Comparative Law and Language

2024
Vol.3 No.2

UNIVERSITY OF TRENTO

Comparative Law and Language
Open access six–monthly scientific journal

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

ISSN 2785-7417

Comparative Law and Language

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Volume 3 Number 2 December 2024

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Editorial

We are proud to present the second issue of *Comparative Law and Language* for 2024. It comprises five papers and one book review, covering a range of topics lying at the intersection of law, language and translation. Each contribution highlights the critical role of language in diverse legal contexts.

The paper entitled "Le génocide dans le *Statut de Rome* traduit : Processus de sécularisation?" by **Nejmeddine Khalfallah** discusses the concept of *genocide* and its translation into Arabic in the Rome Statute of the International Criminal Court. It explores how Arabic, traditionally linked to religious contexts, has adapted to express concepts within a secular and universal legal framework. By comparing the French, English, and Arabic versions of the Rome Statute, the study addresses the role of translation in the global legal order and to what extent translation can bridge legal traditions.

Dorota Lis-Staranowicz and Urszula Bartnikowska's study "The Deaf as a linguistic minority in Poland: Legal Aspirations and Legal Pursuits" explores the language rights of the Deaf in Poland. The authors approach the Deaf as a linguistic minority which uses Polish Sign Language. The study situates the Deaf community within a broader legal framework, examining how Polish laws and initiatives impact their access to resources, services, and civil rights.

The third paper by **Anton Osminkin** et al. entitled "A Three-Step Strategy for Teaching Contract Drafting" proposes a staged method for developing a contract drafting competence in students of law and practising lawyers. The strategy begins with the negotiation process and understanding the parties' objectives, moves through the design of contract structure and clauses, and culminates with linguistic technicalities. Drawing on a corpus of UK and US sale and purchase agreements, the study integrates legal and linguistic insights for drafting purposes.

Petra Lea Láncos's paper on "Enforcing victims' language rights: Paraprofessional interpretation and terminological work at the International Criminal Court" fills in the gap by focusing on the often-overlooked language rights of victims. The author addresses the language services of the ICC, raising awareness of the use of paraprofessional interpreters for "situation languages", their recruitment and training, as well as the need for developing terminology for such languages. The paper contributes to the discussion on linguistic inclusivity and fairness in international justice systems.

Last but not least, **Maria Rosaria Ferrarese**'s paper entitled "Dal paradigma dell'interpretazione a quello della traduzione: una nuova prospettiva per la cultura giuridica" examines the role of interpretation and translation in shaping contemporary legal culture. The author discusses similarities and differences between these concepts and connects them to legal innovations.

The issue closes with the review of *Introduction to Comparative Law* (edited by Jaakko Husa) reviewed by Johannes San Miguel Giralt. We hope readers will find the contributions insightful and thought-provoking. We would also like to encourage readers to submit their research for publication in the upcoming issues.

Łucja Biel
On behalf of the Editorial Board

Comparative Law and Language

Le génocide dans le *Statut de Rome* traduit : Processus de sécularisation ?

Khalfallah Nejmeddine[1]

Résumé : En 1972, l'arabe devint l'une des cinq langues officielles des Nations Unies. Les documents conçus par cette organisation internationale furent désormais traduits en arabe, restituant la trame terminologique/notionnelle prévue qui sera plus tard également utilisée par le Statut de Rome de la Cour pénale internationale. Bien que cette langue fût longtemps reliée aux référents religieux et tribaux, elle fait aujourd'hui partie intégrante du droit international, fondé sur un paradigme positif et universel. Dès lors, les termes arabes proposés en guise de traduction aux notions et principes du droit international s'émancipèrent progressivement de leur mémoire sémantique, référentiels religieux et réminiscences tribales. Afin de relater une telle émancipation, nous examinerons, à travers cette étude, l'équivalent arabe du terme *génocide* en analysant les origines étymologiques, les fonctions pragmatiques et les limites au sein de la logosphère arabe classique et moderne. Pour cela, nous nous référerons au *Statut de Rome* dans ses versions française, anglaise et arabe, afin de mettre en lumière les ressemblances et dissemblances du transfert notionnel opéré sur ce principe propre au droit pénal international. La problématique structurante de cette étude sera centrée sur la capacité terminologique de l'arabe à exprimer le contenu cognitif et juridique du terme *génocide*. Autrement dit, l'arabe est-il en mesure d'en fournir une acception positive conforme aux postulats juridiques, philosophiques et sociaux du *Statut de Rome* ? L'équivalent arabe proposé est-il capable de rompre avec sa mémoire sémantique et l'imaginaire collectif lui étant associé ?

Mots clefs : Génocide, traduction juridique, Statut de Rome, néologie, juritraductologie, sécularisation sémantique.

Sommaire : 1. Introduction ; 2. Examen diachronique ; 2.1. Origines étymologiques obscures ; 2.2 Construction lexico-syntaxique ambiguë ; 3. La traduction : les enjeux sémantiques et socioculturels ; 3.1. *Ibāda* est-il l'équivalent de génocide ? ; 3.2. Sécularisation sémantique ; 4. Conclusion.

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Genocide in the Rome Statute: A Process of Secularization?

Abstract: In 1972, Arabic became one of the five official languages of the United Nations. Documents produced by this international organization began to be translated into Arabic, adopting the terminological and conceptual framework established by the UN, which was later also utilized by the Rome Statute of the International Criminal Court. Although Arabic has historically been closely tied to religious and tribal references, it has now become an integral part of international law, which is grounded in a positive and universal paradigm. Consequently, the Arabic terms proposed as translations for concepts and principles of international law have gradually detached themselves from their semantic memory, religious referents, and tribal reminiscences.

To illustrate this process of emancipation, this study examines the Arabic equivalent of the term genocide by analyzing its etymological origins, pragmatic functions, and limitations within the classical and modern Arabic linguistic spheres. To do so, the study references the Rome Statute in its French, English, and Arabic versions, highlighting the similarities and differences in the conceptual transfer of this principle specific to international criminal law.

The central question structuring this study focuses on the Arabic language's terminological capacity to express the cognitive and legal content of the term genocide. In other words, is Arabic capable of providing a positive meaning that aligns with the legal, philosophical, and social tenets of the Rome Statute? Can the proposed Arabic equivalent successfully break away from its semantic memory and the collective imagination associated with it?

Keywords: Genocide, legal translation, Rome Statute, neology, juritranslation, semantic secularization.

Summary: Sommaire : 1. Introduction ; 2. Diachronic Analysis; 2.1. Obscure Etymological Origins; 2.2 Ambiguous Lexico-Syntactic Construction ; 3. Translation: Semantic and Sociocultural Issues ; 3.1. *Is Ibāda Equivalent to Genocide?*; 3.2. Semantic Secularization; 4.Conclusion.

1. Introduction

Dans la continuité de l'affirmation d'un discours juridique propre au droit international, il apparut légitime de s'interroger sur les rapports entretenus entre la branche pénale de ce dernier, ses ressources étymologiques ainsi que les références métaphoriques des cinq autres langues vers lesquelles il fut traduit. Parmi ces dernières, figure l'arabe qui produisit pléthore de néologismes pointus et positifs destinés à exprimer les mêmes contenus que leurs équivalents européens. En effet, la langue arabe entreprit un profond processus de sécularisation en vue de restituer les notions du droit international pénal avec le même degré d'abstraction que les autres langues officielles de l'ONU.

Le texte original du *Statut de Rome*, désormais SdR, élaboré par des représentants des États européens et non- européens lors d'une conférence diplomatique de plénipotentiaires tenue du 15 juin au 17 juillet 1998, aura vocation à servir de corpus en vue d'étudier ce processus de sécularisation sémantique. Celui-ci consiste à ôter des termes créés, en l'occurrence les lexèmes religieux ainsi que leurs réminiscences culturelles, afin de désigner des agissements jugés criminels par les juristes de la communauté internationale[2]. Pour illustrer ce processus, nous nous appuierons exclusivement sur le

[2] Rappelons pour mémoire que depuis 1973, l'arabe figure parmi les cinq langues officielles de l'ONU. Le 17 juillet 1998, elle fut reconnue comme langue officielle au sein de la Cour pénale internationale. L'article 50 dispose : « Les langues officielles de la Cour sont l'anglais, l'arabe, le chinois, l'espagnol, le français et le russe. Les arrêts

terme *génocide* dont l'équivalent arabe est *ibāda ğamā'iyya*. Ce dernier apparaît s'être émancipé de ses référents culturels et de sa charge sociale locale[3] pour désormais s'apparenter à une notion uniformisée et mondialement admise dans le droit international.

Par la problématique structurante de notre analyse, nous explorerons la façon dont la langue arabe standard moderne puisa dans ses ressources lexicales, plutôt classiques, pour fournir à la fois un équivalent terminologique et une correspondance notionnelle au concept juridique de *génocide,* communément consacré et employé par les États ayant ratifié le SdR. La traduction fut donc le levier de la création d'un néologisme syntagmatique aux lexèmes sécularisés, aujourd'hui présent en tant que signifié spécialisé et conventionnel. Désormais, ce syntagme exprime l'idée que le SdR lui donne dans toutes les langues, tout en incarnant les valeurs et effets juridiques conférés par les juristes internationaux

Amorcée grâce à la traduction, cette sécularisation est-elle, pour autant, systématique, cohérente et globale ? A-t-elle aidé la terminologie juridique arabe à sortir de son archaïsme en rompant avec les réminiscences et les référents religieux nés dans la Péninsule arabique il y a plus de quinze siècles ?[4] A-t-elle contribué à épouser la grille axiologique universelle incarnée par les droits de l'Homme dans leur perception moderne ?

2. Examen diachronique

Avant d'étudier les conditions sémantiques et discursives de l'apparition de l'équivalent arabe au regard de son corrélat français *génocide* ou anglais *genocide*[5], il convient de rappeler que ce dernier se compose de la racine latine *genos,* signifiant *sexe, genre* et *groupe* et de *cide,* qui provient du latin *caedere,* désignant le verbe « tuer ». Ce terme fut créé en 1944 par Raphael Lemkin (1900-1959), professeur de droit américain, juif d'origine polonaise, après la Seconde Guerre mondiale, pour désigner le fait de *tuer une communauté ou un groupe de personnes ayant les mêmes caractéristiques*[6]. Ce néologisme fut ensuite repris dans le droit positif avec l'adoption à Paris, le 9 décembre 1948, de la Convention pour la prévention et la répression du crime de génocide.

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de la Cour ainsi que les autres décisions réglant des questions fondamentales qui lui sont soumises sont publiés dans les langues officielles. La Présidence détermine, au regard des critères fixés par le Règlement de procédure et de preuve, quelles décisions peuvent être considérées aux fins du présent paragraphe comme réglant des questions fondamentales ». Précisons toutefois que l'arabe est une langue officielle, mais il n'est pas la langue de travail de la Cour ; seuls le français et l'anglais le sont.

[3] R. GALLISON, *Où il est question de lexiculture, de Cheval de Troie et d'impressionnisme*, dans *Études de linguistique appliquée*, N°97, 1995, pp. 5-14.

[4] J. CHABBI J. *Les trois piliers de l'islam,* Paris, 2016.

[5]Le mot « génocide » fut utilisé pour la première fois dans l'étude R. LEMKIN, *Axis Rule in Occupied Europe, Carnegie Endowment for International Peace*, Washington, 1944, p. 79. En version française abrégée, R. LEMKIN, *Qu'est-ce qu'un génocide ?*, Monaco, 2008, p. 215., Chapitre 9. Il consacra ce titre afin de définir les crimes commis par « la jeunesse turque de l'Empire ottoman contre les Arméniens » pendant la Première Guerre mondiale ainsi que les crimes perpétrés contre les Syriaques en Irak en 1933, puis contre les Juifs et les Roms pendant la Seconde Guerre mondiale.

[6]Le contenu technique évoqué par ce terme fut déjà précisé par le SdR, qui dispose qu'un génocide est « […] l'un quelconque des actes ci-après, commis dans l'intention de détruire, ou tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel : a) Meurtre de membres du groupe ; b) Atteinte grave à l'intégrité physique ou mentale de membres du groupe ; c) Soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle ; d) Mesures visant à entraver les naissances au sein du groupe ; e) Transfert forcé d'enfants du groupe à un autre groupe». Précisons que cette définition du génocide figurait déjà dans la Convention de 1948. Or, ce n'est pas le contenu cognitif et juridique qui nous intéresse ici en premier lieu, mais plutôt les enjeux linguistiques et culturels induits par cette appellation.

La version arabe du SdR opta, quant à elle, pour le terme *ibāda ğamā'iyya*. Ce syntagme, construit à partir d'un cas d'annexion, correspond à une création *ex nihilo*, dont nous nous appliquerons à analyser les origines et les extensions sémantiques.

2.1. Origines étymologiques obscures

Le *Doha Historical Dictionary* indique que la plus vieille occurrence du verbe *abāda/yubīd* remonte à l'an 525 (J-C). Cet usage figure dans un poème nécrologique attribué au poète arabe classique al-Muhalhil (443-531). Si elle était avérée, cette mention viendrait confirmer que la lexie *abāda* est archaïque, signifiant à l'époque, au sens littéral et figuré, la *disparition totale d'une tribu*. En effet, celle-ci est parfois utilisée dans un sens parabolique suggérant une destruction massive d'une tribu, des individus, de leurs biens et de leurs terres. Le verbe est parfois intégré dans une phrase optative, telle que *abādahum Allah !* [*Qu'Allah les fasse périr* !], pouvant accentuer cette dernière, voire lui conférer une dimension menaçante, ce qui en fait un acte de parole par excellence[7].

Quant au verbe *bāda*/*yabīdu* de la forme I, il serait apparu un peu plus tôt d'après le *Historical Dictionary* susmentionné, qui met en avant la date de 476 J-C, soit cinquante ans avant le verbe de forme IV, dans un vers attribué à Al-Ḥarith Ibn Ka'b, al-Madhḥağī. Dans cette citation, le verbe *bāda* fait référence aux sens premiers de *disparaître, s'éclipser*[8].

La racine trilitère B. W. D. ou B. Y. D, à l'origine des deux verbes précités, ne comporte qu'une seule occurrence dans le texte coranique, dont la révélation est supposée remonter entre 610 et 623. Il y figure en tant que verbe conjugué à la troisième personne du présent (Coran, 18 : 35). Il est écrit : « [Il] entra dans son jardin et il dit : « je ne pense pas que ceci périsse jamais ; (*an tabīda abad*^{an})» (*Coran*, trad. D. Masson, II, p. 360.) Les commentateurs de ce texte n'apportèrent pas d'explication précise et approfondie quant à la signification exacte de ce verset. Ils se cantonnèrent, en effet, à présenter des synonymes tels qu'*être dévasté* ou encore *être entièrement détruit, tahlika wa tafanā*». (Ibn 'Ašūr, 1997, XV, p. 256). En revanche, le dictionnaire *Asās al-Balāġa* [Fondement de la rhétorique] d'un ancien érudit, az-Zamaḫšarī, (1075-1144), associa le verbe *abāda* à Dieu dans plusieurs citations destinées à étayer le sème de la destruction totale. Ainsi, le lexème *ibāda* se réfère, dans l'arabe standard classique, à l'image d'une extermination collective causée par une intervention divine, naturelle ou humaine, conduisant à la disparition totale d'une tribu ou d'un groupe d'hommes plus ou moins important. Dans ces occurrences et cooccurrences classiques, la notion demeure reliée à Dieu, car c'est Lui qui fait périr [les injustes]. C'est en raison de cette mémoire à la fois désertique et religieuse que le lemme prit une acception anthropologique du fait des risques encourus lors de déplacements dans le désert, couplés à une angoisse constante : disparaître totalement et à jamais.

Après étude des définitions que les dictionnaires modernes attribuèrent à *ibāda*, nous pouvons en dégager plusieurs éléments d'analyse. Tout d'abord, les dictionnaires généraux, rédigés à la fin du XIX^{ème} siècle et au début du XX^{ème} siècle, proposèrent des définitions concordantes avec les dictionnaires plus anciens, à l'instar du *Muḥīṭ al-Muḥīṭ* (I, p. 7) de Buṭrus al-Bustānī (1813-1883), du *al-Munğid* (1908) de Luwīs Ma'lūf (1867-1946) et de Aḥmad Ridā (1888-1999) dans *Matn al-luġa* (vol. I, p. 366). En effet, ces trois dictionnaires se contentèrent de mobiliser d'anciennes définitions, en allégeant toutefois quelque peu la dimension surnaturelle de l'acte de *ibāda.* C'est ce qui augura, sans doute, cet usage davantage spécialisé et moins lié aux interventions et forces métaphysiques. *A contrario*, les dictionnaires arabes plus contemporains inclurent une acception technique, comme le mentionne Abū al-'Azm dans *al-Muġnī.*

[7]Consulté le 01-10-2023. https://www.dohadictionary.org/dictionary/%D8%A3%D8%A8%D8%A7%D8%AF
[8] Consulté le 01-10-2023.https://www.dohadictionary.org/dictionary/%D8%A8%D8%A7%D8%AF.

Dans les dictionnaires bilingues, nous constatons la même évolution ainsi qu'une tendance similaire à atténuer les connotations mythiques, associant la destruction aux éléments surnaturels, du lemme. À titre d'exemple, l'orientaliste néerlandais R. Dozy (1820-1883) se borna à traduire en français les anciennes acceptions figurant dans les dictionnaires classiques sans se référer aux sens juridiques contemporains (R. DOZY, *Suppléant*, vol. 1, p. 120). L'orientaliste polonais A. Kasimisrki (1800-1887) y consacra, quant à lui, une entrée en rappelant les sens classiques courants (A. KASIMIRSKI, 1, p. 182).

Dans la même veine, D. Reig, dont le dictionnaire est pourtant plus proche des usages nouveaux (D. REIG, 2004, p. 650.), ne le fit guère plus et se contenta de passer en revue les significations générales telles que *détruire, exterminer, anéantir,* bien que le mot ait commencé à revêtir un sens technique à l'époque de la composition de son Dictionnaire. Il fallut attendre le Dictionnaire de Suhayl Idrīs (1925-2008) et de Ğabbūr 'Abd An-Nūr (1913-1991) pour que le terme « génocide » occupe sa place, accompagné du sens juridique qu'on lui connaît. Il est fort possible que ce soit S. Idrīs qui ait intégré, pour la première fois, cette notion dans les dictionnaires bilingue généraux. Force est de constater, cependant, qu'il proposa deux traductions possibles : *ibāda ğins* et *ibāda ğamā'iyya*. S'il n'était guère surprenant de voir cette double traduction en 1971, il est, toutefois, étonnant qu'elle continue de figurer dans plusieurs dictionnaires spécialisés récents en dépit de l'affirmation du néologisme *ibāda ğamā'iyya* dans les documents officiels et les usages médiatiques.

Ce néologisme fut, enfin, consacré dans les dictionnaires juridiques spécialisés, en particulier les dictionnaires monolingues, comme celui d'Ibrahīm an-Naǧǧār, qui définit le « génocide » comme suit : « [terme] général, [relevant du droit] international, le génocide délibéré d'un groupe national, ethnique, religieux ou politique auquel on a recours pendant les guerres. La Convention internationale sur l'interdiction du génocide stipule qu'il est considéré comme un crime international contre l'humanité, que les pays signataires s'engagent à respecter cette Convention » (An-Naǧǧār, 1980, p. 325)[9].

Ibāda apparut désormais comme un terme technique, équivalent de *génocide* au sens juridique international, consigné dans les dictionnaires généraux et spécialisés. Par conséquent, nulle rupture n'est à noter à cette étape de l'évolution sémantique de la lexie. Nonobstant ces usages techniques, le terme continua à connaître le même flottement sémantique puisqu'il fut employé dans d'autres champs dont le plus étonnant est *mubīd al-ḥašarāt,* signifiant insecticide. Dans le champ médiatique, plusieurs acteurs et groupes politiques arabes recoururent à ce terme, notamment en lien avec le conflit israélo-palestinien, ce qui confirme qu'au-delà de son usage *stricto sensu*, les populations et les acteurs sociaux furent amenés, à leur tour, à s'approprier cette notion juridique, la transposant à des situations militaires, à des fins de communication politique[10].

On pourrait multiplier les exemples venant conforter un fait constant : les acteurs non-professionnels (politiciens, idéologues, orateurs, acteurs associatifs…) qualifient de génocide toute agression massive et violente, et ce, afin de gagner la sympathie du public visé. Ainsi, on assiste à un double usage : premièrement, un sens élargi et manipulé ayant vocation à influencer les récepteurs ; deuxièmement, un sens technique, réservé aux experts du droit international qui l'appliquent selon des critères précis. C'est sans doute son affirmation en tant que syntagme qui lui donna sa puissance

[9] "جريمة إبادة الجنس: دولي، عام، الإبادة المتعمدة لطائفة قوميّة أو سلالية أو دينيّة أو سياسية يلجأ إليها أثناء الحروب. وتقضي الاتفاقية الدولية بشأن تحريم إبادة الجنس على اعتبار أنها من الجرائم الدولية ضد الإنسانية التي تتعهد الدول المنضمّة إلى هده الاتفاقية بمنعها ومعاقبة مقترفيها". ص. 325 القاموس القانوني الجديد (مكتب لبنان).

[10] Les déclarations officielles des dirigeants arabes, y compris celles des chefs d'État, sont souvent nombreuses et diversifiées. À titre d'illustration, on peut se référer à la déclaration publiée par la Ligue arabe lors de son sommet du 3 avril 2024, tenu à Manama, Bahreïn. Cf. URL. https://french.wafa.ps/Pages/Details/217255, consulté le 29-09-24.

juridique et le hissa définitivement au rang de terme technique ; d'où l'importance d'en effectuer une analyse lexico-syntaxique succincte.

2.2. Construction lexico-syntaxique ambiguë

La trame pénale internationale véhiculée à travers le terme français *génocide* fut essentiellement restituée, en arabe, grâce au groupe nominal *ibāda ǧamā'iyya*, si bien que la relation syntaxique régissant la juxtaposition de ces deux termes, *ibāda* et *ǧamā'iyya*, peut être désignée comme qualificative. Analysons les deux composantes de ce syntagme nominal.

Le nom d'action *ibāda* dérive du verbe *abāda*, de la forme IV qui, grâce à sa valeur factitive, signifie *faire périr*, *faire disparaître* tandis que la forme I, *bāda/yabīdu*, évoque l'idée de *périr* (A. D. Kazimirski, I, p. 128). Ce sens premier faisant ainsi écho au mode de vie dans le désert aride de la Péninsule arabique, susceptible de provoquer la disparition d'êtres vivants à cause de la chaleur extrême et de l'absence d'eau. De même, le verbe *bāda* laisse à penser qu'il est dérivé en raison de la valeur dénominative transposant un nom commun en verbe[11], le faisant passer du nom *yabadād* (désert), à *qui fait périr ceux qui y marchent*, via l'adjonction du sème de désert. Quant à l'adjectif qualifiant *ǧammā'ī*, il est lui-même un adjectif relationnel provenant du nom *ǧamā'a* (groupe) dont la marque finale du féminin, *tā*', fut supprimée. Il renvoie, dès lors, à un groupe d'individus, qu'ils soient unis par un lien religieux, ethnique, racial ou national. En somme, le syntagme *in extenso* désigne *un crime visant la destruction d'un groupe dont les membres sont unis par des liens communs.*

C'est davantage grâce à un procédé d'élimination que le traducteur, à l'origine de ce néologisme, évita trois alternatives paradigmatiques, qui auraient pu former ce syntagme. Pour restituer l'idée de la *destruction massive* ou du *massacre*, inhérente au verbe latin *caedere*, *tuer*, il écarta, en effet, deux choix syntagmatiques : *inqaraḍa* et *ahalaka*. Le premier désignant un mouvement interne et progressif de destruction tandis que le second véhiculant davantage de sèmes religieux : Dieu ou le Temps, en tant que forces métaphysiques à même de provoquer le *halāk*. (Coran, 45 : 24). Ainsi, cette traduction ne fit pas appel à l'équivalent immédiat du verbe tuer, *qatala*, car ce dernier ne recèle ni le sème de l'extermination, ni celui de la mort collective et massive, ni celui de l'anéantissement total d'un groupe de personnes. C'est pourquoi le terme *ibāda* fut retenu, étant le seul à pouvoir faire référence à l'image de l'extermination, violente et globale.

Cette même logique d'élimination motiva également le choix relatif à la terminologie arabe pour désigner le groupe. En effet, on aurait pu imaginer que le traducteur ait délibérément écarté les trois lexies suivantes pour des raisons à la fois sémantique et juridique. En premier lieu, c'est la lexie '*irq* (race), qui aurait pu être retenue, en tant qu'équivalent de son pendant français « genre ».

Or, celle-ci fut écartée du fait de connotations négatives sous-jacentes, notamment pendant la Seconde Guerre mondiale. D'ailleurs, jusqu'à aujourd'hui, l'arabe standard moderne tend à ne plus l'employer au profit de l'emprunt lexical *ithniyya*, qui n'est autre que l'arabisation de l'équivalent français *ethnie* ou anglais, *ethnic group*. La lexie *ša'b* (peuple) fut également évincée, pourtant encline à traduire le composant *genre* (J. Dichy : 2002), car ne comportant guère de dimension susceptible de relier les individus d'un groupe par des convictions religieuses ou tout autre lien symbolique. D'ailleurs, y compris au sein de l'espace européen, ce fut Grachus Babeuf qui proposa, en 1794, le néologisme *populicide*, ou l'extermination d'un peuple entier, en écho aux crimes perpétrés contre le peuple de

[11] P. LARCHER, P., *Le système verbal de l'arabe classique*, Aix-en-Provence, 2014, p. 19.

Vendée par le régime de la Convention. Néanmoins, ni le terme français, ni son équivalent arabe supposé, *ibāda ša'biyya*, ne passèrent à la postérité.

On écarta également la lexie *ğins,* terme emprunté au grec, d'après les philologues arabes classiques (Ibn Manzūr, *Lisān*, III, p. xx ; Cf. aussi, N. Khalfallah, 2012), qui correspond, pourtant, à l'équivalent exact et direct de *genre*. S'il fut, lui aussi, écarté c'est certainement à cause d'un autre lexème, qui s'y greffa au fil des décennies. Aujourd'hui, le terme *ğins* signifie également *sexe, sexualité*. Dire *ibāda ğinsiyya* risquerait donc de créer des confusions et ambigüités malheureuses.

Enfin, le terme '*unṣur* (élément, race, origine), qui désigne en arabe moderne la race et, par extension, le racisme, connut le même sort. Ce fut, vraisemblablement, en raison de son étymologie tribale qu'il s'imposa pour désigner les crimes racistes. L'expression *ibāda* '*unṣuriyya* aurait alors simplement désigné *crime raciste*, soustrayant au sème l'ampleur numérique caractéristique des génocides.

En somme, le choix se porta sur le mot *ğamā'a*, manifestement le plus neutre, en guise de traduction de *genre*. Ses connotations s'avèrent, en effet, être les plus objectives en se rapportant à tout groupe, quel qu'il soit, dont les membres sont unis par une identité commune, qu'elle soit ethnique, confessionnelle ou idéologique. La traduction littérale de ce groupe adjectival est donc *disparition ou périssement collectif*. A l'inverse des termes français et anglais, fondés sur la synthèse de deux mots grecs, *génos* et *cid,* le néologisme arabe eut recours à une paraphrase, plus à même de rapprocher la trame cognitive du concept et de la restituer le plus fidèlement possible.

Néanmoins, force est de constater que la langue arabe n'entreprit pas l'arabisation de ce terme alors qu'elle procéda de la sorte avec plusieurs autres emprunts étrangers. La logique à l'œuvre semble, dès lors, d'avoir recours à l'arabisation uniquement lorsque la traduction littérale n'est guère possible, et ce, afin de purifier l'arabe des éléments exogènes.

Les documents comportant des résumés des arrêts, les avis et les ordonnances rendus par la Cour internationale de justice, depuis 1948 jusqu'à nos jours, montrent la présence, l'expansion et la stabilité de ce terme depuis près de sept décennies, témoignant d'une forme d'unanimité quant à l'usage de ce terme[12]. Il s'avère que ce néologisme fut adopté grâce à un jeu d'équivalences et de commutations, destinées à former un vocable précis, au terme de la juxtaposition de deux lexies. Ce syntagme agit, désormais, comme une expression technique figée, véhiculant une charge universelle. Lorsqu'il est l'employé, il est interprété comme une seule collocation, comme un tout indivisible, ce qui constitue le fondement de son acception.

Sur le plan paradigmatique et juridique, seul ce syntagme est en mesure de restituer le continu positif conforme à l'esprit du SdR. Les alternatives auraient, sans doute, entaché la charge laïque et neutre que la Conférence diplomatique des États à Rome voulut conférer aux textes émanant de ses instances. Il est vrai qu'aucun autre choix paradigmatique n'aurait eu cette capacité à refléter une notion sécularisée, sans l'interférence des mémoires ou discours, qui en entraveraient la compréhension, en rappelant, ne serait-ce que partiellement, les charges culturelles locales.

Cette neutralité où l'isomorphisme est réduit à zéro, ou comme l'a appelée J. Sanches- Valendin, « non-conceptuelle », fut essentiellement consacrée grâce à la traduction à l'origine non seulement de

[12] Les affaires les plus pertinentes concernent la Bosnie, Gambie/Myanmar, Ukraine/Russie, Afrique du Sud/Israël). Dans les procès afférents, le concept de «génocide », était largement déployé. Cependant, l'analyse détaillée des documents dépasse le cadre de notre étude.

cette acception, mais aussi de son aptitude à remplir des fonctions réelles, ce qui constitue le propre du langage juridique.

3. La traduction : les enjeux sémantiques et socioculturels

Dans cette seconde partie, nous étudierons les effets de la traduction sur le transfert de la notion de génocide, de l'espace sémantique des langues européennes vers celui de la langue et culture arabes. Nous traiterons, d'abord, la traduction comme un procédé néologique afin de mesurer les éléments supplémentaires ou perdus lors de ce transfert. Nous examinerons, ensuite, le rôle de la traduction dans le processus de sécularisation sémantique des termes juridiques arabes.

3.1. Ibāda est-il l'équivalent de génocide ?

Avant d'examiner le volume des sèmes perdus ou rajoutés lors du passage de la langue-source (l'anglais et le français) vers la langue-cible (l'arabe), il convient de rappeler d'emblée que, dans ce genre de traductions, il est difficile, voire impossible, de déterminer avec certitude l'identité du traducteur ayant proposé l'équivalent *ibāda ǧamā'iyya* pour *génocide*. Qui plus est, vouloir l'identifier conduit, sans doute, à des conjectures invérifiables. Cela étant, si le terme figure aujourd'hui dans les documents officiels de la Cours Pénale internationale, c'est que les interprètes et les juristes furent probablement unanimes quant à ce choix. Or, les options des traducteurs, si précises soient-elles, ne correspondent pas nécessairement aux analyses micro-sémantiques effectuées par les linguistes. Reprenons donc ce syntagme adjectival *ibāda ǧamā'iyya*, afin de déterminer s'il correspondait aux objectifs illocutoires que se sont assignés les rédacteurs du SdR, à savoir créer un terme unique et commun à toutes les nations où l'isomorphisme serait réduit à zéro.

Pour ce faire, il convient, tout d'abord, de parcourir les dictionnaires bilingues spécialisés en droit (à défaut des dictionnaires spécifique au droit pénal international) afin de déterminer comment le terme « génocide » fut traduit alors même que la plupart d'entre eux furent le résultat d'initiatives personnelles, attestant d'usages déjà consacrés.

Pourtant, à notre grand étonnement, le Dictionnaire juridique de l'Académie de la langue arabe (1997) ne mentionna guère le terme. Ce silence pourrait s'expliquer par le fait que ce dictionnaire ne consacra pas d'entrée dédiée aux termes relevant du droit international (Maǧma' al-Luġa al-'Arabiyya, 1997). A titre d'exemple, H. S. al-Fārūqī se contenta, en 1972, de mentionner le sens général du seul verbe *abāda*[13]. Il semblerait qu'il n'ait pas détecté l'acception technique pourtant en vigueur depuis 1948. Jusqu'en 2015, W. Ghamra traduisit, quant à lui, le terme génocide par *ibādat al-ǧins*, signifiant *extermination de l'espace* (W. Ghamra : 2015, p. 261), ce qui confirme non seulement le flottement des équivalents, mais également le chaos définitoire et traductique, qui caractérisait le paysage terminologique arabe moderne. Dans la même veine, Philipe Abi Fadel le traduisit exactement de la même manière, à savoir « L'annihilation de *ǧins*»[14]. Le « Lexique des termes juridiques français-arabe », édité par Dalloz, proposa les deux équivalents *ibada al-ǧins et ibada ǧamā'iyya* et fit suivre cette double traduction de la définition présente dans le Code pénal, article 1/211, p. 289. Enfin, le « Lexique des termes juridiques français-arabe » de M. T. Yagoubi proposa, à son tour, *ibāda ǧins,* alors même qu'il s'agissait d'une troisième édition, datée de 2014 (M. T Yagoubi : 2014, p. 221).

Ce succinct aperçu démontre que les dictionnaires bilingues spécialisés ne suivirent pas, pour autant, le mouvement des textes juridiques en vigueur, malgré l'affirmation du syntagme *ibāda ǧamā'iyya*. Ces corpus continuèrent à proposer des variantes, bien souvent des doublons, comme pour

[13] H. S., FARUQI (AL-), *Faruqi's law dictionary*, Beyrouth, 1972, p. 1.
[14] P. T., ABI FADIL, *Dictionnaire des termes juridiques, dictionnaire détaillé en droit, législation et économie*, Beyrouth, 2004, p. 427.

refléter les usages en vigueur auprès des professionnels de justice dans les pays arabes, chacun favorisant une variante propre à sa culture, confirmant ainsi l'absence d'une quelconque autorité régulatrice des usages terminologiques en circulation. Cela dit, nous ne pouvons qu'être frappés par la résilience du terme *ğins,* qui sévit dans un autre syntagme (annexion) puisque les dictionnaires ne cessèrent pas de le mentionner malgré son absence du SdR et sa très faible occurrence dans les articles de presse évoquant les génocides. En effet, que ce soit pour se rappeler des faits historiques passés, à l'instar du génocide des Arméniens, ou pour lancer des accusations lors de guerres contemporaines, telles qu'en Ukraine, à Gaza, en Azerbaïdjan ou au Rwanda, la seule expression demeure *ibāda ğamā'iyya*.

