa, the myth Ignores other parts of history, for example the Cold War, as well as the fact that some states had different reasons for joining the EU or other historical co-operation between European nations and populations. C. KØLVRAA, *European Fantasies: On the EU's Political Myths and the Affective Potential of Utopian Imaginaries for European Identity*, in *Journal of Common Market Studies* Vol.54(1), 2016, pp.169–84, p.173.
[23] N. KOPOSOV, Populism and Memory: Legislation of the Past in Poland, Ukraine, and Russia, in *East European Politics and Societies*, Vol. 36(1), 2022, pp. 272-297.
[24] M. MUTUA, *Human Rights: A Political and Cultural Critique*. Philadelphia, 2002, p10. In Mutua's view the history of human rights presents the state as the classic rapist, a savage.
[25] N. KOPOSOV, *op. cit.*, p.289; S. HOLMES & I. KRASTEV, Explaining Eastern Europe: Imitation and Its Discontents, in *Journal of Democracy*, Vol. 29(3), 2018, pp. 117-128.
[26] V. DELLA SALA, *Europe's Odyssey?: Political Myth and the European Union*, in *Nations and Nationalism*, Vol.22(3), 2016, pp. 524–41, p.531.
[27] K. TUORI, *The invention of the European legal tradition and the narrative of rights*, in *Journal of European Studies*, Vol. 52(3-4), 2022, pp. 204-218.
[28] N. KOSOPOV, p.273: "in line with the growing juridification of our societies".

the post-1989 framework in Central and Eastern Europe of laws addressing the communist past, prohibition of the denial of communist crimes, reflecting a culture of liberal nationalism. The criminalization of certain statements about the past itself has "contributed to the reactivation of the notion of the sacred in our societies, a notion that can, and often does, generate and legitimize an emotional need for suppressing opinions commonly assessed as blasphemous".[29]

2.4. History and its dilemmas

Evidently, the evolution and sustainability of law are intricately intertwined with historical discourses. These processes are not devoid of risks or dilemmas.

On the one hand, the utilization of historical memory, myth, and narrative has served to enhance the legitimacy of laws, foster social identification, and promote adherence. Myths play an "integrative" function, with specific historical memory used and deemed necessary to aspire to and bolster abstract and universal concepts. For instance, the memory of the Holocaust, regarded in the European psyche as "history's most terrible conflict," led to the realization that "the only salvation lay in the transcendent truth of our essential sameness, despite it all".[30] In fact, Goodale, along with others, argues that "the basic premise of an empirical (and thus also historical) demonstration of human rights universality is itself mistaken".[31] However, since abandoning the notion of universal human rights is undesirable, he points to the significance of maintaining belief in universal human rights as a challenging but necessary narrative; "the enduring struggle to keep the flame of human rights universality burning through the long, dark night of history depends on the ability of some to keep telling the myth and equally on our collective willingness to keep listening to it"[32].

On the other hand, the utilization of historical memory, myth, and narrative carries inherent risks. Memory is susceptible to personal bias and manipulation, and even if collective memory has been constructed through pluralistic interaction, a necessarily somewhat sedimented collective historical memory tends to favor particularity.[33] This has significant ramifications, as memories and myths can become "a strongly sedimented narrative for only a limited audience."[34] Over time, they may lose their persuasive power, and, as Bennet notes, "a subject cannot be separated from its historical narrative; and if it does become separated (through the passage of time) or if this symbiotic relationship becomes demystified, the subject loses its legitimacy".[35]

Alternatively, institutional actors may become entrenched in foundational myths, hindering responsiveness to modern challenges. Bennet points out that the EU, for instance, has become a prisoner of the past it has mythologized: "as the memory of the [Second World] War fades, so too does the resonance of the horrors, and thus the affective potential of the foundational myth is diminished".[36] While the current war initiated by Russia against the newly designated EU-candidate Ukraine leaves options open, Kølvraa convincingly argued peace is now so taken for granted that the risk of war is not seen as realistic and " 'never again' has apparently for some time been a mundane – if not banal – statement".[37] As such, the EU myth can be perceived as a myth for an older generation or even a specific generation of EU-level actors, constituting an elite myth.[38]

Finally, myth and narrative can, depending on the intentions of the myth-makers, naturally not only have integrative but also subjugative and exclusionary functions.[39] They can be weaponized to promote illiberal, exclusive, and identarian beliefs. In this context, populism, with its emotional appeal, seems more at home in the realm of symbolism, memory, and myth than democracy. Ad hoc statutes criminalizing certain claims about the past are a case in point, they operate largely on the level of political symbolism rather than rational

[29] N. KOSOPOV, *op. cit.*, p.290.
[30] M. GOODALE, The Myth of Universality: The UNESCO 'Philosophers' Committee' and the Making of Human Rights, in *Law & Social Inquiry,* vol. 43(3), 2018, pp.596–617, p.615.
[31] M. GOODALE, op. cit., p.615.
[32] *Idem,* p. 616.
[33] S. BENNET, *op. cit.*, pp. 374, 385; N. KOSOPOV, *op. cit.*, p. 290.
[34] S. BENNET, *op cit.*, p.385.
[35] *Idem,* p. 372.
[36] *Idem,* p. 385.
[37] C. KØLVRAA, *op. cit.*, p. 175.
[38] S. BENNET, p. 385.
[39] *Idem,* p.374; C. FLOOD, *op. cit.*, p. 37.

discourse.[40]

These controversies have never left the academic field of history untouched, with varying perspectives vying for prominence within the discipline. Some explicitly advocate for the necessity of moral judgment, accusing certain historians of either concealing or justifying past atrocities.[41] On the opposing side, there are those who assert that ethical values should not compromise the scientific pursuit of the truth.[42] A middle ground is occupied by some, suggesting that the search for truth should consciously, or cannot avoid to, incorporate a commitment to deeply held human values.[43]

Over time, the utilization of historical concepts and narratives inevitably evolves. The "proliferation of relatively more abstract and universal social and political concepts", which "began in the late eighteenth century with the emergence of future-oriented philosophies of history"[44], has recently experienced a reversed trend.[45] Historical concepts and events themselves possess a dual nature, referring to both abstract and potentially universal meanings, as well as concrete occurrences. For example, the concept of absolutism encompasses both unlimited monarchy in theory and the governance of Louis XIV in practice, but its usage is typically confined to contexts not too distant from Sun King's France in both space and time.[46]

Arguably, if we consider history through the lens of a moral science,[47] the intricate specifics of life and the particularity of historical events suggest that histories don't provide ready-made moral templates. Instead, their role is to present, illustrate, and illuminate moral questions and problems for contemplation.[48] As Becker puts it: "Knowledge of history cannot be [...] practically applied and is therefore worthless except to those who have made it, to a greater or lesser degree, a personal possession." Indeed, "by liberalizing the mind, deepening sympathies, and fortifying the will, it enables us to control not society, but ourselves—a much more important thing".[49]

3. Myth-making in Hungary and Poland

In the following sections, we turn our focus to Hungary and Poland, utilizing Bennet's mythopoetic legitimation framework to analyze the influence of historical discourse on constitutional and legal practices. We start by providing a brief overview of the "memory and democracy" era in the 1990s in Hungary and Poland, marking the historical departure from communism (3.1). Subsequently, we introduce the 'countertrend', the "populism and memory" era (3.2.), and proceed to illustrate, through a few examples, how a new illiberal 'legitimizing myth' shapes the constitutional order and legal reforms in Hungary and Poland. Specifically, we will explore how a new 'legitimizing myth' is translated into legal practice (Hungary) (3.3.) or influencing the legal debates (Poland) (3.4.).

3.1. The historical break from communism.

3.1.1. Hungary

As expressed by Kundera, a prevalent memory endured in Central Europe during the era of Soviet-imposed communism, where the region felt severed from its fundamental European cultural and civilizational roots.[50]

[40] N. KOSOPOV, *op. cit.*, p. 290.
[41] J. J. SHEEHAN referencing Lord Acton for example in his speech How History Can Be a Moral Science, https://www.historians.org/research-and-publications/perspectives-on-history/october-2005/how-history-can-be-a-moral-science#note1; D. BLOXHAM, *History and Morality*, Oxford 2020, p. 9.
[42] H.C. LEA, *Ethical Values in History*, in *The American Historical Review*, vol. 9(2), 1904, pp. 233-246;
[43] G. WRIGHT, *History as a Moral Science*, in *American Historical Review*, vol. 81(1), 1976; D. BLOXHAM, *op. cit.*, p. 363.
[44] N. KOSOPOV, *op. cit.*
[45] *Op. cit.*
[46] *Op. cit.*, p. 275.
[47] G. WRIGHT, *op. cit.*
[48] J. J. SHEEHAN, op. cit.
[49] C. BECKER, *A New Philosophy of History*, in *The Dial*, 1915, p.148.
[50] Illustratively, the Hungarian News Agency transmitted in its final dispatch in 1956 just before Russian troops obliterated it: "We are going to die for Hungary and for Europe.", M. KUNDERA, *The Tragedy of Central Europe*, https://dl1.cuni.cz/pluginfile.php/656024/mod_resource/content/1/Kundera%20The%20Tragedy%20of%20Central%20

The fall of communism brought forth the compelling rallying cry ‘return to Europe’ throughout Central and Eastern Europe, Hungary included. In practice, this commitment signified an embracing of the principles of liberal democracy and the emulation of values and institutions inherent in Western European societies.

Following the disintegration of the communist regime, Hungary undertook significant amendments to its first permanent written 1949 constitution, originally adopted by the Hungarian communist party. The revised preamble of the Hungarian constitution in 1989 aimed “to promote the peaceful political transition into the rule of law, realizing the multiparty system, parliamentary democracy, and a social market economy.”[51]

However, unlike its Eastern European counterparts, Hungary did not manage to undergo a symbolic constitutional overhaul in the 1990s. Instead, incremental steps were taken to eliminate remnants of communism. The Hungarian Constitutional Court played a pivotal role, actively transforming the amended constitution of 1989, unofficially dubbed the '89 constitution, by systematically reviewing surviving elements of the old legal system.[52] The Court, characterizing the regime change as a “rule of law revolution”,[53] elevated the rule of law to a foundational normative principle. This principle could be invoked as the sole basis in constitutional procedures leading to the annulment of laws. It evolved into a prominent and frequently referenced[54] concept in jurisprudence, serving as a philosophical umbrella for the entire constitutional order.[55]

3.1.2. Poland

The transformations in the political landscape of Poland following the fall of the Iron Curtain were characterized by the clear aspiration to replace the existing political system with its complete opposite. Unlike Hungary, the Polish Senate symbolically carried out a ‘break with the past’ by means of a political declaration.[56] Polish senators declared a lack of any continuity between the People's Republic of Poland and the Republic of Poland. Justifying their stance, they emphasized that they regarded “the state established in the aftermath of World War II on Polish lands and functioning between 1944-1989 as an undemocratic state with a totalitarian power system, part of the global communist system, devoid of sovereignty, and not adhering to the principle of the Nation's supremacy”.[57]

In this vacuum, the new constitutional construction sought to draw upon well-established concepts grounded in European legal heritage, while in practice aligning with the contemporary democratic values of the 'West'. The principles derived from the past socialist state “axiology” were considered not part of this European legal heritage; ‘Democracy’, the ‘rule of law’ or the ‘independence of the courts’ had suffered distortions during the communist regime and masked entirely disparate meanings.[58] Moreover, with the aim for a strategic alignment with Europe it became necessary to overcome the distinctive dualistic constitutional approach, which delineated a clear separation between national and international law. While a seemingly reasonable structured dichotomy, it had been instrumentalized by the communist authorities to interpret and apply legal rights in a selective manner.[59] The break with the dualistic approach was meant to create a legal system that seamlessly integrated national and European principles, including ensuring fundamental rights

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[51] Despite the lack of symbolic constitutional overhaul, it was still a document shaping the rule of law. G. HALMAI, *The Hungarian approach to constitutional review: the end of activism?,* in W. SADURSKI (ed.), *Constitutional Justice: East and West*, Den Haag, 2002; K. KOVÁCS, G.B. TÓTH, *Hungary’s Constitutional Transformation*, in *European Constitutional Law Review*, Vol.7(2), 2011, pp. 183-203, p. 202.