Pourtant, ce syntagme présente une forme de pléonasme, le « génocide » portant nécessairement sur un groupe, signifié par la composante grecque *gen.* Dès lors, y ajouter l'adjectif *ğamā'ī* (collectif) n'est qu'une accentuation de ce sème, voire une répétition.

Qui plus est, cet équivalent arabe ne couvre pas tous les sèmes de son pendant français ou anglais, car l'adjectif *ğamā'ī* ne renvoie point à la motivation raciale, religieuse ou ethnique, évoquée par la définition fournie par la convention des Nations unies. Cet adjectif n'invite qu'à une réalité numérique (groupe vs. individu). De même qu'il n'évoque pas l'idée de masse car une *ğamā'a* pourrait être constituée seulement d'un petit groupe. Il ne fait pas non plus appel à la relation de causalité entre l'identité du groupe et le sort macabre qui lui est réservé. Autant d'éléments de définition rappelés par A. Rey dans son *Dictionnaire historique de la langue française*, indiquant que « *le mot se fait jour en français en même temps qu'il apparaît en anglais. D'abord employé à propos des nazis et de leur « solution finale » du « problème juif », il se dit de la destruction méthodique ou de la tentative de destruction d'un groupe ethnique, et par extension, vers 1970, de l'extermination d'un groupe en peu de temps* ».

Dans l'élaboration conceptuelle de Lemkin, la notion génocide trouve ses origines dans un système juridique émanant des textes du droit romano-germain sous sa forme française, puis de la jurisprudence anglo-saxonne. L'équivalent arabe dut, dès lors, transférer les sémantismes et les connotations que portaient ces traditions très différentes de la mémoire arabe. De même, le terme s'inscrivit dans un ensemble de dénominations novatrices appliquées aux crimes de nature internationale, ayant émergé au fil des théories et débats sources de nouvelles notions relatives aux grands procès, ayant secoué le monde au XX^{ème} siècle, tels que les crimes de guerre, les crimes contre l'humanité, la traite des êtres humains et le trafic de migrants.

Or, nonobstant l'immaturité de ces concepts dans leurs corpus d'origine, la langue arabe sut les englober et en révéler les nuances, les charges pertinentes et les acceptions techniques, qui devaient figurer dans les discours des juges, procureurs, avocats et les autres personnels œuvrant dans le champ judiciaire. Bien qu'ils provinssent de cultures et de références juridiques différentes, voire conflictuelles, ces concepts et les débats qui en découlèrent, portèrent, à leur tour, les traces des représentations culturelles et des enjeux locaux. Le tout fut recyclé dans l'équivalent arabe qui les prit en compte.

Plus particulièrement, l'échantillon d'*ibāda* analysé ici, illustre qu'au moment où la notion se conformait au tissu universel, à la trame commune que toutes les langues indiquaient, le terme resta, quant à lui, attaché à sa mémoire étymologique, à ses connotations parfois opposées à cette trame positive. Pour autant, si on arrive à traduire la notion de *génocide* et à en restituer le contenu exact, la trajectoire sémantique, l'évolution diachronique restent intraduisibles car elles seront purement et simplement invisibles dans la langue-cible.

En effet, comme pour les autres signes linguistiques, chaque culture se représente le *génocide* selon les propres expériences historiques qu'elle connut tout au long de son histoire politique. L'espace arabe contemporain pourrait se rappeler diverses expériences traumatiques allant du carnage des

Arméniens sous l'Empire ottoman, auquel ils appartenaient, aux massacres plus récents commis contre les Assyriens en Irak (1933), le massacre de Srebrenica, **(**1995) les Yézidis irakiens (2014) par la mouvance terroriste Daech et plus récemment en Ukraine (2022). On pourrait également citer les guerres menées par Israël contre les populations de Gaza (2014, 2020, 2023-24). En revanche, d'autres pensent davantage à ceux commis par les nazis à l'encontre des peuples juif, slave, et tzigane durant la Seconde Guerre mondiale. À chaque langue, son *génocide,* qui fait appel à des connotations différentes, bien que les équivalents dans les langues espagnole, anglaise, russe, arabe et française soient identiques. La langue chinoise fait figure d'exception en ayant opté pour une simple translitération phonétique, et ce, afin de minimiser les différences entre signifiant et signifié.

Les néologues et traducteurs arabes auraient pu puiser dans la tradition de droit musulman un équivalent proche au terme *génocide,* comme ils le firent pour les autres termes. Or, cette démarche aurait rencontré deux sérieuses embûches : d'une part, elle serait allée à l'encontre de l'esprit positif, qui animait la traduction du SdR, à savoir de rompre avec le vocabulaire traditionnel, excessivement chargé de principes et de contenus théologiques ; d'autre part, Raphael Lemkin et ses successeurs insistèrent sur le caractère spécifique de ce crime, survenu pendant la Seconde Guerre mondiale et appliquèrent cette qualification exclusivement aux crimes contre l'humanité perpétrés par les nazis à l'égard des peuples juif et tzigane. Il écrivit ainsi : « *De nouveaux concepts nécessitent de nouveaux mots. Par génocide, nous entendons la destruction d'une nation ou d'un groupe ethnique*. » Il ajouta que par génocide, il renvoyait autant « *aux actions concertées pour détruire des groupes dans leur dimension physiques ou raciale, que dans leur existence religieuse, linguistique ou culturelle* ». Ainsi, rattacher cette notion à d'autres formes de carnages massifs, si graves soient-ils, reviendrait à lui ôter sa spécificité, celle de vouloir exterminer un peuple pour des raisons purement raciales.

Pourtant, qu'il s'agisse d'un arabophone instruit ou profane, le destinataire de ce terme en comprendra, pour ainsi dire, le même contenu et ne sera probablement pas conscient de l'évolution sémantique du lemme *ibāda,* ni des strates constitutives de ses sémantismes, développés au gré des siècles et des discours.

Dans le cas qui nous intéresse ici, la neutralisation du contenu cognitif de la composante *ibāda* et sa réception unanime résultèrent du processus de traduction, qui l'imposa comme un principe technique à la référence neutre, détribalisée, relevant du droit international. Désormais, les juristes arabes spécialistes de ce droit agirent en dehors de l'univers symbolique, qui émanait autrefois du mot *ibāda*. Le syntagme *ibāda ǧamāʿiyya* fonctionnant, à son tour, comme un néologisme de sens appartenant au langage spécialisé et remplissant sa fonction référentielle, exclusivement, grâce à sa charge moderne, en discontinuité totale avec sa mémoire lointaine. Il subsiste, néanmoins, une réelle rupture entre les sédiments conceptuels issus de cette mémoire et l'universalité des principes, censés être affirmés au travers du droit international.

Cela dit, on ne peut prétendre que le développement du vocabulaire juridique arabe se manifesta uniquement grâce à ce mouvement de traduction. Nombre de concepts étant, en effet, profondément enracinés dans la culture classique, recélant d'ores et déjà d'un potentiel positif à même d'offrir une référence claire aux concepts universels régissant la communauté internationale. Phénomène qui se déploya par une réelle tension entre, d'une part, la tradition arabo-islamique, à la fois axiologique et linguistique, et d'autre part, les principes du droit positif, fondés sur un paradigme moderne et universellement adopté.

3.2. Sécularisation sémantique

Le principe de sécularisation sémantique, dont nous avons déjà analysé quelques illustrations dans des travaux antérieurs[15], trouve toute sa légitimité dans la terminologie du droit international, certainement davantage que dans celle des autres branches dudit droit. En effet, lorsque l'on crée des normes internationales, on évite plus consciencieusement toute référence culturelle propre aux contextes nationaux.

Désireux de traduire les notions inédites de ce droit, les Juristes et néologues arabes parvinrent à proposer des termes neutres, à l'instar d'*ibāda ğamā'iyya,* renvoyant à des concepts positifs, en rupture avec la terminologie juridique religieuse et avec les jurisprudences locales. Il convient de noter, à ce propos, que la version arabe du SdR bannit tout vocable juridique en relation avec la racine Š. R. ', présente dans *šarī'a* (Loi religieuse), *tašrī'* (législation, le fait de légiférer) et *mušarri'* (législateur). Aucun dérivé de cette racine ne fut, dès lors, mentionné dans ce texte, hormis une seule occurrence évoquant la *législation nationale* (SdR, p. 68), témoignant d'une volonté de la part des traducteurs arabes d'écarter toute référence à l'héritage islamique dans un texte qui se voulait séculier et consensuel.

Grâce à ces choix, officialisés par le SdR, ces mêmes juristes arabophones saisirent l'opportunité de créer ou de renouveler les familles terminologiques relatives aux champs normatifs et sémantiques que partageaient désormais la communauté internationale. La version arabe montre qu'il n'y avait pas d'idée juridique, qu'elle relevait de la procédure ou du fond, que son trésor ne pouvait indiquer et y renvoyer clairement, tout en atteignant le même niveau d'abstraction et d'exhaustivité requis par le langage juridique employé dans les conventions et traités internationaux. Pourtant, cela aida la langue arabe à se moderniser et à en faire un outil de travail au sein des Nations Unies.

De portée institutionnelle, ce néologisme arabe facilita l'intégration de cette notion inédite. Bien que le terme provienne d'une langue étrangère, il acquit une force pragmatique nouvelle : pointer le crime de l'extermination massive que les États-membres pourraient subir. Ce terme intégra ainsi un système juridique, où il était nécessaire d'unifier les termes traduits et de l'utiliser de manière à limiter toute confusion conceptuelle susceptible d'empêcher la communication entre les pays signataires, les instances et les publics visés.

Cette traduction affirma que la langue arabe s'était libérée de fioritures rhétoriques désuètes et de résidus propres à la pensée métaphysique. Ce terme, comme les autres déployés dans le SdR, montra sa capacité à exprimer des idées positives tout en possédant un haut degré d'ambiguïté, requis dans le langage juridique[16], ainsi qu'une polysémie souhaitée dans ce registre, et ce, quel que soit le document employant cette expression.

De même, la précision avec laquelle le concept de *génocide* fut restitué mit en doute certains préjugés prédominants dans les discours orientalistes. Ces derniers considérèrent pendant longtemps la langue arabe comme incapable de reproduire les contenus positifs du droit, et plus particulièrement, du droit international en raison de sa terminologie diamétralement opposée aux droits arabes, fortement imprégnés par la *šarī'a* et ses règles religieuses. À tel point que cette stigmatisation prétendait que les principes du droit pénal international et des droits de l'Homme étaient intrinsèquement liés à la vision occidentale et qu'en conséquence, la langue arabe était incapable d'exprimer ces principes, à moins de recourir à l'emprunt, la reléguant à un rôle de reproduction des textes européens.

Néanmoins, ces préjugés passaient outre que ce n'était pas tant la langue, qui était incapable d'exprimer un contenu, mais davantage ses locuteurs qui ne trouvaient pas dans ses ressources le terme le plus à même de restituer un contenu positif moderne. L'idée relative au caractère intrinsèquement

[15] N. KHALFALLAH, *La Politique religieuse*, Tunisie, 2021.

[16] G. CORNU, *Linguistique juridique*, Paris, 2005, 134.

sacré de la langue arabe était également infondée, la sacralité n'étant qu'une perception projetée sur une langue pour des raisons idéologiques évidentes, comme le souligna N. Yafi (2022). Ce caractère prétendument sacré fut, toutefois, sapé grâce au processus de mondialisation de l'arabe et de ses tissus lexicaux et terminologiques. Elle fut, en effet, reconnue comme la cinquième langue officielle et parmi les langues de la Cour pénale internationale, sans y être cependant une langue de travail.

Cette traduction arabe du SdR symbolisa, pour ainsi dire, la reconnaissance, bien que tardive de la part des grandes puissances, de l'égalité des langues et de leur capacité à représenter les concepts de droit pénal ainsi que les documents techniques en résultant, sans y être une langue de travail. Langue officielle du Statut, l'arabe retrouva ainsi sa place aux côtés des autres langues mondiales, désormais sur un même pied d'égalité, en tant qu'outil de représentation et de réflexion à part entière et en tant que système communicatif pour les pays arabophones.

Cet exemple du terme *génocide* montre que la symétrie notionnelle entre les langues officielles de la Cour pénale internationale est quasiment parfaite. Ainsi, quelle que soit la langue dans laquelle le droit pénal international s'exprime, le contenu demeure identique. Toutefois, c'est la mémoire sémantique de chaque équivalent qui diffère d'une culture à l'autre. La seule chose qui ne peut, sans doute, guère être traduite relève de la trajectoire sécularisante sous-tendant le terme génocide dans la culture arabo-islamique : ni les enjeux, ni les embûches d'une telle intégration ne sont palpables. Cependant, on en tira le meilleur parti en déployant le concept dans les nombreux conflits ayant trait à ces sociétés.

Précisons enfin que ces remarques issues de l'étude de la langue arabe dans les rapports qu'elle entretient avec le droit international, seraient applicables aux autres langues non- européennes, comme le chinois. En effet, celles-ci connurent, peut-être, la même trajectoire, chacune ayant exploré, de nouveau, ses propres voies en vue d'exprimer les principes d'un droit se voulant commun, unanime et dénudé de toute connotation locale. Le but n'était-il pas de créer des appellations consensuelles destinées à qualifier les normes que la communauté internationale avait retenues afin de régler les rapports entre nations ?

4. Conclusion

L'arabe standard moderne s'ingénia à restituer la notion de *génocide*, relevant du droit pénal international, avec ses acceptions les plus universelles. L'équivalent proposé, *Ibāda ǧamā'iyya*, se caractérise, en effet, par un haut niveau d'abstraction à même d'être applicable à diverses situations, et ce en s'éloignant des références nationales et des réminiscences tribales et religieuses. Désormais, cet équivalent s'inscrit dans un système juridique global engageant tous les 124 pays signataires de ce Statut, faisant partie de la Cour pénale internationale. Ce niveau d'abstraction fut également confirmé par la présence de l'expression arabe dans les documents des autres organes juridiques internationaux, tels que la Cour internationale de justice, confirmant, d'une part, l'authenticité de cette terminologie et d'autre part, son émancipation du droit musulman, qui régissait le discours juridique pendant de nombreux siècles.

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Or, l'analyse micro-sémantique de ce terme montre que malgré l'effort entrepris, les traces de la culture locale n'en furent pas, pour autant, totalement effacées. Ainsi, nul ne saura ni traduire, ni

transmettre les palimpsestes de cette culture résistant à côté de la trame initiale du mot. Il est vrai que même en droit international, la neutralisation des termes n'est guère définitive ; les isomorphismes ne sont pas absolus car des tensions permanentes demeurent vivaces entre le sens technique et le sens général, l'origine étymologique et l'évolution terminologique, le *stricto sensu* évoqué par les experts et les extensions recherchées par les manipulateurs. Le terme génocide ne déroge pas à cette règle. Tout comme ses corrélats, à savoir crimes contre l'humanité, crime de guerre, on s'acharne, en effet, à les employer dans les conflits géopolitiques modernes à des fins politiques et idéologiques. De tels emplois ne mettent, cependant, pas en doute l'affirmation et la diffusion de *Ibāda ğamā'iyya* en tant que concept légal, que les instances officielles s'approprièrent à cœur joie.

Bibliographie

ABI FADIL, P. T., *Dictionnaire des termes juridiques, dictionnaire détaillé en droit, législation et économie*, Beyrouth, 2004.

BEAUVALLET, O., *Lemkin, une œuvre en un mot : l'invention du génocide,* dans *Les Cahiers de la Justice* 2014/4 (N° 4), pp. 543- 552.
CHABBI J. *Les trois piliers de l'islam,* Paris, 2016.

CHRAÏBI, S., *La traduction vers l'arabe des textes relatifs aux droits humains : perspectives historiques du 19ème siècle à nos jours*, Linguistique. Université de la Sorbonne nouvelle - Paris III, 2013.

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

Cour pénale internationale, Modèles de saisine et limites, Leila Bourguiba, Dans Confluences Méditerranée 2008/1 (N°64), pages 25 à 41.

FARUQI (AL-), H. S., *Faruqi's law dictionary*, Beyrouth, 1972.

FOCSANEAU, L., *Les langues comme moyen d'expression du droit international,* dans *Annuaire français de droit international*, 1970, 16, pp. 256-274.

GALLISON, R., *Où il est question de lexiculture, de Cheval de Troie et d'impressionnisme*, dans *Études de linguistique appliquée*, N°97, 1995, pp. 5-14.

GEMAR J.-C., KASIRER N., *Jurilinguistique : entre langues et droits*, Montréal, Bruxelles, 2005.

GHAMRA, W., *Dictionnaire juridique français- arabe*, Beyrouth, 2015.

HARVEY, M., *Traduire l'intraduisible : stratégies d'équivalence dans la traduction juridique*, dans *Les Cahiers de l'ILCEA*, 2002, n° 3, Grenoble, Université Stendhal, p. 39-49.

IBN MANZUR, *Lisān al-'Arab*, Beyrouth, 1997.

KAZIMIRSKI DE BIBERSTEIN, A., *Dictionnaire arabe- Français*, Paris, 1869.

KHALFALLAH, N., *La Politique religieuse*, Tunisie, 2021.

LARCHER, P., *Le système verbal de l'arabe classique*, Aix-en-Provence, 2014.

LAVAULT-OLLEON, E., GROSSMANN F., *Langue du droit et harmonisation terminologique multilingue : l'exemple de LexALP*, dans *Lidil*, 2008, 38, p. 11-32.

LEMKIN, R., *Axis Rule in Occupied Europe, Carnegie Endowment for International Peace,* Washington, 1944.

LEMKIN, R., *Qu'est-ce qu'un génocide?*, Monaco, 2008.

MASSON D., *Coran*, Paris, 1967.

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

REY A., *Dictionnaire étymologique de la langue française*, Paris, 2019.

VALDENEBRO SANCHEZ, J., *L'aspect culturel en traduction juridique*, 2023.

TERRAL, F. *L'empreinte culturelle des termes juridiques*, dans *Meta*, 2004, vol. 49, n° 4, p. 707-984.

YAFI, N., *Plaidoyer pour l'arabe*, Paris, 2022.

The Deaf as a linguistic minority in Poland: Legal Aspirations and Legal Pursuits

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Abstract: The article aims to introduce the issue of Deaf language rights in Poland. It is a linguistic minority that derives its identity from deafness, and its culture is based on Polish Sign Language. The Deaf linguistic minority, both in the world and in Poland, face discrimination because of their language. Therefore, we analyze the relationship between deafness and disability, outline the complexities of Deaf/Deaf community as a linguistic minority, and then contextualize Deafness and Polish Sign Language within a legal framework. An analysis of the laws and initiatives undertaken by the Deaf community in Poland shows that the current status of the Deaf in Poland is still far from satisfactory with regard to their access to goods, services and full enjoyment of their civil rights due to challenges in accessing information. An analysis of initiatives undertaken by the Deaf shows that there is a growing awareness among the Deaf community of their civil rights. These activities are inspired by the changes taking place in other countries and the initiatives of international organizations for the Deaf.

Keywords: Deaf, linguistic minority, human rights, rights to Sign Language/Polish Sign Language

Summary: *1. Introduction, 2. Deafness as a disability, 3. Deaf people as a linguistic minority group, 4. The right to language, 5. Legal aspirations and legal pursuits of the Deaf, 6. Conclusion.*

1. Introduction

This paper aims to shed light on the matter of language rights of the Deaf in Poland. It is a linguistic minority which derives its identity from deafness, and its culture is structured around Polish Sign Language. Therefore, we analyze the relationship between deafness and disability, delineate the intricacies of Deaf culture as a linguistic minority, and subsequently contextualize the Deaf and Polish Sign Language within the legal framework. Finally, we present the legal aspirations of the Deaf community, exemplified by documents developed by the World Federation of the Deaf (hereinafter the WFD), an organization representing the interests of the said community, and petitions submitted to the Polish parliament. The paper serves as a scholarly contribution, acknowledging that it does not exhaustively address all the complexities related to the subject at hand.

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2. Deafness as a disability

The medical model of deafness has prevailed for many centuries. Deafness entails the loss of the sense of hearing and poses significant challenges in speech development. Hearing impairment has been viewed as a bodily injury, and deafness is still frequently regarded as a disability. The medical model aligns with the imperative to assist deaf people, historically focusing on therapies (speech development) or technological interventions (hearing aids, cochlear implants) with the goal of "curing" and transforming a deaf person into an individual indistinguishable from the norm represented by the majority. In essence, the objective of such support has been and continues to be the assimilation of the deaf minority into the majority represented by hearing people.

It is crucial to acknowledge that the repercussions of hearing impairment extend beyond mere medical aspects. Essentially, they pertain to the reception of stimuli from the surrounding environment, which include auditory components of human speech. Exposed to such stimuli, a child or individual can undergo multifaceted development. That process encompasses communication with the environment, the cultivation of profound social connections, and social, emotional, and cognitive growth. Constraints in interpersonal communication affect the overall progress of a child or individual, subsequently altering their social standing. Issues arising from restricted communication with others are considered to be the primary reason for the marginalization of that group[3]. People with profound hearing impairment often exhibit a low level of language competence, as evidenced by research examining their proficiency in both spoken and sign languages[4]. Researchers attribute the causes of such challenges to the education system that is not adapted to the needs of deaf students[5]. As evident, hearing impairment affects the quality of life not only through limited auditory stimuli but primarily due to restricted access to language, consequently limiting the ability to acquire information and actively participate in social life.

In that respect, the medical model presents hearing as the norm, while deafness is considered a pathology. The standard procedure solely involves mitigating hearing impairment and enhancing competencies in spoken language. However, there exists an alternative understanding of deafness.

3. Deaf people as a linguistic minority group

In the 20th century, a departure from the medical model of deafness was initiated by William Stokoe's research on American Sign Language (ASL), ushering in a period of promoting other perspectives. First, linguistic distinctiveness was acknowledged. Research presented sign language as a valuable, natural, and continually evolving means of

[3] O. SACKS, *Zobaczyć głos. Podróż do świata ciszy,* Poznań, 1998, p. 27.
[4] M. CZAJKOWSKA-KISIL, A. SIEPKOWSKA, and M. SAK, *Edukacja głuchych w Polsce,* in M. ŚWIDZIŃSKI (ed.), *Sytuacja osób głuchych w Polsce. Raport Zespołu ds. g/Głuchych przy Rzeczniku Praw Obywatelskich*, Warsaw, 2014, pp. 13-27.
[5] H. LANE, *Maska dobroczynności. Deprecjacja społeczności głuchych,* Warsaw, 1996; pp. 164-182; H. LANE, *Ethnicity, ethics, and the Deaf-World*, in *Journal of Deaf Studies and Deaf Education*, 10 (3), 2005, pp. 291-310; P. TOMASZEWSKI, *Rozwój językowy dziecka głuchego: wnioski dla edukacji szkolnej*, in *Audiofonologia,* 16, 2000, pp. 21- 57; P. TOMASZEWSKI, *Język dzieci głuchych - wskazówki dla edukacji szkolnej*, in *Szkoła Specjalna,* 3, 2005, pp. 167-181; B. WIŚNIEWSKA, *Dzieci z wadą słuchu – specjalne potrzeby edukacyjne*, in E. WOŹNICKA (ed.), *Tożsamość społeczno-kulturowa głuchych,* Łódź, 2007, pp. 120-127; K. RUTA-KORYTOWSKA, M. WRZEŚNIOWSKA-PIETRZAK, *Obraz szkoły i edukacji uczniów głuchych w Polsce w wypowiedziach dorosłych osób niesłyszących,* in *Kultura i Wychowanie,* 2(14), 2018, pp. 55-71.

communication[6]. Consequently, deaf sign language users began to be recognized as part of a linguistic minority. As time progressed, the recognition extended to cultural differences rooted in the use of a different language. It was reflected in the introduction of a distinction between "deaf" and "Deaf." The former term describes an individual with a severe hearing impairment, while the latter denotes someone who identifies with the Deaf community and uses natural sign language. The capitalized form signifies a distinctiveness similar to that associated with nationality[7]. Minority groups are defined by factors such as numerical size, physical (or mental) and cultural particularity (relating to e.g., language, customs), intersubjective social bonds, limited group autonomy (especially in political matters) and the mobilization of the group's interests that prompts its members to engage in activities to protect its status[8]. It is also common for a minority group to experience discrimination by most of the population in a given society[9] as confirmed by researchers of the deaf community[10].

Considering the cultural aspect, numerous researchers have deliberated on the existence of "Deaf Culture".[11] Ultimately, observations and research conducted among the Deaf have shown that they exhibit certain distinct behaviors indicative of a separate culture. Such behaviors include maintaining intense eye contact, engaging in specific rituals during greetings and farewells – marked by more pronounced tactile contact than observed among the hearing, sharing information (withholding information that might not have reached other members of the Deaf community is deemed impolite), transcribing information while adhering to sign language grammar, and assigning "name signs" to individuals, representing specific people through sign language symbols[12]. Moreover, while living among the hearing, the Deaf uphold a distinct set of values. Sign language stands out as a fundamental value, serving as the foundation for the Deaf community and its culture. Another significant aspect is a stronger preference for collectivism over individualism. Many of the Deaf prefer to build relationships with other Deaf people, which is related to the preservation of Deaf identity. In addition to those elements, "Deaf Culture" also comprises the creative output of the Deaf, which is visual, as well as the history of the Deaf, highlighting events significant to the Deaf community (e.g., "'Deaf President Now' movement" in 1988 at Gallaudet University, the establishment of organizations such as Deaf Power and Deaf Pride), and initiatives intended to fortify the position of the Deaf in a society formed primarily by the hearing[13].

Apart from their separate language and culture, the Deaf also navigate different life experiences, which are rooted in a visual perception of reality, where visual stimuli play a

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[6] W. C. STOKOE, *Sign Language Structure: An Outline of the Visual Communication Systems of the American Deaf, Studies in Linguistics*, in *Occasional Papers,* 8, 1960 pp. 3-78, https://web.archive.org/web/20160308223153/http://saveourdeafschools.org/stokoe_1960.pdf.

[7] C. PADDEN, T. HUMPHRIES, *Inside Deaf Culture*, Harvard University Press, 2005, p. 1.

[8] T. PALECZNY, *Mniejszość*, in Z. BOKSZAŃSKI, K. GORLACH, T. KRAUZE, W. KWAŚNIEWICZ, E. MOKRZYCKI, J. MUCHA, A. PIOTROWSKI, T. SOZAŃSKI, A. SUŁEK, J. SZMATKA, W. WINCŁAWSKI (eds.), *Encyklopedia socjologii,* Warsaw, 1999, 2, pp. 259-264.

[9] A. GIDDENS, *Socjologia*, Warsaw, 2005, pp. 272-273.

[10] H. LANE, *Ethnicity, ethics, and the Deaf-World*, in *Journal of Deaf Studies and Deaf Education*, 10(3), 2005, pp. 291-310.

[11] Eg. C. PADDEN, T. HUMPHRIES, *Inside Deaf Culture,* Harvard University Press, 2006, pp. 1-10; D. PODGÓRSKA-JACHNIK, *Głusi. Emancypacje*, Łódź, 2013, pp. 102-163; H. LANE, *Maska dobroczynności. Deprecjacja społeczności głuchych,* Warsaw, 1996; pp. 33-53; C. BARNES, G. MERCER, *Disability,* Cambridge, 2004, pp. 110-116.

[12] U. BARTNIKOWSKA, *Sytuacja społeczna i rodzinna słyszących dzieci niesłyszących rodziców*, Toruń, 2010, pp. 68 and et; L. PAALES, *A Hearer's Insight into Deaf Sign Language*, in *Electronic Journal of Folklore,* 27, 2004, pp. 49-84. http://www.folklore.ee/folklore/vol27/paales.pdf.; L. PAALES, *Name Signs for Hearing People*, in *Folklore Electronic Journal of Folklore,* 47, 2011, pp. 43-76.

[13] C. PADDEN, T. HUMPHRIES, *Inside Deaf Culture,* Harvard University Press, 2006,pp. 123-143; D. PODGÓRSKA-JACHNIK, *Głusi. Emancypacje*, Łódź, 2013, pp. 138-150.

foundational role not only in communication but also in the process of learning[14]. Thus, this is a process different from what unfolds for the hearing. Consequently, there emerged an advocacy for incorporating deaf experiences into education, alongside experiences related to gender, race, and other factors[15]. Additionally, deafness is a collective experience, as it involves the Deaf communicating in sign language and forming communities.

Tom Humphries concluded his paper "Talking Culture and Culture Talking" by stating that "we need to move on from 'How are we different?' to 'how are we being?'"[16]. It highlights another shift, i.e., the necessity to move away from defining what Deaf Culture is and what it is not. We can thus transition to another concept that emerged, namely Deafhood, which encompasses all the hearing-impaired. Deafhood ousts terms like "hearing impairment" and "deafness," which describe people from a medical perspective, prompting a view of the audiological condition as a pathology. The concept offers a deaf-constructed model that grows out of deaf people's own ontologies. Deafhood emphasises positive, experience-oriented views of deaf people,[17] stating that Deafhood is an act of defiance against the oppression of hearing people. Deafhood is also a process of discovering one's own identity by every deaf person. Such an approach aims to uncover the inherent potential within the Deaf world, which can benefit not only the deaf but also the hearing community.

Deaf Gain is another perspective on d/Deafness, which encourages considering the benefits of deafness, both on an individual and societal level[18]. It signifies a return to viewing human deafness as an individual experience while simultaneously revisiting the medical perspective, albeit in an altered context. Deaf Gain is defined as "a reframing of 'deaf' as a form of sensory and cognitive diversity that has the potential to contribute to the greater good of humanity"[19]. The proponents of the Deaf Gain concept identify several aspects of this framework: Deaf Increase (emphasizing that Deaf people have something important), Deaf Benefit (emphasizing that hearing impairment is not only a loss but also a gain), Deaf Contribute (emphasizing the importance of the various ways in which Deaf individuals contribute to society). This approach points to the concept of diversity of life in all its manifestations – biological, cultural, and linguistic[20]. Deafness is one form of human existence on the biocultural and linguistic continuum, and sign language is a distinguishing feature of the analyzed group.

4. The Right to Language

[14] P. C. HAUSER, A. O'HEARN, M. McKEE, A. STEIDER, D. THEW, *Deaf Epistemology: Deafhood and Deafness*, in *American Annals of the Deaf*, 154 (5), 2010, pp. 486-492.
[15] G. A. M. DE CLERC, *Deaf epistemologies as a critique and alternative to the practice of science: an anthropological perspective,* in *American Annals of the Deaf*, 154(5), 2010, pp. 435 – 446.
[16] T. HUMPHRIES, *Talking Culture and Culture Talking*., in H-D. L. BAUMAN (ed.), *Open Your Eyes: Deaf Studies Talking*, Minneapolis, 2008, pp. 35-41.
[17] P. LADD, *Deafhood: A concept stressing possibilities, not deficits*, in *Scandinavian Journal of Public Health*, 33(66), 2005, pp. 12–17; P. LADD, *What is Deafhood and why is it important?,* in H. GOODSTEIN & J. DAVIS (eds.), *The Deaf Way II Reader: Perspectives from the Second International Conference on Deaf Culture*, Washington, 2006, pp. 245–250; A. KUSTERS & M. De MEULDER, *Understanding Deafhood: In search of its meanings,* in *American Annals of the Deaf*, 157(5), 2013, pp. 428–438.
[18] H-D. BAUMAN, *Audism*, in D. MITCHELL, S. SNYDER (ed.), *Encyclopedia of Disability,* London, 2006, vol. 5, pp. 141-143; H-D. BAUMAN, J.M. MURRAY, *Reframing: From Hearing loss to Deaf Gain,* in *Deaf Studies Digital Journal*, 1, 2009, pp. 1-10.
[19] Ibidem, p. 3.
[20] L. MAFFI, *Linguistic, Cultural, and Biological Diversity,* in *Annual Review of Anthropology,* 29, 2005, pp. 599–617.

Language rights are acknowledged as universal human rights[21]. Language is inherent to humanity and contributes to its dignity, which is inalienable and inviolable, serving as the source of human rights, including the right to sign language[22]. It is argued that the core of language rights encompasses the freedom of expression in one's language, the prohibition of discrimination based on language in all areas of life, and the right to education in one's own language[23]. Deaf people, as a linguistic minority, demand that their language rights also include: a) legal recognition of national sign languages as natural, b) respect for Deaf culture and identity based on sign languages, c) bilingual education, i.e., in national sign languages and the national language (speech and writing), d) information accessibility in all areas of social, political and cultural life, e) and, above all, the availability of a sign language interpreter[24]. The latter right is crucial for Deaf people who have limited proficiency in spoken and written language.

Deaf people experienced, and experience discrimination known as audism, that arises from the perception of speech as a form of communication superior to sign language, thereby asserting the superiority of the hearing majority over the deaf minority. The very ability to hear and speak makes the hearing majority feel superior to deaf people. Audism means: "1. The notion that one is superior based on one's ability to hear or behave in the manner of one who hears.; 2. A system of advantages based on hearing ability; 3. A metaphysical orientation that links human identity with speech. The first is the initial seed planted by Tom Humphries (1975). The second is adapted from Wellman's (1993), definition of racism and is mindful of Lane's (1992) discussion of institutionalized audism. The third definition was presented at the Deaf Studies VI conference by Bahan and Bauman (2000)"[25]. In this context, the focal point of the endeavours of the Deaf community in Poland, as well as globally, was the legal acknowledgment of sign languages and the pursuit of language rights.