[52] C. BOULANGER, *Europeanization Through Judicial Activism? The Hungarian Constitutional Court’s Legitimacy and the ‘Return to Europe*’, in: W. SADURSKI, A. CZARNOTA, M. KRYGIER (eds.), *Spreading Democracy and the Rule of Law?* Dordrecht, 2006, pp. 263–280.

[53] Decision HCC 11/1992. (III. 5.) decision, Point III.1.

[54] F. GÁRDOS-OROSZ, *Jogállamiság*, In: F. Gárdos-Orosz, I. Halász, (eds.) *Bevezetés az alkotmányjogba: alapfogalmak* [Introduction into constitutional law: definitions], Budapest, 2019, pp. 49-59., p. 59.

[55] N. CHRONOWSKI, *Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről* [The rule of law – Thoughts on the legal developments in Hungary and the European Union], Budapest, 2016, pp. 32-42.

[56] P. FIEDORCZYK, *Roconciliation with the Communist Past: Polish Way*, in *Zeitschrift der Savigny – Stiftung fur Rechtsgeschichte*: *Germanistiche Abteilung*, vol.125(1), 2008, p. 297.

[57] Resolution of the Republic of Poland of 16 April 1998.

[58] H. SUCHOCKA, *Polska Konstytucja z 1997 roku jako element europejskiego dziedzictwa konstytucyjnego* in *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 80(1), 2018, p. 18.

[59] *Idem*, p. 18.

rooted in a perceived European legal heritage.

At the same time, however, the Polish Constitution was supposed to serve as a living testament to the rich historical identity of the Polish nation, which the communist regime had so forcefully oppressed. Central to this identity were the struggles for independence, cultural heritage, and an unwavering commitment to democratic principles. Recognizing the Constitution as a vehicle for expressing this collective identity, deliberate references to historical experiences and values were interwoven throughout its text.

The inclusion of historical references served a twofold purpose. Firstly, it was a conscious effort to acknowledge and honor the sacrifices and triumphs of the past. An illustration of this is evident in the introductory words of the Constitution: 'grateful to our ancestors for their work [...] for the culture rooted in the Christian heritage of the Nation and universal human values, drawing on the best traditions of the First and Second Republic (…)'. As can be seen from the above, the influence of Christian culture was recognized as equally pivotal factor in shaping constitutional identity. This act of remembrance was intended to instill a sense of continuity, connecting the contemporary legal framework with the historical trajectory of the nation. Secondly, the historical references were strategically employed to root the Constitution in the shared experiences and aspirations of the Polish populace, a shared commitment to democratic values, cultural heritage, and the ongoing pursuit of national goals.

3.2. The counter historical and constitutional trend

Since the 2000s, the socio-political landscape in Hungary and Poland has shifted from the post-war "memory and democracy" era to the era of "populism and memory".[60] As Krastev and Holmes have argued, this backlash has stemmed, among other factors, from a perception of and frustration with inauthentic attempts to mimic the West in recent decades, rather than embracing and safeguarding national authenticity and identity—a discourse often rooted in historical narratives.[61]

Populist national movements capitalize on the current "crisis of the future," characterized by "a decay of abstract notions and universal values and the growing importance of "local logics" and particularistic identities".[62] Exploiting a mental climate favoring the sacred, identity, and particularism, these movements also take advantage of a punitive trend initiated by liberal democracies by introducing speech bans (see: Poland[63]) into national criminal codes in the late twentieth century.[64]

The commemorations of communism's collapse shifted from emphasizing a future of democracy and a market economy on the twentieth anniversary in 2009 to a more critical discourse on the thirtieth anniversary in 2019; indeed "commemorative debates feature[ed] prominent discussions of the transition's negative aspects, including economic crises, demographic deficits, and the perceived loss of communal purpose and meaning.''[65]

Central and Eastern European countries had previously cultivated a memory culture centered on liberal nationalism, promoting national narratives in the face of oppressive international communism, rather than the "cosmopolitan" EU-sponsored memory of the Holocaust.[66] In fact, the "EU's democratic mnemonic frames", "provoked a populist backlash against narratives seen as disparaging the nation."[67] Against the backdrop of a failure to constitute a pan-European memory project[68], "many former Warsaw Pact members wanted to have

[60] N. KOSOPOV, p. 273.
[61] S. HOLMES, I. KRASTEV, *The Light That Failed: Why the West Is Losing the Fight for Democracy*, New York, 2020.
[62] *Op. cit.*, p.275; J. F. SEBASTIAN, J. F. FUENTES, *Conceptual History, Memory, and Identity: An Interview with Reinhart Koselleck,* in *Contributions to the History of Concepts*, vol. (2), 2006, p. 119. See on the rise of memory, F. Hartog, *Regimes of Historicity: Presentism and Experiences of Time*, New York, 2015.
[63] See section 3.4.2.
[64] N. KOSOPOV, pp. 290-291.
[65] F. KRAWATZEK, G. SOROKA, *op. cit.*, p. 205
[66] N. KOSOPOV, *op. cit.* p. 276, p. 273; F. KRAWATZEK, G. SOROKA, *op. cit.* p. 206; D. LEVY, N. SZNAIDER, *The Holocaust and Memory in the Global Age,* Philadelphia, 2006.
[67] F. KRAWATZEK, G. SOROKA, *Op. cit.*, p. 214.
[68] *Op. cit.*, p. 206; F. PESTEL, R. TRIMÇEV, G. FEINDT, F. KRAWATZEK, *Promise and Challenge of European Memory*, in *European Review of History: Revue européenne d'histoire* vol. 24(4), 2017, pp. 495–506; D. LEVY, N. SZNAIDER, Memory Unbound: The Holocaust and the Formation of Cosmopolitan Memory, in *European Journal of Social Theory*, vol.5(1), 2002, pp. 87-106.

the EU more overtly recognize the suffering of those states that endured communism".[69]

A resurgence of antagonistic memories is shaping narratives that victimize the past to serve national interests. Statutes deflect responsibility for historical injustices onto others, enabling nation-states to evade accountability for crimes against humanity.[70] Leaders exploit traumatized nationalism to whitewash history, framing the populist and 'the people' as unambiguously 'good'. By invoking a timeless historical enemy, policy and legal decisions are justified as revenge against the perceived 'evil other,' simplifying complex historical and contemporary realities.

Such a counterconstitutional trend, attacks the idea of law as apolitical and impartial. This trend includes a re-politicization of the law by inflecting it with sources outside the law, such as political power and history. Additionally, it entails reclaiming political sovereignty and democratic decision-making, challenging the limitations imposed by the imagined boundaries of the rule of law, and critiquing the liberal emphasis on individualism over collectivism for its perceived divisive impact on unity. Within this framework, liberal democracy is faulted for contributing to the erosion of a nation's historical roots, while a competing legitimizing myth aims to restore an idealized historical or cultural order.[71]

3.3. Hungary's historical constitution

Since 2010, Hungary has undergone a notable transformation marked by the rise of an illiberal populist 'constitutional imaginary', meticulously crafted by Viktor Orbán to establish mythopoetic legitimacy. Orbán has championed a shift towards 'illiberal democracy'[72] and 'Christian democracy',[73] interweaving political-historical narratives deeply rooted in Hungarian sociohistorical discourse. His political rhetoric extends beyond tapping into existing socio-economic discontent, delving into the manipulation of Hungarians' memories related to the post-communist transition. Contesting the achievements of the Constitutional Court and Hungary's constitutional order in eradicating communist remnants, Fidesz strategically leveraged the 'post-communist' argument, accusing liberal democracy and prior socialist-liberal governments of complicity in a perceived loss of control and limited sovereignty during and after the transition.[74]

Orbán capitalized on a growing desire for national identity and collective self-esteem, stemming from both communist suppression and the perceived imposition and imitation of Western values in the post-transition era. Linking the implementation of the 2012 Hungarian constitution to a narrative of breaking free from post-communism and reclaiming Hungarian identity, the new constitutional framework underscores historical significance and asserts continuity since the founding of the first Hungarian state in 1000. History becomes pivotal to contemporary collective identity, shifting away from individual-centered liberal constitutionalism to invoke Christian and national traditions predating the communist era, signaling a move toward collective constitutionalism.

The new constitutional framework and its application are not isolated from contemporary European political struggles, particularly those related to asylum and migration. Orbán strategically positions himself as a defender of Hungary and Europe, framing his stance as a heroic culture war against 'hegemonic and liberal power holders in the European Union' who purportedly fail to preserve the Christian-inherited European and Hungarian 'way of life.'[75]

Despite the various aspects of these phenomena being researched and analyzed, our focus here is on the use of history as a direct moral framework in Hungarian legal adjudication, specifically at the Hungarian

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[69] F. KRAWATZEK, G. SOROKA, *op. cit.*, p. 214; M. MÄLKSOO, A Baltic Struggle for a 'European Memory': The Militant Mnemopolitics of the Soviet Story, in *Journal of Genocide Research,* vol.20(4), 2018, pp. 530–44.
[70] N. KOSOPOV, p. 280.
[71] P. BLOKKER, *op. cit.*
[72] https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp
[73] https://2015-2022.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/
[74] P. KREKÓ, *'The Stolen Transition' – Conspiracy Theories in Post-Communist and Post-Democratic Hungary*, in *Social Psychological Bulletin*, vol. 14(4), 2019, pp. 1-13; G. HUNYADY, *Stereotypes during the decline and fall of communism*, London, 2002; S. HOLMES, I. KRASTEV, *op. cit.*
[75] C. LAMOUR, *Orbán Urbi et Orbi: Christianity as a Nodal Point of Radical-right Populism,* in *Politics and Religion*, vol.15(2), 2022, pp. 317-343, p. 338.

Constitutional Court.

We analyze four[76] Hungarian Constitutional Court (HCC) rulings from 2016 to 2021, concentrating on asylum seekers' and migrants' rights within the EU legal framework and tackling constitutional identity disputes. These rulings shed light on evolving legitimizing myths and concepts in legal assessment. In 2016, responding to the Hungarian Ombudsman, the HCC assessed Hungary's constitution concerning the EU's 2015 refugee and migration relocation decision, asserting its authority to review joint exercises of power with the EU and emphasizing the protection of constitutional identity. The 2019 rulings, prompted by concerns from the Hungarian Minister of Justice and Amnesty International Hungary, focused on the interpretation of illegal migrants and Hungary's restrictive legislation aiding asylum seekers and migrants. The HCC clarified that granting asylum is not a constitutional obligation for non-Hungarian citizens from safe third countries and allowed additional restrictive measures in combating illegal migration. The 2021 ruling, addressing a petition from the Hungarian Minister of Justice against the EU Court of Justice's condemnation of Hungary, underscored Hungary's right to determine its population and unilaterally exercise shared competences with the EU when the EU allegedly fails to protect the self-identity rights of those in Hungary.

3.3.1. History, not rule of law

The use of history as a moral and legitimizing framework is apparent through the appropriation of the concept of constitutional identity within the EU, recognized in the Lisbon Treaty. This signifies a shift from a universally linked rule of law identity that embeds Hungary in European obligations to a historic constitution that deserves protection, encompassing a historical (illiberal) Christian identity beyond the constitution.

The HCC does not refer to protecting rule of law as part of its constitutional identity in its rulings. Instead, the decision in 2021 explicitly states: "the adoption of the Fundamental Law [in 2012] can be seen in itself as an effort to safeguard, protect and restore our nation's constitutional right to self-determination, especially in relation to our historical constitution''.[77] The constitutional identity is interpreted as "the constitutional self-identity of Hungary" which "is a fundamental value not created by the Fundamental Law" but "merely acknowledged by the Fundamental Law". One that "cannot be waived by way of an international treaty – [….]".[78]

As such, the concept of constitutional identity is not being limited to the constitutional text. Judges need, or can, take aboard the complex (including potential illiberal) constitutional and cultural history of Hungary in their adjudication by reference to the preamble and "achievements of our historical constitution".[79] Following the Seventh Amendment to the Hungarian Constitution, the HCC can also call to account every state body to protect this constitutional identity as well as the Christian culture of Hungary, as interpreted by the Court.[80] These elements are expressly put in connection with Article 4 of the EU Treaty[81], the EU's protection of national constitutional identity, and an inalienable core of a constitutional identity which the German constitutional court propagates.[82]

As an illustration, the 2016[83] and the 2021 decisions mention István Werbőczy's book "Tripartitum" as an achievement of the historical constitution (a collection of common law in Hungary assembled in 1517), including the book's references to the Charter of King Ulászló I in 8 March 1440 *"that Hungary and Poland would unite their forces against the Turks"* and its recognition *"that from then on Hungary bore the title of "propugnaculum Christianitatis",* to argue that Hungary has been a Christian republic and *'the bastion of Christianity', for centuries"*[84].

[76] Decision 22/2016. (XII. 5.) AB, paras. 1-118 ;Decision 2/2019. (III. 5.) AB, paras. 1-123; Decision 3/2019. (III. 7.) AB, paras. 1-123; Decision 32/2021. (XII. 20.) AB, paras. 1-111.
[77] Decision 32/2021. (XII. 20.) AB, paras. 1-111, para. 108.
[78] Decision 22/2016. (XII. 5.) AB, paras. 1-118, para. 67.
[79] *Idem*, para. 64.
[80] Decision 32/2021. (XII. 20.) AB, paras. 1-111, para. 77.
[81] *Idem*, para. 97-98.
[82] *Idem*, para. 101. On inalienable, they are "values that make up Hungary's constitutional identity" and "have come into existence on the basis of historical constitutional development, they are legal facts that cannot be waived".
[83] Decision 22/2016. (XII. 5.) AB, paras. 1-118, para. 110.
[84] Decision 32/2021. (XII. 20.) AB, paras. 1-111, para. 102.

3.3.2. Historical legacy establishes collective illiberal norms

The HCC (re)appropriates individual Fundamental Rights under a historical context and puts forward a new fundamental rights notion in 2021: the human dignity of the individual Hungarian as expressed through its self-identity. This self-identity is contextualized in an already existing alleged traditional historical environment that shaped this self-identity:

"The traditional social environment the individual is born into and which is independent of the individual shapes the self-definition of the individual, and the self-definition of the individuals who make up society creates and then shapes the collective identity, that is, the identity of the given community and the given nation"[85]. This collective social environment is seen as "*a natural and State-protected quality of life"*[86] in which the *"State has an obligation of institutional protection in order to ensure that*[87]*"* the democratic and human dignity rights of Hungarians and the *"fundamental function of the State affecting the public order"* are protected.[88]

This implies here an environment that needs protection against (unwanted) foreigners who by their presence threaten the existing traditional social environment if Hungarians do not democratically consent to it.

In addition, the individual self-determination of the Hungarian is restricted within a historical constitutional identity. According to the court *''the right to self-determination deriving from human dignity"* implies responding *"to the endowments determined by one's traditional social environment"* and *"can only be achieved through a process of mutual reflection with the relevant social factors"* and *"as a member of the community"*[89]. While the state has to ensure that citizens *"participate, in the framework of democratic exercise of power, in the decisions essentially affecting his or her right of self-determination*[90], the problem in the Hungarian context is that the democratic quality of this framework is in reality severely dysfunctional. At the same time, the duty of state protection of the traditional environment must "*be assessed in the context of Hungary's constitutional identity"*; including the aforementioned historical achievements and Christian culture.[91] The risk: individual self-determination of Hungarians to self-identity and a deviation of ruling party dominant cultural discourse, including for example solidarity towards Muslim migrants or asylum seekers, could severely be restricted.

3.3.3. A new EU myth

The contestation of the EU's cosmopolitan narrative is also evident, emphasizing an EU of nation states and a Christian Europe. This involves utilizing the concept of national constitutional identity in EU law discourse and re-appropriating the legal principle of sincere cooperation, impacting the constitutional relationship with Member States like Hungary.

The HCC first of all refers to Hungary's historical freedom fights. Allegedly this inspires the constitutional review of the shared competences with the EU and facilitates the rejection of EU law. As noted in para 99 of the 2021 ruling, *"taking into account Hungary's historical struggles"*[92] and in para 109 *"struggles for the defence and restoration of self-determination"*[93], the Court recognizes the "*aspiration to safeguard the country's sovereign decision-making powers"* as *"itself part of the country's national [and constitutional] identity"*[94]. This discourse supports the argument that *"joint competence [EU membership] may not restrict the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure is itself part of Hungary's constitutional identity."*

In a 2019 decision, the Court already emphasized that "the Member States are masters of these treaties"[95].

[85] *Idem,* para. 41.
[86] *Idem,* para. 43.
[87] *Idem,* para. 39.
[88] *Idem,* para. 43.
[89] *Idem,* para. 39.
[90] *Idem,* para. 43.
[91] *Idem,* para. 43.
[92] *Idem,* para. 99.
[93] *Idem,* para. 109.
[94] *Idem, p*ara. 99.
[95] Decision 2/2019. (III. 5.) AB, paras. 1-123, para 24 (Reasoning [32]).

More prominently, in the 2021 decision the HCC referred to established principles of EU law, such as 'sincere cooperation'[96], to claim that Hungary has the right to unilateral action in policy domains that it shares with the EU. While 'sincere cooperation' (Article 4(3) TEU) addresses both the EU institutions and the Member States, its significance was hitherto mainly viewed in proper EU inter-institutional cooperation and the idea that the Member States should actively contribute to the EU objectives and therefore pro-actively implement its policies. The Court provides the opening however for the view that the EU institutions should instead demonstrate more 'sincere cooperation': i.e., grant space for Hungary to achieve the objectives of its own (historical) constitutional identity: "*interpretation of reserved sovereignty is also explicitly in line with the principle of sincere cooperation under Article 4 (3) TFEU.*"[97]

Moreover, the HCC implicitly connects a (historical) Hungarian claim of European identity to the EU's own identity. For example, the idea of joining Christian Europe a thousand years ago is perceived as consequential to become a respectable EU Member State. This is mirrored in a 2019 decision[98] and in the 2021 decision the paragraph is partly repeated, referencing the 2019 decision.[99] The paragraph also talks about Hungary' s 'defence of Europe' which (implicitly) sends the message that today the EU and Hungary should fight (illegal) migration:

''[16]The formation of the State of Hungary had been the first act by which the Hungarian nation expressed its European identity […].we are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. It is also a part of our national values that our nation has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence, […]." As a direct consequence of this European identity, Hungary made consistent efforts after the change of the political system to take part in the European integration and our accession was approved by a decisive national referendum.[100]"

3.3.4. Alternative historical contestation

The newly developed historical legal principles and repertoires of evaluation can simultaneously be employed to challenge their established meanings. For example, the Hungarian Helsinki Committee in proceedings for the Court contested the meaning of the historical constitutional identity by the ruling party, arguing that it implies respect for the rule of law and the developed rights for asylum seekers: "The freedoms listed in the catalogue of fundamental rights are an achievement of the Hungarian historical constitution and safeguarding them is part of Hungarian constitutional identity […]. [While] by creating the concept of constitutional identity the Constitutional Court clearly aimed at extending fundamental rights and protect the rule of law, the Government's petition aims at the opposite: the practical elimination of the most basic rights of asylum seekers"[101].

Even the HCC provided openings for contestation of the current illiberal constitutional imaginary.[102] In the 2021 ruling the Court points to a mutual solidarity between states to admonish Hungary to contribute to "*reassuring settlement of the situation of asylum seekers in its territory"*[103] and went further to state that*: "There are many examples of the active expression of mutual solidarity and the welcoming of the persecuted throughout Hungary's history, and the concepts consistent with this are an integral part of our public law literature. (See for example Part VI of St Stephen's admonitions to his son, Prince Imre)".*

The paragraph refers to the letter of King St. Stephen, founder of the Hungarian state, to his son on how to be a good ruler. The referenced Part VI is *"About welcoming and protecting guests"*. These constitutional historical texts could allow for a more multicultural constitutional imaginary and an appreciation of refugees and migrants. For example, the King has written among others: *"Guests and newcomers bring such profit that*

[96] And also, the effectiveness of EU law.
[97] Decision 32/2021. (XII. 20.) AB, paras. 1-111, para 83.
[98] Decision 2/2019. (III. 5.) AB (25 February 2019), para 16.
[99] Decision 32/2021. (XII. 20.) AB, paras. 1-111, para 96.
[100] Decision 2/2019. (III. 5.) AB (25 February 2019, para 16.
[101]Hungarian Helsinki Committee, Amicus Curiae brief, 2021, p.10, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/Amicus_curiae_EN_final.pdf
[102] Whether as part of a cynical 'compromise' strategy to protect the social order and to conceal a 'trojan horse discourse', see Luining &Van Hout forthcoming 2024, or as a sincere opening to a more 'liberal' or 'consensual' discourse.
[103] Decision 32/2021. (XII. 20.) AB, paras. 1-111, para 49.

their appreciation deserves to be called the sixth royal virtue […] they bring various languages and manners, virtues and weapons, by which they enrich the country and increase the grandeur of the court. The unilingual and unicultural country is weak and perishable. Therefore, I order you, my son, to benevolently protect and respect the newcomers so they would rather stay with you than elsewhere […]".[104]

In conclusion, mythopoetic legitimization is evident in the HCC's rulings, where alleged historical constitutional accomplishments are established as a basis for adjudication. This fosters new illiberal collective norms and an EU myth through the appropriation of the concept of constitutional identity. However, the newfound historical legitimizing vocabulary can be subject to contestation and may serve different purposes. Nonetheless, its practical success within Hungary's current semi-autocratic political landscape might be minimal.

3.4. Poland's historical constitutional reinterpretation

Much like Hungary, the constitutional imaginary of Poland underwent substantial transformations during the period from 2015 to 2022, under the governance of the PiS party. Under the guise of historical narratives, PiS party embarked on a deliberate campaign to reconstruct societal values, fostering a sense of national identity rooted in specific historical interpretations. Such mythopoetic legitimization was instrumental in cultivating a distinct nationalistic and conservative identity aligned with the party's vision and justify legal amendments, consolidate political authority, and redefine the democratic institutions.

In the subsequent analysis, we provide concrete instances illustrating the formulation of a distinct historical narrative, beginning as early as 2005 and further solidified in 2015-2022 (section 3.4.1) which was strategically utilized in the implementation of some pivotal national reforms post-2015, including legal reforms (section 3.4.2).

To achieve this, we examine the political literature of these periods on the historical context, along with primary sources, including the party's 2005 program document (with a focus on its delineation of 'historical policy'), as well as specific political statements made by the party's representatives and excerpts from Constitutional Tribunal rulings.

3.4.1. The historic policy and the score of wrongs 2005 -2015

In the years before PiS came to power for the first time in 2005, they decisively rejected the prevailing liberal European approach to dealing with a traumatic past, characterized as 'reconciliation through forgetfulness'. Instead of embracing a narrative that prioritized putting historical conflicts behind for the sake of the European integration, the party chose to assert Poland's distinct historical narrative centered around the atrocities it suffered under totalitarian regimes and confront or redress perceived wrongs. The trauma of communism became the focal point of memory politics.

PiS's approach to historical policy from 2005 encompassed two key aspects. First, there was an effort to promote awareness of Poland's history domestically. The intention was to create a shared historical consciousness among the people, fostering a sense of national identity deeply rooted in a particular interpretation of Poland's past. Secondly, by popularizing a specific historical narrative internationally, the party aimed to influence how Poland was perceived by the international community.

With these objectives in mind, PiS stood as the only party directing its efforts towards shaping the historical image and reputation of Poland. The term "historical policy" itself entered the Polish political lexicon in 2005, when it became an official part of the party program during the parliamentary elections.[105] The program highlighted 'Poland's merits in the fight against Nazi and communist totalitarianism[106]'. It also emphasized a proactive stance against historical revisionism and a commitment to safeguarding Poland's historical narrative on the international stage:

"We will pursue a thoughtful, effective historical policy both domestically and internationally. (...) The international aspect of historical policy includes all activities aimed at popularizing, beyond Poland's borders, particularly significant facts from our history. Poland played a unique role in the 20th-century history of struggles against criminal totalitarian systems. However, we are currently witnessing attempts to relativize

[104] https://epa.oszk.hu/00000/00010/00003/hist.htm
[105] PiS Party Program of 2005 *IV Rzeczpospolita. Sprawiedliwość dla Wszystkich* (online).
[106] *Idem,* p. 49.

responsibility for the outbreak of World War II and the crimes committed during its duration".[107]

Jarosław Kaczyński, the leader of the party, himself has repeatedly underscored the significance of the cultivation of Polish pride:

"we need to consolidate Polish national consciousness, build the pride of Poles. Other nations, even those with historical challenges, do this. Schools should impart to young Poles a specific body of knowledge that allows them to find their place in the national community, understand Polish symbols, and comprehend Polish historical and literary references."[108]

Upon assuming power in 2005, this discourse also extended to national commemorations and anniversaries, particularly those associated with World War II, serving as strategic tools for promoting its distinctive historical narrative. These events functioned as significant platforms to fortify the party's vision of Poland as a nation characterized by a singular historical identity. According to this narrative, Poland has weathered victimization from external forces while exhibiting resilience in the face of adversity. The framing of Poland as both a victim and a resilient entity contributed to the party's proud national narrative, reinforcing its image as a defender of national values and historical truth. PiS politicians draw a clear boundary between themselves, the proprietors of the 'true' vision of the past, and other actors who nurture 'improper', 'false' versions of history[109].