It seems that the process of advocating for the language rights of the Deaf began in the 1950s, with the first scientific studies confirming that national sign languages are natural. Around the same time, the World Federation of the Deaf was established (1951)[26], with its primary task being the preservation of sign languages and Deaf culture[27]. Recognition of national sign languages and the acknowledgment of Deaf culture are fundamental conditions for the exercise of the language rights of that minority. At international level, the legal recognition of sign languages was a development that unfolded in the 21st century with the adoption of the United Nations Convention on the Rights of Persons with Disabilities by the UN General Assembly on 13 December 2006 (hereinafter the Convention). The Polish government signed the Convention on 20 March 2007, but its ratification was only completed on 6 September 2012. As per the stipulations of the Convention, language is construed as both

[21] T. SKUTNABB-KANGAS, *Linguistic Human Rights*, in L. SOLAN, L., P. TIERSMA, (eds.), *Oxford Handbook on Language and Law*, Oxford, 2012, https://www.researchgate.net/publication/297831861_Linguistic_Human_Rights.
[22] D. LIS-STARANOWICZ, *The Right of the Deaf to Polish Sign Language,* in *Przegląd Prawa Konstytucyjnego*, 6, 2021, p. 403.
[23] A. SKORUPA-WULCZYŃSKA, *Language rights of the citizen of the European Union,* Warszaw KSAP, 2020, pp. 246-267.
[24] H. HAUALAND, A. COLIN, *Deaf People and Human Rights,* World Federation of the Deaf and Swedish National Association of the Dea, 2009, p. 9 http://www.wfdeaf.org/wp-content/uploads/2011/06/Deaf-People-and-Human-Rights-Report.pdf
[25] H-DIRKSEN L. BAUMAN, *Audism: Exploring the Metaphysics of Oppression*, in *Journal of Deaf Studies and Deaf Education*, 9(2), 2004, p. 245; P. TOMASZEWSKI, R. WIECZOREK R., E. MOROŃ, *Audyzm a opresja społeczna,* in J. KOWALSKA, R. DZIURLA, K. BARGIEL-MATUSZEWICZ (eds.), *Kultura a zdrowie i niepełnosprawność,* Warsaw, 2018, pp. 164-165.
[26] The Polish Association of the Deaf is a member of the World Federation of the Deaf.
[27] Our story, http://wfdeaf.org/who-we-are/our-story/.

spoken and signed languages, along with other forms of non-spoken languages (Article 2). Furthermore, the Convention makes explicit references to sign language on multiple occasions.

First and foremost, the Convention guarantees accessibility, which entails the obligation of states to enable persons with disabilities to live independently and participate fully in all aspects of life. Accordingly, states are required to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas (Article 9). The Convention also guarantees freedom of speech and opinion, as well as access to information. It is therefore incumbent on states to take all measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention. States Parties are obliged to legally recognise and promote the use of sign languages and to ensure that Deaf people have the right to use sign languages or alternative forms of communication in official interactions (Article 21). Moreover, sign language is also referred to in the Convention in the context of the education of the Deaf (Article 24). States Parties recognize the right of persons with disabilities to education. Consequently, they are obliged to take appropriate measures to a) facilitate the learning of sign language and promote the linguistic identity of the deaf community, b) ensure that the education of the Deaf is delivered in sign languages, and c) employ teachers, including teachers with disabilities, who are qualified in sign language. References to sign languages can also be found in Article 30 of the Convention, which pertains to participation in cultural, recreational, leisure, and sports activities (Article 30). In this context, the Convention grants Deaf people the right, on an equal basis with others, to recognition of their specific cultural and linguistic identity, including sign language (Article 30(4)).

At this point, it is worth noting that the "Convention represents the inaugural initiative by the United Nations to regulate the legal status of people with disabilities. In its essence, the Convention does not establish novel rights; rather, it underscores the imperative for action by States Parties to dismantle the 'barriers' impeding people with disabilities from exercising their political, personal, and social rights. Additionally, it establishes benchmarks for the conduct of public authorities concerning people with disabilities. To this end, States Parties undertake to adopt appropriate measures of a legislative, administrative, or other nature […]"[28].

The UN General Assembly designated September 23 as the International Day of Sign Languages in order to raise awareness of the importance of sign languages for the exercise of the language rights of the Deaf. "With Sign Language, everyone is Included!" was the theme for the first International Day of Sign Languages in 2018. Despite such awareness campaigns, the mistaken belief that sign language is universal and not a national language continues to persist. This misconception has not been dispelled by state actions, which involve enacting legislation to protect the national status of sign languages. An example of such legislation is the Act of 19 August 2011 on sign language and other means of communication (i.e. Journal of Laws of 2023, item 20), which, on the one hand, fulfils the obligations imposed on Poland by the Convention and, on the other, does not fully meet the expectations of Deaf Poles, as it fails to recognize Polish Sign Language as official and does not equate it with spoken language.

5. Legal aspirations and legal pursuits of the Deaf

[28] See more D. LIS-STARANOWICZ, M. LASKOWSKA, *Projekt stanowiska Sejmu w sprawie o sygn. akt K 47/12*, in *Zeszyty Biura Analiz Sejmowych,* 4, 2013, pp. 299-300 and the bibliography given there.

The UN Convention is also the first international legislative measure that explicitly addresses sign languages. However, it falls short of meeting the expectations of the Deaf community. They demand a direct guarantee and full implementation of language rights by states. The "Deaf Charter on Sign Language Rights for All" (hereafter: the Charter)[29], adopted by the WFD, is a reflection of those aspirations. While not normative (as it represents soft law), it is an important instrument of legal policy. It advocates for the full social integration of the Deaf (Article 1.1), while emphasizing their cultural and linguistic distinctiveness (Article 2.3): "We acknowledge that deaf communities are part of a unique intersectionality of rights, belonging to both linguistic and cultural groups, and the disability movement. Deaf people have their own identity, mainly tied to national sign languages and social connections built on the shared experience of the use of these languages. Sign language and deaf culture strengthen multilingualism and are means of promoting, protecting and preserving the diversity of languages and cultures globally. Deaf people are found among all cultural, linguistic, and ethnic minorities and the deaf community is a diverse and intersectional community". In addition, the Charter places emphasis on the legal recognition of national sign languages and the equalization of their legal status with spoken language. "National sign languages are full, complex natural languages with the same linguistic properties as spoken languages, including phonetic, phonemic, syllabic, morphological, syntactic, discourse, and pragmatic levels of organisation. They are the mother tongue and the natural language of deaf children. They are the vector of the inclusion of deaf children both in deaf communities and in society, fostering the building of their own identities and communities" (Article 2.2.). In essence, the WFD demands that national sign languages be recognized as official languages (Article 2.1). Most importantly, the WFD advocates for free access to sign language interpreters, which entails the obligation for states to provide professional interpretation training (Article 4.2)[30].

It is worth noting that the WFD has developed the Declaration on the Rights of Deaf Children (hereinafter the Declaration). It contains 10 articles that respectively proclaim: equality (Article 1), the right to a sign language from birth onwards (Article 2), the prohibition of infringing the right to sign language (Article 3), the right of hearing parents of deaf children to language instruction (Article 4), the right to bilingual education (Article 5), the right to know Deaf culture (Article 6), the prohibition of discrimination (Article 7), the right of access to individuals proficient in sign language, including in the education process (Article 8), the right to express opinions on all matters affecting them (Article 9), and the need for the immediate implementation of these rights (Article 10). Although the Declaration is a not a legally binding document, it may be an important reference point in the development of international legislation of global (e.g., UN) or regional (e.g., Council of Europe) significance, as well as national legislation, as it expresses the demands of the Deaf community[31].

Changing a perspective from global to domestic, it should be said the Polish Sign Language (polski język migowy, PJM) was "emerged around 1817, with the foundation of the first school for the deaf in Warsaw and has been continually in use since then. The current number of PJM users is estimated to exceed 50,000. Despite being one of the largest minority languages in Poland, PJM has not – until recently – attracted much attention from the hearing linguistic community. The first-ever academic unit specializing in research on the grammatical

[29] Deaf Charter on Sign Language Rights for All, https://wfdeaf.org/charter/ .
[30] See more L. BUSATTA, *The legal recognition of sign languages in an intersectional perspective*, in *Comparative Law and Language*, 1, 2022, pp. 75-77.
[31] Declaration on the Rights of Deaf Children, https://wfdeaf.org/rightsdeafchildren/.

and lexical properties of PJM was created at the University of Warsaw in 2010 (the Section for Sign Linguistics, SSL)"[32].

For many years, Deaf Poles were deprived of language rights. Firstly, they lacked the right to bilingual education since there were no instructional programs in Polish Sign Language within schools for the Deaf. Consequently, deaf children were compelled to acquire proficiency in spoken Polish, expressing their identity through a language that was often inaccessible or challenging to grasp due to their deafness. Secondly, the state did not grant the Deaf the right to a Polish Sign Language interpreter and failed to remove barriers to information accessibility. Thirdly, they experienced discrimination known as audism.

Legal situation of the Deaf in Poland has improved considerably. Polish Sign Language was hardly recognized until the adoption of the Act of 19 August 2011 on sign language and other means of communication (i.e. Journal of Laws of 2023, item 20; hereinafter the PJM Act). This law established the Polish Sign Language Council. The council is an advisory body to the Minister of Family, Labour and Social Policy. The most significant duties of the Council are a) to spread awareness of PJM, b) to give opinions on draft legislation, c) to propose legal solutions that remove barriers to communication. The council consists of 17 members, including the Government Plenipotentiary for Disabled People. Secondly, polish parliament adopted Act of 19 July 2019 on ensuring accessibility for persons with special needs (i.e. Journal of Laws of 2024, item 1411; hereinafter the Accessibility Act). These acts recognize Polish Sign Language, but PJM is not an official language in Poland. According to Fillipe Venade de Sousa, "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»"[33]. Polish laws grant Deaf people the right to the interpreter PJM in the public sphere. They do not guarantee this right to the whole extent, because they only partially remove communication barriers between the Deaf and public entities[34]. The Deaf community in Poland appealed and still appeals for an improvement in its legal situation and legislative changes to be made by the parliament.

At the outset, it is important to note that as early as the 19th century, the Deaf united in associations aimed at social aid and support[35]. The Christian Society of Deaf "Opatrzność" (providence) was founded in 1883 (Warsaw). The first association of Deaf Jews "Spójnia" was established in 1916 (Warsaw)[36]. It seems that nowadays associations and foundations aspire to provide the right to PJM than to provide social assistance. They represent individual or group

[32] J. LINDE-USIEKNIEWICZ, M. CZAJKOWSKA-KISIL, J. ŁACHETA, P. RUTKOWSKI, *A Corpus-based Dictionary of Polish Sign Language (PJM),* in A. ABEL, Ch. VETTORI & N. RALLI (eds.), *Proceedings of the XVI EURALEX International Congress: The User in Focus*. 15-19 July 2014. Bolzano/Bozen, 2014, p. 365.

[33] "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». Furthermore, it considers this language as a «natural and complete communication system», 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»". - see more F. VENADE de SOUSA, *Decoding sign language legal status: exploring a distinct category (or tertium genus) between recognition and officiality. A comparative analysis,* in *Comparative Law and Language,* 3(1), 2024, pp. 75-77.

[34] Malgorzata Talipska points out a dozen acts that should be changed because they violate the interests of the Deaf - see M. TALIPSKA, *Wybrane propozycje zmian w prawie z uwzględnieniem potrzeb g/Głuchych*, in M. TALIPSKA, M. DEMIANIUK (eds.), *Głusi mają głos. Głusi aktywni obywatele*, Warsaw, 2024, vol. II, pp. 31-62.

[35] B. MARGANIEC, *Głuchy obywatel*, in M. TALIPSKA, M. DEMIANIUK (eds.), *Głusi mają głos. Głusi aktywni obywatele*, Warsaw, 2024, vol. II, p. 9.

[36] T. ŚWIDERSKI, *Przewodnik po Głuchej Warszawie*, Warsaw, 2017, p. 23 and 33.

interests of Deaf people. Examples of such institutions are the Polish Association of the Deaf, the Association of the Polish Institute for Deaf Rights or the Institute for Deaf Affairs and Institute of Deaf History „Surdus Historicus". These organizations fight vigorously for the realization of the right to PJM. Deaf people recognize the necessity of standardizing the legal status of PSL interpreters and the removal of barriers through laws. They submit their petitions, claims and demands to the constitutional and non-constitutional state bodies.

Inter alia it is manifested in petitions submitted to the parliament or to the President[37]. The most far-reaching demand concerns amending the Constitution of 2 April 1997 by adding a new section to Article 27 of the Constitution, reading: "Poland protects Polish Sign Language as part of Polish culture" (petition 1)[38]. Additionally, the Deaf community advocates for an amendment to the Polish Sign Language Act of 2011 by expanding the scope of the right to a sign language interpreter, to cover all public institutions, including healthcare facilities and educational institutions. They also demand the right to have documents concerning their legal and factual interests translated into PJM. According to the petition, that right is correlated with the state's obligation to provide a free PJM interpreter service. The authors of the petition call for the introduction of criminal provisions against those who infringe the language rights of the Deaf (petition 2). Furthermore, the deaf community points to the need to amend the Act of 6 September 2001 on access to public information (Journal of Laws of 2019, item 1429, as amended) by granting the Deaf the right to submit requests for access to public information in PJM and recorded in video form. The petitioners justify the petition by stating that the Polish (spoken and written) language is difficult, foreign, and incomprehensible to Deaf people. Writing a request for access to public information is impossible without the assistance of a hearing person (petition 3). For the same reason, they appeal for the right to submit petitions in PJM and recorded in video form (petition 4). Moreover, the overwhelming majority of petitions concern the right to a sign language interpreter, which removes barriers to access to: cultural goods (museums) (No. BKSP-144-IX-215/20); archival records (No. BKSP-144-IX-201/20); proceedings of parliamentary committees (no. BKSP-144-IX-213/20); parliamentary and senatorial offices (No. BKSP-144-IX-290/21). Other petitions submitted to the Sejm concern social rights, e.g., reduced rates (No. BKSP-144-IX-740/23, BKSP-144-IX-368/21, No. BKSP-144-IX-291/21); employment (No. BKSP-144-IX-369/21), social assistance pension (No. BKSP-145-IX-27/19). Those petitions have failed to resonate, as the Sejm has not made any legislative changes that would expand the scope of language rights for the Deaf in Poland.

It is worth mentioning the activities of the Institute of Deaf Affairs (a foundation) and its Council of the Deaf. The Institute is also actively involved in changing the law by formulating proposals to public authorities. The Council works to recognized PSL as an official language in Poland and demands to amend Article 27 of the Constitution. It also cares about the image of the Deaf in the media. It asserts to liberalise of Polish language requirement for Deaf people applying for Polish citizenship. It opposes the use of the word "deaf-mute" in Poland. It also fights for bilingualism in the education of Deaf children[39].

Finally, petitions, demands and requests above described without the support of state bodies will remain only aspirations of Deaf people in Poland. The full realization of Deaf

[37] We focus our comments on petitions because it is a legal instrument. It is a constitutional political right in Poland (art. 63 of the Constitution). The subject of the petition can be a demand to change the law, to take a decision or other action on a matter concerning the subject of the petitioner, community life or values that require protection in the name of the common good. In turn, the obligation of the authorities is to consider petitions.
[38] D. LIS-STARANOWICZ, *Metoda regulacji i potrzeba konstytucjonalizacji polskiego języka migowego – prolegomena,* in *Zeszyty Biura Analiz Sejmowych*, 4, 2022, pp. 17-18.
[39] Resolutions of the Council of the Deaf, https://gao.isg.org.pl/prace-rady/ .

language rights should become a constitutional priority. “These priorities are undoubtedly determined primarily by the political organs of the state, i.e., the Council of Ministers, the Parliament and the President. The Council of Ministers conducts the state’s domestic and foreign policy (Article 146 of the Constitution). Parliament also plays an important role, enacting laws that implement the provisions of the Constitution (Articles 118–121 of the Constitution). Parliament, as a body representing diverse political views, has the tools to set constitutional priorities in the manner most consistent with the will of the people or through political consensus. Finally, the President, who has the right of legislative initiative and the right to sign laws, may, respectively, either submit a bill to the Sejm for a specific law, or terminate the proceedings in a manner he deems just (by signing the law, vetoing it or referring it to the Constitutional Tribunal; Articles 118 and 122 of the Constitution)” [40].

6. Conclusion

The examination of legal provisions and initiatives undertaken by the Deaf community in Poland seeking legal reforms leads to several observations. Firstly, the current status of the Deaf in Poland is still far from satisfactory with respect to their access to goods, services, and the full exercise of civil rights due to challenges in accessing information in the Polish language. Secondly, there is a growing awareness within the Deaf community regarding their rights as citizens, prompting diverse initiatives aimed at achieving parity for Polish Sign Language with the Polish language. These endeavours draw inspiration from transformations occurring in other states and initiatives of international organizations uniting the Deaf. Thirdly, the linguistic minority of the Deaf, both globally and in Poland, has encountered discrimination based on their language. The fundamental human right to sign language, arising from the dignity of the Deaf, has failed to be acknowledged. Presently, Deaf communities advocate for their language rights, seeking legal acknowledgment of natural sign languages as official, their legal protection, and the assurance of the right to interpretation free of charge. Lastly, the Convention on the Rights of Persons with Disabilities is the first and only international legal instrument addressing sign language and equating it with spoken language. In Poland, however, initial legislation is represented by the Act of 2011, which fails to confer official status on Polish Sign Language and does not treat it as equivalent to spoken Polish. Both legal instruments fall short of meeting the expectations of the Deaf community, as evidenced by the documents drawn up by the World Federation of the Deaf (Charter and Convention) and petitions submitted to the polish parliament by Deaf Poles.

Bibliography

1. Literature

BARNES, C., MERCER, G., *Disability,* Cambridge, 2004.

[40] K. DOKTÓR-BINDAS, *The Right to a Clean Environment or the Right to Energy Security – the Change of Constitutional Priorities,* in Studi Polacco-Italiani di Toruń,/*Toruńskie Studia Polsko-Włoskie*, XVIII, 2022, p. 104.

BARTNIKOWSKA, U., *Sytuacja społeczna i rodzinna słyszących dzieci niesłyszących rodziców*, Toruń, 2010.

BAUMAN, H-Dirksen L., *Audism: Exploring the Metaphysics of Oppression*, in *Journal of Deaf Studies and Deaf Education*, 9(2), 2004, 239–246, https://doi.org/10.1093/deafed/enh025.

BAUMAN, H-Dirksen L., *Audism*, in MITCHELL, D., SNYDER, S., (eds.), *Encyclopedia of Disability,* London, 5, 2006, pp. 141-143.

BAUMAN, H-D.L., MURRAY, J. M., *Reframing: From Hearing loss to Deaf Gain*, in *Deaf Studies Digital Journal*, 1, 2009, pp. 1-10.

BUSATTA, L., *The legal recognition of sign languages in an intersectional perspective*, in *Comparative Law and Language*, 1, 2022, pp. 75-77.

CZAJKOWSKA-KISIL, M., SIEPKOWSKA, A., SAK, M., *Edukacja głuchych w Polsce*, in ŚWIDZIŃSKI, M., (ed.), *Sytuacja osób głuchych w Polsce. Raport Zespołu ds. g/Głuchych przy Rzeczniku Praw Obywatelskich*, Warsaw, 2014, pp. 13-27.

DE CLERC, G.A.M., *Deaf Epistemologies as a Critique and Alternative to the Practice of Science: An Anthropological Perspective*, in *American Annals of the Deaf,* 154(5), 2010, pp. 435–446.

GIDDENS, A., *Socjologia*, Warsaw, 2005.

DOKTOR-BINDAS, K., *The Right to a Clean Environment or the Right to Energy Security – the Change of Constitutional Priorities,* in *Studi Polacco-Italiani di* Toruń,/*Toruńskie Studia Polsko-Włoskie Toruńskie Studia Polsko-Włoskie*, XVII, 2022, pp. 103-109.

HAUSER, P.C., O'HEARN, A., MCKEE, M., STEIDER, A., THEW, D., *Deaf Epistemology: Deafhood and Deafness,* in *American Annals of the Deaf,* 154(5), 2010, pp. 486-492.

HUMPHRIES, T., *Talking Culture and Culture Talking*, in H-D. L. BAUMAN (ed.), *Open Your Eyes: Deaf Studies Talking,* Minneapolis, 2008, pp. 34-41.

KUSTERS, A., DE MEULDER, M., *Understanding Deafhood: In Search of its Meanings,* in *American Annals of the Deaf*, 157(5), 2013, pp. 428–438.

LADD, P., *Deafhood: A Concept Stressing Possibilities, Not Deficits*, in *Scandinavian Journal of Public Health*, 33(66), 2015, pp. 12–17.

LADD, P., *What is Deafhood and Why is It important?* in Goodstein, H., Davis, J., (eds.), *The Deaf Way II Reader: Perspectives from the Second International Conference on Deaf Culture,* Washington DC, 2006, pp. 245–250.

LANE, H., *Maska dobroczynności. Deprecjacja społeczności głuchych,* Warsaw, 1996.

LANE, H., *Ethnicity, Ethics, and the Deaf-World,* in *Journal of Deaf Studies and Deaf Education*, 10(3), 2005, pp. 291-310.

LINDE-USIEKNIEWICZ J., CZAJKOWSKA-KISIL M., ŁACHETA J., RUTKOWSKI P., *A Corpus-based Dictionary of Polish Sign Language (PJM),* in ABEL, A., VETTORI, CH., & RALLI, N., (eds.), *Proceedings of the XVI EURALEX International Congress: The User in Focus*. 15-19 July 2014. Bolzano/Bozen, 2014.

LIS-STARANOWICZ, D., *The Right of the Deaf to Polish Sign Language,* in *Przegląd Prawa Konstytucyjnego,* 6, 2021, pp. 395-405.

LIS-STARANOWICZ, D., LASKOWSKA M., *Projekt stanowiska Sejmu w sprawie o sygn. akt K 47/12,* in *Zeszyty Biura Analiz Sejmowych,* 4, 2013, pp. 294-312.

LIS-STARANOWICZ, D., *Metoda regulacji i potrzeba konstytucjonalizacji polskiego języka migowego – prolegomena,* in *Zeszyty Biura Analiz Sejmowych,* 4, 2022, pp. 9-22.

MAFFI, L., *Linguistic, Cultural, and Biological Diversity,* in *Annual Review of Anthropology,* 29, 2005, pp. 599–617.

MARGANIECC, B., *Głuchy obywatel*, in TALIPSKA, M., DEMIANIUK, M., (eds.), *Głusi mają głos. Głusi aktywni obywatele*, Warsaw, 2024, vol. II, pp. 7-30.

PAALES, L., *A Hearer's Insight into Deaf Sign Language*, in *Electronic Journal of Folklore,* 27, 2004, pp. 49-84.

PAALES, L., *Name Signs for Hearing People,* in *Folklore Electronic Journal of Folklore*, 47, 2011, pp. 43-76.
PAPPEN, C., HUMPHRIES, T., *Inside Deaf Culture*, Harvard, 2006.
PALECZNY, T., *Mniejszość,* in BOKSZANSKI, Z., GORLACH, K., KRAUZE, T., KWASNIEWICZ, W., MOKRZYCKI, E., MUCHA, J., PIOTOWSKA, A., SOZANSKI, T., SULEK, A., SZMATKA, J., WINCLAWSKI, W. (eds.), *Encyklopedia socjologii*, Warsaw, 1999, 2, pp. 259-264.
POGORSKA-JACHNK, D., *Głusi. Emancypacje*, Łódź, 2013.
RUTA-KORYTOWKSA, K., WRZESNIOWSKA-PIETRZAK, M., *Obraz szkoły i edukacji uczniów głuchych w Polsce w wypowiedziach dorosłych osób niesłyszących,* in *Kultura i Wychowanie*, 2, 2018, pp. 55-71.
SACKS, O., *Zobaczyć głos. Podróż do świata ciszy,* Poznań, 1998.
SKORUPA-WULCZYNSKA, A., *Language Rights of The Citizen of The European Union,* Warsaw, 2020.
SKUTNABB-KANGAS, T., *Linguistic Human Rights*, in SOLAN, L., TIERSMA, P., (eds.), *Oxford Handbook on Language and Law*, Oxford, 2012, https://www.researchgate.net/publication/297831861_Linguistic_Human_Rights.
STOKOE, W. C., *Sign Language Structure: An Outline of the Visual Communication Systems of the American Deaf, Studies in Linguistics,* in *Occasional Papers,* 8, 1960, pp. 3-78, https://web.archive.org/web/20160308223153/http://saveourdeafschools.org/stokoe_1960.pdf.
ŚWIDERSKI, T., *Przewodnik po Głuchej Warszawie*, Warsaw, 2017.
TALIPSKA, A., *Wybrane propozycje zmian w prawie z uwzględnieniem potrzeb g/Głuchych*, in TALIPSKA, M., DEMIANIUK, M., (eds.), *Głusi mają głos. Głusi aktywni obywatele*, Warsaw 2024, vol. II, pp. 31-62.
TOMASZEWSKI, P., *Rozwój językowy dziecka głuchego: wnioski dla edukacji szkolnej,* in *Audiofonologia*, 16, 2000, pp. 21- 57.
TOMASZEWSKI, P., *Język dzieci głuchych - wskazówki dla edukacji szkolnej,* in *Szkoła Specjalna*, 3, 2005, pp. 167-181.
TOMASZEWSKI, P., WIECZOREK R., MORON, E., *Audyzm a opresja społeczna,* in Kowalska, J., DZIURLA, R., BARGIEL-MATUSZEWICZ, K., (eds.), *Kultura a zdrowie i niepełnosprawność,* Warsaw, 2018.
WISNIENIEWSKA, B., *Dzieci z wadą słuchu – specjalne potrzeby edukacyjne*, in WOZNICKA, E. (ed.), *Tożsamość społeczno-kulturowa głuchych,* Łódź, 2007, pp. 118-128.

2. Legal acts

Konwencja ONZ o prawach osób niepełnosprawnych (Dz. U. z 2012 r. poz. 1169).
Ustawa z dnia 19 sierpnia 2011 r. o języku migowym i innych środkach komunikowania się (tekst jedn. Dz. U. z 2023 r. poz. 20) / Act of 19 August 2011 on sign language and other means of communication (i.e. Journal of Laws of 2023, item 20).
Ustawa z dnia 19 lipca 2019 r. o zapewnianiu dostępności osobom ze szczególnymi potrzebami (tekst jedn. Dz. U. z 2024 r. poz. 1411) / Act of 19 July 2019 on ensuring accessibility for persons with special needs (i.e. Journal of Laws of 2024, item 1411).

3. Raport

HAUALAND,H., COLIN, A., *Deaf People and Human Rights,* World Federation of the Deaf and Swedish National Association of the Dea*, 2009, p. 9 http://www.wfdeaf.org/wp-content/uploads/2011/06/Deaf-People-and-Human-Rights-Report.pdf* (access: 12.11.2024).

4. Internet sources

WFD Deaf Charter on Sign Language Rights for All., https://wfdeaf.org/charter/.
WFD Declaration on the rights of deaf children, https://wfdeaf.org/rightsdeafchildren/.

Petition 1: Petition of the Association of the Polish Institute of Deaf Rights dated 19 October 2020 submitted to the Senate and 23 May 2019 submitted to the President., https://www.prezydent.pl/bip/petycje/petycje-2019/petycja-w-sprawie-zmiany-konstytucji-w-zakresie-extensions-art-27.25950.

Petition 2: Petition of the Association of the Polish Institute of Deaf Rights, no. BKSP 145-IX-59/20 submitted to the Sejm.
https://www.sejm.gov.pl/Sejm9.nsf/agent.xsp?symbol=PETYCJA&NrPetycji=BKSP-145-IX-59/20.

Petition 3: Petition of the Association of the Polish Institute of Deaf Rights, no. BKSP-145-IX-192/20 submitted to the Sejm,
https://www.sejm.gov.pl/Sejm9.nsf/agent.xsp?symbol=PETYCJA&NrPetycji=BKSP-145-IX-192/20.

Petition 4: Petition of the Association of the Polish Institute of Deaf Rights, no. BKSP-145-IX-58/20 submitted to the Sejm,
https://www.sejm.gov.pl/Sejm9.nsf/agent.xsp?symbol=PETYCJA&NrPetycji=BKSP-145-IX-58/20.

Resolutions of the Council of the Deaf, https://gao.isg.org.pl/prace-rady/.

A Three-Step Strategy for Teaching Contract Drafting

A Study Based on US and UK[1] Sale and Purchase Agreements

Elisabeth Staels, Natasha Costello, Anton Osminkin[2]

Abstract: The main purpose of this article is to provide a three-step strategy for teaching contract drafting. The first step focuses on the negotiation of a business deal and on understanding the needs and objectives of the contracting parties. The second step deals with the practical process of drafting a contract, looking at contract structure and types of contract clauses. Finally, the third step describes the jurilinguistic key features, which provide a linguistic frame to the agreement.

Such a multifaceted approach enables teachers and students to picture the teaching process from a legal and jurilinguistic perspectives, as well as to consider contract drafting from the initial business deal and its negotiations to a range of details and specific text needed to be included in the written agreement.

The set of legal documents selected for this paper is a corpus of five UK and five US sale and purchase agreements the subjects of which represent goods and services as well as share capital.

Each step of the strategy includes a number of exercises that teachers can use with students for them to gain a better understanding of legal and linguistic aspects of contract drafting.

The students mentioned in the paper include law students from universities in Paris, France, studying legal English and legal translation courses as well as practising lawyers who have to deal with contract drafting in English.

Keywords: three-step strategy, contract drafting, contract structure, contract negotiations, teaching, legal English, jurilinguistics, linguistic frame, legalese, Plain English Movement, modals, SHALL, discursive devices.

Summary: 1. Introduction; 2. Methodology; 3. Contract Negotiation; 4. Contract Content; 5. Jurilinguistic Aspects of Contract Drafting; 6. Conclusion.

[1] We use the expression 'US' (United States of America) for ease of reference in this article. The contracts in our corpus are governed by laws of different States. Similarly we use the expression 'UK' (United Kingdom) for ease of reference, but we are referring to contracts made under the law of England, or of England and Wales. The titles of all of the contracts in our corpus include the word 'Agreement', We use the expressions 'agreement' and 'contract' interchangeably in this article, but we recognise that the expression 'agreement' can have a wider meaning than 'contract'. A contract is an agreement which is binding on the parties and enforceable by law.

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1. *Introduction*

When teaching contract drafting, legal English teachers tend to focus on different aspects, depending on their professional expertise. Legally-trained teachers are usually more deal-focused and look at the legal content of a contract, whereas linguists concentrate more on the legal language.

On occasion, though not often, groups of experts will teach contract drafting from a multifaceted perspective. We share this vision because we find such approach very effective and comprehensive. Thus, in this paper, combining our professional experience, we would like to describe a three-step strategy for teaching contract drafting. Our approach involves three elements:

- helping students understand how a business deal is negotiated and how this is reflected in the drafting of a contract;
- understanding how the content of a contract is organised and the types of clauses it contains;
- analysing features needed to provide a proper jurilinguistic frame to the contract.

In the second part of this paper, we will present the methodology of our study as well as a short description of our corpus of sale and purchase agreements.

The third part of the study will describe the process of negotiating a business deal and will include exercises to identify negotiated terms in sale and purchase agreements. This part has been written by Elisabeth Staels, a former member of the Brussels' Bar and former in-house counsel, the President of the European Legal English Teachers' Association (EULETA), who now teaches legal English to non-native English-speaking lawyers based in France.

The fourth part of the paper describes a method for teaching the organisation and content of sale and purchase agreements, with a number of classroom activities. This part has been written by Natasha Costello, solicitor (non-practising) and former senior lecturer on the Legal Practice Course at Manchester Metropolitan University. Natasha teaches legal English to students at the Université Paris Nanterre and also to non-native English-speaking lawyers based in France. Natasha is a member of the EULETA Board.

The fifth part of the paper provides an approach to teaching the jurilinguistic frame of the legal documents from our corpus. In addition, a number of exercises helpful at this stage of contract drafting will be mentioned. This part has been written by Anton Osminkin, a jurilinguist teaching legal translation from French into English to law students at the Institute of Intercultural Management and Communication (ISIT Paris) and working as a legal translator at the Court of Appeal of Paris. Anton is also a member of the EULETA Board.

Our study is not inscribed in a precise legal or linguistic theoretical framework, but it is nevertheless inspired by Common Law, Civil Law, Contract Law as well as by cognitive grammar, discourse analysis and corpus linguistics.

We hope that our study will be interesting and useful for lawyers, legal English teachers, and jurilinguists, as well as for legal translators and interpreters. In addition, this paper may be of interest for law students who are beginning or continuing their academic journeys in university and wish to gain more knowledge of legal drafting and its jurilinguistic aspects.

2. *Methodology*

The corpus collected for this study is comprised of five UK and five US agreements, drafted over the period 2000-2023, with a total of 191,959 words. This has allowed us to notice a certain number of features specific to British and American contract drafting.

The US agreements have been gathered from the database Onecle https://www.onecle.com/. This is a free e-platform which stores agreements executed in the US with domestic and overseas partners. The documents are organised in two specific manners: by agreement types and by American states in which these agreements were executed.

The UK agreements are available on the Internet, and can be read and consulted either online or in downloadable formats.

Our corpus is not large, but it is balanced and condensed. It can also be defined as a compact specialised corpus. A. O'Keeffe[3] confirms the advantages of this type of corpus since specialised corpora are carefully targeted. Even with relatively small amounts of data, specialised lexis and structures are likely to occur with more regular patterning and distribution than in a large, general corpus.