Beyond fostering awareness of Poland's history and shaping a specific narrative on the international stage, the PiS party's historical policy was also utilized as a political tool to mobilize the electorate, criticize opponents, and establish a foundation for the constitutional overhaul.

Indeed, from the party's inception, its' strength as a political actor to mobilize support was not solely derived from its policies or electoral promises but was deeply rooted in its ability to tap into and address the multifaceted historical grievances of the populace. Through the invocation of past injustices, PiS combined historical grievances to shape a narrative where they position themselves as victims. Such narratives shaped the party's populist discourse and resonated with individuals seeking validation for their grievances of different kinds. The party effectively tapped into the collective memory of its base, offering a narrative that not only acknowledged their perceived injustices but also positioned PiS as the solution and the defender of their rights.

However, in doing so, the party which consistently avowed its dedication to confronting historical revisionism, assumed paradoxically a stance of historical revisionism itself. In this sense, elements related to the injustices suffered by the Polish community are considered foundational for collective memory, such as the idea of the Polish nation as an innocent victim of external oppression during communism, while other aspects are either downplayed or excluded from the discourse[110]. This "collective amnesia" manifests in various forms.[111] For instance, the nation's involvement in the Holocaust is approached with a defensive stance and confronting the nation's historical involvement with communism is deliberately avoided.

Moreover, in the hands of PiS, history has become a component of an aggressive political style, condemning political opponents. A pivotal example was, when during the 2005 presidential campaign, political opponent Donald Tusk was accused of omitting information about his grandfather's service in the Wehrmacht. In the same vein, in 2007 Kaczyński portrayed his party as a continuation of the ethos of the Home Army[112] and characterized political opponents of his government as heirs to "the traditions of the Communist Party of Poland, radical left-wing (...) the traditions of those who later, for at least some time, accepted the People's Republic of Poland, even in its most brutal period".[113] As such PiS sought to position themselves as the rightful

[107] *Idem,* p. 110.
[108] Jarosław Kaczyński's *exposé from 19 july 2006*, reprinted in: J. MARSZAŁEK-KAWA, P. SIEMIĄTKOWSKI (eds.) *Exposé Prezesów Rady Ministrów 1989–2019,* (online), 2021, pp. 255-277.
[109] L. RADONIĆ, *„Nasze" i „odziedziczone" muzea – PiS i Fidesz jako mnemoniczni wojownicy.",* in *Teksty Drugie*, vol. 4, 2020, (online), p. 130.
[110] D. KARNOWSKA, *Polityka zagraniczna Prawa i Sprawiedliwości w latach 2005–2011. Próba bilansu,* in *Nowa Polityka Wschodnia,* vol. 2(3), 2012, p. 44.
[111] M. KRÓL, *Patriotyzm przyszłości,* Warsaw, 2004, p. 76.
[112] The Home Army (Polish: Armia Krajowa) was the dominant resistance movement in German-occupied Poland during World War II.
[113] M. BIAŁOUS, I. SADOWSKI, *Na karuzeli krzywd. Historyczne źródła podziałów społeczno-politycznych w Polsce* in *Studia Politologiczne*, vol. 29, 2013, p. 83.

heirs to a certain historical legacy, appealing to sentiments associated with anti-totalitarian or anti-communist resistance.

Finally, historical discourse became a reservoir of arguments for PiS to systematically criticize the liberal constitutional order. The party contended that the post-1989 political transition, marked by the adoption of the 1997 constitution, did not signify a genuine breakthrough or departure from the previous oppressive political system. According to PiS, the political changes in 1989 were insufficient in dismantling the structures of the communist regime entirely. The 1997 Constitution was presented as a 'rotten' political compromise that failed to adequately address the historical injustices of communism. The democratic transformation itself was seen as the continuation of a system marked by what they referred to as 'post-communist arrangements'. Consequently, structures inherited from the communist era were said to persist, influencing all aspects of contemporary Polish society - political, economic, and cultural.

Since 2005, under PiS and conservative elites, ideas circulated about the creation of a 'Fourth Republic' following a 'moral revolution' aimed at eliminating the "oligarchic network of comradely ties" of the post-communist Third Republic.[114] The idea of establishing a Fourth Republic draws parallels to the history of the Piłsudski[115] supporters from the period following May 1926 when a coup was enacted.[116] Both Piłsudski supporters and PiS perceived a discrepancy between the structure of the existing state and their own programmatic-ideological guidelines. While the proposed constitutional change did not come to fruition, the project of the Fourth Republic, endured and gained renewed vigor after the triumphant 2015 elections.

3.4.2. Historical grievances and national constitutional identity as grounds for legal reforms

The ideal of the Fourth Republic, rejecting the notion that a genuine break from (post-) communism had occurred, served as a legitimizing myth for PiS in justifying constitutional overhaul. However, PiS, despite winning the elections in 2015 with a landslide, faced a significant obstacle: the lack of a constitutional parliamentary majority required to change the Constitution. This inability of constitutional overhaul or amendments prompted the party to adopt alternative strategies aimed at achieving a 'real' transformation aligned with their vision.

Hence, in justifying their judicial reform, which involved violations of both the constitution and EU law, they referred to alleged systemic flaws in the judiciary inherited from the post-communist era. According to the party, a comprehensive restructuring of the judiciary was imperative to eliminate perceived vestiges of the communist era and establish a legal framework in harmony with their vision of a just and sovereign Poland.

The former Prime Minister Morawiecki has repeatedly talked about "judges from the martial law era" who were supposed to sit in the Supreme Court. In July 2018, following EU criticism, he said in the European Parliament in Strasbourg: "Do you know that those judges from the time of martial law who issued disgraceful judgments are in the Supreme Court defended by you? (...) Post-communism has not been overcome in Poland; we fight it through the reform of the judiciary"[117]. Similarly, in an article in the "Washington Examiner" in December 2017, he wrote that as a result of the Round Table talks, post-communists occupied judicial positions in free Poland.[118]

President Andrzej Duda expressed comparable views. During a press conference in Washington in June 2019, he remarked: "Not too long ago, just a few years back, I was surprised to discover that there is a whole group of judges in the Polish Supreme Court who were members of the communist party (...) They even passed judgments during martial law, convicting people and applying communist legislation. (...) Essentially, all our efforts aimed at retiring these individuals, but unfortunately, despite the passage of 30 years, their influence,

[114] https://www.politico.eu/article/poland-going-forth-with-a-new-republic/ .
[115] Józef Piłsudski (1867-1935), initially a member of the Socialist Party, later a military leader (appointed Marshal in 1922). He played a central role in the struggle for Poland's independence and in the construction of the Polish state, holding several top offices such as the Commander-in-Chief of the Armed Forces and the Head of State. On May 26, 1926, he led a military coup, establishing an authoritarian regime known as "Sanacja" (Sanation).
[116] Ł. RESZCZYŃSKI, *Piłsudczyzm a Prawo i Sprawiedliwość W poszukiwaniu podstaw do analogii*, in *Historia i Polityka,* vol. 5(12), 2011, p. 105.
[117] https://www.europarl.europa.eu/doceo/document/CRE-8-2018-07-04-ITM-004_PL.html.
[118] https://www.washingtonexaminer.com/opinion/1075707/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary/.

established after 1989 when they rebranded themselves as the elite of the new state, remains substantial".[119]

In context of EU criticism, the idea of national constitutional identity became prominent and led to a return to a more dualist constitutional approach by PiS. The captured Polish Constitutional Tribunal rejected EU interference, legitimizing the judicial reforms by PiS as in line with Polish national constitutional identity: "With best will for a pro-[EU] interpretation of the Constitution, it is not possible to interpret the powers of EU, [..] to suspend Polish laws concerning the system and jurisdiction of Polish courts"[120]. The Minister of Foreign Affairs argued for the Tribunal that the reorganization of the judiciary relates to constitutional identity and is in light of Art. 4 TEU up to the free assessment of the Member States.[121] Simultaneously, the Court of Justice of the European Union was admonished to listen to a proud historic Poland by the Tribunal: "The content of Article 2 TEU, while deriving from the content of the constitutions of national states, draws heavily on the content and interpretation of Article 2 of the Constitution of the Republic of Poland as one of the largest Member States of the European Union with a legal culture that is centuries old".[122]

The idea of addressing the (post-)communist past concerned not only the judiciary, but many other fields. For instance, PiS has consistently portrayed its media reforms as a response to what it perceives as post-communist legacies. The "new" reformed media, considered a part of the "good change", are in competition with the "old", pathologically partisan system seen as a post-communist arrangement.[123]

Furthermore, the PiS party aimed to identify all individuals responsible for the suffering of the Polish nation before 1989 and to punish them for their loyal stance towards the authorities of the People's Republic of Poland. In 2017, PiS enacted legislation amending the law on social security for public officials and their families, particularly those working in the fields of police, security, intelligence, and fire protection, among others.[124] This law aimed to decrease retirement pensions for individuals who had served, even for a single day, in selected formations and institutions of the communist state during the period of 1944-1990. By advocating for individual accountability, the party sought to rectify perceived mistakes made in the 1990s.[125]

Finally, the PiS's historical policy, aimed at preserving a positive Polish national image, led to a legal governance of history. A memory law aimed at "protecting the good name of the Polish State and the Polish Nation" was introduced in 2018, criminalizing false accusations of Polish complicity in Nazi crimes. However, the inclusion of 'and other offences' in the law potentially shifted responsibility away from Poland in the atrocities that did occur. This aspect was criticized for suppressing freedom of speech and hindering historical research.[126]

In summary, mythopoetic legitimization has played an important role in Poland under PiS political rule, fostering a nationalistic and conservative identity aligned with the party's vision and the idea to eliminate perceived vestiges of the (post)communist era. This narrative has been utilized to justify judicial capture, challenge EU authority and consolidate and monopolize political power in media, as well as in the legal governance of historical discourse.

4. Conclusion

Historical beliefs can influence political and legal decision-making. A dynamic and reciprocal relationship exists between the realms of law and history, whether engaged in consciously or subconsciously by legal actors, and irrespective of whether it is deemed preferable or not.

We are faced with the inevitability that law, especially the proclaimed universal values of democracy, the

[119] https://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/andrzej-duda-wspolna-konferencja-donald-trump,3948.
[120] Ref. no. P 7/20|14 VII 2021, 14 July 2021, concluding remarks.
[121] Ref. no. K3/21|7 X 2021, 7 October 2021, para. 4.4.
[122] Ref. no. P 7/20|14 VII 2021, 14 July 2021, para. 6.10.
[123] S. MOCEK, *Władza i media. Dyskurs polityczny wokół mediów publicznych w Polsce* in *Zoon Politikon,* vol. 8, 2017, p. 48.
[124] Act of 16 december 2016 to amend the act on social security of the functionaries of the police, internal security agency, intelligence agency, Counterintelligence bureau, Central anti-corruption bureau, border Guards, Government pro-tection bureau, national fire service and prison service and their families, Journal of laws of 2016, item 2270 (Pol.).
[125] D. GAWIN, *Wspólnota przeszłości: polityka historyczna*, in *Rzeczpospolita,* 2006, vol. 235, p. A12-A14.
[126] N. KOSOPOV, *op. cit.*, pp. 273-74.

rule of law, and fundamental rights, is developed and applied from a particular historical societal point of view. Furthermore, historical discourse influences legal discourse in various ways. Constitutional systems incorporate historical cultural, symbolic, and imaginative dimensions, considered conducive to achieving the necessary level of societal identification. These constitutional imaginaries utilize legitimizing myths derived from historical narratives and collective memory, guiding, sustaining, and legitimizing structures and actions of contemporary political and legal institutions. Finally, the domain of history can increasingly fall under the purview of legal regulation.

As a result, collective memory and historical narratives incorporated into integrative myths have been employed to promote national democracy, liberal democracy, and European integration. Simultaneously, legal regulation of history has upheld a culture of collective memory safeguarding sacred considered human values by criminalizing denials of atrocities. The symbiotic influence of law and historical narrative is particularly evident when examining the post-communist transition in Hungary and Poland during the 1990s and its subsequent shift to populism and semi-authoritarianism from the early 2000s onwards.

In the latter case, there is a shift towards illiberal, increasingly identitarian national myths with subjugative and exclusionary functions, exploiting historical grievances and traumatic memory. These myths legitimize or influence national political and legal reforms, as seen in Poland, or even direct constitutional adjudication, as exemplified by the historical constitution in Hungary. This leads to a replacement or contestation of liberal constitutionalism and the introduction of competing legitimizing myths concerning national democracy and even the EU itself.

Examining the impact of historical beliefs on political and legal decision-making remains a relatively unexplored territory; however, legal and constitutional scholars cannot afford to overlook this trend. Perhaps, it is history that is too important to be left solely to historians and cannot be ignored by lawyers.[127]

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[127] M. MALSCH, *Law is Too Important to Leave to Lawyers*, Den Haag, 2021.

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Semantical Discordances of Comparison in Law Negatively Defined

Comparative Law as Methodology vs 'Comparative Law Methodology' as Tautology

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Abstract: Defining comparative law is difficult simply because it is polysemic and contingent in nature. A framework for refinement, differentiation and affirmation is represented by the negative paradigm. Comparative law's inadequacy to designate the subject is best exemplified by the following neologism, 'Comparative Law Methodology'. It is argued the latter phrase is distinguished from the former by a redundant lexical addition. Thus, this triad translates a latent divide between object and method already contained in the former idiom. Morphological observations of the distinctive features of a terminology indicate these can be affected alternatively from subservience to precedence by diachronic semantical variations. Modern comparatists naturally concerned with the ascertainment of explicit methodological frameworks extending beyond tacit use improperly refer to this tautological expression.

Keywords: Comparative law theory and method, Epistemology, Linguistics, Philology, Semantics.

Le poète compare, il
n'explique ni ne décrit.
[…] Baudelaire
ne décrit jamais, il évoque, et il y a toute la différence
du monde entre décrire et évoquer. […]
— En poésie, les mots évoquent d'une part,
signifient de l'autre.
ÉMILE BENVENISTE, *Baudelaire*[1]

1.Introduction

1.1 Epistemic imperative of characterisation: scholarship's reluctance to abandon an inadequate terminology

Comparative Law contains all aspirations of comparatists who, unlike poets, describe and explain law

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[1] E. BENVENISTE, *Baudelaire*, in C. LAPLANTINE, *Émile Benveniste : poétique de la théorie - Publication et transcription des manuscrits inédits d'une poétique de Baudelaire (Doctoral Thesis, Annexes F.1)*, Saint-Denis, 2008, 15, f°9 [f°115]; 20, f°3 [f°197]; and 22, f°32 [f°284] [original manuscript emphasis and lines].

elsewhere in different legal traditions and in relation one to another. Despite this radical methodical opposition, "[n]ot even poetry – poetry! – is ensconced within a strictly local paradigm" dissentingly asserts Professor Pierre Legrand who considers this art a "cosmopolitan endeavour".[2] Comparing both disciplines reveals that these arguably share the latter commonality of a spatially unrestricted territory. Their methods though appear to be diametrically divergent, or are they really? Legal terminology's purpose is to *signify* strictly and unequivocally. However, 'comparative law' as an incredibly diverse and polysemic vocable *evocates* various notions, perhaps to the jurists' dismay. Thus, to which extent does the 'proper word' inadequately designate the discipline? Also, are there alternative "designations any other than the 'proper word' if they evocate better"? [3] Are there consensually predominant phrases or terminologies deemed more appropriate? Are there otherwise designations that should be discarded completely? These are the few questions guiding the inquiry presented in this article.

At the edge of a century of modern 'comparative law', undertaking an inventory of the discipline's attributes and progress was customary. In this regard, a noted scholar in the field – despite his reluctance to engage in what he deemed a sterile debate – identified its detrimental semantical "identity crisis".[4] It remains true today that the inadequacy of the expression reflects a resolute diversity of opinions.[5] Another scholar, focusing on the practical objects of the discipline, earlier admitted philology would more aptly define the phrase.[6] While a third one suggested more appropriate alternative designations as the 'comparison of laws', 'comparative study of law or laws' or 'comparative legal study and research'.[7]

This state of confusion also impedes on the subject's progress.[8] If disagreement in exact sciences on terminology is less frequent than in law, the nature of legal scholarship and absence of standardisation regarding the ambit of 'comparative law' make it an incredibly broad area encompassing various endeavours – at times illegitimately – that would require more appropriate designations. Therefore, there is indeed a paramount epistemic necessity to properly designate in order to define the subject. What is certainly incidental for scholars occupied with the more practical aspects of the discipline should not be disregarded as such by specialists when an increasing number of lawyers incorporate comparative argumentations into their studies. Thus far extends the critique of those who refrain from adding perhaps more confusion than sense to an already labyrinthine literature. They do not completely disserve the discipline by choosing to let this issue pending, perpetually debatable in a sense, for there is perhaps no common ground for agreement on this matter despite the apparent common denomination.

If comparative law, *droit comparé*, *rechtsvergleichung*, *derecho comparado*, *diritto comparato*, appear laconic, limpid, and *prima facie* axiomatic due to their systematic use in scholarship, these idiomatic phrases are nonetheless constantly criticised by jurists.[9] Perhaps projecting their own methodological, linguistic, and substantive difficulties on the expression, the latter seem to return to these labels and lament the conundrum resulting from such a simple compound! This is not to suggest at all that these and other labels in different languages are equivalent or that each separate term constituting these terminologies implies the same meaning. As Professor Basil Markesinis arguably puts it, "if you wish to bring the word comparative into the picture, you must speak of method [noun] – Rechtsvergleichung – and not as the French do, of *droit comparé* [adjective]".[10] Similarly, and more recently, some French scholars expressly preferred the term of

[2] P. LEGRAND, *Negative Comparative Law: A Strong Programme for Weak Thought*, Cambridge, 2022, p. 237.
[3] E. BENVENISTE, *op. cit.*, 22, f°59 [f°311]: "*Le principe de l'énonciation poétique est de procurer le contact le plus étroit possible – idéalement l'identification – avec ce qui est évoqué : s'il est question d'une source, qu'on croit y baigner ses lèvres. C'est une des conditions essentielles du jeu poétique : que le mot ne signifie pas (~~seulement~~), mais qu'il évoque. Par suite on pourra recourir à des désignations tout autres que le « mot propre » si elles évoquent mieux*".
[4] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Opening Remarks*, in *Tulane Law Review*, Vol. 75, 2001, p. 863. See also, M. REIMANN, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, in *American Journal of Comparative Law*, Vol. 50, 2002, p. 686.
[5] J. HUSA, *Introduction to Comparative Law*, Oxford, 2023, p. 1. See also, K. KERAMEUS, *Comparative Law and Comparative Lawyers: Opening Remarks*, in *Tulane Law Rev*, Vol. 75, 2001, p. 866; X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, in *Tulane Law Review*, Vol. 75, 2001, p. 1235.
[6] M. SCHMITTHOFF, *The Science of Comparative Law*, in Cambridge Law Journal, Vol. 7, 1939, 95.
[7] W. J. KAMBA, *Comparative Law: A Theoretical Framework*, in International and Comparative Law Quarterly, Vol. 23, 1974, p. 487.
[8] *Ibidem*, p. 486; M. REIMANN, *op. cit.*, pp. 672–3, 686.
[9] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, *op. cit*., pp. 1235–6.
[10] B. MARKESINIS, *Scholarship, Reputation of Scholarship and Legacy: Provocative Reflections from a Comparatist's*

"*comparatisme*" over "*droit comparé*" as the former "refers to the *method* consisting in the simultaneous study of legal systems".[11]

Another cause of complaint could be that the adjective 'comparative' is misleading in law as it suggests a systematism empirically denied by both practice and scholarship altogether.[12] The vocable's contracted form makes it difficult to distinguish from traditional legal subjects such as 'competition law' in the minds of students expecting a fixed set of rules to be presented to them under this heading. To compare, etymologically, is to set similar things side by side to emphasise similarity or difference. Thus, according to the authors of an introductory textbook, comparative law would be "an intellectual activity with law as its object and comparison as its process".[13] On this point there should be in principle no contention. For some, comparison would be 'simply' that.[14] However, 'scholarship comparing legal phenomena' does not qualify all activities falling within the purview of 'comparative law'. Experience offers countless examples of self-proclaimed works pretending to be comparative that are simply not. These attempts to compare are conducted for a purpose certainly deemed useful by their instigator(s). Indeed, what would be critically missing from these studies is not a focus on foreign law(s) as an object but, generally, regard for important aspects of the 'comparison process' in the first place, and a 'systematic' consistency under a more scrupulous scrutiny.[15] In short, these lack method, let alone the presence of explicit referential frameworks.

Minor traces of comparison here and there do not qualify a production as comparative.[16] Furthermore, the validity of *implicit* comparison defended by some as conforming with the canons of the discipline should be rejected as quasi-comparison.[17] This approach effectively brings closer aspects pertaining to different legal traditions – a prerequisite for explicit comparison – but draws no observations from these. This analysis cannot bear on a single legal tradition of course, as the act of *comparing* requires at least two or more terms unless such comparison is historical or vertical. Therefore, the study of a single legal tradition foreign to the observing subject results in an internal, implicit comparison. If not externalised, that is, explicitly opposed and contrasted with one's own or another tradition, it simply does not meet the requirements of 'comparative law'.

Implicit descriptiveness effectively still is comparative law's rudimentary methodological trait – despite its constantly decried shortcomings. In order to overcome these, the method using logical deduction requires a further two essential argumentative phases of 'identification' and 'explanation' of similarities and differences giving comparison a fuller meaning.[18] If implicit comparison has a relative utility, it would be because description is rarely devoid of dogmatic or parochial prejudice.[19] Indeed, the objectivity and detachment required for scientific studies are perhaps not attributes of legal comparatists considering the mental habits necessarily ingrained by their training in a specific legal tradition resulting in an ethnocentric or even imperialistic encounter.[20]

On the one hand, the relative validity of the expression 'comparative law' in case the enterprise is macro-comparative, that is, concerned with a holistic study of the legal traditions of the world may not necessarily seem problematic. Yet, macro-comparison is not solely concerned with the sum of different national laws and

Point of View, in *Irish Jurist*, Vol. 38, 2003, p. 9 [original emphasis].

[11] J.-B. BUSAALL, F. CHERFOUH, G. GUYON, *Du comparatisme au droit comparé, regards historiques, Introduction*, in *Revue Clio@Themis*, Vol. 13, 2017, p. 1 [translated by the author; emphasis added].

[12] G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, Oxford, 2014, pp. 6, 173; P. GLENN, *Against Method?*, in M. ADAMS, D. HEIRBAUT (eds.), *The Method and Culture of Comparative Law*, Oxford, 2014, p. 177; P. FEYERABEND, *Against Method*, London, 2010, p. 7; K. ZWEIGERT, *Methodological Problems in Comparative Law*, in *Israel Law Review*, Vol. 7, 1972, p. 465.

[13] K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *An Introduction to Comparative Law*, Oxford, 1998, p. 2.

[14] S. A. SMITH, *Comparative Legal Scholarship as Ordinary Legal Scholarship*, in Journal of Comparative Law, Vol. 5, 2010, p. 336.

[15] W. J. KAMBA, *op. cit.*, pp. 486, 489, 506.

[16] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, *op. cit.*, p. 1236; K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *op. cit.*, p. 6; W. J. KAMBA, *op. cit.*, pp. 505–6.