Although the main concept of all the agreements is selling and purchasing, the subject matters of the agreements, i.e. items and objects to be sold and purchased, are different. They include goods (nutraceutical supplements), securities, industrial products (polysilicon), semiconductors, shares, and share capital. Hence, these agreements reveal a junction of different branches of law.

The corpus of the legal texts has been studied from a legal and jurilinguistic perspective. In other words, each of us, i.e. the authors of this paper, refer to the corpus in a different manner, which depends on our teaching and professional approach. In terms of the quantitative analysis, we have collected the legal patterns provided in the documents, i.e. different types of legal provisions. Meanwhile, we have gathered the jurilinguistic aspects and forms of the documents, such as the use of grammatical tenses, the Plain English Movement or legalese style of drafting, using modals, textual devices, and connectors. The qualitative analysis has enabled us to distinguish legal and jurilinguistic features common and specific to each document in our corpus. This, in turn, lead us to the conclusions which have shaped our three-step strategy for teaching contract drafting.

In addition, it should be noted that this study is based on our experience of teaching legal English and drafting in various institutions and law firms in Paris, which includes lectures, seminars, workshops and individual online and offline classes.

In this paper, when referring to our learners, we use the term ‘students’ to represent both professional lawyers and law students at universities.

For our quantitative analysis, we used Word, Excel, as well as certain tools provided by British National Corpus and SketchEngine. Moreover, in order to make it easier to extracts modal verbs and contextual connectors, such as herein, thereof, wherein, etc., we have used the free software l Parts-of-speech.Info as shown in the following picture:

[3] A. O’KEEFFE, *From Corpus to Classroom: Language Use and Language Teaching*, Cambridge, 2007, p. 98.

3. Contract Negotiation

When teaching contract negotiation and contract drafting, We should always tell students at the beginning of the course: “Choose your words carefully”.

One word can jeopardise a deal. For example, choosing the word « shall » instead of « should » can have important consequences.

On the last day of negotiations at the UN Climate Change Conference in Paris (COP 21), US Secretary of State John Kerry spotted the word « shall » in the draft climate change agreement (the ‘Paris Agreement’)[4] and he immediately alerted the French diplomats. Mr Kerry stated that unless the word « shall » was replaced by « should », the US could not sign the Paris Agreement.

The wording of Article 4 paragraph 4 of the Annex to the Paris Agreement adopted at the UN Climate Change Conference (COP 21) reads as follows:

(Example 1) First version:
Developed country Parties **shall** continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances[5].

(Example 2) Final version:
Developed country Parties **should** continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances[6].

The example of the Paris Agreement shows us that it is of the utmost importance that the written agreement reflects exactly what the parties have negotiated.

But what does it mean to negotiate an agreement? Where do you start? How do you go about it?

[4] Framework Convention on Climate Change, Paris Agreement, United Nations, 12 December 2015.
[5] Framework Convention on Climate Change, Annex, Paris Agreement, Article 4, paragraph 4, the first version, United Nations, 12 December 2015.
[6] Framework Convention on Climate Change, Annex, Paris Agreement, Article 4, paragraph 4, the revised version, United Nations, 12 December 2015.

Students should understand that a lawyer cannot draft an agreement without a thorough understanding of the needs and objectives of the parties to the agreement. In a business environment dealing with the sale and purchase of goods, services, or shares, this means that a lawyer has to understand the client's business and company structure, specific sector and environment the business operates in, and the product or service they want to sell or purchase. In the discussions with their client and counterpart, a lawyer should raise the following questions and listen carefully to the answers:

- What?
- Where?
- When?
- How?
- Why?

For example: What exactly does the client want? How much are they willing to pay? What is the timeline? What about risk allocation? Who will be liable for what? Can liability be limited? How can this be done? A lawyer should not only understand their client's goals but also the client's counterpart's goals and limits.

Without a thorough understanding of the business deal, a lawyer cannot draft the agreement.

For teaching negotiation and contract drafting to students, we can use the following 3-step approach:

1. Ask the students to choose an everyday product or service to sell: (i) a product, for instance: a set of books, furniture, a bicycle, a car, (ii) a service, for instance: guitar classes, mathematics or French lessons, and to negotiate the sale of this product or service.

It is important that the students choose an everyday, straightforward product or service they know well[7].

2. Ask the students to list different types of commercial contracts for the sale of goods or services (for instance: sale of goods, services agreement, share purchase agreement) and to determine under which category of contract the sale of their product or service falls.

3. Give the students access to a corpus of signed commercial contracts for the sale of goods and services. Ask the students to identify in the signed contracts the several aspects the parties to the contracts have negotiated.

To better understand each stage of the activity, here is a detailed description of the 3-step exercise:

Exercise I: Choose an everyday product to sell

The suggested time for this exercise is 45 minutes.

Divide the class in groups of 4 students. In each group there is a seller, a buyer, and two lawyers. One lawyer assists the buyer, the other lawyer assists the seller.

Ask the students to choose an everyday product or service they would like to sell or buy. At the end of several rounds of questioning and discussion, both parties should have a thorough understanding of the

[7] T. L. STARK, *Thinking like a lawyer – to come to an agreement,* 2004, p. 223.

product or service, the state it is in or the conditions under which it will be sold, at what price, payment terms (instalments or one payment), and the delivery place and terms. Parties should have also discussed the risks of the deal, who bears these risks, and whether it is possible to limit the risks. Is it possible to put an end to this agreement? If so, how?

The exercise of negotiating the selling and buying of an everyday product will show the students that it is important to cover all the aspects of the deal and to be very clear about what you want and under which terms and conditions.

Exercise II: Identify types of commercial sale and purchase contracts

The suggested time for this exercise is 30 minutes.

Ask the students to brainstorm and come up with as many types of sale and purchase contracts as they can think of. The most probable answers are: sale of goods, supply of services, sale of shares of a company, sale of a building or land. Ask them which type of contract their sale of product or service would fit into.

The students should now have a good understanding of the complexity and difficulty of negotiations of goods or services. They can now understand that to negotiate well and reach your business objectives, you have to know what your priorities are, what are the important aspects of the deal, which aspects are less important and on which points you can lower your requirements.

It might take several rounds of questioning and discussions before the seller and the buyer agree on all aspects of the deal.

The seller and the buyer now have a business deal which reflects each party's objectives. However, they do not yet have a written contract or an agreement[8].

It is the lawyers' job to write the facts of the deal into a proper sale and purchase contract or agreement, with specific clauses and contract concepts. It is in the parties' interests to draft the agreement as clearly as possible, reflecting precisely the parties' negotiations. Clear and precise wording will avoid misunderstandings, different interpretations of the contract, and possible litigation.

All this can be a bit vague and theoretical for students. They can easily underestimate the complexity and difficulty of the negotiation and drafting process. If you would like them to see how the terms of the negotiations are worded in commercial sale and purchase contracts and agreements, you can compile a corpus of signed sale and purchase agreements and let your students work with these "real world" contracts.

Exercise III : Give access to a corpus of signed sale and purchase agreements – ask the students to identify the terms of the negotiations in the sale and purchase agreements.

The suggested time for this exercise depends on the length and complexity of the corpus - probably between 45 minutes and 1h30.

Give the students access to a corpus of signed commercial agreements of different types of goods and services and give them the following tasks:

- identify the different types of agreements in the corpus;
- explain what the parties have negotiated regarding the product, the price, and the delivery terms;

[8] In UK and US contract negotiations it is common for the business deal to be recorded in heads of terms which are then forwarded to a lawyer to record in a written contract.

- more advanced task will be finding an indemnity clause and explaining why the parties have included this.

Identify different types of contracts

When we look at our corpus, we can identify several types of contracts, for instance:

- Sale of goods agreement:
  - Equinox Neutraceuticals and Stacked Digital LLC;
  - Semiconductor purchase agreement – Motorola inc and Freescale Conductor Inc.
- Sale of goods and services agreement:
  - Standard purchase agreement between Tekelec and Arbinet Thexchange Inc.;
  - General purchase agreement Egenera Inc and Goldman, Sachs and Co.
- Share purchase agreement:
  - ValueAct Capital Master Fund LP and Valeant Pharmaceuticals International Inc.;
  - Galliford Tly PLC, Goldfinch Ltd and Bovis Homes Group Plc.;
  - Agreement for the sale and purchase of Sky Plc.

From looking at a corpus of signed sale and purchase contracts, students can understand that it is important for the parties to have a thorough understanding of the business deal and to negotiate your business deal in detail so that each party's role, goal, rights and obligations are clearly reflected in the contract.

We give you below some examples from our corpus where the students can see that the terms of the negotiations are reflected in the wording of the contract or agreement.

Some clauses are short and drafted in a straightforward language. Other clauses are lengthy with a detailed description of a procedure or process to follow.

The example clauses we use below for that purpose are:

- A contract clause defining the product which is the object of the sale and purchase agreement;
- A contract clause explaining the delivery terms of the product or service;
- A contract clause defining the conditions and payment of an indemnity.

Two examples of contract clauses defining the product

1). In the Equinox Neutraceuticals and Stacked Digital LLC agreement from our corpus the definition of the product is straightforward: the objects clause of the agreement reads as follows:

(Example 3)Sale of Goods

1. The Seller will sell, transfer and deliver to the Purchaser based on individual future orders the following goods (the 'Goods'):

2. Nutraceutical supplements.

2). In the ValueAct Capital Master Fund LP and Valeant Pharmaceuticals International Inc agreement from our corpus the definition of the goods to be sold, defined as *Purchased Securities and any and all rights and benefits incident to the ownership thereof,* and the Purchase price are drafted in the same clause as they are

linked and the Purchased Securities cannot be identified without a price definition mechanism. We can imagine that the price definition mechanism is the result of a negotiation between seller and buyer.

(Example 4) 1.1 Subject to the terms and conditions of this Agreement, at the Closing (as defined below), the Seller shall sell, convey, assign and deliver to the Company, and the Company shall purchase from the Seller, the Purchased Securities and any and all rights and benefits incident to the ownership thereof, at the per share amount equal to the Purchase Price (as defined below). The number of shares of the Purchased Securities shall be determined by dividing (a) $275,000,000 (the "Gross Amount") by (b) the per share price equal to 94.23% of the 20-day average closing price of the Common Shares on the New York Stock Exchange for the 20 consecutive trading days up to and including February 24, 2011 (the "Purchase Price").

A contract clause explaining the delivery terms of the product or service

In the Semiconductor purchase agreement – Motorola Inc and Freescale Conductor Inc from our corpus the delivery clause reads as follows:

(Example 5) 3.4 Delivery. Freescale will use commercially reasonable efforts to deliver Products pursuant to a mutually agreeable schedule. Notwithstanding anything to the contrary in this Agreement, if Freescale is required to allocate Product under 2-615 of the Uniform Commercial Code, Freescale may adopt an equitable plan of allocation, taking into consideration the percentage of volume purchased by Motorola for specific Products affected by the plan, and adjust delivery schedules accordingly. Except as otherwise expressly provided, Motorola will not be entitled to any price reduction or other remedy under this Agreement or otherwise as a result of any plan of allocation or adjusted delivery schedule adopted by Freescale as a result of such Product allocation.

It is clear from the delivery clause that this part of the business deal has been negotiated in detail.

The wording of the clause is rather complex. The words *reasonable efforts, mutually agreed schedule and an equitable plan of allocation* show that parties made an effort to reflect the complexity of the delivery of the product respecting each other's requirements and constraints:

- *Freescale will use commercially reasonable efforts to deliver the products;*
- *The delivery follows a mutually agreed schedule;*
- *Delivery schedules can be adjusted according to an equitable plan of allocation.*

A contract clause defining the conditions and payment of an indemnity

Black's Law Dictionary defines an indemnity as 'A duty to make good any loss, damage, or liability incurred by another'. By reading the indemnity clause in the Standard purchase agreement between Tekelec and Arbinet Thexchange, Inc., from our corpus (clause copied below) we understand that the parties want to be very careful about liability and which party may indemnify the other party and under which circumstances. The indemnity clause takes almost an entire page and sets out the several steps of the indemnity process. The clause is drafted in detailed, nuanced language. For instance:

- The words "promptly" and "first" in the following sentence:

(Example 6) Buyer shall notify TEKELEC in writing of any such suit or proceeding promptly upon Buyer's first learning of such suit or proceeding.

- The words « sole » « the right to settle ….on any terms ….deems desirable »

(Example 7) TEKELEC shall have sole control over any such suit or proceeding, including, without limitation, the right to settle on behalf of Buyer on any terms TEKELEC deems desirable in the sole exercise of its discretion.

Indemnity clause in full:

(Example 8) 10. INDEMNITY. Subject to Buyer's fulfillment of all Its obligations under this Agreement, TEKELEC will defend any suit or proceeding brought against Buyer insofar as such suit or proceeding shall be based upon a claim that the unmodified Software owned by TEKELEC infringes any United States patent or copyright (a U.S. Proprietary Right). Buyer shall notify TEKELEC in writing of any such suit or proceeding promptly upon Buyer's first learning of such suit or proceeding, and shall provide TEKELEC at no cost with such assistance and cooperation as TEKELEC may reasonably request in the defense thereof. TEKELEC shall have sole control over any such suit or proceeding, including, without limitation, the right to settle on behalf of Buyer on any terms TEKELEC deems desirable in the sole exercise of its discretion. Subject to Buyer's fulfillment of its obligations under this Section 10, TEKELEC shall pay all damages and costs finally awarded against Buyer (or payable by Buyer pursuant to a settlement agreement) in connection with any such suit or proceeding, provided, however, that TEKELEC's obligations to pay such damages and costs on behalf of Buyer shall not exceed the amounts paid by Buyer hereunder for such Equipment or Software.

TEKELEC shall not enter into any settlement agreement pursuant to this Section 10 in excess of such amount without the prior consent of Buyer, which approval will not be unreasonably withheld. In the event that the Equipment or such Software becomes, or in TEKELEC's opinion is likely to become, the subject of a claim of infringement of a U.S. Proprietary Right, Buyer shall, upon receipt of written instructions from TEKELEC, cease to use such Equipment or Software and TEKELEC may at its option (i) modify the infringing Equipment or Software so that the use thereof by Buyer ceases to be infringing; or (ii) procure for Buyer the right to continue using the Equipment or Software as permitted hereunder; or (iii) if, neither (i) nor (ii) is commercially reasonable, demand the return of all units of the Equipment or Software and upon receipt thereof, refund to Buyer the depreciated value of said units of such Equipment or Software, based on a five (5) year straight line depreciation, and this Agreement shall terminate with respect to such Equipment or Software.

TEKELEC shall have no liability to Buyer whatsoever for any loss or damage resulting from a claim of infringement or wrongful use of a U.S. Proprietary Right based upon and arising from (i) TEKELEC's compliance with Buyer's designs, specifications or instructions, (ii) the use of the Equipment or Software in combination with any equipment, products, software or data not manufactured, designed or assembled by TEKELEC, or (iii) any unauthorized alteration or modification of any Equipment or Software. The parties both agree to indemnify and hold harmless each other against any suit, claim or proceeding brought against the other party for direct damages that result from death, bodily injury or damage to personal, tangible personal property, to the extent the damages are proven to be the result of the indemnifying party's actions or inactions.

It is clear from the examples above that "translating" the business deal into a legal document, the written contract, is a complex task which requires several skills. The process requires from the lawyer a thorough understanding of the business deal and of the legal concepts to give effect to that deal, and a fine mastering of the English language, whether the contract or agreement is written in Plain English or legalese.

4. Contract Content

When it comes to transposing the facts of the deal into a formal contract or agreement, lawyers rarely start with a blank sheet of paper. Instead they will usually look for a template of a similar type of contract to the one they wish to draft. One of the advantages of this is that it saves time: a lawyer does not have to start from scratch but can simply adapt the template to their client's deal. But a lawyer needs to be careful with this approach. They need to check that the content and language of the template contract accurately reflect what their client has agreed. And they should avoid a copy-paste approach of mixing content from different contracts since this could lead to inconsistencies.

One way to start a course on contract drafting is by looking at some example contracts with students, to help them understand how the content of an English-language commercial contract is usually organised.

Students from civil law jurisdictions might find English-language contracts overwhelming because they are often very long:

> One well-known practical matter in relation to contracts in the common law, and in particular in relation to negotiated commercial contracts, is the custom of drafting lengthy, detailed documents.[9]

But while UK and US commercial contracts might be long, they usually follow a similar structure. Being familiar with this structure will help students navigate their way around these contracts and understand how the component parts of a contract can be organised.

A study of our corpus shows that UK and US commercial contracts contain the following parts. As a preliminary exercise, we can ask students to try to place these parts in the order that they appear in a contract (see **Exercise IV**)[10].

Exercise IV: The parts of a contract

The suggested time for this exercise, including discussion of the different parts of the example contracts, is 45 minutes, although it could take longer, depending on the number of example contracts used.

Give students - on a slide or on pieces of paper - the following **parts of a contract** and ask them to place these parts in the order that they would appear in a contract. In other words, ask students which part would

[9] J. CARTWRIGHT, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, 2016, p. 71. Cartwright explains that a lawyer from a civil law system 'may draft a much shorter contract, saying that he need not include in the document all the details of the terms which [their civil] code will necessarily import into a contract of this kind', J. Cartwright, *op. cit.*, p. 217.

[10] A similar, alternative exercise, which includes a listening activity, can be found in Chapter 8: Contract drafting and review in N. Costello and L. Kulbicki, *Practical English Language Skills for Lawyers: Improving Your Legal English*, 2023.

come first in the contract, which part would come second, and so on (allow 5 minutes for this preliminary task)[11].

Parts of a contract

SIGNATURE BLOCKS	APPENDICES	DEFINITIONS
RECITALS - background to the contract	**INTRODUCTORY PARAGRAPH** - name of the contract, date of the contract, names and addresses of the parties	**OTHER CORE PROVISIONS** - other terms of the contract. For example: other obligations, warranties, termination.
BOILERPLATE - also called 'miscellaneous provisions'	**MAIN PROVISIONS** - the most important terms of the contract, for example: the obligation to pay the price.	**WORDS OF AGREEMENT** - words to show that what follows are the terms that the parties have agreed.

Next, ask students to identify the parts of a contract, and their order, in some example contracts (for example, the contracts in our corpus). From a study of our corpus we can see that the following order is usual[12]:

1. An introductory paragraph

All of the contracts in our corpus contain an introductory paragraph[13] which in most cases includes the name of the contract (for example, 'Semiconductor purchase agreement'), the date of the contract, and the names and addresses of the parties to the contract.

2. Recitals

The recitals set out the background to the contract. They are not strictly necessary but can help to explain why the parties have entered into the contract. Most of the contracts in our corpus have recitals and these are laid out in brief, lettered (A, B, C etc) paragraphs.

3. Words of agreement

The words of agreement make it clear that what follows are the terms that the parties have agreed. Some of the contracts in our corpus contain the simple sentence: 'It is agreed'. Two of the contracts use a sub-heading 'Agreement'.

4. Definitions

All of the contracts in our corpus relate to sales and purchases, and they all include definitions of the items being sold and purchased. Students could compare different ways of defining terms. For example:

(Example 9) "Products." The term "Products" shall mean those TEKELEC product[s] listed in the Quotation.'

[11] Some of the parts include additional explanation to help the students. This activity works well when students work together in small groups.
[12] See T. L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do*, 2013 and C.M. Adams, P.K. Cramer, *Drafting Contracts in Legal English*, 2013 for more detailed explanations of the different parts of a contract.
[13] Sometimes called the 'preamble' - see T. L. Stark, *op. cit.*

(Example 10) Freescale will sell to Motorola, and Motorola will buy from Freescale hardware, software, or a combination of hardware and software (collectively "Products").

In these examples, we see that there is a definition of 'Products', to avoid having to repeat throughout the contract a more lengthy description of the items being sold[14]. It is interesting that half of the contracts in our corpus contain definitions in a separate clause, like the first example here[15], and the other half give definitions in context, like in the second example. We could ask students which of these they find easier to read.

From a drafting perspective, it is also important to notice that a defined term has a capital letter (in this example: **P**roducts). Wherever the word 'Products' is written with a capital letter in the contract, it will have this defined meaning. However, the word 'products' with a lower case letter will be presumed to have its 'ordinary' meaning[16]

5. Main provisions and 6. Other core provisions

The rest of the contract contains the parties' expressly agreed terms. These start with what we could call the 'main provisions' – the most important terms of the contract - and are followed by 'other core provisions'[17]. Some lawyers refer to these parts of a contract together as the 'main body' of the contract[18].

The contracts in our corpus relate to sales and purchases, and we can see that the 'main provisions' are the clauses imposing obligations on the sellers to sell and on the buyers to buy (and pay the purchase price). An example of this is Example 4 above.

After the main provisions, the contracts in our corpus contain various other core provisions. There is no particular pattern in the content or order of the clauses, although most of the contracts have clauses relating to warranties, limitation of liability, and confidentiality. An indemnity, such as that described above in Example 8 would also be contained in the other core provisions.

7. Boilerplate

Boilerplate refers to the general terms found at the end of a contract, before the signature blocks. In our corpus, some of the contracts include these in a separate clause titled 'General provisions', or 'Miscellaneous provisions'. Lawyers often refer to these as being 'standard' clauses: The Legal Information Institute of Cornell Law School[19] defines 'boilerplate' as '*a colloquial term used to describe stock language in a legal*

[14] See T. L. STARK, *op. cit.*, for other reasons why we might use definitions in a contract.
[15] Some contracts, although none in our corpus, include definitions in a separate appendix at the end of the contract.
[16] Cambridge Dictionary defines a product as '*something that is made to be sold, usually something that is produced by an industrial process or, less commonly, something that is grown or obtained through farming'* https://dictionary.cambridge.org/dictionary/english/product. In the case of GB Building Solutions Limited (in administration) v SFS Fire Services Limited (t/a Central Fire Protection) [2017] EWHC 1289 (TCC), the court agreed with the Claimant that Practical Completion had a different meaning from practical completion. '*The claimant's fundamental argument is that there is no reason to treat the definition of "Practical Completion", as a capitalised phrase, as applying to clause 6.1, under which the definition of "Terminal Date" – which is itself another defined phrase – is defined as the date of practical completion (a non-capitalised phrase) of the subcontract as determined in accordance with clause 2.20.*'
[17] 'Main provisions' and 'other core provisions' are not technical or legal expressions. Other writers might use different terminology.
[18] The technical term for the parts of the contract which come after the words of agreement are the 'operative provisions'.
[19] https://www.law.cornell.edu/wex/boilerplate

document that appears in all instruments of that type; general, standardized language in a legal instrument'. However, our corpus shows that there is no 'standard' list of boilerplate clauses and these are not written in 'standardised' language. The most common boilerplate clauses in our corpus relate to entire agreement, governing law, severability, assignment, and variation.

8. Signature blocks

The precise requirements for signing a contract will depend on the jurisdiction in which a contract is made. All of the contracts in our corpus contain signature blocks at the end of the contract (although followed in some cases by appendices - see below). And in most cases the signature blocks are preceded by a sentence - called a 'testimonium clause' – beginning 'In witness whereof…'.

9. Appendices

To make a contract easier to read, some information can be moved to a separate place at the end of the contract. Most of the contracts in our corpus contain this and in most cases it comes after the signature blocks. However, there seems to be no consistency in how to label these parts of an English-language contract. Students could be asked to compare the language used in the contracts in our corpus. They will find the words: 'Attachment', 'Appendix', 'Addendum', and 'Schedule' ('Schedule being more common in the UK contracts)[20].

After this preliminary exercise, students should have a better understanding of the typical structure of an English-language commercial contract and the types of provisions that it might contain[21].

Being familiar with the structure of a contract can provide a framework for the content of a contract but a lawyer still needs to draft specific provisions to reflect their client's own deal[22]. So how can we transform the business deal, as discussed above in the third part of this paper , into contract clauses?

Tina Stark refers to this process as '*translating the business deal into contract concepts*'[23] . Her method involves taking each part of a deal and translating it into one of seven different contract concepts: *Representations, Warranties, Covenants, Rights, Conditions, Discretionary authority, Declarations*.

[20] Mark Anderson states "*Sometimes the Schedules are called Annexes, Annexures, Appendices, Attachments or other names. Some drafters make a distinction between Schedules (which set out provisions affecting the parties' rights and obligations under the present agreement); and attachments (which are not part of the present agreement but have been included for some good reasons, e.g. to show the format of a licence which the parties will sign if certain conditions are met). This is a matter of personal preference, the important point being to identify clearly within the main part of the agreement the status of any documents attached to the main agreement (i.e. whether the provisions in such documents are to form part of the agreement).*" M. ANDERSON, V. WORONER, *Drafting and Negotiating Commercial Contracts*, p. 57.

[21] This is the typical structure of an English-language commercial contract but it is not the only way to organise the content of a contract. For example, the ICC Model International Sale Contract contains a part A: Specific Conditions (terms specific to that deal) and a part B: General Conditions (see https://iccwbo.org/business-solutions/model-contracts-clauses/icc-model-international-sale-contract/). And in her book, '*Secrets of Productive Contracts: How to think digitally and write paperless contracts for a faster future*' Checklist Legal, 2017, Verity White proposes a 'Reverse Sandwich Contract' which contains a key details table at the front of the contract.

[22] It is a fact that many UK and US commercial contracts are long, but we are not suggesting that long is better. We agree with Alex Hamilton that "*Contracts should be short, clear, reasonable, and relevant*" A. Hamilton, 'GenAI and commercial contracting: what's the point?', November 2023, https://www.radiantlaw.com/resources/genai-and-commercial-contracting-whats-the-point.

[23] T. L. STARK, *op. cit*. p. 10.

Cynthia Adams and Peter Cramer, in their book, '*Drafting Contracts in Legal English*'[24], follow a similar approach:

> As a contract drafter, you will decide how each agreed term will be expressed as a contract provision.

They use eight 'categories of contract provisions': Obligations and corresponding rights, discretionary powers, procedural statements, conditions, declarations, express warranties, performatives, exceptions.

Essentially, these methods involve a lawyer thinking about the purpose behind their drafting. For example, taking a few of these concepts[25], a lawyer can ask: is the purpose to impose an **obligation** on one of the parties to the contract, for which remedies will be available for breach? Is the intention to give a party a **discretion,** a choice whether or not to do something? Is the purpose simply to record something that the parties have agreed, in other words a **statement of fact**?

Exercise V: identifying contract concepts

The suggested time for this exercise is 10 minutes, although it could take longer if more examples are used.

Ask students to look at some contract clauses and identify different types of concepts which are being used. Teachers could use these two examples cited earlier in this paper :

(Example 11) Subject to the terms and conditions of this Agreement, at the Closing (as defined below), the Seller shall sell, convey, assign and deliver to the Company, and the Company shall purchase from the Seller, the Purchased Securities and any and all rights and benefits incident to the ownership thereof, at the per share amount equal to the Purchase Price (as defined below). The number of shares of the Purchased Securities shall be determined by dividing (a) $275,000,000 (the "Gross Amount") by (b) the per share price equal to 94.23% of the 20-day average closing price of the Common Shares on the New York Stock Exchange for the 20 consecutive trading days up to and including February 24, 2011 (the "Purchase Price").

Here we can see that there are **obligations** on the Seller to sell and the Buyer to buy: 'the Seller shall sell, convey, assign and deliver to the Company, and the Company shall purchase from the Seller, the Purchased Securities'

The final part of this clause 'The number of shares of the Purchased Securities shall be determined…' is simply **a statement of fact** about how the number will be calculated.

(Example 12) Delivery. Freescale will use commercially reasonable efforts to deliver Products pursuant to a mutually agreeable schedule. Notwithstanding anything to the contrary in this Agreement, if Freescale is required to allocate Product under 2-615 of the Uniform Commercial Code, Freescale may adopt an equitable plan of allocation, taking into consideration the percentage of volume purchased by Motorola for specific Products affected by the plan, and adjust delivery schedules accordingly.

[24] C. ADAMS and P. CRAMER, *op. cit.*, p. 79.
[25] For more details on these different concepts and provisions, see T. L. STARK, *op. cit.*, and C.M. ADAMS and P.K. CRAMER, *op. cit*.

The first sentence of this clause, 'Freescale will use commercially reasonable efforts to deliver Products pursuant to a mutually agreeable schedule' imposes an **obligation** on Freescale to deliver the goods. The words 'Freescale may adopt an equitable plan of allocation' show that Freescale has a **discretion.** It has the choice to adopt an equitable plan of allocation and adjust the delivery schedules.[26]

Students could also be encouraged to think about the original negotiation exercise in Exercise I above . What was the purpose behind each part of their deal and how could they translate that into contract clauses, using different contract concepts?

Exercise VI: contract language.

The suggested time for this exercise is 5 minutes, although it could take longer if more examples are used.

Taking this one step further, students can start to examine the language which is used to express each type of contract concept. Using Examples 11 and 12 above:

In Example 11, **obligations** are expressed by the word 'shall': 'the Seller **shall** sell, convey, assign and deliver to the Company, and the Company **shall** purchase from the Seller, the Purchased Securities'[27]

However, in Example 12, the obligation is expressed by the word 'will': 'Freescale **will** use commercially reasonable efforts to deliver Products'[28].

Tina Stark prefers to use **shall** to impose an obligation on a party to a contract[29], but plain English advocates might prefer other words.[30] In the next part of this paper, we will examine some of these linguistic differences in more detail. Whichever word is chosen, contract drafters should be consistent throughout the contract in the language they use to express an obligation.

In Example 12, the **discretion** is expressed by the word 'may': 'Freescale **may** adopt an equitable plan of allocation'. Tina Stark also recommends using **may** to express a discretionary authority.[31]

The **statement of fact** in Example 11 uses the word 'shall': 'The number of shares of the Purchased Securities shall be determined…' This is confusing, as students can see that 'shall' is also used to express obligations. Tina Stark suggests using the **present tense** for statements of fact (she calls these 'declarations')[32]. For example: 'The number of shares of the Purchased Securities **is** to be determined…'.

By understanding the structure of an English-language contract, students will more easily be able to navigate the content of contract templates. But to draft a contract, students must then consider the purpose of each

[26] There is also a condition to that exercise of discretion. Freescale only has that discretion 'if Freescale is required to allocate Product under 2-615 of the Uniform Commercial Code…'
[27] In Example 11 , the statement of fact also uses the word 'shall'. See below and also see the next part of this paper where we discuss the use of modal verbs in contract drafting.
[28] We can also see that Freescale's obligation has been limited by the words '*use commercially reasonable efforts to'.* A detailed discussion of language used to qualify obligations in a contract is beyond the scope of this article.
[29] '*To obligate a party to perform, use **shall**'* T. L. STARK, *op. cit.*, p. 151.
[30] See for example Text 8.1, N. COSTELLO and L. KULBICKI, *op. cit.*, p. 136
[31] T. L. STARK, *op. cit.*, p. 174
[32] *Ibidem*, p. 178

part of their client's deal and use an appropriate type of contract concept and appropriate language to reflect this.

5. Jurilinguistic Aspects of Contract Drafting

For law students from the Université Paris Panthéon-Assas and Université Paris-Saclay, the juriste-linguiste programme course at ISIT Paris has become an obligatory part of their double degree in Law and Linguistics since 2021. This means that students have to do the course of legal translation, from French into English and vice versa. Previously only students who voluntarily chose the course attended the classes. Since 2021, it has been different. At the very beginning of the course, my colleagues and we must now respond to students questioning why a lawyer has to be a linguist. Would it not be more than enough to simply translate from one legal language to another? The same reaction comes from practising lawyers taking legal English classes. Surprisingly, the answer is the same for both groups of students: future and practising lawyers should master linguistic, more precisely jurilingistic, subtleties of legal drafting. It not only gives a deeper insight into the way in which a legal text should be written, but also a clearer understanding of what jurilinguistic frame should be adopted, depending on the legal environment in which the text will be treated as well as on its recipient.

For example, would it be preferable for a lawyer to apply the legalese or the Plain English Movement's style of drafting? Why must they use only the present simple and not the present continuous? Should they use the 'stigmatized' *shall* [33] or not? In which situations must they have recourse to different modals and how can they choose them in order to express obligations and permissions? What jurilingistic explanations should a lawyer provide to their manager or business partner who does not understand the difference between the use of *may* and *can* in legal text? The list could go on endlessly.

In the previous parts of this paper, we have analysed and described the teaching of identifying the business deal, negotiation process, and legal framework of the sale and purchase agreements from our corpus. This part will cover the main jurilingistic aspects that students should take into consideration when drafting such a contract or translating it into legal English.

Once the content of a contract has been determined, a jurilingisitic form should be chosen. In the second part of the paper, it has already been mentioned that a drafter has to deal with contracts written either in plain language or in legalese. In other words, this consists of selecting either the traditional style for drafting (i.e. the legalese style)[34] or the mode of writing legal documents in plain English (i.e. the Plain English Movement's style)[35]. This first choice is crucial as it determines the whole structure of a legal text: syntax, textual devices, modal verbs and expressions, terminology, etc.

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[33] There has been much discussion about use of *shall* in legal drafting. Those lawyers who prefer tradition style of legal writing keep using *shall* in legal texts. The proponents of plain language in legal writing insist on the fact that the use of *shall* is a relic of the past. According to them, *shall* should be avoided in legal drafting except for the cases in which *shall* occurs with a collective noun (such as the Company, the Buyer, the Board, etc.). Such collective nouns must have socio-physical capacity of acting and the obligation expressed by *shall* must imply 'have a duty to do something'. (R. FOLEY, *Going out in style? Shall in EU legal English*, in Law, Linguistics, 2001, p. 185; Ch. WILLIAMS, *Tradition and Change in Legal English*, in Linguistic insights : studies in language and communication, 2007; Kenneth Adams, Shall means Shall ?, personal blog https://www.adamsdrafting.com/shall-means-shall/

[34] Legalese informally refers to specialised terminology and phrasing used by legal drafters within legal documents. Legalese is notoriously difficult for the public to understand. Key features of classic legalese include long, wordy, complicated sentence structures, use of passive voice and Latin. Although there has been movement towards the use of plain or simple English, legalese persists in the legal field. Proponents of legalese hold that it allows for greater precision in legal writing (Cornell Law School, https://www.law.cornell.edu/wex/legalese).