[17] X. BLANC-JOUVAN, *Centennial World Congress on Comparative Law: Closing Remarks*, *op. cit.*, pp. 1235.

[18] W. J. KAMBA, *op. cit.*, pp. 511–2, 517.

[19] K. ZWEIGERT, *op. cit.*, p. 467.

[20] G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, *op. cit.*, pp. 6, 9; G. SAMUEL, *Taking Methods Seriously (Part Two)*, in *Journal of Comparative Law*, 2, 2007, pp. 230–1; P. LEGRAND, *How to Compare Now*, in *Journal of Legal Studies*, Vol. 16, 1996, p. 238; P. LEGRAND, *Comparative Legal Studies and Commitment to Theory*, in *Modern Law Review*, Vol. 58, 1995, pp. 262–3.

investigates more than rules of law as it considers primary causes of ontological differentiation. Studies concerned with visual representations of law and justice, for instance, although not strictly legal, but socio-legal, ethnological, historical, and interdisciplinary, are often conducted by jurists themselves and encompass considerations relevant to comparatists.[21]

On the other hand, for any given branch of law under a micro-comparative study, a variable term is introduced to the denomination, e.g., comparative 'contract' law, comparative 'tort' law, comparative 'criminal' law. Are these areas of scholarship contained within the denomination of comparative law or independent from it? One can assume that the study of these branches from a comparative standpoint is subsumed under the overarching discipline represented by the terms of 'comparative law' as they should. Yet some partisans of these designations claim the idiosyncrasies of their methodology such as, for instance, constitutionalists. To be perfectly unequivocal, there is no single method of conducting comparison in law or 'scheme of intelligibility' using a terminology coined in social sciences.[22] It is argued that despite the diversity of paths to follow to reach the goals of the comparative task, there should be no unnecessary divisions or exclusive categories confiscated by any branch of law.[23]

1.2 Diachronic alteration of semantical structures: defining terminology negatively and positively

A more deeply concerning and recurrent issue in the field is the inability to define the subject. Accurately defining conditions success of any enterprise and comparison in law is certainly not the least demanding. Jurists confronted with the thorny question 'what is comparative law' often 'kick into touch' in favour of a paradigm shift considering instead 'what is *being compared* in law' thereby focusing on a particular subject matter or on individual methods, i.e., '*how to* compare in law'. This paper focuses on the first question, however, both incidental questions seemingly contribute to answer the main question. To understand comparative law today, one should consider its inherently contingent meaning.

The answer to this primary question requires to be framed positively, obviously by reference to some negative aspects of what 'comparative law' is not. Recently, this negative approach has been examined by Pierre Legrand who relies on Plato, Aristotle and Aquinas to state that an affirmative proposition or enunciation precedes and is superior to the "less informative and harder to process" but also potentially 'parasitic' and 'fallow' negative statement having nonetheless the virtue of permitting 'differentiation'.[24] Contrastingly, Professor Rachel Giora considers "[n]egation often functions as an attenuator rather than a suppressor. As such, it prompts *default* automatic interpretations […] which prompts metaphoricity, or internal incongruity, which prompts sarcasm. [Therefore,] sarcastic interpretation, […] will be processed *faster* than nondefault, nonattenuated (yet sarcastically biased) affirmatives".[25]

In legal scholarship, it is a custom to refer to Kahn-Freund's nihilist definition given upon taking the Chair of Comparative Law at Oxford, stating that the subject "*has* the somewhat unusual characteristic that it does *not* exist"![26] In itself and in isolation, this negative statement could be considered useless if not resituated in its context. Perhaps Kahn-Freund used this negation to assist his audience in internally and expeditiously dispelling all their presumptions on comparative law as a *subject* asserted positively immediately before the negation and as suggested by the title of his inaugural lecture. The wider context in which this sarcastic assertion was made is addressed in this paper. If not a subject, it has been identified by Kahn-Freund as method(s). Furthermore, there is compelling evidence as of late, both individually and institutionally, of a resurgence of the subject's methodological dimension. Defining entails setting forth a certain set of

[21] C. SCHWÖBEL-PATEL, R. KNOX (ed.), *Aesthetics and Counter-Aesthetics of International Justice*, Coventry, 2024.
[22] M. ADAMS, J. GRIFFITHS, *Against 'Comparative Method': Explaining Similarities and Differences*, in M. ADAMS, J. BOMHOFF (eds.), *Practice and Theory in Comparative* Law, Cambridge, 2012, pp. 279, 301.
[23] K. BOELE-WOELKI, D. P. FERNÁNDEZ ARROYO (eds.), *The Past, Present and Future of Comparative Law*, Paris, 2018.
[24] P. LEGRAND, *Negative Comparative Law, op. cit.*, 370–1. See also, L. R. HORN, H. WANSING, *Negation*, in *Stanford Encyclopaedia of Philosophy*, 2020: https://plato.stanford.edu/entries/negation/ (accessed: 14/06/2024) Section 1.2 'Negation in natural language: markedness and asymmetry' for extracts of the classical authors mentioned.
[25] R. GIORA, *The Creativity of Negation, On Default Metaphorical, Sarcastic, and Metaphorically Sarcastic Constructions*, in W. XU, J. R. TAYLOR (eds.), *The Routledge Handbook of Cognitive Linguistics*, New York, 2021, pp. 127–8 ['default': bold in the original text; 'faster': emphasis added].
[26] O. KAHN-FREUND, *Comparative Law as an Academic Subject*, in *Law Quarterly Review*, Vol. 82, 1966, 41 [emphasis added]. See also more recently to the same effect, B. MARKESINIS, *op. cit.*, p. 9.

characteristics and decisive traits. It is interesting to note that while Kahn-Freund's definition was accepted by "common consent" at the time he expressed it, partially explaining his rather emboldened address, Reimann for instance taking note of its relative adequacy continuously met by a broad consensus within the scholarly community until today, denied its accuracy and relevance thirty-six years later, early in the 21st century, attributing a proper domain to the subject.[27]

Diachronic considerations are significant in shaping terminology on any given topic. Accordingly, comparative law has been, in effect, the fertile ground for changing designations intended to adequately characterise the subject. Take for instance the phrase 'comparative jurisprudence' used in the 19th century as the main designation for the discipline.[28] A perfectly valid terminology at a given time may be considered partially inadequate or simply obsolete at another given time. A nomenclature can also contain various acceptations and – although formally static and intact in appearance – what it entails may be subject to fluctuation. In this regard, modern comparative law's motto could be *fluctuat nec mergitur* akin to the city of Paris where was hosted more than a century ago during the 1900 Universal Exhibition, the seminal First International Congress of Comparative Law. Proponents of the prevalent scientific nature of the subject under the impulse of Lambert and Saleilles were then challenged by Pollock whose definition essentially does not differ from Kahn-Freund's although expressed sixty-six years prior.[29]

To comparatists of course, and lawyers more generally, the results of comparative investigations should not be seen as purely monolithic and unaffected by the passage of time no matter how appealing this assumption can be for categorisation and explanation. Instead, these should be examined from the far more accurate perspective of the dynamics of divergence and convergence as alternating trends.[30] Even if the answers to these investigations are essentially sought for understanding law, considerations drawn from other disciplines such as anthropology, ethnology, history, linguistics, philosophy, politics and sociology extend far beyond the remit of 'law' *stricto sensu*. They require an inquisitive mindset and a *multidisciplinary* approach that the traditionally and conventionally accepted expression omits.[31] Therefore, the reductive view of former President of the International Academy of Comparative Law, Professor Kerameus, considering the terms of 'comparative law' "fully justified and suitabl[e]" is challenged.[32]

This critique is not intended to lead to an auto-da-fé of textbooks soberly entitled 'comparative law'.[33] The crux of this inquiry is to raise awareness regarding the expression's inadequacy by reference to a negative example. Terminology dictates the direction, intensity, and interests in given aspects of a discipline. Hence, a taxonomic word choice invariably determines the initial focus setting arbitrary limits only crossed by an inquisitive ethos. Comparative law, due to its polysemic nature, appears to suffer from two excesses. Thus, it often fails to encapsulate the full meaning of its objects, and otherwise evocates omnipotence and ubiquity. Therefore, it is argued the subject's reduction to its methodological dimension as a tool is only one possible acceptation of the terminology – irrespective of the insoluble semantic discord feebly attempting to reduce *comparing* (verb in action) to what would subjectively best *evocate* it, either a noun (*comparison*) or an adjective (*comparative*) that is besides the *practical* yet theoretical concerns of comparatists. Finally, the formula 'Comparative Law Methodology' is arguably inconsistent for setting methodology *outside* of 'comparative law' and is met with a strong rebuttal.

[27] M. REIMANN, *op. cit.*, pp. 683–4.
[28] F. POLLOCK, *History of Comparative Jurisprudence*, in *Journal of the Society of Comparative Legislation*, Vol. 5, No.1, 1903, pp. 74–89.
[29] F. POLLOCK, in *Congrès international de droit comparé, Procès-verbaux des séances et documents*, Vol. 1, Paris, 1905, 60. The difference would be the reference to the term "*science propre*" instead of "subject".
[30] J. H. MERRYMAN, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in Stanford Journal of International Law, 17, 1981, p. 358.
[31] G. SAMUEL, *Taking Methods Seriously (Part One)*, in *Journal of Comparative Law*, 2, 2007, 94–5; G. SAMUEL, *Taking Methods Seriously (Part Two)*, *op. cit.*, pp. 235–6; G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, *op.* cit., p. 35.
[32] K. KERAMEUS, *op. cit.*, pp. 866.
[33] M. SIEMS, *Comparative Law*, Cambridge, 2022. Since a picture is worth a thousand words, 3rd edition book cover alone portraying dissected apples and oranges (plain in 1st and 2nd editions) should dissuade from such an idea…

2. Terminological inconsistencies of comparison in law: emancipated or erring methods?

> *Oportet ingenii aciem ad res minimas et maxime faciles totam convertere, atque in illis diutius immorari, donec assuescamus veritatem distincte et perspicue intueri. […] Si quaestionem perfecte intelligamus, illa est ab omni superfluo conceptu abstrahenda, ad simplicissimam revocanda…*
> RENÉ DESCARTES, *Regulae ad directionem ingenii*[34]

2.1 Comparative Law's inadequacy to characterise the scope of the subject

The loose and vague terms of 'comparative law' appear all-encompassing and unspecific since the act of 'comparing' is accompanied by a reference to the field of 'law' as a whole, suggesting a complete and homogenous taxonomic entity.[35] In fact, this may seem a truism but the least specific an expression is despite its laconic formulation, the more it may lead to confusion. A positive consequence of this broad terminology is that it seemingly contains all aspects of comparison in law. The obvious downside of a notion that would be too broad would be scattered information leaving uninitiated newcomers having to find a needle in a haystack. Underpinning an admittedly tacitly accepted and flawed general qualification is the acknowledgment that the contours of the subject are perhaps as susceptible of agreement as there is consensus in law and juridical 'science' in any given jurisdiction, let alone globally. Divergencies on an appropriate standard or common appellation other than 'comparative law' may well also be defeated by the diversity of modern languages composing the world's community.