[35] The plain English movement is the name given to the first effective effort to write legal documents, particularly those used by consumers, in a manner that can be understood, not just by the legal technicians who draft them, but by

At the beginning of the course of legal translation, we always describe the current situation regarding English speaking countries and European institutions advocating for either the Plain English Movement (PLM) or traditional legal drafting (legalese).

The situation in the Southern hemisphere is rather clear. Australia, New Zealand, and South Africa have manifested their intention to follow the PLM recommendations for a long time. It firstly concerns the efforts made by the proponents of PLM to call for the elimination of *shall* from legal texts[36]. One of the finest examples is the 1994 version of the Interim Constitution of South Africa, which was subsequently amended in 1997:

(Example 13) (11a) 1994: Every person **shall have** the right to life,

1997: Everyone **has** the right to…

(Example 14) (11b) 1994: Every person **shall have** the right to freedom and security of the person, which **shall include** the right not to be detained without trial,

1997: Everyone **has** the right to freedom and security of the person, which **includes** the right (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial…[37]

Changes to legal texts, initiated by the PLM, imply not only the elimination of *shall* but also include reducing the use of the passive, nominalization, and sentence length, as well as removing unnecessary words and expressions.[38]

By contrast, in the English versions of texts issued by international organizations, such as the European Union and the United Nations, one can see that these institutions appear to be conservative. They prefer to use the legalese style of legal drafting, and seem reluctant to follow the PLM recommendations as in the following example:

(Example 15) The European Parliament **shall be** composed of representatives of the Union's citizens. They **shall not** exceed seven hundred and fifty in number, plus the President. Representation of citizens **shall be** degressively proportional, with a minimum threshold of six members per Member State. No Member State **shall be** allocated more than ninety-six seats[39].

In the Northern hemisphere, the situation is ambiguous. In Canada and in the US (both adopters of the PLM principles), as well as in the UK, legal drafters have already made many efforts to integrate plain language into legal writing. However, there are those lawyers who still prefer traditional legal drafting in these three countries. Another interesting point is that there are legal texts which represent a mix of plain writing and legalese. This is confirmed by our corpus of UK and US agreements. For example, the US

the consumers who are bound by their terms. The followers of this movement insist on eliminating archaic and Latin expressions, removing all unnecessary words, reducing the use of the passive, nominalisation, and the use of *shall* to express obligations.

[36] Ch. WILLIAMS, *Is legal English "going European"? The case of the simple present, Verbal constructions in prescriptive texts*, 2013, pp.105–126.

[37] I. RICHARD, *L'évolution de l'emploi de shall, de must et du présent simple dans le discours juridique normative dans le cadre du Plain Language Movement*, 2006, p. 143.

[38] Ch. WILLIAMS, *Legal English and Plain English, an* introduction, 2004, pp. 111-124.

[39] Consolidated version of the Treaty on European Union TITLE III - PROVISIONS ON THE INSTITUTIONS, Article 14.2.

Standard Purchase Agreement of 2003 and the UK Agreement for the Sale and Purchase of Share Capital of Sky P of 2018 appear to employ more legalese as we can see the frequent occurrence of *shall*, lengthy phrases, passive forms and the use of connectors on *here-*, *there-*, and *where-*, such as *hereof, thereto, whereof,* etc. By contrast, in the US Semiconductor Purchase Agreement - Motorola Inc. and Freescale Semiconductor Inc. of 2004 and in the Assets Sale and Purchase Agreement of 2014, we can find all the typical features of the PLM style: less complex syntax, a clear balance between passive and active structures, the use of *shall* only in those provisions in which the obligation expressed by the modal verb implies 'have a duty to do something', absence of connectors on *here-*, *there-* and *where-*.

The UK Sale and Purchase Agreement of 2008 from our corpus is a notable example of an agreement drafted in the legalese style, but one can find some PLM flavour in the document. For instance, in the section in which the terms of the agreement are stated, it is written *Data Room Documents means* instead of the wording 'shall mean' which would be typical for legalese.

For students, such a short introduction serves as a road map to the distribution of the PLM and legalese in legal world. It also represents a guideline for the course that students are going to have. Moreover, we always tell our students that mastering both legal drafting styles can be an important advantage for them as a job applicant since it gives students unique expertise and transferrable skills.

As a practical activity **[Exercise VII]** enabling students to better understand the difference between PLM and legalese, we usually propose that, under supervision, students analyse extracts drafted on the basis of both styles (use of tenses, active and passive forms, use of modals, etc.) as in the following examples from our corpus:

(Example 16) The Parties may mutually establish commercially reasonable minimums for orders and deliveries under this Agreement. The minimum order size for Products sold in reels is one reel. The minimum order/minimum delivery will be in multiples of MPQ (Multiple Package Quantity) or one POQ (Preferred Order Quantity) (PLM style of writing)[40].

(Example 17) NOW, THEREFORE, in consideration of the premises and mutual benefits representations, warranties, conditions, covenants and agreements contained herein, the parties hereto hereby agree as set forth below (legalese style of writing)[41].

The suggested time for this exercise depends on the number of students but it should not exceed 20-25 minutes as it enables us to briefly test law students' knowledge of the difference between the two styles. In any case, their nodding acquaintance with these styles will be developed during the course since we always ask them to draft in English or translate different parts of a document, using both the Plain English style and legalese.

To help students get familiar with the difference between the two styles, we often do **Exercise VIII** in which we suggest that we rewrite together legalese provisions into PLM versions. The suggested time for Exercise VIII is about 25-30 min. We begin to work with simple cases from the introductory sections of contracts as in Example 17: Possible rewriting that can be elicited from students during the class is the following:

(Example 17)' ~~NOW, THEREFORE~~, ~~in consideration of the premises and mutual benefits representations, warranties, conditions, covenants and agreements contained herein~~, **In view of the above**, the parties **to this Agreement** ~~hereto hereby~~ agree **on the following** :~~as set forth below~~.

[40] Semiconductor Purchase Agreement - Motorola Inc. and Freescale Semiconductor Inc. (2004) from our corpus.
[41] Purchase Agreement - ValueAct Capital Master Fund LP and Valeant Pharmaceuticals International Inc. (Feb 24, 2011) from our corpus.

For homework, we usually ask students to find some typical extracts from agreements drafted in the PLM and legalese style. They also have to rewrite the PLM extracts into legalese contract provisions, and vice versa.

As mentioned above, this introduction becomes a guideline for considering topics during the courses from a PLM and legalese perspective, some of which we will describe below.

Terminology and Legal Expressions

In most cases, students associate the legalese style with the use of complex terms and Latin expressions as in the following examples:

> (Example 18) On March 30, 2016, Mr. (C) was granted, before the Paris Court of First Instance, **an exequatur** of (), on the basis of which he had executed multiple attachment orders, all of them had been unsuccessful[42].
>
> (Example 19) They conclude that the French Court has jurisdiction under the provisions of Article 7 of the Brussels I bis Regulation, by arguing that the contract of August 27, 2019 is a **sui generis** (of its own kind) contract which cannot be considered as a sales contract or a service contract[43].
>
> (Example 20) Within the framework thus defined, the arbitral tribunal considered, in its Procedural Order 26, that neither the ICC Rules of Arbitration nor the **lex arbitrii** (law of arbitration) precluded the taking of evidence by virtual means, noting in this respect that[44]…

We explain to students that PLM principles encourage drafters to use clear and transparent terms or, at least, provide descriptions of very specific terms like *exequatur* in Example 18, which can be defined as *an order for enforcement of the arbitral award*. The same advice concerns Latinisms in legal writing: drafters are recommended not to use them at all or to provide an English description in brackets, like *sui generis* (of its own kind) in Example 19 and *lex arbitrii* (the law of the place of arbitration) in Example 20.

As a practical activity **[Exercise IX]**, we ask students to study extracts with non-transparent terms and Latin expressions, and provide their explanations in brackets. The suggested time for this exercise is about 20-25 minutes and can be done in pairs or as teamwork with peer checking and subsequent open class feedback.

Syntax

If students are asked to draft legal documents, using the traditional style, they need to master complex syntax. One of the main textual devices here is the comma, which is an indispensable textual navigator for

[42] Decision RG 19-11413 of 12 July 2021 rendered by International Commercial Chamber at the Court of Appeal of Paris.
[43] Decision RG 22/20498 of 16 May 2023 rendered by International Commercial Chamber at the Court of Appeal of Paris.
[44] Decision RG 21-10727 of 14 February 2023 rendered by International Commercial Chamber at the Court of Appeal of Paris.

readers in lengthy legal narration. In this type of discourse, commas are used to effectively separate and match information units, ensuring coherence and cohesion in the text. Apart from classical punctuation rules related to the use of comma[45], there are the cases in which a comma performs a coordinating function, as in the following example:

> (Example 21) Buyer agrees that it will not at any time during or after the term of this Agreement assert or claim any interest in**,** or do anything which may adversely affect the validity or enforceability of**,** any trademark**,** trade name**,** copyright or logo belonging to or licensed to TEKELEC (including any act**,** or assistance to any act**,** which may infringe or lead to the infringement of any proprietary right in the Software, Software Copies or Related Materials).

The coordinating role of the comma in this extract will become even more evident if we leave out the brackets in [*including any act, or assistance to any act, which may infringe or lead to the infringement of any proprietary right in the Software, Software Copies or Related Materials]*, and add another comma before *including*.

In this regard, we should recall the nominative absolute participle construction, which is very typical for legalese syntax. It must always be separated with a comma from a main clause, as in the following example:

> (Example 22) All returned Equipment must be shipped to the facility specified by the TAC, freight prepaid, in the original carton or equivalent**,** with shipping label clearly specifying the assigned RMA number.

In Example 22, a comma helps not only to add an important and additional information unit (*freight prepaid*) but also distinguish an absolute participle construction 'with shipping label clearly specifying the assigned RMA number' from the main clause. Hence, readers understand that *all returned Equipment* must be shipped and *freight* must be prepaid before the shipment of the Equipment. In addition, *shipping label* must clearly specifies the assigned RMA number. If we leave out a comma before *with shipping*, the provision may be read as a cumulative list of items that should be shipped (all returned Equipment + label).

For comma usage in complex syntax structures, **[as Exercise X]**, we usually share with students lengthy legal provisions from contracts to which they have to correctly add commas. Alternatively, students should add additional information units into contract provisions so that the text is coherent and easy to follow. The suggested time for this exercise is about 15-20 minutes. It can be done individually, in pairs or as teamwork with peer checking and subsequent open class feedback.

Legalese syntax also reveals the frequent use of discursive connectors based on *here-*, *there, where-* as in the following examples:

> (Example 23) NOW, THEREFORE, in consideration of the premises and mutual benefits representations, warranties, conditions, covenants and agreements contained **herein**, the parties **hereto hereby** agree as set forth below.[46.]

[45] For example, a comma after linking words (In addition,…etc.) or after introducing information units (During the financial period, …).

[46] Purchase Agreement - ValueAct Capital Master Fund LP and Valeant Pharmaceuticals International Inc. (Feb 24, 2011) from our corpus.

(Example 24) IN WITNESS **whereof** this deed has been executed and delivered on the date stated at the beginning of it.[47]

(Example 25) "Shareholders' Agreement" means the shareholders agreement in respect of the Company dated 26 May 2005 made between The Company (1), the Initial Senior Lender Shareholders (as defined **therein**) (2), The Tier 1 Managers (as defined **therein**) (3), Precis (2517) Limited (4) and The ICG and Graphite Shareholders (as defined **therein**) (5).[48]

Advocates for legalese insist on the fact that connectors are not only a legal custom but also, and above all, a strong anaphoric[49] device. As a rule, most students, including native speakers, copy and paste these connectors without understanding their formation and exact principles of their use in legal text.

In order to make students feel comfortable using the connectors, we offer them some theoretical information based on my study of the connectors as well as practical exercises. The theoretical knowledge includes learning the linguistic concept of deixis[50], textual contrast between 'this/these' and 'that/those'. We also mention the discursive correlation between 'this/these', 'that/those', and the adverbs 'here' and 'there' in relation to the connectors on *here-* and *there-* accordingly. In the case of the connectors based on *where-*, the link between 'where' and 'which' should be studied during the classes[51].

The practical part includes **Exercise XI** in which students decode the connectors used in legal provisions in Examples 23, 24, 25, they should rewrite *here**in*** as ***in** this Agreement; here**to*** as ***to** this Agreement;* and *here**by*** as ***by** this Agreement*; *in witness where**of*** as *in witness **of** which*; *there**in*** as ***in** the shareholder agreement*. They also have to transform different word combinations into respective connectors based on *here-*, *there-*, and *where-*.

The suggested time for this exercise is about 25-30 minutes. Students should deal with a large number of extracts containing various connectors based on here-, there- and where-, in order to fully understand the differences between the connectors and their configurations with differents prepositions.

Not surprisingly, proponents of PLM insist on clear and light syntax. They propose dividing lengthy legal provisions into shorter phrases as in the following example:

(Example 26) 6. The Goods will be delivered to the Purchaser at Molding Box 2625 South 600 West Salt Lake City, UT 84115. The method of shipment will be within the discretion of the Purchaser. However, the Seller will only be responsible for the lesser of truck fright or rail freight to the Purchaser.

[47] Agreement for the Sale and Purchase of Share Capital of Sky p, 2018 from our corpus.
[48] Share Purchase Agreement relating to the sale and purchase of the entire issued share capital of HLG HOLDINGS LIMITED, 2011 from our corpus.
[49] From a linguistic perspective, anaphora is the use of an expression whose interpretation depends upon another expression in context (i.e. its antecedent). For example, The Parties sign **this agreement** (=its antecedent) in French and English (=antecedent). **It** (=the anaphoric referring tem or an anaphor) must be made in 2 copies.
[50] In a physical world, deixis or a deictic centre represents a starting point (a person –*I*, time – *Now*, and place – *HERE*). In text, deictic centre refers to a group of words/expressions or a word/an expression that metaphorically *implies I, NOW*, and *HERE* as opposed to *YOU, HE, SHE, THEN*, and *THERE*. In a legal context, the deictic centre implies the idea of 'this document', which can be 'this agreement', 'this letter', etc.
[51] A. Osminkin, *Pronominal Adverbs Based on Here-, There-, and Where- as Textual Connectors in Legal Discourse*, 2020, pp. 57-85.

In order to be able to provide short and clear syntactical structures, students should have a good knowledge of linking words. They must also develop a strong sense of coherence, cohesion, as well as anaphora and cataphora[52]. In this regard, as **Exercise XII** students should first fill in gaps in sentences, taken from legal and business context, with linking words (*hence, therefore, however, nevertheless, whereas, when, while*, etc.). This controlled practice enables us to check that students understand the meanings of linking words. Then in **Exercise XIII**, we share with students long legalese sentences that they have to split up and rewrite into shorter and clearer versions. The suggested time for Exercise XII and Exercise XIII is about 30-35 minutes. In addition, we would recommend doing them one after another, which enables students to better understand in practice the differences in meanings of linking words.

Modals

In the third part of this paper, it has already been mentioned that *shall* traditionally expresses obligations though the proponents of PLM prefer to use other modal markers. Indeed, legalese is associated with the extensive use of *shall*, which is sometimes unnecessary and seems redundant in constructions like 'shall be obliged to' or 'shall mean', or 'shall have the right to'…

On the contrary, proponents of PLM claim that *shall* should be banned and replaced with the present simple, or at least, with *must* and *will*.

In our opinion, irrespective of either style, the problem lies elsewhere. On the one hand, the excessive use of one or another form to the detriment of other modals impoverishes legal English; moreover, it causes the disappearance of shades of meanings. On the other hand, both approaches, PLM and legalese, remain silent on how exactly *shall*, *will*, *must*, and the present simple must be used in legal writing. Regarding the expression of permission, nothing is specifically said about whether it is possible to substitute *can* for *may* in its deontic[53] meaning. This leads to situations in which readers may wonder whether the present simple, *will*, *shall*, etc. in the same document imply the same or different obligations. Alternatively, the use of two different modals which seem, at first glance, to convey the same meaning (e.g. dynamic possibility) can also puzzle the recipient of the text as in the following example:

> (Example 27) 'Know-How' means all information and data reasonably useful for the development, process development, regulatory approval, manufacture, use, formulation or sale of Compound in the Field which (i) is in the possession of ELI LILLY as of the November 7, 1997 or is created by ELI LILLY after the November 7, 1997, (ii) ELI LILLY **can provide** using reasonable efforts and (iii) ELI LILLY is free to provide without obligation to any third party. Such Know-How **may include** information that is secret, whether or not patentable, relating to materials, methods […].

In this regard, we share the view of certain lawyers and jurilinguists[54] who claim that proponents of PLM and legalese could find a compromise and let all the flowers bloom. In other words, all modals, including the present simple, could be employed in legal writing, but in a logical and reasonable manner. For example,

[52] From a linguistic perspective, cataphora represents the use of a word/an expression that refers to and replace other words used later in a text. For example, *if **they** (=cataphor) agree on the terms and conditions of this Agreement, **the Buyer and Seller** (=later expression) will sign it in 2 copies four days after…*

[53] The deontic modality (modals) expresses obligation/prescription and permission. From a linguistic perspective, such obligation/prescription, and permission represent external circumstances permitting or obliging the participant (usually, it is the subject of the sentence) to engage in the state of affairs (J. van der Auwera, V. Plungian, *Modality's semantic map*, 1998, p. 81).

[54] I. RICHARD, *op. cit.*, 2006, pp. 143-145 ; Ch. WILLIAMS, *op. cit.*, p. 120; KENNETH ADAMS, *op. cit.*

shall could only be used with dynamic verbs. [55] The obligation expressed by *shall* must clearly mean 'have a duty to do something' in combination with a particular type of subject. This subject must represent a collective noun having a socio-physical capacity to act such as *a company*, *a party*, *a board*, etc. Moreover, *shall* should not be employed in the constructions such as 'be obliged to' because *shall* looks redundant in 'shall be obliged to'. For the same reason, *may* should not be used in 'may be entitled to' or 'may have the right'. Other types of obligations could be shared between *must*, *will*, and the present simple. Likewise, *may* and *can* could be employed in a clear manner in order to express deontic permission, dynamic and epistemic possibility[56]. We also agree with the above-mentioned experts that *must* could be used to express conditions or mandatory obligations; *will* would work in orders, strong intentions imposed by law or in expressing legal predictions and eventualities; the present simple could express definitions, and descriptions. It could also be a contextual synonym of *shall* with dynamic verbs. In addition, the present simple could be employed to express general prescriptions. Here are some examples of the use of modals and the present simple described above, taken from our corpus:

(Example 28) The non-breaching party **must** provide such termination notice within 30 days after the expiration of the relevant cure period[57] (the use of must with 'after' implying a condition).

(Example 29) To appoint a proxy, the form of proxy and any power of attorney or other authority under which it is executed (or a duly certified copy of any such power or authority) **must** be either (a) sent to the Company's Registrar Computershare Investor Services PLC, The Pavilions, Bridgwater Road, Bristol BS99 6ZY […]. [58] (must implying a mandatory obligation).

(Example 30) The terms of this Agreement **will** continue in effect for any Order hereto that is outstanding at the time of termination of this Agreement or expiration of the Term. […] Subject to Buyer's fulfillment of all Its obligations under this Agreement, TEKELEC **will** defend any suit or proceeding brought against Buyer insofar as such suit or proceeding shall be based upon[59] (Will implying legal prediction and a strong order).

(Example 31) "Completion Date" **means** the date of this agreement. […] Each Management Seller in respect of himself only hereby **warrants** to the Buyer as at the date of this agreement in the terms of the Title Warranties.[60] (The present simple expressing a definition and is used as a contextual synonym of SHALL implying that each Management Seller has a duty to warrant to the Buyer…).

[55] Dynamic verbs are often called action verbs. They describe constant change, activity or progress (sign, transfer, pay, etc.)

[56] In legal context, dynamic modality is mainly expressed by *may* and *can* referring to the ability, capacity or willingness of the participant to do something. Such participant can be an explicit subject of the sentence in active constructions such as in *The Parties **may/can sign** this Agreement in 3 copies*. Otherwise, the participant can be implied in passive constructions such as in *This Agreement **may/can be signed** in 3 copies*. Epistemic modality (possibility) in legal writing is very limited and mainly expressed by MAY either with simple or perfect infinitive (*may + have*) or with *will* as legal predictions. The function of epistemic modality is to make judgements about the possibility, etc. (F. R. Palmer, *Modality and the English Modals*, Longman, 1990, p.50.

[57] Semiconductor Purchase Agreement - Motorola Inc. and Freescale Semiconductor Inc. (2004) from our corpus.

[58] Sale and Purchase Agreement, 2019 from our corpus.

[59] Standard Purchase Agreement, 2003 from our corpus.

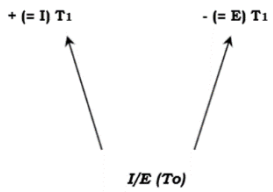
[60] Share Purchase Agreement relating to the sale and purchase of the entire issued share capital of HLG HOLDINGS LIMITED, 2011 from our corpus.

It is in this case, when dealing with modals, that linguistics can help for two reasons. First of all, linguistic terms and schemes/charts enable one to better understand subtleties of modals in a context, like the legal one, in which such modals are similar in meaning. Secondly, the simplified versions of linguistic terms and schemes/charts can make it possible to explain to a non-lawyer or a non-linguist the difference between modals where it is vitally important. For example, before signing an expensive sale and purchase agreement with partners, an accountant or a manager can ask the lawyer-linguist who drafted the document to explain to them the exact meanings of *shall, will, must, may, can*, etc. in the text.

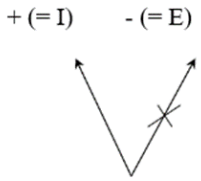
As for English linguistics, there are various linguistic theories in English speaking countries, especially in the US, and also in France. For my courses, as related to modals, Jennifer Coates' and Frank Palmer's[61] studies and some of the elements of the French *Théorie des opérations énonciatives* developed by Antoine Culioli[62] appear to be relevant. The main advantage of these studies is a number of ideas accompanied by schemes that can easily be adapted for teaching legal drafting. It is well known that a picture is sometimes worth a thousand words.

Without going into too much detail, we will provide below some schemes as illustrations of how it can be adapted and applied to the teaching process.

Figure 1 shows that for *shall* and *will* there is the initial point (*I/E*) and the moment of speaking (*To)* from which an obligation or interdiction (*shall not/will not*) expressed by the modals is projected into the future (*T1*). Both *shall* and *will* imply only the *+I* scenario, i.e. implementation of an obligation or an interdiction in the future. *-E* implies that there is no way that such obligation or interdiction will not be implemented[63]. Figure 1.1 shows that *shall* imposes the implementation of an obligation/an interdiction on the entity that does not enjoy any autonomy. In contrast to *shall, will* implies not only deontic force but also the volition of the entity that has to implement an obligation/an interdiction. For the manager or the accountant, it could be transformed into the following possible interpretation: **both *shall* and *will* have a strong prescriptive force though *will* also implies the willingness of the entity to act.**



SHALL and WILL



IE
MUST

[61] Jennifer Coates is a British linguist, professor of English Language and Linguistics at the University of Surrey Roehampton and author of the *Semantics of the Modal Auxiliaries* (1983); Frank Palmer was also a British linguist and author of *Modality and the English Modals* (1990).

[62] Antoine Culioli was a French linguist, professor of English Linguistics and author of the *Théorie des opérations énonciatives.*

[63] As a rule, it is not necessary for me to explain to students what +I and –E imply. However, to those students who are very curious, the following linguistic clarification can be provided: I means that an action expressed by a modal *(shall, will, must, may, can*, etc.) will be situated 'in the interior (I) of realisation', i.e. it will happen. E means that an action expressed by one of the modals will be situated 'in the exterior of realisation' (E), i.e. it will not happen.

Figure 1

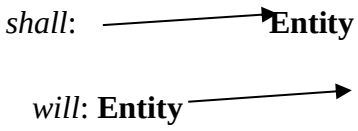


Figure 1.1.

Figure 2

Figure 2 shows that the use of *must* implies that *+I* scenario is prioritized. It means that an obligation or an interdiction (*must not*) has to be implemented. In contrast to *will* and *shall*, in the case of *must*, the *E* scenario, when an obligation/an interdiction may not be implemented, is discarded though it is not totally left out. In other words, *shall* and *will* appear to be 'stronger' than *must* according to the scheme.

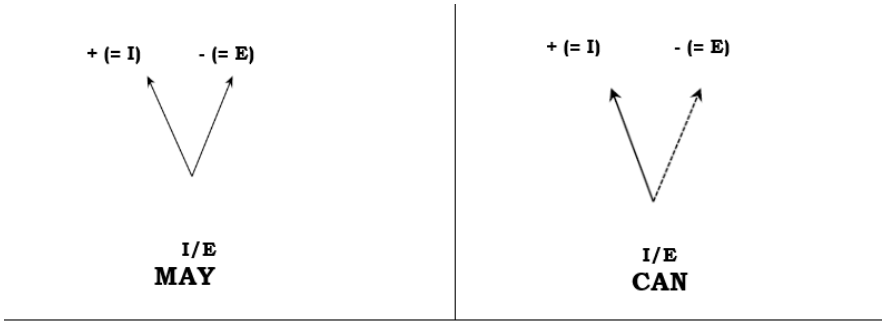


Figure 3

Using the same signs of representation, the main difference between *can* and *may* can be shown. Deontic, epistemic or dynamic *may* always implies a choice between possible *(+I)* or impossible (-E). For this reason, *may* is more hypothetical in all its meanings than *can* which cannot provide a genuine bifurcation as *may* does. With *can*, the 'impossible' scenario becomes less probable than with *may* as shown with a dotted line for *can*. With this scheme, it is easier to explain that *can* does not have epistemic possibility as it does not imply a pure bifurcation 'possible/impossible'. A number of linguists doubt that this modal can express a real permission[64]. For these reason, legal drafters should be careful, using the modal in legal writing. The linguists claim that *can* seems to have the only dynamic meaning (dynamic possibility) which is interchangeable with dynamic *may* (dynamic possibility). In this case, dynamic *may* will always be more hypothetical than *can* due to the *may*'s possible//impossible property.

In this regard, in Example 27 dynamic possibility expressed by *can in* 'ELI LILLY can provide' (80% of certainty) is closer to the present simple (ELI LILLY provides=100% of certainty) whereas *may* 'in Such Know-How may include' implies 60% of certainty and appears to be more hypothetical[65].

With Jennifer Coates' concept, it is easier to explain the cases in which the overlapping of meanings occurs. For example, *may* can be represented as a deontic centre (deontic permission = blue nucleus) because deontic permission is the primary meaning of *may* in legal discourse. There is a transition zone between the deontic centre and dynamic periphery (dynamic possibility=area around the blue nucleus). Next to it, there

[64] F. PALMER, *Modality and the English Modals*, 1990, p.72.

[65] We have suggested 60%, 80% and 100% of certainty simply as a conventional reference in order to show that the present simple implies the absolute degree of certainty. In this case, MAY is the most hypothetical whereas CAN is situated between the present simple and MAY.

is also the epistemic meaning of *may*. Therefore, depending on a context, some of the meanings of *may* can overlap. For example, there are legal provisions in which *may* can be interpreted either as a deontic *may* (permission) or as a dynamic *may* (possibility). Sometimes *may* can also be interpreted either epistemically or dynamically (the green zone of overlapping) as shown in the following scheme:

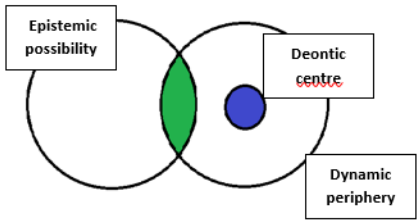


Figure 4

In her study, Jennifer Coates also shares a very effective set of paraphrases that could be used as a linguistic tool, in order to 'decode' modals to non-specialists. For example, the three meanings of *may* can be paraphrased in the following way:

Deontic *may*: *X is allowed to do…/ Y is allowed to be done*

Dynamic *may*: *It is possible for X to do…./ It is possible for Y to be done*

Epistemic *may*: *It is possible that X does/will do/did…*

These paraphrases can also help a lawyer-linguist explain to non-specialist how exactly the overlapping of meanings can be represented:

> (Example 32) […]the directors be generally and unconditionally authorised to exercise all the powers of the Company to allot the New Ordinary Shares, provided that: (1) the maximum aggregate nominal amount of relevant securities that **may be allotted** under this authority shall be the aggregate nominal amount of the said New Ordinary Shares referred to in paragraph 3.1 above; […].

Deontic *may*: the maximum aggregate nominal amount of relevant securities that **is allowed to be allotted** under this authority

Dynamic *may*: **it is possible for the maximum aggregate nominal amount** of relevant securities **to be allotted** under this authority.

In order to master all the aspects of the modals described above, as **Exercise XIV**, students have to draft contract provisions using different modals to express different obligations and have to explain their choice. Then, as **Exercise XV**, students must also interpret modals in sale and purchase agreements and contracts, using paraphrases. The suggested time for Exercise XIV and XV is about 45-50 minutes. Students need time to draft provisions and carefully think of their choice of modals with jurilinguistic analysis.

Tenses

Another important feature of legal drafting, irrespective of the legalese or PLM style, is the use of grammatical tenses. The temporal dimension of prescriptive texts is mainly represented by the present simple and the present perfect. It is also confirmed by our corpus as in the following examples:

> (Example 33) IN WITNESS WHEREOF, the parties hereto **have caused** this Agreement to be executed by their duly authorized representatives effective as of the Effective Date.

(Example 34) Motorola will furnish to Freescale a certificate certifying that the original and all copies of the Licensed Programs and derivative versions thereof, in whole or in part and in any form, **have been destroyed**[66].

(Example 35) Such service shall be deemed completed on delivery to such agent (whether or not it is forwarded to and received by the Seller) and shall be valid until such time as the Purchaser **has received** prior written notice that such agent has ceased to act as agent.

As a rule, the present perfect frequently occurs with the prepositions *until, provided that* or *after* as well as in conditional clauses after *if* and *unless* as in Example 35. This tense introduces a resulting condition, implying that one legal event or an action is or will be possible if such resulting condition has occurred. This metaphorically resembles a mechanism in which one gear wheel drives the other one in order to produce motion. In other contexts, especially in oral discourses, it is the present simple that is usually employed after *if* and *unless*, which makes the sense of such *if*- or *unless* clauses more neutral. The preference for the present perfect after *if* or *unless* in legal drafting reveals the importance of the resulting of this grammatical tense for legal texts.

(Example 36) WHEREAS, the Company **desires** to purchase from the Seller, and the Seller **desires** to sell to the Company, an aggregate number described in Section 1.1 below of common shares, no par value per share, of the Company (the "Common Shares," and such number of Common Shares, the "Purchased Securities") in accordance with the terms of this Agreement.

(Example 37) This agreement **contains** the whole agreement between the parties relating to the transactions contemplated by this agreement and supersedes all previous agreements, whether oral or in writing, between the parties relating to these transactions.

(Example 38) The Seller irrevocably **appoints** the Trustee as its agent to receive on its behalf in England and Wales service of any legal proceedings to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation.

(Example 39) The Seller **represents** and **warrants** to the Company that it has good and valid title to the Purchased Securities free and clear of lien, mortgage, security interest, pledge, charge or encumbrance of any kind ("Liens"). [67]

Another grammatical tense, which plays a crucial role in legal drafting, is the present simple. However, many linguists overlook the fact that, apart from modals, the most commonly used verbal construction in legal context is the present simple[68]. The present simple is employed in two cases: 1) in legal provisions of declarative nature as in Examples 36 and 37; 2) in legal provisions of prescriptive nature in Examples 38 and 39.

One of the main advantages of the present simple is that it enables one to render the action in its entirety[69]. Another benefit of this tense is that it implies the atemporal character of the action. Declarative statements or deontic prescriptions expressed by the present simple can be validated at any time. For this reason, the present continuous is never used in a legal context as it does not possess these linguistic properties. In addition, according to my experience, it is the linguistic explanation that helps students better understand the absence of the present continuous in legal texts.

[66] 34, 35, 36 - Semiconductor Purchase Agreement - Motorola Inc. and Freescale Semiconductor Inc. (2004) from our corpus.
[67] 36, 38 - Purchase Agreement - ValueAct Capital Master Fund LP and Valeant Pharmaceuticals International Inc. (Feb 24, 2011); 37, 39 - Agreement for the Sale and Purchase of Share Capital of Sky P, 2018 from our corpus.
[68] Ch WILLIAMS, *op. cit.*, p. 150.
[69] *Ibidem*, p. 153.

As has already been mentioned, the present simple can be interchangeable with *shall*. Nevertheless, we suggest that the present simple can have deontic meaning solely in a particular morpho-syntactic configuration. Drafters should use dynamic verbs in affirmative phrases with an entity, as the subject of the phrase, which possesses socio-physical force to act. This socio-physical force can also be defined as linguistic agentivity (e.g. *a company, a board, a party*, etc.), as in Examples 38 and 39[70].

As a practical activity **[Exercise XVI]**, for this part of the course, students have to draft contract provisions using grammatical tenses. It should be noted that the use of the present perfect causes difficulties for French speaking students since this tense does not exist in their language. The suggested time for Exercise XVI is about 20-25 minutes with peer checking and subsequent open class feedback.

In addition, in **Exercise XVII**, students should identify the cases in legal extracts in which they could replace *shall* with the present simple in English. Finally, they have to indicate where they can translate the French present tense into *shall* and/or the present simple in legal English. The suggested time for Exercise XVII is about 25-30 minutes since students will need time to carefully analyse suggested extracts and their choices for translation.