Modern comparison in law requires more, in fact, much more than considering a study object from a purely authoritative standpoint, by engaging in *interdisciplinarity*.[36] However, lawyers mostly concerned with law as an authoritative body of rules because of their education at either universities or vocational institutions alike – despite their pretentions to nurture a critical mind that is a necessary mental habit for undertaking comparative law work – are seemingly unable to emancipate themselves from a purely descriptive approach.[37] Comparison in law is also more than a comparison of rules of law. Some even consider a necessity for the discipline to operate beyond a formalistic and authoritative approach to law centred around legislation or cases – i.e., black letter law.[38] Others, for the past fifty years, have been active militants for the universal adoption of a dubious scheme of intelligibility – known as functionalist – involving an inquiry into the common problems faced in different legal traditions, allegedly met by common answers, supposing homogeneity and a uniform human nature.[39] Proponents of the functionalist dogma, well aware of the insufficiencies of their approach rely on the existence of 'systems' belonging to a common cultural heritage allegedly sharing common values (e.g. Western nations) – having achieved at least a similar level of development – or else be 'system-neutral'.[40] This exclusivist approach is known to Legrand as 'positivist' as opposed to a 'cultural' paradigm inclusive of the irreducible diversity of otherness in all its uniqueness, and the former is stigmatised by him as representing the narrow and "neophobic" views of a "philistin[e]" crowd…[41]

Another approach best defended by Smith, Van Hoecke and others considers comparison in law as *orthodox*

[34] R. DESCARTES, *Règles pour la direction de l'esprit*, Paris, 2016, Rules IX and XIII, 120, 154. See also, J. COTTINGHAM, R. STOOTHOFF, D. MURDOCH (trs.), *The Philosophical Writings of Descartes*, Vol. 1, Cambridge, 1985, pp. 33, 51.
[35] U. MATTEI, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, in American Journal of Comparative Law, Vol. 45, 1997, p. 5.
[36] P. LEGRAND, *How to Compare Now*, *op. cit*., p. 238.
[37] J. BELL, *Legal Research and the Distinctiveness of Comparative Law*, in M. VAN HOECKE (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Oxford, 2011, 158; M. LASSER, *The Question of Understanding*, in P. LEGRAND, R. MUNDAY (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003, p. 238.
[38] M. VAN HOECKE, *Deep Level Comparative Law*, in M. VAN HOECKE (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, 2004, pp. 165–95.
[39] K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *op. cit.*, p. 34; E. ÖRÜCÜ, *Methodological Aspects of Comparative Law*, in European Journal of Law Reform, Vol. 8, 2006, pp. 33–7.
[40] K. ZWEIGERT, *op. cit.*, 474; K. ZWEIGERT, H. KÖTZ, T. WEIR (tr.), *op. cit.*, pp. 33–40.
[41] P. LEGRAND, *Negative Comparative Law*, cit., 2. See also for an earlier positivist response, J. GORDLEY, *Comparison, Law, and Culture: A Response to Pierre Legrand*, in American Journal of Comparative Law, Vol. 65, 2017, pp. 133–80.

legal scholarship comparing legal phenomena, deriving its methods from classic legal research with an extra touch of regard to cultural sensitivities and heteronomies.[42] As a result of this presumption, holding symposia and publishing reviews to the effect of discussing comparative scholarship at length would be counterintuitive. In fact, such practice reveals instead that the problems arising from the comparison process, i.e., questions deriving from the interrogation 'how to compare in law' are far from being obvious and second nature. It appears "questions about the implications of conducting legal research based on a comparative law axiological framework" are still central to these events giving rise to "multiple interpretations" and interrogations.[43] Furthermore, a recurrent emphasis on methodological aspects related to comparison in law indicates a growing concern regarding their ascertainability.

Despite a permanent reluctance to attribute a larger domain than methodological to comparative law, the subject has gained significance in scholarship negating claims confining it to a mere set of methods.[44] Lawyers accustomed to a fixed set of rules to be contained and presented in traditional legal subjects have constantly been hesitant to attribute a proper status to 'comparative law'.[45] The uncertain nature of its geographical scope and substantive focus would apparently suggest otherwise since there are "no generally accepted theoretical frames, established terminology or aims set in comparative law".[46] However, think for a moment of a subject such as philosophy. It is generally not denied it is a subject simply because of its vastness. The same goes for what is commonly referred to as 'comparative law' seen by some both "as a discipline and as a form of legal research".[47] This subject necessarily comes with the caveat that it is not only as diverse as comparatists who set forth their comparative study, but the proposed questions and extent of answers provided by legal comparatists are necessarily limited in one's work, detailed in another's, or simply left unconsidered in the realm of possibility.

Whether the subject can pretend to be qualified as a science begs the question whether law, legal or juridical 'science' is at all a science.[48] The *scientificity* debate depends on perceptions concerning the influence of science and rationality on the subject that, as explained in the foregoing developments, would be minimal.[49] Furthermore, even following the assumption that comparative law would also be, according to some, a proper subject or a branch of science, arguments justifying the independence and affirmation of 'methodology' as a standalone epistemologically differentiated entity are unconvincing.[50] The immediate consequence of the current state of scholarship reinforces the argument according to which the methodological aspects of the discipline are constitutive of its principal facet. However, disregarding the results yielded by the comparative approach as incidental and a byproduct of the comparative enterprise is inept. In mathematics, the solution is equally as important as the reasoning process leading to the answer and proves or disproves the method. In law, although some claim comparison is only conducted for a practical purpose to achieve a specific goal, emphasis on method implies that validity of findings depends upon the validity of the route(s) taken to reach the destination.[51]

[42] S. A. SMITH, *op. cit.*, 336; M. VAN HOECKE (ed.), *Methodologies of Legal Research*, *op. cit.*, v. See also, G. SAMUEL, *Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?* in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, *op. cit.*, p. 207.
[43] F. PETROSINO, *Roundtable for the Semiotics of Law – Panel on Comparative Law and Methodology*, in Comparative Law and Language, Vol. 2, No. 1, 2023, p. 105.
[44] M. REIMANN, *op. cit.*, pp. 683–4.
[45] U. MATTEI, *Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, in American Journal of Comparative Law, Vol. 50, Supplement, 2002, p. 87.
[46] J. HUSA, *op. cit.*, p. 1.
[47] *Ibidem*.
[48] L. REID, *The Judge as Lawmaker*, in Journal of the Society of Public Teachers of Law, Vol. 12, 1972–3, 29: "law is as much an art as a science".
[49] See P. LEGRAND, *Negative Comparative Law*, cit., 386–8 on the 'Strong Programme' and 'weak tought'.
[50] G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, cit., 2: "method and methodology are to be distinguished from the substance of a discipline". The danger here is that this segregation – if not reconciled with substantive law – risks to preclude method from fulfilling its primary purpose. The *raison d'être* of a method is to be of practical use. It is essentially to serve as the basis for comparative investigations in law.
[51] M. SCHMITTHOFF, *op. cit.*, p. 99.

2.2 'Comparative Law Methodology': inept attempt at differentiation and affirmation or tautology?

Lately, a phrase constantly uttered by comparatists concerned with the methodological dimension of comparison in law consisting of three words is 'Comparative Law Methodology'. Using capital letters, the expression appears to be empowered as an independent field of knowledge. It seems pertinent to insist on the fact that this paper is not concerned with methods. In other words, it strictly does not aim to answer the question 'how to compare' in law. This article challenges problematic conceptions on the meaning of the expression and as *comparative law* is so commonly equated to its *methodological* dimension, the triad 'Comparative Law Methodology' is critically examined. A primary observation argues its inherent unsuitability for adding the term *methodology* as a suffix when it is essentially already contained in the traditional appellation. Indeed, once again, *comparative law* for many scholars includes *methodology* and for some, it would be just that. Why then the recurrent need to distinguish both which does not seem to be accidental nor isolated?[52]

A few observations are required before answering this question. It is the relevance of the distinction that is discussed here. First, by reference to three examples driven by individual and institutional impetus, illustrating recent trends pleading for a mainstream use of, and an affirmative reliance on, methods of comparison in law. Then, the neologism is critically examined by reference to the traditional dichotomies of the subject. Finally, the conclusion is negative and open-ended as it may be difficult to refrain from referring both to the terms of 'comparative law' and of 'comparative law methodology' that are widely used more for the sake of convenience than accuracy.

'Comparative Law Methodology', a convenient triptych emphasising the methodological dimension of the subject has been a "common focal element" under discussion during the 23rd International Roundtable for the Semiotics of Law recently held in Rome, Italy in late May 2023.[53] This concern for the development of a methodological framework crystallised in 2020 in the form of a new open-source journal under the aegis of the International Academy of Comparative Law entitled *Ius Comparatum*, that would equate to the Latin form of the French formula. This recent publication under the auspices of the Academy only came to fruition almost a century after its creation finally providing a consistent platform for a global scholarly community inclusive of younger researchers to discuss related substantive legal subjects. Its specificity consists in the explicit formulation by authors of their particular methodological choices. This confirms a well initiated trend by the Academy as testified by the inaugural event of 15 May 2017 celebrating the careers of 'five great comparatists' during which a roundtable specifically discussed 'comparative law methodology' as one of three crucial topics.[54] The same year, in a special dossier on the theme *Du comparatisme au droit comparé, regards historiques*, the term of "*comparatisme*" expressly preferred over "*droit comparé*" indicates the latter phrase allegedly fails to *signify* for some "the *method* consisting in the simultaneous study of legal systems, and more technically, […] the opposition of institutional, doctrinal or practice models".[55]

These examples representing a globally consistent intellectual agenda recognising the preponderance of methodology in the scholarly activities revolving around comparison in law illustrate the need to situate the subject beyond a detrimental formalistic terminology. The semantic inadequacy of the traditional formula clearly reveals adverse consequences for the intelligibility of the discipline.

Comparative Law is inadequate to signify the activity resulting from comparison in law. Indeed, if 'comparative law' was purely a method, eliciting the idiom by adding the term 'methodology' would be tautological – something akin to a 'method's methodology' or the 'methodology of methodology'...[56] While it is the purpose of methodology to determine the scope and inner workings of a method, the triad could be valid if 'comparative law' had a definite and structurally consistent set of methods. However, divergencies and disagreements on methods for comparison in law are clearly incompatible with the formulation of '*a*'

[52] A valid epistemological distinction can already be drawn: 'comparative' as the methodology; 'law' as its object.
[53] F. PETROSINO, *op. cit.*, p. 105.
[54] K. BOELE-WOELKI, D. P. FERNÁNDEZ ARROYO (eds.), *op. cit.*, pp. v-vi, x-xi.
[55] J.-B. BUSAALL, F. CHERFOUH, G. GUYON, *op. cit.*, 1 [translated by the author; emphasis added]. Same paragraph concludes "*la méthode* 'du' *droit comparé*" (*article partitif*, equivalent to the preposition 'of'). This incongruity marks the distinction drawn as irrelevant: method is *intrinsic* to 'comparative law' and not *specific* to "*comparatisme*".
[56] From a purely semantical standpoint, 'comparative law methodology' suggests 'comparative law' would be the object – instead of 'law' alone – on which 'methodology' applies, additionally to the already present notion of 'methodology' represented by the isolated term 'comparative'. Also, if 'comparative law' = 'methodology' then 'comparative law methodology' = 'methodology methodology'.

methodology in a discipline allegedly still not having "attained a certain fullness and orderliness" to use Kant's conception of an accomplished logical science.[57] It is the consistent use of method leading to its 'completion' and the 'elimination' of both "mistakes and of confused thoughts" that comparative law is still missing.[58] Comparative law is not there yet, if it ever will be.

Comparative Law Methodology is also undoubtedly unsuitable. Regardless of the claims concerning the nature of 'comparative law', this compound adds an element of confusion rather than facilitation. Its only positive aspect – from a concrete standpoint – would be emphasising the necessity to focus on methods. Nonetheless, not doing away with the traditional idiom signifying methodology is a problem. Those three words put together equivocally reinforce the highly disputed dichotomy confining 'comparative law' as either a mere method of conducting comparison in law, or a proper discipline as explained in the foregoing developments.

This might seem a moot point but following the 23rd International Roundtable, a recent article in a special issue of *Comparative Law and Language* journal containing a summary of the event where the triad was used extensively is entitled 'Comparative Law *and* Methodology'. The use of the coordinating conjunction '*and*' situating methodology *outside* of 'comparative law' may be confusing especially since 'comparative law' is seen in this example in '*its*' methodological dimension as a '*tool*' suggesting it is intrinsic rather than extrinsic.[59]

Comparison in law calls into the application of a specific method unless envisaged strictly under an anarchistic epistemological paradigm.[60] The latter case could not be the chosen option for those who refer to 'methodology' as a guiding yardstick unless they are completely unfamiliar with the principle of non-contradiction. Furthermore, the imperative necessity to objectivise a method is paramount in a comparative legal discourse as there is an obligation to comply with ethical requirements for any scholarly production.[61] Hence, for jurists operating within a modern rationalist theory of knowledge, the explicit formulation of a concrete though subjective methodology is also imperative and unconditional.[62]

Consequently, comparison in law intrinsically relies on methods regardless of effective reliance on, and affirmation of, methodological frameworks particular to each comparatist or comparative studies. In other words, this methodological requirement is not waived by the inability of jurists to effectively use, or satisfactorily explain, their chosen methods. This standard remains an essential part of the comparison discourse despite its potential absence in any given study.

In conclusion, '*comparative law methodology*' on top of being tautological is certainly inadequate. This schismatic redundancy – as opposed to comparative law *as* methodology – contrastingly translates an ecumenical and illusory impulse tending to an agreement on a common methodological framework. Instead of speaking of *a* common *methodology* that would be objective and universal in reach within the discipline of law, it seems more pertinent to speak of *methodologies* in the plural form as these would better represent individual initiatives responding to the needs of scholars and jurists undertaking comparative investigations.[63] Finally, the ascertainment of explicit methodologies requires no consensus and certainly need not come at the expense of an inept compound considerably complicating the already problematic phrase of '*comparative law*'.

[57] I. KANT, *De Mundi Sensibilis atque Intelligibilis Forma et Principiis* in D. WALFORD, R. MEERBOTE (eds.), *Theoretical Philosophy, 1755–1770*, Cambridge, 1992, p. 406.
[58] *Ibidem*. See on the unreliability of methodology in comparative law, K. ZWEIGERT, *op. cit.*, p. 465; P. GLENN, *op. cit.*, 177. On a 'state of experimenting', G. SAMUEL, *An Introduction to Comparative Law Theory and Method*, *op. cit.*, pp. 3, 6.
[59] F. PETROSINO, *op. cit.*, pp. 107, 105 [emphasis added].
[60] R. DESCARTES, *op. cit.*, Rule IV, 88 (French) and J. COTTINGHAM, R. STOOTHOFF, D. MURDOCH (trs.), *op. cit.*, p. 15 (English); P. FEYERABEND, *op. cit.*, pp. 11–2, 17.
[61] O. KAHN-FREUND, *op. cit.*, p. 41.
[62] S. GLANERT, *Method?*, in P. G. MONATERI (ed.), *Methods of Comparative Law*, Cheltenham, 2012, pp. 67–8.
[63] *Ibidem*, pp. 66–8.

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Literature Review: the Language of the Juridification Process of Animal Law

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Animals are currently undergoing a process of *juridification*. This is not to suggest that they were never part of the legal landscape; rather, animals have received more protection under the law over time in a number of contexts, including criminal, civil, international, and, more recently, constitutional[2]. What is new about this process is its expansion, intensification and, above all, the last step mentioned: the legal protection of animals at constitutional level[3].

Like any process of juridification, the intensification of the legal protection of animals and its expansion into the different areas of law also passes through definitions. New definitions appear, just as others are extended to include new realities, starting with the very definition of animals at the legal level, in addition to the classification of animal rights. In this contribution, a brief review of the literature dealing with this subject will be proposed, focusing on the use of definitions in this field from a comparative perspective.

Some publications will be taken as illustrations of the interaction between the increasing legal protection of animals and the use of definitions in legal literature. Without providing a thorough examination of all the current English-language literature on the topic, only a few examples will be provided, showing the key trend lines.

1. *Animal law in the legal literature, the definitions: looking to the present…*

From a very general point of view, animals are part of everyday language: in particular, they are often the object of metaphors and comparisons. In Italian, for instance, you can be "as cunning as a fox", "as sharp as an eagle", "as strong as a bull" or "as short-sighted as a mole"[4]. Even legal literature refers to this intertwining of everyday language and animals, recalling how one can be "bullish", "snail", "shark", or "bird-brained" and not always in a positive sense[5]. Beyond this aspect, the literature on this subject is affected by the process of juridification of animal protection, also in terms of language: in this respect, convergence of terms is not rare. In particular, the scholars' contributions confirm the adoption of the definition of "sentient beings", which also appears in legislation, as a consolidated term. In Europe, for example, in 2009 the Lisbon Treaty has amended the Treaty on the Functioning of the European Union, introducing the definition of animals as "sentient beings"[6].

In this regard, there are many examples, such as the book *Animal Law and Welfare, International Perspectives* edited by Deborah Cao and Steven White (2016, which also provides for an analysis of the legal systems of

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[2] About the concept of juridification, from a wider perspective, see L. CHR. BLICHNER, A. MOLANDER, *Mapping Juridification*, in *European Law Journal*, 14, 1, 2008, 36-54; GUNTHER TEUBNER (ed.), *Juridification of Social* Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law, Berlin, 1987.

[3] See for example Olivier Le Bot, *Constitutional Animal Law* (December 2023, independently published).

[4] In Italian: "astuto come una volpe", "acuto come un'aquila", "forte come un toro" o "miope come una talpa".

[5] These examples are mentioned by I. OFFOR in *Global Animal Law from the Margins: International Trade in Animals and Their Bodies*, New York, 2024.

[6] See art. 13 of the *Treaty on the Functioning of the European Union*, in *OJ C* 326, 26.10.2012, 47–390: «In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage».

different countries[7]), or *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* edited by Jane Kotzmann and Rodriguez Ferrere (2024[8]).
If one were to identify the object of legal protection, the most frequent definition in this respect is that of "animal welfare", even if within this broad concept a balance must be struck between the protection of animals and their possible uses for human purposes: a very controversial subject. Even in this area, however, there are some convergences, for example with regard to the term "cruelty", which indicates behaviors that are unacceptable and undoubtedly contrary to animal welfare: a sort of common core of animal legal protection.
Beyond this strong core of protection, the legal relevance of animals is delineated in the different areas, where the literature presents two other interesting phenomena, on a definitional level.
On the one hand, reference is made to "animal law" (as for example the *Studies in Global Animal Law* edited by Anne Peters, 2020[9]), indicating the existence and autonomy of this disciplinary field. On the other hand, the existence of animal law also innovatively characterizes other areas of law. For instance, there is a recurring reference to animal and global law: a subject of reflection in the legal sphere, which becomes an object of interest with specific reference to the topic of the legal protection of animals. In this sense, the animal rights perspective is linked to legal domains, becoming a cross-cutting key that characterizes them in an innovative sense. For example, the already mentioned *Global Animal Law from the Margins: International Trade in Animals and Their Bodies* by Iyan Offor[10] deals with the relationship between animal law and international and global law, as well as *Animals in International Law* by Anne Peters[11]. On a similar subject, see *Globalization and Animal Law: Comparative Law, International Law and International Trade* by Thomas G. Kelch, which also confirms the interest in this topic from the perspective of comparative legal studies[12].
It is worth also mentioning the volume *Colonialism and Animality: Anti-Colonial Perspectives in Critical Animal Studies* (2020) edited by Kelly Struthers Montford and Chloë Taylor. It presents an original perspective, concerning more generally the intersection of animal studies with colonial and de-colonial studies[13].

2. …and looking to the future.

What has been referred to as the "animal turn" – i.e. the growing interest in animal welfare, as it has been defined by Katie Sykes in *The Appeal to Science and the Formation of Global Animal Law* (2016[14]) – has resulted in an intensification of legal protection and thus also of an interest in animals that has had, as already noted, an inevitable reflection in language. The same contribution (Sykes) highlights the complexity of interpreting the terms that give voice to the protection of animal welfare. From this perspective, each area presents specific issues to be addressed. For example, several contributions underline the importance of terminology in the scientific field, with particular reference to the use of animals in scientific research, where the literature has highlighted the need for uniformity (T. Pietrzykowski, K. Smilowska, *Kinds of Harm: Animal Law Language from a Scientific Perspective*, 2022)[15].

The legal doctrine shows an interest in the intersections of animals and law, even with an eye toward the future. In addition to having an impact on existing disciplines, in fact, animal law looks to the future questioning the possible developments in animal rights, especially in areas where law intersects with

[7] D. CAO, S. WHITE (ed. by), *Animal Law and Welfare, International Perspectives*, Cham, 2016.
[8] J. KOTZMANN, M. B. RODRIGUEZ FERRERE (ed. by), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications*, UK, 2024 (in press).
[9] A. PETERS (ed. by), *Studies in Global Animal Law*, Berlin, 2020.
[10] Above at note 5.
[11] A. PETERS, *Animals in International Law*, The Hague, 2021.
[12] Thomas G. Kelch, *Globalization and animal law: comparative law, international law and international trade* (2nd ed.), UK, Kluwer Law International, 2017.
[13] K. STRUTHERS MONTFORD, C. TAYLOR (ed. by), *Colonialism and Animality Anti-Colonial Perspectives in Critical Animal Studies*, New York, 2020. See also S. SINHA, A. BAISHYA (ed. by), *Postcolonial Animalities*, New York, 2020.
[14] K. SYKES, *The Appeal to Science and the Formation of Global Animal Law*, in *The European Journal of International Law*, 27, 2, 2016, 497.
[15] T. PIETRZYKOWSKI, K. SMILOWSKA, *Kinds of Harm: Animal Law Language from a Scientific Perspective*, in *Animals*, 12, 5, 2022, 557.

technology. Hence, there is an intersection between emerging areas of law such as robotics and the animal field, as for example in *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* by Joshua C. Gellers (2021)[16].

From this point of view, besides, artificial intelligence goes right into the realm of language, proposing studies and experiments that seek precisely to decipher animal forms of communication. This is a complex area, which requires specific expertise in order to be understood. However, it can be assumed as of now that it will also pose the need for legal reflection and that it may also have an impact on the definition of terms such as "animal welfare" (for example Y. Yovel, O. Rechavi, *AI and the Doctor Dolittle challenge*, 2023[17]).

Looking to the future, however, does not only concern the intertwining with technology, but also the configuration of animal rights themselves, which may change over time, also in relation to human rights as highlighted by Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (2023[18]), or by Davide Favre, *The Future of Animal Law* (2021)[19].

Finally, there is an additional phenomenon that is somewhat symmetrical to the one that was just mentioned: the introduction of some terms that are specific to the human realm and that become relevant when compared to the animal kingdom. For example, it is in the light of the emergence of animals at the legal level that the reference to anthropocentricsm can be understood. *The Routledge Handbook of International Law and Anthropocentrism* edited by Vincent Chapaux, Frédéric Mégret, and Usha Natarajan (2023), for instance, deals with the topic of anthropocentrism, intersecting with international law[20].

Similarly, one can understand the growing interest in the concept of speciesism in the legal sphere. Both of these terms, have an intersection with various legal disciplinary fields; for example, one may discuss anthropocentrism or speciesism in relation to international law, constitutional law, etc. In this sense, the centrality of the human person and speciesism become parameters for evaluating legal institutions according to new perspectives: once again, the emergence of particular terminology gives voice to a phenomenon to be considered.

The adjective "interspecific" and the noun "interspecificity" are mentioned as well by the legal literature and account for the confrontation between the legal sphere and the animal world. An example is given by *Animal Labour: A New Frontier of Interspecies Justice?* edited by C.E. Blattner, K. Coulter, W. Kymlicka (2020[21]) or, on a wider perspective, *Interspecies Politics: Nature, Borders, States* by Rafi Youatt (2020[22]). Even Martha C. Nussbaum accounts for the interactions between humans and animals, mentioning this definition (*Justice for Animals: Our Collective Responsibility*, 2022[23]).

The literature allows us to draw attention to an additional element: the juridification of animal rights also entails reflection on what characterizes human rights as "humane". Indeed, considering what characterizes the animal kingdom inevitably prompts consideration of what it means to be "human".

In fact, Saskia Stucki in the book "One Rights: Human and Animal Rights in the Anthropocene" wonders: "Who Is the 'Human' of Human Rights?"[24].

16 J. C. GELLERS, *Rights for Robots. Artificial Intelligence, Animal and Environmental Law*, New York, 2021.

17 Y. YOVEL, O. RECHAVI, *AI and the Doctor Dolittle challenge*, in *Curr Biol.*, 7, 33, R783-R787.

18 S. STUCKI, *One Rights: Human and Animal Rights in the Anthropocene*, Cham, 2023.

19 D. FAVRE, *The Future of Animal Law*, Cheltenham, 2021.

20 V. CHAPAUX, F. MÉGRET, U. NATARAJAN (ed. by), *The Routledge Handbook of International Law and Anthropocentrism*, New York, 2023.

21 C.E. BLATTNER, K. COULTER, W. KYMLICKA (ed. by), *Animal Labour: A New Frontier of Interspecies Justice?*, Oxford, 2020.

22 R. YOUATT, *Interspecies Politics: Nature, Borders, States*, United States of America, 2020.

23 M. C. NUSSBAUM, *Justice for Animals: Our Collective Responsibility*, United States of America, 2022.

24 Above at note 18.