6. Conclusion

In this paper, we described a three-step strategy for teaching contract drafting. Our approach covers the process from understanding the negotiations of the UK and US sale and purchase agreements from our corpus to attributing to them a relevant legal and linguistic framework.

The first step includes analysing the needs and objectives of the parties who envisage signing the contracts. With a set of exercises provided for this step, students learn how to pass from an initial business idea to negotiating the key conceptual elements of the agreements.

The second step describes the legal aspects of the drafting of the agreements once the deal has been negotiated and approved. This includes identifying appropriate provisions to be included in such agreements. The exercises suggested for this step help students to understand the usual structure and content of the agreements.

Finally, the third step covers the jurilinguistic aspects, which provide a linguistic frame to the agreement. This covers the choice of the legalese or PLM's style, the use of modals and grammatical tenses as well as a certain number of textual devices.

Such a multifaceted approach enables teachers and students to consider contract drafting from a legal and jurilinguistic perspective. It helps to visualise the whole process from developing and negotiating the initial business concept to a range of key legal and linguistic elements which constitute the agreements.

Corpus

Corpus of US Sale and Purchase Agreements and Contracts (2000-2013)

Purchase Agreement - Equinox Nutraceuticals and Stacked Digital LLC (January 21, 2013)

https://contracts.onecle.com/xhibit/equinox-purchase-2013-01-21.shtml

[70] A. OSMINKIN, *L'emploi du présent dans le contexte juridique trilingue*. Une approche contrastive à partir d'un corpus anglais, français et russe, 2023, p. 102.

Purchase Agreement - ValueAct Capital Master Fund LP and Valeant Pharmaceuticals International Inc. (February 24, 2011)

https://contracts.onecle.com/valeant/valueact-purchase-2011-02-24.shtml

Semiconductor Purchase Agreement - Motorola Inc. and Freescale Semiconductor Inc. (2004)

https://contracts.onecle.com/freescale/motorola.mfg.2004.shtml

Standard Purchase Agreement (May 19, 2003)

https://contracts.onecle.com/arbinet/tekelec.purchase.2003.05.19.shtml

General Purchase Agreement - Egenera Inc. and Goldman, Sachs & Co. (June 26, 2002)

https://contracts.onecle.com/egenera/goldman-sachs.mfg.2002.06.26.shtml

Corpus of UK Sale and Purchase Agreements and Contracts (2008-2023)

Sale and Purchase Agreement (7 November 2019) https://www.gallifordtry.co.uk/media/1214/saleandpurchaseagreementbetweengallifordtryplcandgoldfinchjerseylimitedandbovishomesgroupplcdated7no.pdf

Assets Purchase and Sale Agreement (7 November 2014) provided by Natasha Costello

Agreement for the Sale and Purchase of Share Capital of Sky P, (3 October 2018)

https://www.cmcsa.com/static-files/514fc99a-fbd3-4543-8353-9312a8e21c63

Sale and Purchase Agreement, (23 September 2008)

https://www.sec.gov/Archives/edgar/data/1123647/000119312508230291/dex101.htm

Share Purchase Agreement relating to the sale and purchase of the entire issued share capital of HLG HOLDINGS LIMITED, (12 May 2011)

https://www.sec.gov/Archives/edgar/data/354190/000119312511142565/dex21.htm

Other Legal Documents

Consolidated version of the Treaty on European Union (26 December 2012)

https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

Decision RG 19-11413 of 12 July 2021 rendered by International Commercial Chamber at the Court of Appeal of Paris

Decision RG 21-10727 of 14 February 2023 rendered by International Commercial Chamber at the Court of Appeal of Paris

Decision RG 22/20498 of 16 May 2023 rendered by International Commercial Chamber at the Court of Appeal of Paris

Bibliography

ADAMS K., *Shall means Shall ?*, personal blog https://www.adamsdrafting.com/shall-means-shall/

ADAMS M. C., CRAMER P. K., *Drafting Contracts in Legal English*, Aspen, 2013.

ANDERSON M., WORONER V., *Drafting and Negotiating Commercial Contracts*, Dublin, 4th ed., 2016.

BLACK'S LAW DICTIONARY, fourth pocket edition, Thomson Reuters, 2011.

CAMBRIDGE DICTIONARY ONLINE, https://dictionary.cambridge.org/#google_vignette

CARTWRIGHT J., *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, Dublin, 3rd ed., 2016.

COATES, J., *Semantics of the Modal Auxiliaries*, London, 1983.

CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/legalese

COSTELLO N., KULBICKI L., *Practical English Language Skills for Lawyers: Improving Your Legal English*, London, 2023.

FOLEY R., *Going out in style? Shall in EU legal English*, in Law, Linguistics, in UCREL Technical Papers, 2001, pp. 185-196.

GILBERT E., *La théorie des opérations énonciatives* d'Antoine Culioli, in HAL Open Science, 1993, pp. 1 - 57.

HAMILTON A., *GenAI and commercial contracting: what's the point?*, November 2023, https://www.radiantlaw.com/resources/genai-and-commercial-contracting-whats-the-point.

RICHARD I., *L'évolution de l'emploi de shall, de must et du présent simple dans le discours juridique normative dans le cadre du Plain Language Movement*, in ASp [la revue du GERAS], 2006, pp. 137-157.

O'KEEFFE A., *From Corpus to Classroom: Language Use and Language Teaching*, Cambridge, 2007.

ONECLE, database of legal documents, https://www.onecle.com/info/about.shtml.

OSMINKIN A., *L'emploi du présent dans le contexte juridique trilingue. Une approche contrastive à partir d'un corpus anglais, français et russe*, in Comparative Law and Language, Vol. 2 No. 1, 2023, pp. 86-104.

OSMINKIN A., *Pronominal Adverbs Based on Here-, There-, and Where- as Textual Connectors in Legal Discourse*, in International Journal of Law, Language & Discourse, *8*(2), 2020, pp. 57-85.

PALMER F., *Modality and the English Modals*, London, 1990.

STARK T. L., LLORENTE L., M., *Drafting Contracts: How and Why Lawyers Do What They Do*, Wolters Kluwer, 2nd ed., 2014.

STARK T.L., *Thinking like a lawyer – to come to an agreement*, Journal of Legal Education, Vol. 54, No. 2, 2004, pp. 223-234.

WILLIAMS Ch., *Is legal English "going European"? The case of the simple present, Verbal constructions in prescriptive texts* in Canadian Journal of Linguistics/Revue canadienne de linguistique 58(1), 2013, pp.105–126.

WILLIAMS Ch., *Tradition and Change in Legal English, in Linguistic insights: studies in language and communication*, rev. ed., 2007.

WILLIAMS Ch., *Legal English and Plain English, an introduction*, in ESP Across Cultures 1, 2004, pp. 111-124.

Enforcing victims' language rights:
Paraprofessional interpretation and terminological work at the International Criminal Court

Petra Lea Láncos[1]

„From a professional and ethical perspective, it's not about me.
I'm here to provide a service. And the ultimate goal is
justice for the victims, that justice be done."
Anonymous Interpreter[2]

Abstract: While the language rights of the accused in criminal proceedings conducted before national and international courts are well established, there are other participants of the proceedings whose linguistic participation must be ensured for the fulfilment of human rights requirements. This paper focuses on the language rights of victims before the ICC on the one hand, and the language services to enforce such rights on the other. These language services include in particular the recruitment and training of paraprofessional interpreters, as well as the necessary terminology work in the so-called situation languages.

Keywords: International Criminal Court, paraprofessional interpreters, interpreter training, situation languages, terminology

Summary: 1. Introduction: Victims' participation in criminal proceedings; 2. International crimes and victims' rights at the International Criminal Court; 3. Victims' rights: participation, protection and redress; 4. Guaranteeing victims' language rights: interpretation and terminology work at the International Criminal Court; 4.1. Organisational and linguistic regime; 4.2. Training of paraprofessional interpreters; 4.3. Terminological work on under resourced situation languages; 5. Summary.

1. Introduction: Victims' participation in criminal proceedings

The exclusivity of the state's criminal power and the concept of danger to society have led to the development in Europe of criminal proceedings where the social dimension of the crime is the main focus and the perpetrator is confronted with the state justice system, not the victim of the crime. This has also had an impact on procedural solutions in international criminal justice: According to Trumbull, "[u]ntil now, victims of mass atrocities have mostly been voiceless, and the world has largely ignored the impact that criminal proceedings have had on them. Past international criminal proceedings have undoubtedly left many victims feeling vulnerable and unsatisfied."[3]

However, since the 2000s, there has been a shift in international and national legal sources towards a focus on the victims of crime, the starting point of which is that human dignity, recognised as the mother of fundamental rights, precludes the objectification of the person, such as the marginalisation of

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[2] L. SIGWART, *Unseen and Unsung: Language Services at the International Criminal Court and Their Impact on Institutional Legitimacy*, in: F. BAETENS (ed.) *Legitimacy of Unseen Actors in International Adjudication*, Cambridge University Press, Cambridge, 2019, p. 288.

[3] C. P. TRUMBULL IV, *The Victims of Victim Participation in International Criminal Proceedings*, Michigan Journal of International Law, Vol. 29, 2008, 4, p. 825.

the victim in proceedings for the crime against them, or the inclusion of the victim as a mere accessory. In this approach, the human dignity of the victim requires that they be 'heard' as an equal participant in the proceedings, just like the accused, and thus that their injury be recognised in the proceedings.[4] According to international criminal law expert Mariana Pena, "of all of the things victims want from prosecutions for atrocities, the opportunity to be heard and to share their experiences is the most often and most strongly expressed".[5] The International Criminal Tribunal for the former Yugoslav Republic of Macedonia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), established in 2002, pioneered this approach and the ICC's Statute (Rome Statute) provides in detail for the protection of the dignity of victims and their participation in the proceedings.[6]

International criminal courts were established to prosecute the most serious crimes: genocide, aggression, war crimes and crimes against humanity (*crimina juris gentium*). Based on the ICTY *Erdemovic* judgment, Sántha summarised war crimes and crimes against humanity as follows: while war crimes are essentially conduct constituting violations of the laws and customs of warfare, crimes against humanity amount to the most serious violation of humanity, of fundamental human values and of human dignity. According to ICTY practice, crimes against humanity are serious acts of violence that harm human beings by attacking what is most important to them: their life, liberty, physical well-being, health and dignity. As such, "they are crimes that attack the entire international community and humanity".[7]

Cases before international criminal tribunals are of major importance to society, as they serve to bring perpetrators to justice, restore a sense of social justice and promote reconciliation. For this reason, these trials have received a great deal of media attention: even the trials and sentencing of the Nuremberg Tribunal were broadcast by contemporary media,[8] relying heavily on the work of the world's first simultaneous interpreters. Kovács underlines that the requirement that the victim has the right to know the truth, and the right to have the outside world know the truth about who is responsible for these heinous crimes is now "considered to be a human rights-based requirement".[9]

For these reasons, victim participation in criminal proceedings in general, and in ICC proceedings in particular is essential, among others from a human rights perspective. At the same time, victim participation in international proceedings such as those before the ICC require additional efforts for the full enforcement of this right. Indeed, victims' full participation presupposes also their linguistic participation, i.e. that they understand the proceedings and can make statements in its framework. This requires interpretation, translation and terminology work in the languages spoken by victims. In this paper I concentrate on the enforcement of victims' language rights, that is, the conditions for victims' linguistic participation in ICC proceedings. To highlight the context of the use of victims' language rights, I discuss the ICC's mandate, including those cases where the perpetrators had been convicted. I then turn to the rights of victims under the Rome Statute, and the system of language services provided by the ICC, describing the language regime applied at the Court, and the organisation of interpretation and terminology work applied to ensure the linguistic participation of victims. In writing this study, I relied on the relevant professional and academic literature and on the data from an exploratory interview conducted with unnamed sources on 13 February 2024 at the premises of the ICC.

2. International crimes and victims' rights at the International Criminal Court

[4] R. L. HOLDER, A. DEARING, *Human Dignity, Rights and Victim Participation in Criminal Justice*, International Criminology (published online: 22 March 2024).
[5] D. PODDAR, *The Importance of Language in Participation in International Criminal Law*, Quid Iustitiae (published: 22 November 2012).
[6] Trumbull, note 3.
[7] F. SÁNTHA, Az emberiesség elleni bűncselekmények, Miskolci Jogi Szemle, 3, 2008, 1, p. 52, author's translation.
[8] W. FRANK, *Nuremberg's Voice of Doom. The Autobiography of the Chief Interpreter at History's Greatest Trials*, Pen & Sword, Barnsley, 2018; J. BAIGORRI-JALÓN, *The Nuremberg Trial as a turning point in the history of interpreting: notes on historical transitions*, The Interpreters' Newsletter, 2022, 27 *bis*, pp. 1-24.
[9] P. KOVÁCS, *Introduction to the jurisprudence of the International Criminal Court*, Pázmány Press, Budapest, 2020, p. 181, author's translation.

Established in 2002, the International Criminal Court, based in the Hague, now has 123 States Parties and has jurisdiction to prosecute crimes including genocide, crimes against humanity, war crimes and crimes against aggression as international crimes (Articles 6-8 *bis of* the Rome Statute). The ICC also makes a major effort to raise awareness of its work and broadcast its proceedings, particularly in countries affected by international crimes, thus helping to restore a sense of social justice helping affected communities to come to terms with the past. Trumbull adds that "[t]he opportunity for victims to seek reparations, albeit in many cases collective or symbolic reparations, will also inject a desired element of restorative justice into international criminal law".[10]

The ICC recognises two types of victims: individual victims, and organisations or institutions, when their property dedicated to certain purposes (religion, education, art, science or charitable and humanitarian purposes, or historic monuments or hospitals) is harmed as a result of an international crime.[11] To give an idea of the involvement of victims of crimes in ICC proceedings, I highlight below five cases in which the Court has convicted the accused and awarded reparations. These judgments have helped to unravel the factual elements of certain international crimes, and reparations orders have fleshed out the categories of victims and the forms of reparations.

Thomas Lubanga Dylio was the first person to be arrested following an arrest warrant issued by the ICC. Lubanga was convicted by the ICC in 2012 after recruiting and conscripting 'child soldiers' (minors under 15 years old) as leader of the Union des Patriotes Congolais (UPC) in the Democratic Republic of Congo. Although the complainants alleged that UPC soldiers committed mass killings, torture, rape and mutilation, the ICC found evidence only of the recruitment and enlistment of boy and girl child soldiers in Lubanga's case (*Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06-2842, Trial Chamber I, 05 April 2012). The ICC has also ruled on reparations, stating that "[r]eparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Court to ensure that offenders account for their acts" (*Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, ICC-01/04-01/06-3129-AnxA, Appeals Chamber, 03 March 2015; p. 1).

Germaine Katanga was convicted by the ICC for murder, assault, destruction and pillaging of civilians while in command of the Force de résistance patriotique de l'Ituri in the Democratic Republic of Congo in 2003 (*Prosecutor v. Germain Katanga*, Judgment, ICC-01/04-01/07-3436-tENG, Trial Chamber II, 07 March 2014). The ICC awarded individual reparations to a total of 297 victims and ordered collective reparations for the long-term benefit of the entire affected community (*Prosecutor v. Germain Katanga*, Reparations Order, ICC-01/04-01/07-3728-tENG, Trial Chamber II, 24 March 2017). The significance of the case is that it was here that the prosecution first brought charges of rape and sexual slavery, but Katanga was eventually acquitted of these charges. It is worth noting that Katanga gave the victims satisfaction in the form of a so-called statement of regret, in which he accepted the findings of the ICC against him and expressed his sincere regret to all those who suffered because of his conduct.[12]

Bosco Ntanganda was sentenced by the ICC in 2019 for war crimes and crimes against humanity committed while he was Chief of Staff of the Congrès national pour la défense du peuple in the Democratic Republic of Congo. The ICC found him guilty of crimes of rape, murder, recruitment of child soldiers and sexual slavery; for the latter he was convicted for the first time in the Court's history (*Prosecutor v. Bosco Ntaganda*, Sentencing judgment, ICC-01/04-02/06-2442, Trial Chamber VI, 07 November 2019). The Court defined and expressed in monetary terms the reparations awarded to victims in the following categories: physical rehabilitation (treatment, care), psychological rehabilitation,

[10] Trumbull, note 3, p. 25
[11] Booklet. Victims before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of the Court (without date).
[12] A. NGARI, *Hope deferred: abrupt end to the Katanga case fails victims The ICC Prosecution's decision to discontinue its appeal has left victims of international crimes in the Katanga case feeling disappointed and betrayed*, ISS Today (published: 29 August 2014).

individual socio-economic reintegration (training, mentoring, other), reconstruction of physical infrastructure (education, health facilities, restoration of drinking water supply, building a market), programme implementation (administration, monitoring, evaluation) (*Prosecutor v. Ntaganda*, Reparations Order, ICC-01/04-02/06-2659, Trial Chamber VI, 08 March 2021).

Dominic Ongwen, the commander of the Ugandan Lord's Resistance Army guerrilla group, himself a victim of serious international crimes and a child soldier (Gamaliel 2018), was charged by the ICC with the following international crimes: murder, recruitment and use of child soldiers, and sexual and gender-based crimes, including forced marriage, rape and sexual slavery *(Prosecutor v. Dominic Ongwen,* Trial Judgment, ICC-02/04-01/15-1762-Red, Trial Chamber IX, 04 February 2021). A victim of the Lord's Resistance Army described the actions of the guerrilla group saying that where they show up, they kill fathers, loot and burn everything down, murdering and kidnapping children (DTJ 2012). The ICC has awarded individual reparations to those forced into refugee camps by the Lord's Resistance Army, victims of sexual and gender-based crimes, children born of sexual offences and former child soldiers (*The Prosecutor v. Dominic Ongwen,* Reparations Order, ICC-02/04-01/15, Trial Chamber IX, 28 February 2024). In the case, the ICC was also able to develop elements of the crime of forced pregnancy, the international criminal nature and factuality of which was denied by the defence in the case.[13]

The ICC does not only deal with physical attacks on persons: in 2016, for the first time since its establishment, the Court dealt with a case that revolved exclusively around the destruction of buildings forming part of the world heritage.[14] In 2012, a commander of the Tuareg Islamist militia (Ansar Dine), Ahmad al-Faqui al-Mahdi, demolished ten religious and historical monuments in Timbuktu, which had UNESCO World Heritage status, in violation of the Rome Statute No 8. Article 8(2)(e)(iv) ("[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives"). The ICC considered the destruction of monuments that are part of the cultural heritage to be the destruction of the local community's link with their precious cultural heritage and a disruption of their culture (*Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-17, Trial Chamber VIII, 27 September 2016.; paras 19 and 85), and awarded reparations to the direct victims of the destruction, while at the same time stating that the crime affected not only its direct victims in Timbuktu, but also the people of Mali as a whole as well as the international community. In its reparations decision, the ICC therefore pursued a "hybrid" solution,[15] with individual reparations made to those who suffered direct and personal harm from the destruction, and other victims receiving collective reparations through the restoration of monuments (*Reparations Order, Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017).

The five cases briefly described above illustrate that the number of victims of international crimes is typically very high, and that crimes committed against their persons and possibly their communities cause grave physical and psychological suffering, material and non-material damage. The participation of victims in ICC trials and hearings is not only a means of providing evidence, but also of reparation and restoring the dignity of victims.

3. Victims' rights: participation, protection and reparations

According to a publication by the ICC's Registry, "[o]ne of the innovations of the Rome Statute and the ICC's Rules of Procedure and Evidence is the series of rights that are granted to victims. 'For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court' and to obtain, 'where appropriate, some form of

[13] A. L. KATHER, A. NASSAR, *The Ongwen case: a prism glass for the concurrent commission of gender-based crimes*, *Völkerrechtsblog* (published online: 15 March 2021).
[14] L. BILSKY, R. KLAGSBRUN, *The Return of Cultural Genocide?*, The European Journal of International Law, 29, 2018, 2.
[15] Ibid, p. 395.

reparation for their suffering'. 'It is this balance between retributive and restorative justice that will enable the ICC not only to bring criminals to justice, but also to help the victims themselves obtain justice'".[16] In fact victims can already participate in the preliminary fact-finding, investigation and confirmation of charges stages – not only in the trial before the ICC.[17] The victims' rights enshrined in the Rome Statute aim at both protecting victims (who are often witnesses), ensuring satisfaction through their participation in the trial, and obtaining reparations for the harm they have suffered from the Trust Fund for Victims.[18]

In order to protect the victims' right to defence and to guarantee their protection, the ICC courtroom is designed in such a way that visitors can sit in a raised gallery, which is enclosed by a glass wall, so that they can only see the Trial Chamber, the staff of the Prosecution, the defence, the victims' representatives and the bailiffs. Visitors can follow the proceedings through headsets and listening to the hearing with the help of interpreters. They can also see the person being heard on screens set up for them, or see a blurred out image of the person being heard. Finally, in case of a fully closed hearing, the curtain in front of the gallery is drawn so that visitors cannot see or hear anything. The victim/witness is also protected by the distortion of their voice so that they are not recognisable to the outside world. These protective measures are complemented by a time lag, namely, although the hearings can be followed remotely via the internet, they are only transmitted by the ICC with a half-hour delay, so that if "the witness has let something slip that could endanger their safety, a technical intervention can make this element unintelligible in the transmission".[19] This half-hour delay is also necessary because it may be the case that by some omissions the victim's image is not blurred or their voice is not distorted. Thanks to the time lag, they will only be recognisable to the audience in the gallery. Victims' participation in a trial may involve the exercise of all three rights: rights of participation, protection and reparations – for example, in cases where the victim is heard in a closed hearing in reparations proceedings. Kovács summarises the means to protect victims as follows: "(i) the sealing of names and personal data; (ii) visual blurring in video recordings; (iii) visual blurring and audio distortion; (iv) fully or partially closed hearing, i.e. a certain part of the witness's testimony will not be made public. These measures may be combined".[20]

Victims' rights are supported by the Victims Participation and Reparations Section (VPRS) and the Victims and Witnesses Section (VWS). Victims are represented by attorneys from the Office of Public Counsel for Victims (OPCV), which is funded by the ICC budget. The attorneys of the Office of Public Counsel for Victims may make statements (opening and closing statements), question witnesses, request the hearing of witnesses, make submissions and ask questions in a hearing that affects the interests of victims, in order to "present the personal circumstances of victims, their situation in their community, as well as their feelings and typical problems".[21] Victims also have the possibility to participate directly in the proceedings, so they can make a claim for reparations or testify in person at the trial.

In what follows, I will focus on the linguistic participation of victims in trials and hearings, as victims mainly communicate through interpretation at the hearings organised at the ICC.

4. Guaranteeing victims' language rights: interpretation and terminology work at the International Criminal Court

In addition to the physical participation of victims in ICC trials and hearings in ICC reparations proceedings, they must also be guaranteed linguistic participation to ensure their full participation. Victims' linguistic participation is ensured by the interpretation service and system organised at the ICC.

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[16] International Criminal Court. *Behind the Scenes: The Registry of the International Criminal Court.* The Hague, 2010, ISBN No. 92-9227-182-2, p. 15.
[17] KOVÁCS, note 9.
[18] Ibid.
19 Ibid, p. 180, author's translation.
20 Ibid, p. 179, author's translation.
21 Ibid, p. 189, author's translation.

Under the ICC Rules of Procedure and Evidence, "the Court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules" (Rule 42).

4.1. Organisation and language regime

The language services organised at the ICC fall under the Division of Court Services, set up in 2002. Drawing on the experience of national courts and former *ad hoc* tribunals and mixed chambers of national judges and international judges, the Division has built up, inter alia, the Court Interpretation and Translation Section (STIC), which has now become the Language Services Section (LSS). The Language Services Section is part of the Division of Court Services and, together with the other victim support sections, provides uniform and effective support to victims. In the context of the cooperation between these departments, it has become clear that interpreter training in the languages of those affected by international crimes (so-called 'situation languages') must be developed in case where these languages are under resourced languages, i.e. where there are no professionally qualified conference interpreters available in these languages. In addition, it has become clear that, in order to ensure consistent language use, a terminology unit must be set up for ICC purposes.[22]

Accordingly, the ICC's Language Services Section not only translates, proofreads and edits court documents, but also develops terminology tools to ensure terminological consistency for the Court's bodies, while providing interpretation services to fulfil the ICC's tasks. The latter includes the consecutive and simultaneous interpretation of meetings, trials, hearings, press conferences and other events at the seat of the Court in the Hague and at other venues. It also includes the recruitment, training and accreditation of 'field interpreters' (where international crimes are committed and where victims are located) as well as interpreters working at the Court.[23]

The ICC's language regime is made up of its official languages, working languages, and the situation languages. The language of the perpetrators, witnesses or victims of international crimes are so-called situation languages. Situation languages may be languages where there is a sufficient number of qualified translators and conference interpreters, such as Spanish, Chinese, Russian, Georgian and Arabic, all of which, with the exception of Georgian, are also official languages of the UN and thus of the ICC. However, situation languages, may be, as mentioned above, under resourced languages or languages of lesser diffusion, in which professionally qualified interpreters or translators are not available.

	State	Situational language
Situations	Uganda	Acholi
		Lango
		Ateso
	Democratic Republic of Congo	Swahili
		Lingala
		Alur
		Ngiti
		Kilendu
		Kinyarwanda
		Kihema
	Sudan	*Arabic (*Standard and Sudanese*)*
		Zaghawa
		Fur
	Central African Republic	Sango
		Lingala
		Fulfulde

[22] International Criminal Court, note 16, pp. 25, 27.
[23] Ibid.

		*Arabic (*Shuwa and Chadian*)*
	Kenya	Kalenjin
		Luo
		Kikuyu
		Luhya
		Swahili
	Libya	*Arabic* (Standard)
	Côte d'Ivoire	Malinké (dyula)
		Mòoré
		Guéré
	Mali	Bambara
		Arabic (Standard)
		Tamasheq
		Songhay
	Georgia	*Georgian*
		Osset
		Russian
	Burundi	Kirundi
		Swahili
	Bangladesh/ Myanmar	Burmese
		Bengali
		Rohingya
	Afghanistan	Dari
		Pashto
	Palestine	*Arabic* (Standard)
		Hebrew
	Philippines	Tagalog
		Cebuano
	Venezuela	*Spanish*
	Ukraine	*Ukrainian*
		Russian

Table 1: ICC situation languages until 01.05.2024 (established situation languages in italics).[24]

Under resourced situation languages are "are mostly local, sometimes tribal languages often lacking the vocabulary necessary to describe complex legal issues, to deal with notions and phenomena of modern substantive or procedural law".[25] These languages play a key role in every phase of the proceedings: from the investigation to the trial and the reparations hearings.[26]

The working languages of the ICC are chosen from among the official languages of the United Nations: English and French have been designated as the working languages of the Court (Article 50(2) of the Rome Statute). In addition, the Rules of Procedure and Evidence also allow for the inclusion of other official languages of the UN as working languages, if necessary (Rule 41), making Arabic an important pivot language (and situation language) of the ICC. Arabic is a crucial pivot language because in the case of many African situation languages there are only linguistic mediators available in Arabic. Since the ICC working languages English, French and Arabic are considered to be languages for which

[24] D. ZANEN, E. GILLOGLEY-MARI, *Preparedness in a Fast Changing Environment*, Language Services Section (LSS), Registry, 2022.
[25] P. KOVÁCS, *Languages and Linguistic Issues before the International Criminal Court*, Hungarian Yearbook of International Law and European Law, 8, 2019, 1, pp. 155-168.
[26] B. CATHALA, 2006. *Administrative Issues and Practical Challenges in the Field*, in: Austrian Federal Ministry for Foreign Affairs and Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law (eds.) *The Future of the International Criminal Court.* www.sbg.ac.at/salzburglawschool/Retreat.pdf.

there is a sufficient number of qualified translators and interpreters, the ICC's terminology, interpreter recruitment and training efforts are focused primarily on under resourced situation languages.

In the context of victim participation in trials and hearings, the work of so-called professional or paraprofessional interpreters who mediate in situation languages is indispensable.[27] In the following, I will focus on the status, training and work of paraprofessional interpreters of under resourced situation languages.

4.2. Training of paraprofessional interpreters

Given the lack of professionally qualified conference interpreters in the ICC's under resourced situation languages, it has become necessary to train an adequate number of interpreters for the trials and reparations proceedings facilitated by simultaneous interpretation. In 2005 and 2006, two professional interpreters from the ICC attended a distance learning course at the University of Geneva to develop a general training framework for situation language interpreters. The result was a two to four-month interpreter training course with a detailed syllabus and a mid-term exam, at the end of which a final exam would select the best candidates with the participation of interpreters from major international organisations and professors from interpreting training centres.[28]

The reality is that there is usually not enough time to train interpreters, so it is usually the case that former *ad hoc* (humanitarian/field) interpreters are recruited and trained by ICC professional interpreters to become interpreters in a matter of a few months or even weeks. They are the so-called paraprofessional interpreters, i.e. language mediators who have not received formal training as interpreters at an academic institution, but have learned the techniques of interpreting through practice. Paraprofessional interpreters are typically qualified to interpret conversations, simple negotiations and non-professional texts, but the interpreters trained at the ICC can also be considered paraprofessional interpreters, providing court interpreting in both consecutive and simultaneous modes.

In addition to the time constraints, another challenge in training paraprofessional interpreters is that the professional interpreter who is training them does not speak the under resourced situation language, so different techniques had to be developed to deliver the training effectively. Sigwart describes this as follows. "The trainer asks a trainee to interpret an English text into the target language. A second person interprets it back from the target language into English. A comparison is then made of the original and 'back interpretation' of the English text and the wrong turns are identified. All interpretation channels are recorded so they can be reviewed by trainees, and over time their skills are gradually built up".[29] Accordingly, the training is based on a collaboration between trainer and trainees, where the trainees check each other's work. Training usually begins with consecutive interpreting: although the paraprofessional interpreter will interpret largely in a booth, in a meeting, by practising consecutive interpreting, candidates learn to analyse the spoken speech and to grasp the message encoded in it, which they must then translate into the target language.[30] In contrast to professionally qualified ICC interpreters, who interpret exclusively into their 'A' language (their native tongue), paraprofessional interpreters not only work into the situation language, but also work into their 'B' language (their strongest foreign language), this is the so-called *retour.* This can be either a working language of the ICC or a *pivot* language (currently Arabic which is both an official and a working language). This is the only way to achieve bidirectional interpreting, as only paraprofessional interpreters are proficient in both languages.[31]

Paraprofessional interpreters must also perform other tasks. Although their main profile is to interpret in the Court's hearings, since the ICC does not have a sufficient number of language specialists in the

[27] SIGWART, note 2.
[28] International Criminal Court, note 16, p. 27.
[29] L. SIGWART, *Unseen and Unsung: Language Services at the International Criminal Court and Their Impact on Institutional Legitimacy*, Researchgate, 2019, p. 17.
[30] SIGWART, note 2.
[31] Ibid.

under resourced situation languages, paraprofessional interpreters also carry out terminology, translation and subtitling work. Terminology work is a particularly important part of the work of paraprofessional interpreters. Paraprofessional interpreters work with terminologists to find target language equivalents that can be used to consistently translate concepts of the situation language into the working languages of the ICC and, conversely, the ICC's substantive and procedural law concepts into the situation language. According to Prieto Ramos, "[a]t the ICC, the most challenging terminological difficulties arise precisely in the translation of less or non-standardised languages used by testifying witnesses to whom concepts such as 'victim' are unknown".[32] Drawing on his own experience as a judge, Kovács stresses that "there are always special local notions, which are impossible to translate with a single term, sometimes becoming a part of the English or French language of the procedure".[33] Kovács also cites as an example the techniques of circumlocution or paraphrasing in the toolbox of paraprofessional interpreters. Of course, it is not only the interpretation of legal terms that can cause difficulties, but also the rank of the militia involved in international crimes and other military terms that typically cause linguistic conundrums.[34]

The work of translators and interpreters and the consistent use of terminology is therefore aided by the terminological work carried out at the ICC, which I will discuss below.

4.3. Terminological work on under resourced situation languages

The Language Services Section under the Translation Support and Terminology Unit organises, among others, the ICC's terminology work in both working and situation languages. The Unit organizes and coordinates language panels, if possible, to work on terms related to ICC proceedings.[35] Whenever a new, under-resourced situation language emerges before the ICC, a language panel is convened, bringing together some of the ICC's legal experts, as well as experts of the legal system related to situation language, legal historians, and linguists, terminologists and 'field interpreters' or paraprofessional interpreters. The composition of these language panels is usually a challenge, not only because of the limited time available, but also because of the difficulties in finding linguists and experts in the situation language legal culture and history. Nowadays, the language panel's meetings are greatly facilitated by the possibility of online video-conferencing.

To effectively carry out their multiple tasks, paraprofessional interpreters must receive terminology training. This training includes a review the principles, methodologies standards and strategies of terminological work, the meaning of domains, terminological resources and the concepts used in ICC procedures. The aim of this training is to ensure that terminological work in the new situation language is carried out according to a common set of principles and strategies. The starting point is always the concept; therefore, the meaning of the concepts expressed through the terms of the ICC working languages must be explored in detail to find a suitable candidate in the situation language. Priority must be given to using words that already exist in the situation language, elevating them to ICC terms, as these are understood and used by situation language speakers. This may be illustrated by the developments in the terminological work done in the Acholi language: at first, attempts were made to 'replace' terms with literal translations and borrowings from the colonial language, but it turned out that the situation language speakers did not understand these new terms. It was therefore very important for the terminologist to draw on the lexical resources of the situation language, since these words are immediately intelligible to speakers. It is considered good practice to look for situation language terms in historical or religious texts, sayings, or the vocabulary of older speakers. The semantic field of these situation language terms must show full or partial equivalence with the ICC's substantive or procedural law concepts to become a situation language term. Paraphrasing and circumlocution can also be a good solution. A booklet containing ICC-related terms and expressions with definitions in English and French

[32] F. Prieto Ramos, *International and Supranational Law in Translation: from Multilingual Lawmaking to Adjudication*, The Translator, 20, 2014, 3, p. 320.
[33] Kovács, note 25, p. 145.
[34] Ibid.
[35] International Criminal Court, note 16.

helps guide paraprofessional interpreters and other situation language experts in the development of the relevant situation language terminology.

Terminology work can be described as a cycle, in which a terminologist first explains the relevant concept to the members of the language panel or the paraprofessional interpreter. The situation language expert understands the concept and finds the term used in the same or a similar sense in the situation language and its exact spelling, but they may also decide to paraphrase or coin a new expression. The situation language expert and the terminologist discuss the potential term, with the situation language expert translating it literally for the terminologist. This often reveals whether there is indeed an equivalence between the potential situation language term and the ICC term (validation). Then the interpreters/translators start using the term in practice – verifying whether the speakers actually understand the term and attribute to it the meaning that the relevant ICC term implies (feedback). If not, the terminological cycle starts again: a new potential term must be found to express the ICC term in the situation language.

The work on terminology does not stop at codifying the terminology of under resourced situation languages: in the case of Acholi for example, the language panel met again after a decade to review the terminology. However, it is not always possible for the ICC to convene a language panel, so a bulletin of terminology has been prepared, which includes the relevant ICC terms in the following categories: crimes, criminal responsibility, victims and witnesses, evidence, stages of a trial, relevant terminology in the Courtroom, Latin terms and military terms. In addition to some lexical fields, the bulletin includes definitions, observations and pertinent phraseology in English and French. This will enable language experts to immediately start searching for relevant terms in the under resourced situation language. Further terminology bulletins have also been produced, including for example acronyms used in the context of a specific situation or phraseology in the Courtroom setting (covering 7 situation languages). The Translation Support and Terminology Unit also supports the production of glossaries for under resourced situation languages, e.g. most recently a glossary in Songhay was produced, which is revised regularly by paraprofessional interpreters. Translators and interpreters alike rely on the terminology thus developed, which is kept in glossaries, bulletins and the ICC's multilingual termbase.

5. Summary

In holding perpetrators of international crimes accountable, the ICC is pioneering victim participation and taking an important step towards restorative justice through victim protection, participation and reparations. To enable victims' participation in ICC trials and hearings, language services linked to the Court's complex linguistic regime had to be developed. In particular the provision of interpretation in under resourced situation languages has been a challenge, as there are typically no qualified conference interpreters available in these languages. To fulfil its tasks, the ICC therefore organises the training of so-called paraprofessional interpreters at its premises in the case of under resourced situation languages, who provide other language services in addition to court interpreting. One of the most important of these tasks is terminology work, since, in the absence of other situation language specialists, it is mainly in cooperation with paraprofessional interpreters that ICC-specific terms are found and used consistently in all situation languages. This requires both the terminological training of paraprofessional interpreters and their continuous cooperation with the Translation Support and Terminology Unit.

Bibliography

Scholarly sources:
BAIGORRI-JALÓN, J., *The Nuremberg Trial as a turning point in the history of interpreting: notes on historical transitions*, The Interpreters' Newsletter, 2022, 27 *bis*, pp. 1-24.

BILSKY, L., R. KLAGSBRUN, *The Return of Cultural Genocide?*, The European Journal of International Law, 29, 2018, 2, pp. 373-396.

CATHALA, B., *Administrative Issues and Practical Challenges in the Field*, in: Austrian Federal Ministry for Foreign Affairs and Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law (eds.) *The Future of the International Criminal Court,* 2006, www.sbg.ac.at/salzburglawschool/Retreat.pdf

DIJKSTAL, H. J., The ICC and Human Rights: The Crime Against Destruction of Cultural Heritage as Part of a Trend Towards Greater Human Rights Influence, *Indiana International & Comparative Law Review*, 31, 2021, 3, pp. 379-408.

FRANK, W., *Nuremberg's Voice of Doom. The Autobiography of the Chief Interpreter at History's Greatest Trials*, Pen & Sword, Barnsley, 2018.

HOLDER, R. L., A. DEARING, *Human Dignity, Rights and Victim Participation in Criminal Justice*, International Criminology (published online: 22 March 2024), doi:10.1007/s43576-024-00119-3

GAMALIEL, K., *The Prosecution of a Child Victim and Brutal Warlord: The Competing Narrative of Dominic Ongwen*, SOAS Law Journal, 5, 2018, 1, pp. 70-82.

KATHER, A. L., A. NASSAR, *The Ongwen case: a prism glass for the concurrent commission of gender-based crimes*, *Völkerrechtsblog* (published online: 15 March 2021), doi: 10.17176/20210315-153731-0

KOVÁCS, P., *Languages and Linguistic Issues before the International Criminal Court*, Hungarian Yearbook of International Law and European Law, 8, 2019, 1, pp. 155-168.

KOVÁCS, P., *Introduction to the jurisprudence of the International Criminal Court*, Pázmány Press, Budapest, 2020.

PRIETO RAMOS, F., *International and Supranational Law in Translation: from Multilingual Lawmaking to Adjudication*, The Translator, 20, 2014, 3, pp. 313-333. doi.org/10.1080/13556509.2014.904080

SÁNTHA, F., *Az emberiesség elleni bűncselekmények*, Miskolci Jogi Szemle, 3, 2008, 1, pp. 50-69.

SIGWART, L., *Unseen and Unsung: Language Services at the International Criminal Court and Their Impact on Institutional Legitimacy*, in: F. BAETENS (ed.) *Legitimacy of Unseen Actors in International Adjudication*, Cambridge University Press, Cambridge, 2019, pp. 272-296, doi.org/10.1017/9781108641685.015

SIGWART, L., *Unseen and Unsung: Language Services at the International Criminal Court and Their Impact on Institutional Legitimacy*, Researchgate, 2019. https://www.researchgate.net/publication/335326195_UNSEEN_AND_UNSUNG_ICC_LANGUAGE_SERVICES_AND_THEIR_IMPACT_ON_INSTITUTIONAL_LEGITIMACY.

TRUMBULL IV, C. P., *The Victims of Victim Participation in International Criminal Proceedings*, Michigan Journal of International Law, Vol. 29, 2008, 4, pp. 777-826.

News articles:

NGARI, A., *Hope deferred: abrupt end to the Katanga case fails victims The ICC Prosecution's decision to discontinue its appeal has left victims of international crimes in the Katanga case feeling disappointed and betrayed*, ISS Today (published: 29 August 2014), https://issafrica.org/iss-today/hope-deferred-abrupt-end-to-the-katanga-case-fails-victims .

PODDAR, D., *The Importance of Language in Participation in International Criminal Law*, Quid Iustitiae (published: 22 November 2012), https://www.quidjustitiae.ca/fr/blogue/importance-language-participation-international-criminal-law .

Professional materials:

Booklet. Victims before the International Criminal Court. A Guide for the Participation of Victims in the Proceedings of the Court, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf

DTJ, *We Suffer from War and More War*, Harvard Humanitarian Initiative, 2012, www.DTJ.org/LRAreport2012

International Criminal Court. *Behind the Scenes: The Registry of the International Criminal Court.* The Hague, 2010, ISBN No. 92-9227-182-2.

ZANEN, D., E. GILLOGLEY-MARI, *Preparedness in a Fast Changing Environment*, Language Services Section (LSS), Registry, 2022.

Dal paradigma dell'interpretazione a quello della traduzione: una nuova prospettiva per la cultura giuridica

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Riassunto: I concetti di interpretazione e traduzione offrono al giurista una lente preziosa attraverso la quale esaminare tanto il passato, quanto che lo stato attuale del diritto. Sebbene ognuna di queste discipline abbia un proprio, distinto rapporto con il diritto, insieme rivelano sinergie e cambiamenti significativi all'interno del fenomeno giuridico. Sebbene l'interpretazione e la traduzione condividano molte somiglianze, si differenziano altresì per molti aspetti: il saggio si concentra su alcuni punti essenziali di sovrapposizione e divergenza tra i due concetti, con l'obiettivo di leggere l'interpretazione e la traduzione alla luce delle profonde innovazioni che caratterizzano il panorama giuridico attuale.

Parole chiave: Interpretazione, traduzione, somiglianze, differenze, innovazione giuridica.

Sommario: 1. Introduzione; 2. Interpretazione e traduzione tra somiglianze e differenze; 3. L'interpretazione giuridica in Europa: radici e contesto; 4. L'interpretazione: evoluzione e influenze oltreoceano; 5. Globalizzazione e nuove prospettive sull'interpretazione; 6. La traduzione nel diritto; 7. Mutamenti di paradigma: dall'interpretazione alla traduzione; 8. Lingue in dialogo: tra separazione e scambio; 9. Verso una cultura giuridica aperta e dialogica.

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From the paradigm of interpretation to that of translation: a new perspective for legal culture

Abstract: The concepts of interpretation and translation offer the jurist a valuable lens through which to examine both the past and the current state of law. Although each of these disciplines has its own distinct relationship to law, together they reveal significant synergies and changes within the legal phenomenon. Although interpretation and translation share many similarities, they also differ in many respects: the essay focuses on some essential points of overlap and divergence between the two concepts, with the aim of reading interpretation and translation in the light of the deep innovations that characterise the current legal landscape.

Keywords: Interpretation, Translation, Similarities, Differences, Legal Innovation.

Summary: 1. Interpretation and translation: similarities and differences; 3. Legal interpretation in Europe: roots and context; 4. Interpretation: evolution and overseas influences; 5. Globalization and new perspectives on interpretation; 6. Translation in law; 7. Paradigm shifts: from interpretation to translation; 8. Languages in dialogue: between separation and exchange; 9. Towards an open and dialogical legal culture.

1. Introduzione

Il binomio interpretazione-traduzione fornisce un ottimo punto di osservazione per riflettere al contempo sulla storia e sull'attualità del diritto. Ognuno di questi concetti ha una propria storia in rapporto al diritto. Proprio attraverso questa coppia di concetti si possono cogliere anche alcuni significativi cambiamenti che attraversano la scena giuridica: si può persino provare a tematizzare il cambiamento nei termini di un passaggio di consegne dall'interpretazione alla traduzione, come paradigma significativo per il diritto.

Tra interpretazione e traduzione corrono molte somiglianze, ma anche molte differenze. Senza entrare in profondità nell'analisi delle varie somiglianze e differenze, il presente saggio sarà limitato a mettere in evidenza alcuni essenziali punti di tangenza e di distacco tra i due concetti, a delineare fino a che punto i due temi si possono intrecciare e da quale punto avviene invece il loro distacco. Punti di tangenza e linee di fuga ci dicono quali sovrapposizioni siano possibili e quali distacchi siano inevitabili, ma ci indicano anche quali trasformazioni siano in atto, quali vantaggi e quali rischi si accompagnino ad esse.

2. Interpretazione e traduzione tra somiglianze e differenze

Il primo tratto che accomuna i due temi è quello dell'incertezza. Interpretazione e traduzione implicano infatti entrambe una forma di ricerca: esse avvengono dunque in uno spazio più o meno aperto, caratterizzato dall'incertezza dell'esito, in quanto implicano una sorta di impotenza del testo ed una linea di fuga dalla sua lettera. La risoluzione dell'incertezza richiede l'uso di intelligenza umana e il ricorso a risorse di tipo specialistico; essa non può insomma essere risolta con meccanismi automatizzati o affidata ad un computer[2].

[2] Tuttavia, la tentazione di affidarsi a risposte automatiche ai quesiti si è estesa sia all'area dell'interpretazione che a quella della traduzione. Se Weber immaginava il giudice come un "distributore automatico del diritto", oggi l'avvento dell'intelligenza artificiale generativa e dei sistemi di traduzione neuronale, come quelli alla base di Google Translate o DeepL, ha rivoluzionato il panorama della traduzione. Se un tempo Umberto Eco ironizzava sulle bizzarrie della traduzione automatica di sistemi rudimentali come Altavista, oggi assistiamo a risultati di qualità spesso sorprendente, anche se non privi di limiti e sfide, soprattutto in contesti culturali, legali o tecnici complessi, dove il ruolo umano resta insostituibile.

Da questo primo tratto comune ne discende un altro: se entrambe le operazioni sono dunque operazioni dinamiche, che implicano un movimento, una intenzione di avvicinamento a qualcosa, inevitabilmente, entrambe sono dunque esposte al rischio: il rischio dell'errore, della cattiva qualità (dell'interpretazione o della traduzione), così come dell'infedeltà o addirittura del "tradimento" si annidano ugualmente nell'interpretazione, così come nella traduzione.

In relazione alle differenze tra i due concetti di interpretazione e di traduzione, è stato notato come l'incertezza che circonda ogni operazione di interpretazione giuridica «può essere affrontata sulla base di una preliminare certezza: le parti si contrappongono e confliggono all'interno di una comune appartenenza»[3]. In altri termini, l'attività interpretativa impegna soggetti che agiscono all'interno di una cultura giuridica di riferimento, ossia di un tessuto culturale ed istituzionale basato su valori unitari, condivisi e socialmente riconosciuti. Al contrario, la traduzione implica una fuoriuscita dal proprio tessuto culturale, una sorta di avventura in terra straniera, per cimentarsi con la diversità e l'alterità culturale, oltre che linguistica. Il senso della traduzione è proprio quello di tirarsi fuori dalla propria "enciclopedia", ossia dalla rete dei propri riferimenti culturali, per riuscire a catturare qualcosa che è estraneo e diverso, provando a farlo diventare "interno" a quel tessuto culturale.

A questa prima differenza se ne lega un'altra: l'interpretazione, come si è detto, è, per il diritto moderno, un'operazione che si svolge con riferimento ad un testo giuridico, mentre la traduzione non necessariamente implica questo rapporto e trova un campo di applicazione più ampio: ad esempio, si può "tradurre" anche con riferimento ad una pratica giuridica, che non necessariamente rimanda ad un testo, o addirittura ad una cultura[4].

A partire da queste differenze, l'intento è di collegare i due temi dell'interpretazione e della traduzione con le profonde innovazioni che attraversano l'odierno scenario giuridico, per cogliere l'inevitabile alchimia tra evoluzione dello scenario giuridico e rinnovamento delle problematiche della interpretazione, così come della traduzione giuridica. Più precisamente, la tesi che sosterrò in questo saggio è che il cambiamento oggi in atto porta ad un ruolo sempre più rilevante del paradigma della traduzione per il diritto, e persino ad un crescente passaggio di consegne dal paradigma dell'interpretazione a quello della traduzione. Naturalmente con ciò non si vuole ipotizzare una scomparsa del processo interpretativo. Sarebbe una scomparsa impossibile: l'interpretazione è un processo intrinseco ad ogni operazione giuridica tanto che il diritto stesso si può compendiare in una serie di "pratiche interpretative"[5] o, com'è stato parimenti detto, in "un'impresa interpretativa"[6]. Piuttosto, qui si cercherà di tracciare, a partire dal quadro giuridico europeo-continentale, che aveva posto al centro della propria attenzione il processo di interpretazione giuridica, un percorso che, nello scenario globale, conduce quel processo interpretativo a fuoriuscire dai suoi precedenti tradizionali confini e ad assumere caratteri, movenze e requisiti che sono propri della traduzione.

3. L'interpretazione giuridica in Europa: radici e contesto

L'interpretazione, intesa in senso lato come ricerca del senso del diritto, configura un tema ed un problema su cui esiste una letteratura pressoché sterminata, con infiniti dibattiti e molte varianti. Non è questa la sede per addentrarsi neanche minimamente in questo dibattito. Il mio intento sarà invece quello di sottolineare che il dibattito sull'interpretazione del diritto ha una storia specialmente europea e che rinvia ad un contesto giuridico ben identificabile, che è quello degli stati moderni nell'Europa continentale. Insomma, quel dibattito rinvia ad una radice storica e politica ben precisa. Non a caso, come si dirà più avanti, negli Stati Uniti, in un contesto storico, giuridico e politico ben diverso, il tema dell'interpretazione ha avuto un'importanza di gran lunga inferiore.

Occorre tuttavia in primo luogo qualche sia pur fugace richiamo di carattere storico, ed in particolare all'*interpretatio* che costituiva l'anima dell'esperienza giuridica medievale. In quel tempo, il compito del giurista era proprio quello di essere "interprete", ossia di instaurare e mantenere una "intermediazione tra legge antica e fatti nuovissimi, più che spiegazione ed esegesi"[7]. In un contesto come quello dello *ius commune*,

[3] F. VIOLA, G. ZACCARIA, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Roma-Bari, 1999, p. 102.
[4] C. GEERTZ, *Interpretazione di culture*, Bologna, 1998.
[5] F. VIOLA, G. ZACCARIA, *op. cit*., p. 99 e *passim.*
[6] M. ROSENFELD, *Interpretazioni. Il diritto tra etica e politica*, 2000.
[7] P. GROSSI, *L'Europa del diritto*, Roma-Bari, 2007, p. 51.

l'interpretazione non implicava un processo di natura esegetica, riferito ad un testo, ma un intervento più libero, rimesso alla capacità dell'interprete di collegare la legge tratta dalla tradizione con le esigenze del presente. Ed all'interpretazione del giurista non era estraneo il riferimento anche alla sfera economica, religiosa, etica, ecc. Insomma, l'interpretazione si svolgeva con modalità che erano tipiche di un'accezione sapienziale del diritto, che ne affida l'evoluzione essenzialmente ai suoi stessi cultori.

Più avanti nel tempo, nell'esperienza giuridica moderna, lo spazio dell'interprete si restringe: via via che il diritto diviene quasi esclusivamente legge e testo scritto, l'interpretazione del diritto viene reclusa in un'accezione sempre più di tipo esegetico, in nome di una tecnicità sempre più spinta. L'esegesi, come ricorda Grossi, «è vocabolo che viene da lontano, dagli studi sulle Sacre Scritture nei quali si richiede allo studioso un atteggiamento doverosamente passivo»[8]. Coerentemente, in aderenza all'immagine del giudice come "bocca muta", che pronuncia le parole della legge, si rafforza un'idea dell'interpretazione come processo dominato da regole eminentemente tecniche[9], che tende ad accreditare l'interprete sulla base di una particolare ed elevata specializzazione, piuttosto che come un protagonista del processo giuridico.

Naturalmente, tra queste due versioni storiche dell'interpretazione, in Europa il punto di svolta decisivo è costituito dall'ideale illuminista di produzioni di leggi così chiare da rendere superflua l'interpretazione: un ideale ben rappresentato dal celebre brocardo *in claris non fit interpretatio*. Nei paesi dell'Europa continentale ad esperienza legislativa e codicistica, Francia in testa, si guarda dunque con diffidenza allo spazio dell'interprete, tentando di ridurlo al minimo possibile. La vicenda europea dell'interpretazione giuridica sembra dunque legata ineluttabilmente a due elementi essenziali: da un lato al carattere testuale del diritto, dall'altro ad una precisa teoria delle fonti. È la posizione di preminenza del diritto legislativo, ossia "scritto", nell'assetto delle fonti, che dà luogo alla possibilità di porre l'interprete in posizione "esegetica". Ciò implica infatti sia una posizione di quasi monopolio del legislatore nella produzione normativa, sia il carattere "scritto" di questa fonte, che può produrre una conseguente teoria dell'interpretazione di tipo esegetico.

Va qui precisato subito che per "scrittura", si deve intendere non un qualsiasi tipo di scrittura: il grado di "scrittura" di un testo giuridico è proporzionale all'importanza che ha quel testo in quanto testo di riferimento. Solo i codici e le costituzioni possedevano un carattere simile a quello del libro sacro di una religione monoteista. E l'Europa dell'età moderna è stata l'unico scenario giuridico in cui si sia portato a compimento il tentativo di produrre scritture giuridiche così importanti ed esclusive, da contenere la pretesa di abbracciare ed esaurire tutto il diritto.

Era il riferimento forte al diritto inteso come testo, che permetteva, in Europa, di operare la chiusura di un intero mondo giuridico entro i confini di ciascuno stato. Ciò appare con maggiore evidenza se si fa il confronto con il mondo di *common law*. È proprio la presenza del testo scritto come riferimento primario per l'interprete che segna la differenza più importante tra mondo di *civil law* e mondo di *common law*. Se è vero, come ricordano George Fletcher e Scott Sheppard, che il *civil law* è il prodotto «di una struttura intellettuale di tipo autoritario ereditata dalla Chiesa cattolica e dal Giudaismo, mentre il *common law* riflette il decentramento e lo spirito democratico espressi dalla riforma protestante»[10], ne derivano due scenari assai diversi anche in materia di interpretazione. In altri termini, il riferimento al primato del legislatore ha costituito per l'esperienza giuridica dei paesi europei di cultura continentale il presupposto di quella "teologia giuridica", che identificava nel legislatore l'equivalente di una figura divina.[11]

È ancora possibile riconoscere nella realtà europea odierna la fotografia dell'interpretazione giuridica in senso esegetico tracciata dagli illuministi? Questa immagine, tuttavia, risulta ormai sbiadita e difficilmente rappresenta l'attualità, essendosi progressivamente appannata nel tempo.

Nel corso del Novecento, in Europa, l'interpretazione, pur restando una attività essenzialmente riferita ad un testo scritto, ad una legge da cui l'interprete non può prescindere, si è allontanata sempre più da un'accezione esegetica. Si possono cogliere almeno due passaggi essenziali di questa vicenda. In primo luogo, un percorso teorico che ha portato sempre più ad estendere e valorizzare lo spazio interpretativo del giurista e

[8] *Ibidem*.
[9] P. CHIASSONI, *Tecnica dell'interpretazione giuridica*, Bologna, 2007.
[10] G. FLETCHER, S. SHEPPARD, *American Law in a Global Context. The Basics*, Oxford e New York, 2005, p. 38.
[11] Come verrà sottolineato più avanti nel testo, questa "teologia giuridica" è rimasta estranea al mondo di common law, specie a quello americano, che ha guardato tradizionalmente piuttosto con sospetto alla legislazione come potenziale portatrice del rischio di "tirannia delle maggioranze", e che non ha mai rinunciato ad altre fonti di produzione giuridica come quelle proprie del common law.

specie del giudice. In secondo luogo, un percorso politico ed istituzionale che, a ridosso del processo di unificazione europea, ha complicato e arricchito quel sistema delle fonti a carattere piramidale, che gli stati avevano eretto come guida esclusiva per l'interprete.

Sotto un profilo teorico, l'allontanamento da teorie dell'interpretazione di stampo esegetico si compie attraverso un lungo percorso che ha comportato strappi e dissensi dalla dottrina positivistica dell'interpretazione ed è stato animato da voci e posizioni assai diversificate. In quel panorama, Rodolfo Sacco si segnalò precocemente con le sue posizioni eterodosse, sostenendo che l'unico significato rinvenibile nella legge è quello che ad essa dà l'interprete[12].

Più in generale, si va verso un'idea dell'interpretazione come «un elemento essenziale perché il sistema giuridico riconosca la propria identità e dai testi scritti si passi al diritto vivente»[13]. Su questa scia, appare sempre più scopertamente non solo il ruolo significativo svolto dall'interprete, ma anche la "natura composita" dell'interpretazione[14]. Così, se da un lato l'interpretazione appare sempre più come "attività di attribuzione di un significato ad un testo", secondo l'autorevole definizione di Giovanni Tarello[15], e dunque un riflesso del ruolo attivo dell'interprete, dall'altro, essa non è attività meramente cognitiva o ricognitiva, ma include anche altri aspetti e sfaccettature. Vi è, ad esempio, un'attività di "decisione" che svolge l'interprete e si potrebbe, in tal senso, dire che "il giudice decide interpretazioni", mentre il giurista "propone interpretazioni", secondo la suggestione di Guastini[16]. Inoltre, come sottolinea l'approccio ermeneutico all'interpretazione, questa si compone anche di un ulteriore tassello: l'attività dell'interprete svolge sempre anche una essenziale funzione di "concretizzazione", perché si pone su un terreno intermedio "tra l'ambito normativo e l'ambito fattuale"[17].

Qui vi è una prospettiva particolarmente interessante per analizzare i lidi a cui approda l'interpretazione, via via che nell'occhio dell'interprete entra sempre più prepotentemente il mondo dei "fatti", proprio come accadeva nella storia medievale[18]. Nel passato disegnato dagli illuministi, come si è detto, il tema dell'interpretazione giuridica era declinato soprattutto con riferimento ad una precisa gerarchia delle fonti, e tendeva ad espungere i fatti, o almeno a ridurne al minimo specificità e rilevanza, nella presunzione di una loro perfetta riconducibilità a fattispecie e categorie giuridiche astratte. Via via che i fatti entrano nell'occhio dell'interprete, il tema dell'interpretazione si allontana dalla forbice di una opposizione secca tra l'opzione di una "interpretazione vera/corretta" e quella di un'interpretazione "falsa/sbagliata" e si vede la possibilità di dare più risposte plausibili ad uno stesso quesito.

4. L'interpretazione: evoluzione e influenze oltreoceano

Proprio mentre l'Europa compiva questo lungo percorso, anche sulla scia di influenze realiste americane, per un curioso paradosso, negli Stati Uniti, come altre volte è accaduto nella storia di quel paese, si andavano profilando tendenze di segno opposto. È un vero paradosso che oggi siano gli Stati Uniti ad approdare sui lidi di nuove e rigide teorie dell'interpretazione, in connessione con teorie politiche e giuridiche che non sono né nella storia né nella tradizione di quel paese.

Gli Stati Uniti, a differenza dell'Europa, non hanno mai avuto una "teologia politica", nella misura in cui non hanno mai attribuito carattere prioritario o esclusivo ad un legislatore che avesse il monopolio della produzione giuridica. Sul suolo americano, in un contesto giuridico ben diverso, il tema dell'interpretazione ha assunto una importanza di gran lunga inferiore. Varie circostanze contribuivano a determinare la diversità. In primo luogo, la dispersione delle competenze a produrre diritto attraverso il federalismo ha impedito che si riproducessero le condizioni di monopolio di *un* legislatore tipiche della tradizione europea. Ancora più importante, il contesto di un *common law*, ossia la tradizionale prevalenza di una modalità non scritta e decentrata di produzione giuridica, affidata essenzialmente ai giudici. Inoltre, l'esistenza del *judicial review* in forma diffusa sul suolo americano rende evidente e legittima una logica competitiva tra organi legislativi e

[12] R. SACCO, *Il concetto di interpretazione del diritto*, Torino, 2003, copia anastatica del volume del 1947.
[13] F. VIOLA, G. ZACCARIA, *op. cit.*, p. 329.
[14] *Ibidem*.
[15] G. TARELLO, *Diritto, enunciati, usi*, Bologna, 1974, e ID., *L'interpretazione della legge*, Milano, 1980.
[16] R. GUASTINI, *Le fonti del diritto e l'interpretazione*, Milano, 1993.
[17] F. VIOLA, G. ZACCARIA, *op. cit*., p. 114.
[18] Paolo Grossi ha ripetutamente salutato con favore questo ingresso dei fatti nella lente dell'interprete, come un'opportunità per dare vitalità e aggancio alla vita reale al diritto dei nostri giorni.

organi giudiziari. In queste condizioni di decentramento della produzione e del controllo giuridico, non potevano darsi teorie dell'interpretazione come quelle sorte sul suolo europeo, con un sistema delle fonti estremamente coeso ed organizzato in forma piramidale. Come notava Karl Llewellyn, «il *common law* non ha mai dato il meglio quando ha amministrato la giustizia sulla base di testi scritti»[19]. Più in generale, questo autore lamentava «il carattere irregolare ed il percorso a balzi» della letteratura americana sul diritto legislativo, in quanto diverso dal diritto giudiziario[20].

L'unico campo in cui la teoria dell'interpretazione si è più sviluppata sul suolo americano ed ha prodotto una consistente letteratura è quello costituzionale: sull'interpretazione costituzionale non solo esiste una notevole produzione[21], ma si è talora anche affacciata l'idea di un accostamento con le Sacre Scritture[22]. Tuttavia, anche il tema della interpretazione costituzionale è stato declinato prevalentemente secondo i canoni del *common law*, che danno rilievo soprattutto al criterio dello *stare decisis*[23], ossia con riferimento a criteri di decisione elaborati in precedenza nelle corti.

Se questa era la tradizione più consolidata, si è assistito ad una curiosa inversione di ruoli tra Europa e Stati Uniti su questo tema. La questione dell'interpretazione si è accesa sul suolo americano più di quanto non sia successo sul suolo europeo, ma in una chiave tutta diversa da quella tradizionalmente europea. Se in Europa l'idea di una interpretazione fedele agli intenti del legislatore ha da tempo lasciato il campo ad un'idea storica ed evolutiva del processo interpretativo, negli Stati Uniti, l'idea di *originalism,* evocata da Antonin Scalia[24], pare orientata verso il passato: un passato inventato, visto che nel passato la questione della interpretazione non aveva mai avuto un grande rilievo, anche per la mancanza di quei presupposti di natura sistemica che sono alla base del diritto europeo. L'*originalism* sfiora persino il *common law*, smentendo una lunga tradizione in cui continuità e cambiamento, fedeltà al passato e innovazione hanno sempre convissuto[25]. Gli intenti degli originalisti vanno intesi come ricerca del senso originale del testo e come un freno contro l'idea di una "living Constitution" che possa, ad esempio, pervenire a dichiarare "incostituzionale" la pena di morte, che è scritta a chiare lettere nel testo costituzionale americano[26].

Ma è la riscoperta del *textualism* il grimaldello teorico con cui Scalia, in esplicita contrapposizione proprio con quella tradizione di *common law*, che ha dominato l'orizzonte giudiziario americano, rivendica un diverso approccio al diritto. Egli, sostenendo che questa è «un'epoca di legislazione e la maggior parte del nuovo diritto è diritto legislativo»[27], lamenta che una sopravvissuta prassi di *common law*, in un mondo di *civil law*, impedisca una adeguata elaborazione di criteri di interpretazione riferiti al diritto scritto. Naturalmente è soprattutto al testo costituzionale, ad alta valenza politica, che è rivolta l'attenzione di Scalia, ed è di quel testo che egli rivendica il carattere "scritto", a cui dovrebbe fare seguito una appropriata interpretazione.

Dunque, anche negli Stati Uniti, la questione dell'interpretazione si risveglia intorno ad un "testo", che del resto è sempre stato per quel paese il testo per eccellenza.[28]

La riscoperta del *textualism* e l'intento di allinearsi con teorie dell'interpretazione come quelle tipiche dell'Europa continentale appaiono in singolare contraddizione con le innovazioni che oggi coinvolgono buona parte del mondo, anche all'insegna di una estensione della *rule of law* di ispirazione americana. Tutto questo si è posto parallelamente ad altri atteggiamenti di chiusura esibiti dagli Stati Uniti, ad esempio sia verso alcuni

[19] K. LLEWELLYN, *The Common Law Tradition*, Boston, 1960, p. 60.
[20] Richiama questo carattere A.M. GLENDON, *Comment* al testo di Scalia *"A matter of Interpretation. Federal Courts and the Law"*. Anche la nota 10 è tratta dal testo di Glendon, p. 96.
[21] Si veda J. GOLDSWORTHY (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford, 2006. Tra altri si veda anche: C. R. SUNSTEIN, *How to Interpret the Constitution*, Princeton, 2023.
[22] G.A. KALSCHEUR S.J., *Christian Scripture and American Scripture: An Instructive Analogy?*, in *Journal of Law and Religion*, vol. 21 (2005-2006), dove si fa esteso riferimento al lavoro del biblista Pelikan su analogie e differenze tra Bibbia e testo costituzionale.
[23] U. MATTEI, *Stare decisis*, Milano, 1988.
[24] A. SCALIA, *Common-Law Courts in a Civil-Law System: the Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A. GUTMAN (ed.), *A matter of Interpretation. Federal Courts and the Law*, Princeton N.J, 1997 – ultima edizione 2018.
[25] Si veda B.A. MEYLER, *Towards a Common Law Originalism*, rep. in hppt://lsr.-nellco.org/cornell/clsops/papers/20.
[26] Cfr. *ivi*, p. 46.
[27] *Ivi*, p. 13.
[28] Nell'ondata del dibattito sull'interpretazione nel paese è stata proposta dal Congresso una Risoluzione per porre limiti precisi all'interpretazione costituzionale.

accordi di diritto internazionale, sia verso Corti internazionali o di altri paesi, attraverso il cosiddetto "dialogo di costituzionalismo". Non a caso, la Corte Suprema è stata a più riprese teatro di scontro proprio sulla possibilità di potersi avvalere nel processo interpretativo del ricorso a fonti giuridiche straniere, così come al diritto internazionale[29].

5. Globalizzazione e nuove prospettive sull'interpretazione

Ora, questo percorso americano appare ancor più paradossale se si pensa che in Europa sarebbe difficile tornare a teorie ispirate all'idea della fedeltà al "testo". Oltre al percorso evolutivo già accennato nei paragrafi precedenti, più in generale, con la globalizzazione, il tema dell'interpretazione si pone su basi sensibilmente nuove in Europa e fuori dall'Europa. Ciò essenzialmente per due ordini di ragioni.

In primo luogo, perché si assiste all'attenuarsi del carattere scritto del diritto[30], almeno se la scrittura viene intesa come sigillo di un testo e forma definitiva e destinata a durare. Quando il testo giuridico si poneva in forma strettamente legislativa, era più facile indurre l'interprete ad una posizione ancillare rispetto ad esso. Ma si è assistito al carattere recessivo della forma legislativa e codicistica, via via che il diritto si pone in forma sempre più "contrattuale" o in forma "giudiziaria": la scrittura non cessa di esistere, ma assume un carattere mobile, instabile, fino al punto di poter dire che spesso l'interpretazione, piuttosto che svolgersi rispetto ad un testo scritto, contribuisce di volta in volta a "scrivere" il diritto, ossia a tradurlo in formulazioni scritte rilevanti, che producono effetti, ma che non sono definitive, e attendono successive riformulazioni. Si pensi al carattere "scritto" di un contratto, e soprattutto delle sentenze: si tratta di atti di scrittura giuridicamente rilevanti, che producono effetti, ma destinati a durare, come parole scritte sulla sabbia, solo fino a che il vento o la pioggia o un altro movimento successivo non la mutino o la cancellino.

In più, anche dove la forma rimane legislativa, via via che diversi testi legislativi si accumulano gli uni sugli altri, diventa difficile tornare a tecniche interpretative tradizionali. Si assiste al moltiplicarsi di varie fonti e documenti giuridici, che rendono sempre più problematico il riferimento ad una rigida gerarchia di fonti. Alla fine, i giudici di *civil law* sono spesso in posizione non troppo dissimile da quella dei colleghi di *common* law, quando sono alle prese con una pluralità di testi, spesso rabberciati frettolosamente, che presentano sovrapposizioni, ambiguità e incongruenze.

Infatti, il nostro tempo è caratterizzato sia da tendenze di carattere federalista, che portano alla produzione di regole giuridiche sub-nazionali, sia da spinte in direzione opposta, verso la produzione di atti di diritto internazionale, sovranazionale e transnazionale. Questa ricca panoplia di strumentazioni giuridiche, in formazioni variegate, affolla il campo visivo dell'interprete, dilatando significativamente il suo spazio di manovra e le opzioni a sua disposizione. D'altra parte, la coesistenza di tante dimensioni giuridiche porta a fenomeni di contatto e di ibridazione, che hanno inevitabili ripercussioni sulla sfera dell'interpretazione. Com'è stato notato, «l'ibridazione non si riduce all'elaborazione delle norme, essa rinnova anche la questione della loro interpretazione in caso di imprecisioni o di lacune del diritto scritto»[31]. Inoltre, i trattati internazionali, la cui interpretazione è rimessa in gran parte a giudici nazionali, pongono a loro volta l'esigenza di nuovi criteri interpretativi che assicurino conformità[32]. In Europa, d'altra parte, nuove elaborazioni sono affidate alla Corte di giustizia[33] ed anche al dialogo tra le due corti[34]. Mentre incontri e scontri tra

[29] Si veda ad es. lo scontro tra due *Justices* come A. Scalia e A.M. Kennedy, attestati rispettivamente sulla linea dell'*originalism* e su quella del riconoscimento di un cambiamento globale che crea bisogno di confronto e di apertura verso altre esperienze ed altre storie del mondo, in S. TOOBIN, *The Nine. Inside the Secret World of the Supreme Court*, New York, 2007, p. 195 ss.

[30] Rimando in proposito al mio *Le istituzioni della globalizzazione*, Bologna, 2000, p. 159 ss.

[31] M. DELMAS-MARTY, *Les forces imaginantes du droit (II). Le pluralisme ordonné*, Paris, 2006, p. 121. La stessa autrice ricorda che lo Statuto della CPI impone nuove direttive sull'interpretazione ai giudici penali internazionali (*ivi*, p. 16).

[32] Si veda *Ars interpretandi*, 2001, interamente dedicato al tema "Giustizia internazionale e interpretazione". Si veda altresì L.J. SILBERMAN, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, http://lsr.nellco.org/nyu/-plltwp/18.

[33] C. JOERGES, *Il ruolo interpretativo della Corte di Giustizia e la sua interazione con le corti nazionali nel processo di europeizzazione del diritto privato*, in *Rivista critica di diritto privato*, n. 2/2000.

[34] Osserva ad es. C. Pinelli, che secondo la Corte «le diverse formule espressive dei cataloghi dei diritti dell'uomo "si integrano, completandosi reciprocamente nella interpretazione"». Così in *La tutela multilivello dei diritti fondamentali. Una ricostruzione*, in *Studi in onore di Alessandro Pace*, III, Napoli, 2012.

interpretazioni e pratiche interpretative si producono a più livelli nello scenario globale, dando luogo a vere e proprie battaglie interpretative[35], compaiono qui e lì statuti e tentativi per dare regole e indicazioni specialmente a quell'interprete particolare che è il giudice internazionale[36].

Dunque, le problematiche dell'interpretazione sono in profondo rinnovamento: via via che si moltiplicano gli scenari giuridici e le tipologie di contatto tra vari sistemi, norme, istituti e scenari giuridici, anche l'interpretazione giuridica è costretta a rinnovarsi, spesso prendendo in carico intonazioni e temi tipici della traduzione. Così l'interpretazione a più riprese è costretta a fuoriuscire dal suo guscio monoculturale, a confrontarsi con altri istituti, altri sistemi, altre culture giuridiche.

6. La traduzione nel diritto

L'altro polo del nostro binomio, la traduzione, ha una storia assai meno lunga ed importante per il diritto. Naturalmente anche nel passato si ricorreva alla traduzione del diritto per esigenze volta a volta diverse. Si poteva trattare di esigenze di carattere culturale, legate all'interesse per un sistema o per un istituto giuridico di un paese diverso. L'esistenza stessa delle discipline comparatistiche è stata inevitabilmente connessa a bisogni di traduzione. Si poteva trattare di esigenze di carattere pratico, come, ad esempio, quelle di un avvocato alle prese con un caso di diritto internazionale privato. Si poteva trattare, infine, di esigenze di carattere politico, come nel caso di uno stato in cui vigesse il plurilinguismo, o di accordi commerciali o trattati tra vari stati. Ma la traduzione restava una presenza marginale, ben circoscritta, in un mondo giuridico che restava prevalentemente consegnato alla divisione netta tra gli ordinamenti statali e alle differenze linguistiche e culturali che sui territori degli stati insistevano. Il ruolo marginale svolto dalla traduzione in area giuridica valeva per gli Stati Uniti, così come per l'Europa, a dispetto del fatto che il continente nord-americano poteva contare su una lingua unica, mentre l'Europa era suddivisa non solo in diversi stati e culture giuridiche, ma anche in una miriade di linguaggi giuridici.

Il tema della traduzione ha assunto una importanza ed una valenza del tutto nuove per il diritto nel corso del processo di globalizzazione, che conduce a continue occasioni di incontro, confronto e ibridazione tra vari sistemi giuridici. Naturalmente, sul tema della traduzione non manca una consistente letteratura[37], sufficiente per mettere a punto la problematicità del processo che essa implica. Una problematicità persino maggiore rispetto a quella dell'interpretazione, come si evince da quel tratto distintivo prima evocato: se la traduzione si differenzia rispetto all'interpretazione perché comporta un "salto" in un'altra dimensione, l'esito di questo movimento è esposto ad un rischio maggiore. Proprio questa problematicità porta a formulare definizioni e significati diversi per la traduzione, così come a dare risposte diverse e persino opposte al quesito sulle possibilità di successo che si possono prevedere per un'operazione di traduzione. Vi è un lungo intervallo lungo il quale è possibile sistemare le varie risposte a questo quesito e ai due estremi troviamo quelle opposte soluzioni che François Ost caratterizza come Scilla e Cariddi: da una parte l'idea dell'impossibilità della traduzione, e dall'altra l'idea della traduzione perfetta[38].

Lungo questo intervallo, più o meno ad un punto intermedio, si può collocare la proposta di Umberto Eco di definire la traduzione come il tentativo di "dire quasi la stessa cosa" da una lingua in un'altra[39]. Questa risposta appare particolarmente preziosa, proprio perché, pur sottolineando tutta la problematicità dell'intervento del traduttore, non cede all'alibi dell'intraducibilità, né indulge, all'opposto, all'illusione della traduzione perfetta, che sia, cioè, esente da problemi o imperfezioni. Al contempo, Eco ci conduce a pensare che, data l'imperfezione della traduzione, possano darsi più traduzioni, proprio come si possono dare più

[35] Si veda in tal senso P. MONATERI, *La battaglia tra le interpretazioni e la questione della verità*, in E. NAVARETTA, A. PERTICI (a cura di), *Il dialogo tra le Corti. Principi e modelli di argomentazione*, Pisa, 2004. Monateri non esita a porre l'interpretazione sul piano della «giustificazione della difesa di un interesse mediante autorità sopra il significato di un testo» (p. 61).
[36] M. DELMAS-MARTY, *op. cit.*, p. 26, ad esempio, richiama l'attenzione sullo Statuto della CPI, che "impone ai giudici internazionali delle direttive d'interpretazione".
[37] Si veda, ad esempio: S. ŠARČEVIĆ, *New Approach to Legal Translation*, The Hague, 1997; Id. Language and Culture in EU Law. Multidisciplinary Perspectives, Farnham, 2016.
[38] Ost torna in più scritti su questa forbice.
[39] U. ECO, *Dire quasi la stessa cosa*. *Esperienze di traduzione*, Milano, 2006, ristampato nel 2024.

interpretazioni per uno stesso testo[40].

Gli apporti di Eco appena ricordati appaiono particolarmente utili per inquadrare anche la scena della traduzione giuridica, in quanto corrispondono al tasso di problematicità che è proprio di quella, e che cresce ed assume nuove connotazioni lungo il processo di globalizzazione. Questa è, infatti, un motore di continui bisogni di traduzione anche nell'area giuridica, lungo percorsi che producono continue occasioni di incontro e di scontro tra le differenze linguistiche. In questo scenario, la traduzione giuridica tende sempre più ad apparire, piuttosto che come un'operazione astratta e sempre uguale a sé stessa, come un orizzonte operativo le cui operazioni tendono a diversificarsi in ragione specialmente degli scenari giuridici in cui si svolgono.

Grosso modo, i tre principali scenari in cui si verificano contatti tra sistemi giuridici diversi e conseguenti bisogni di confronto e di traduzione sono i seguenti: l'area del diritto internazionale; l'area del diritto sovranazionale ed infine quella del diritto transnazionale. Conviene distinguere queste tre "tipologie" del diritto globale[41], perché ognuna di esse è presumibilmente collegata a diversi bisogni ed esigenze di traduzione. In altri termini, si vanno costruendo problematiche della traduzione, che si pongono presumibilmente in maniera differenziata e specifica con riferimento a diversi scenari. Naturalmente, anche all'interno degli stati possono insorgere bisogni di traduzione, in ragione del multiculturalismo o, per gli stati europei, in ragione del rapporto con il diritto "comunitario". Ma soprattutto lungo le tre dette aree insorgono bisogni di intesa e di traduzione giuridica, che non necessariamente sono gli stessi, perché rispondono a fini ed esigenze diversi per ogni area, cosicché si potrebbero ipotizzare altrettanti "scenari" od "orizzonti" della traduzione.

Vi è innanzitutto l'area del diritto internazionale, costellata di trattati e di organizzazioni internazionali. Proprio il moltiplicarsi di queste organizzazioni dà vita ad uno scenario internazionale diverso da quello tradizionale, in cui gli stati restavano i "padroni" quasi esclusivi dei trattati. In quel quadro, gli stati potevano gestire anche gran parte delle questioni di traduzione giuridica, in un assetto piuttosto statico. Oggi le organizzazioni internazionali, prevalentemente multilaterali, pur avendo ancora formalmente un carattere interstatuale, costituiscono uno scenario assai più mobile ed irrequieto anche sotto il profilo linguistico: nella misura in cui costituiscono delle macchine organizzative complesse, dotate di staff permanenti, che tendono ad acquisire una relativa indipendenza dagli stati, esse contengono e producono, oltre che continue occasioni di incontro e bisogni di traduzione tra i vari termini dei lessici giuridici nazionali, anche scenari di innovazione delle pratiche e dei temi della traduzione. È infatti inevitabile che si producano, nella vita delle stesse organizzazioni, non solo semplici operazioni di traduzione, ma veri e variegati effetti di commistione anche sotto il profilo linguistico[42].

Si pensi ad una procedura internazionale ormai consolidata come quella detta *notice and comment* che, così come altre procedure internazionali, costituisce una modalità di consultazione e negoziazione tra i vari stati per arrivare ad una base di accordo condiviso. È ovvio che lungo questo percorso si producano anche conflitti e negoziazioni sui termini, anche attraverso la collaborazione di esperti di varia natura, giuristi, contabili, economisti, analisti finanziari, ecc., che introducono i propri vari vocabolari.

Dalla partecipazione dei vari soggetti all'arena internazionale deriva, tra altri effetti, la tendenza a ridurre le differenze più eclatanti dei vocabolari giuridici dei vari stati, per indirizzarsi verso mete giuridiche semanticamente più condivise che in passato. Siamo qui evidentemente ben oltre il mero orizzonte della traduzione di un accordo internazionale nelle varie lingue dei paesi contraenti. È la stessa creazione del diritto internazionale che avviene su un terreno di reciproca contaminazione tra i registri linguistici, culturali e giuridici degli stati.

Ancor più, nell'ambito del diritto sovranazionale sorgono bisogni ed esperienze di traduzione che sono specifici e che sono collegati alla struttura costituzionale e linguistica dell'Europa. L'esperienza di istituzionalizzazione dell'Unione europea ha dato luogo, per la prima volta nella storia, ad un multilinguismo giuridico esteso a (quasi) tutte le lingue presenti negli stati membri e completamente istituzionalizzato. Il motto di riferimento "uniti nella diversità" trova in ambito linguistico una specifica realizzazione, cosicché l'Europa giuridica pone al centro della propria produzione normativa il concetto di co-decisione e, con questo, quello

[40] U. ECO, *I limiti dell'interpretazione*, Milano, 1990, ristampato nel 2016.
[41] Rimando in proposito al mio *Diritto sconfinato*, Roma-Bari, 2006.
[42] Si veda, ad es., E. MENEZES DE CARVALHO, *The Juridical Discourse of the World Trade Organization: The Method of Interpretation of the Appellate Body's Reports*, in *Global Jurist*, vol. 7, iss. 1 (Topics), art. 4, in www.bepress.com/gj/vol7/iss1/art4, dove con riferimento alle decisioni dell'*Appellate Body* si analizzano i metodi di interpretazione adottati con i sistemi linguistici dei vari paesi in questione, che vengono utilizzati come dei "dizionari".

della traduzione come pratica estesa e quotidiana.

La traduzione giuridica irrompe nello scenario europeo all'insegna di un paradosso: sospesa tra un destino di routinizzazione della sua pratica e gli effetti rivoluzionari che produce per la cultura giuridica degli stati. Da un lato, essa, ridotta a pratica continuata e quotidiana, legata a fini funzionali, si burocratizza e perde quella connotazione magica misteriosa che le è propria. Dall'altro, proprio attraverso questa routinizzazione, si compie un esperimento di portata storica, che mira all'avvicinamento tra le varie culture giuridiche statali. Al contempo, ponendo le questioni della traduzione al centro dello scenario giuridico, l'Europa innova sensibilmente sia le problematiche giuridiche che quelle della stessa traduzione[43].

Infine, anche i processi di creazione di diritto transnazionale costituiscono una ulteriore occasione di confronto, interazione e comunicazione tra vari termini e sistemi giuridici, che producono specifiche esigenze di traduzione: qui non si tratta tanto di tradurre da una lingua in un'altra, quanto di creare termini e lessici giuridici che corrispondano al bisogno di costituire una sorta di speciale "lingua comune". Che si tratti della cosiddetta *lex mercatoria*, che viene creata e utilizzata dai vari "mercanti" odierni, per permettere ed allargare l'area degli scambi commerciali[44], o del progetto *Principles and Rules of Transnational Civil Procedure*[45], che mette a disposizione delle regole di procedura civile per le grandi controversie tra soggetti economici, ci troviamo di fronte a dei "non luoghi giuridici"[46]: assetti di regole giuridiche di origine privata, che rinunciano ad una precisa e univoca connotazione culturale, per proporsi con successo al maggior numero possibile di fruitori nel mondo globale. Certamente questi "non luoghi" giuridici, essendo frutto di una elaborazione maturata soprattutto nella cultura anglo-americana, tendono non solo a ricorrere preferibilmente all'inglese, ma anche ad assumere prevalentemente le tonalità tipiche del *common law*. Ma essi non si sottraggono all'incrocio anche con altre diverse tonalità, siano quelle di *civil law* o quelle addirittura di altre culture giuridiche[47]. Il bisogno di produrre uno spazio di elaborazione giuridica affrancata da appartenenze culturali monotematiche, e rispondente ad un criterio di incontro tra varie culture, produce a sua volta un'elaborazione linguistica nuova, una specie di meta-lingua giuridica a carattere specialistico[48].

Ma anche nell'ambito dei diritti umani si assiste ad una elaborazione linguistica che possa accompagnare il percorso di avvicinamento tra le varie culture giuridiche e politiche di riferimento. Specialmente in questo campo, il mondo globale sembra richiedere anche nuove elaborazioni linguistiche, capaci di ridurre la diversità tra le varie accezioni di diritti e di preparare cammini più condivisi. Ancora una volta, siamo di fronte a problemi e questioni che si collocano oltre il tradizionale ruolo dell'interpretazione: in un universo in cui, si potrebbe dire, si rivelano le capacità anticipatrici e visionarie delle parole, ed attraverso queste, si può dare forma "al progetto, così come alla speranza"[49].

7. Mutamenti di paradigma: dall'interpretazione alla traduzione

Se la teoria e la pratica del diritto statale erano costellate dai problemi dell'interpretazione, la pratica e la

[43] Ho sostenuto questa tesi in *Drafting e traduzione: un'insolita accoppiata. Si può scrivere il diritto in molte lingue?*, in E. IORIATTI FERRARI (a cura di), *La traduzione del diritto comunitario ed europeo: riflessioni metodologiche*, Quaderni del Dipartimento di Scienze Giuridiche, Trento, 2007.

[44] La letteratura sul tema è davvero enorme. Mi limiterò a richiamare F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, 2005, il numero speciale di *Sociologia del diritto* interamente dedicato al tema e le mie pagine sul tema in *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Bari-Roma, 2006.

[45] Il lavoro di stesura, durato sette anni e che ha avuto come co-reporters G. Hazard e M. Taruffo per l'*American Law Institute* e G. Hazard e R. Stuerner per UNIDROIT, si è avvalso di incontri con le diverse categorie di giuristi (avvocati, giudici, accademici) di vari paesi, inclusi Cina, Giappone, Usa, America Latina ed Europa. Si veda F. FERRAND (a cura di), *La procédure civile modelisée*, Paris, 2004. Il testo completo del progetto è consultabile in www.ali.org.

[46] Rimando in proposito al mio *Diritto sconfinato*, cit., p. 79 ss.

[47] Galgano, ad esempio, sottolinea la penetrazione nei Principi Unidroit di clausole che tendono a rispecchiare principi di solidarietà e reciprocità tipici del diritto asiatico. Si veda F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, 2006, pp. 75-76 dove si richiama, tra l'altro, un lodo arbitrale di G. Alpa, in cui si applica l'*hardship*, che pure non è conosciuto dal diritto italiano. Inoltre, sui modelli contrattuali asiatici e il rapporto con l'Occidente, M. TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Padova, 2004.

[48] Ad esempio si veda: E. IORIATTI, *Visualizing EU law through meta-concepts and legal formants*, in L. BIEL, H. J. KOCKAERT (a cura di), Handbook of Terminology. Vol 3 Legal Terminology, Amsterdam, 2023, p. 289-309.

[49] Cfr. P. ZUMTHOR, *Babele*, Bologna, 2007, p. 186.

teoria del diritto odierno sono sempre più costellate da temi e problemi tipici della traduzione, fino al punto di poter ipotizzare una posizione addirittura paradigmatica per la traduzione nello scenario giuridico attuale. Rodolfo Sacco ci chiama qui a salutare una nuova disciplina, la traduttologia, che, con l'antropologia, accompagna sempre più i percorsi del diritto.

Ma Sacco non è il solo ad intuire questi nuovi percorsi. Ost ci illustra efficacemente non poche delle ragioni per cui oggi la traduzione guadagna una posizione sempre più paradigmatica per il diritto[50]. Innanzitutto, la traduzione si "iscrive nell'ambito della pluralità", perché deriva dalla frammentazione nell'universo linguistico in una molteplicità di universi comunicativi e dalla necessità o dal desiderio di stabilire ponti, rapporti ed equivalenze tra essi. Come ha mostrato Paul Ricoeur, dopo la tragedia di Babele, in un mondo condannato all'incomunicabilità, e dunque all'impossibilità della stessa fraternità (come si può essere fratelli senza parlarsi e senza intendersi?), la traduzione appare come l'unico rimedio per restaurare una possibilità di dialogo e di comunicazione tra lingue diverse. Ma la traduzione non è solo un rimedio dettato dalla necessità; essa incorpora anche una ispirazione etica perché esprime quello che Ricoeur ha chiamato un principio di "ospitalità linguistica": tradurre significa voler riservare uno spazio nella propria lingua a qualcosa (un termine, un concetto, un'idea) che viene da fuori. Al contempo, poiché "tradurre è capire"[51], la traduzione comporta una volontà di avvicinamento, una finalità di comunicazione e dialogo tra i vari sistemi. Naturalmente si può tradurre anche per fini malevoli o illegali: per spiare, per controllare o per impossessarsi di un segreto o di una risorsa: ma in ogni caso, anche in questi casi, la barriera dell'incomunicabilità è stata abbattuta[52].

La traduzione può essere vista insomma sia come necessario rimedio alla maledizione dell'incomunicabilità tra le lingue prodotta da Babele, sia come risorsa per un mondo che non si vuole far rinchiudere entro recinti condannati all'incomunicabilità. Le assonanze tra il processo di globalizzazione e la torre di Babele sono facili da cogliere. La globalizzazione ha implicato il crollo di quell'ordine post-illuministico, che era stato eretto sulla chiarezza dei concetti e sulla nettezza delle distinzioni. Sotto un profilo istituzionale, gli stati rispondevano a quel richiamo, confinando entro precisi confini la propria identità ed il proprio diritto. La globalizzazione giuridica implica un rimescolamento di quelle differenze, una rottura di quei confini.[53] Nel mondo globalizzato, la traduzione irrompe come inevitabile necessità innanzitutto sotto il profilo culturale, di fronte ad un bisogno di "traduzione di culture" che caratterizza il nostro scenario in maniera sempre più prepotente. Se l'antropologia, disciplina tributaria verso l'esperienza coloniale, è la scienza che mette a fuoco "l'interpretazione di culture"[54], ossia la necessità di "interpretare l'interpretazione che una società dà di se stessa" e perfino di "interpretare questa interpretazione dell'interpretazione"[55], oggi una nuova antropologia post-coloniale ha il compito di andare al di là della interpretazione, per assumere la traduzione come suo schema di riferimento. Qual è la caratteristica essenziale di questa "antropologia interpretativa", che incorpora in sé alcuni classici tratti della traduzione?

Assumere lo schema del traduttore implica una forma di agire pervasa dalla consapevolezza di un continuo e potenziale scambio di ruoli. Il traduttore fa riferimento ad un duplice orizzonte: quello di tradurre in una lingua "altra", a partire dalla propria, o quello di tradurre da un'altra lingua nella propria. Si può tradurre ed essere tradotti. Questa è la consapevolezza di fondo del traduttore. L'antropologo che fa proprio questo schema lascia il punto di osservazione fisso, che è proprio dell'interprete: si percepisce come possibile bersaglio passivo, oltre che come soggetto attivo. Lo sbilanciamento in questa direzione implica un sapersi mettere al posto dell'altro, non solo a fini intellettuali, ma anche a fini pratici. E quando l'interprete lascia la terraferma del proprio orizzonte culturale, automaticamente si pone sul terreno dell'interprete. Vi è un'inquietudine che aleggia sul lavoro del traduttore: «non si rischia di perdere improvvisamente di vista il porto da cui si è partiti,

[50] Si veda F. OST, *Les détours de Babel. La traduction comme paradigme*, in J.-J Sueur (ed.), *Interpréter et traduire*, Bruxelles, 2007, p. 13-45. Il testo è stato pubblicato in una versione aggiornata in spagnolo con il titolo *Traducir: Defensa e ilustración del multilingüismo* (Città del Messico, 2019).
[51] P. RICOEUR, *La traduzione tra etica e interpretazione*, Brescia, 2001.
[52] In proposito mi piace pensare al bellissimo film tedesco "Le vite degli altri" dove un poliziotto DDR incaricato di spiare un artista sospettato di comportamenti sovversivi, a furia di ascoltare le sue conversazioni e di partecipare alla sua vita, finisce per capirne e condividerne le ragioni.
[53] Richiamo, ad esempio, il mio contributo *Il diritto comparato e le sfide della globalizzazione. Oltre la forbice differenze/somiglianze*, in Rivista critica di diritto privato, Vol. 31 N. 3, pp. 369-402, 2013. Si veda anche: M. R. FERRARESE, *Poteri nuovi : privati, penetranti, opachi*, Bologna, 2022.
[54] C. GEERTZ, *op. cit.*
[55] Così A. DAL LAGO, *Introduzione all'edizione italiana*, in C. GEERTZ, *op. cit.*, p. XII.

quello verso cui si fa rotta», in una «navigazione senza bussola e, a essere esatti, interminabile?»[56].

Tutti sono oggi chiamati ad un compito di "traduzione di culture": gli esponenti del potere politico, i capi religiosi, i soggetti economici e, ovviamente, anche le varie tipologie di giuristi che affollano lo scenario istituzionale dei nostri tempi: giudici, avvocati, consulenti ed esperti vari, che agiscono nelle diverse sfere del diritto globale. I legislatori nazionali possono restare al di fuori di questo agone ma non del tutto: si pensi a legislazioni in materia di multiculturalismo o di differenze religiose, ecc. In questi casi, anche il legislatore nazionale è chiamato a confrontarsi con la diversità, facendosi "traduttore" di altre culture. Questo bisogno di "traduzione di culture" si fa avvertire persino nel comune cittadino, laddove sia impegnato in una interazione fugace o prolungata con una persona di diversa appartenenza etnica, religiosa o culturale. Se tradizionalmente la vita in città era un'esperienza di quotidiano "incontro tra estranei", nel senso che implicava un lasciare in ombra le differenze, oggi quell'incontro deve tenere conto di alcune differenze, in modo da renderle compatibili, o almeno al fine di non renderle incompatibili.

Il corredo di situazioni appena richiamate contribuisce a fare della traduzione un "paradigma" significativo anche per il diritto odierno, sempre più spesso costretto ad uscire dal guscio della propria specificità statale e culturale, per incontrare la diversità. In esso vediamo racchiuse non poche delle più significative problematiche del diritto odierno ed anche delle possibili risposte che ad esse è possibile dare.

In altri termini, poiché, com'è chiaro, non si può dare alcuna traduzione senza profonda comprensione-interpretazione del testo giuridico, si potrebbe dire che la traduzione finisce per incorporare molti dei temi e problemi tipici della interpretazione giuridica; al contempo, tuttavia, essa comporta non solo una grandiosa estensione del raggio visivo dell'interprete, che va molto al di là dei confini che erano imposti dalla tradizionale teoria dell'interpretazione, ma anche un'inversione di rotta rispetto ai presupposti di coerenza sistemica del diritto di riferimento. Non si tratta solo di guardare genericamente al di là di quei confini, ma di fare della traduzione un'opportunità ed una "risorsa" per l'interprete, portando quest'ultimo a misurarsi con ciò che è altro rispetto a se stesso, anche ai fini di una migliore autocomprensione.

Come si diceva, la traduzione di termini e concetti giuridici porta con sé un notevole tasso di difficoltà, vista l'incrostazione di significati tecnici che intorno a quei termini e concetti si è compiuta all'interno di ciascuna cultura. Dire "quasi la stessa cosa" in campo giuridico espone inoltre a rischi e conseguenze anche su un piano di carattere pratico, dato il potere "performativo" di parole e concetti. La traduzione è qui particolarmente esposta al rischio dei "falsi amici", alle sfide dell'incertezza, dell'imperfezione e del fraintendimento[57].

8. Lingue in dialogo: tra separazione e scambio

L'impossibilità della traduzione perfetta, in ambito giuridico così come in altri ambiti, è del tutto parallela all'impossibilità della "lingua perfetta". Umberto Eco, analizzando i vizi delle lingue perfette, che vengono talora create o solo ipotizzate e vagheggiate, per supplire ai vizi delle lingue naturali, ci conduce a valorizzare quei vizi ed a "riconciliarci con la maledizione babelica"[58]. Grazie alla maledizione babelica, infatti, ciascuna lingua può arricchire il proprio vocabolario e accedere a nuove sfere di senso: ogni lingua contiene infatti zone di intraducibilità, che permettono di aprire sfere di scambio tra lingue diverse.

L'utilità e talora la necessità dello scambio in ambito linguistico sono rese evidenti anche da un'altra circostanza. Se si mettessero insieme tutte le parole di tutte le lingue del mondo, si vedrebbe che, mentre la gran parte di esse appaiono sovrapponibili più o meno perfettamente, perché hanno un significato più o meno coincidente, altre restano sole, o con compagne non proprio simili, in quanto indicano un'azione, un sentimento, un modo di sentire o un oggetto, che solo ad esse corrisponde.

Per un qualche mistero, negli universi linguistici, oltre alle parole di uso comune, che indicano oggetti o sentimenti universali, che tutti i soggetti in qualche modo condividono nel mondo, esistono infatti negli universi linguistici dei miracoli, sorta di rivelazioni, che si verificano in una lingua e non nelle altre. Ciò deriva

[56] Cfr. P. ZUMTHOR, *op. cit*., p. 194.
[57] Sul punto, ad esempio, si veda S. FERRERI, *Falsi amici nelle corti. Leggere le sentenze di Common Law evitando le trappole linguistiche*, Milano, 2019.
[58] U. ECO, *La ricerca della lingua perfetta nella cultura europea*, Bari-Roma, 2006 (sesta ed.), p. 26. Ristampato nel 2017.

innanzitutto dal fatto che la lingua possiede in *nuce* una continua possibilità inventiva: com'è stato notato, le parole «generano un potere e la voglia di trascendere la banalità delle cose»[59]. Per "miracolo" si può intendere la cattura di frammenti di senso nelle parole di una lingua, che non hanno corrispettivo in altre lingue.

Questi miracoli linguistici avvengono prevalentemente in due opposte sfere della comunicazione: quella estremamente sofisticata, e dunque in un quadro che è frutto di una raffinata elaborazione intellettuale, o quella collegata a situazioni localmente situate, che è dunque frutto di pratiche consolidate e socialmente condivise. In altri termini, tali miracoli possono avere sia un'origine culta, come, ad esempio, nel caso di sir Warpole, che inventò il termine *serendipity*, per indicare quel misto di accidentalità e sagacia che porta ad una scoperta insperata e non prevista[60], sia un'origine popolare, come avviene talora con parole comuni o dialettali che indicano frammenti di senso legati a pratiche localmente determinate e che non necessariamente hanno un corrispettivo nella lingua ufficiale o in altre lingue. Si pensi ad esempio al termine brasiliano *maresia*, che indica l'ora in cui arriva sulla terra il profumo del mare, o al portoghese *saudade* per indicare la sensazione di nostalgia provata specialmente dagli emigranti. Termini come questi non richiedono traduzione: semplicemente si aggiungono ai vari vocabolari nazionali; pur essendo legati a situazioni o esperienze locali, vengono messi a disposizione del mondo.

Insomma, l'elaborazione linguistica procede e si arricchisce non solo attraverso grandi viali e vie maestre, ma anche attraverso viottoli e strade secondarie. Del resto, come ricordato da Merton e Barber con riferimento all'Inghilterra, «i primi dizionari non si occupavano dell'uso corretto della lingua inglese: erano molto più simili a quell'altro tipo di dizionario che usiamo quando impariamo o traduciamo da una lingua *straniera*. Fino alla fine del XVI secolo i dizionari (o piuttosto i glossari vocabolari, com'erano chiamati allora) erano effettivamente strumenti per la traduzione del latino in vernacolo, e viceversa, o semplicemente per l'apprendimento del latino»[61]. La consolidazione dei linguaggi nazionali ebbe dunque alle spalle un processo di scambio linguistico simile alla traduzione ed attinse alle sfere alte, come alle sfere basse della comunicazione sociale.

Lo stesso, in qualche modo, avviene e può avvenire anche nel linguaggio giuridico. Anzi, nel caso dei termini giuridici, la sovrapponibilità è persino più ristretta di quella delle parole comuni, perché, dietro un'apparente identità di significato, per lo più si celano delle differenze giuridicamente rilevanti, dovute a diverse elaborazioni tecniche, ma anche a diverse culture e ideologie[62]. Il più noto è l'esempio del contratto, istituto che in ogni stato rimanda a diversi riferimenti e giustificazioni.

Il tendenziale processo di convergenza tra i sistemi giuridici, che non si sottrae a numerose occasioni di divergenza linguistica e persino di opposizione tra i significati dei termini nelle varie lingue, contiene anche inedite possibilità. La contaminazione linguistica produce anche in ambito giuridico un arricchimento della sfera di senso, attraverso pratiche di scambio ed esperimenti di avvicinamento tra termini, istituti e tradizioni diversi. Inoltre, la sfera giuridica odierna è carica di neologismi, che spesso derivano dal bisogno di indicare nuove potenzialità, mete o caratteristiche del diritto. Infine, anche quei termini che derivano dal bisogno di incontro e compromesso tra varie lingue e tradizioni giuridiche, possono acquistare un senso diverso all'interno dei vari universi giuridici contrassegnati dagli stati.

9. Verso una cultura giuridica aperta e dialogica.

Il passaggio dal paradigma dell'interpretazione a quello della traduzione implicherebbe per il diritto un rilevante cambiamento culturale: si tratterebbe di passare da una cultura giuridica "introversa", monoculturale e attenta a valorizzare le proprie peculiarità, ad una cultura giuridica "estroversa", ossia aperta ad altre culture e disponibile a confronti con esse. Gli stati europei, costruiti intorno al mito della sovranità, avevano, per così dire, una naturale attitudine all'introversione, ossia a essere ripiegati su se stessi, consolidando ciascuno un mondo diverso entro i propri confini. Le culture giuridiche erano a propria volta tendenzialmente "introverse", perché riferite al mantenimento delle proprie specificità statali, piuttosto che rivolte verso l'esterno e

[59] P. ZUMTHOR, *op. cit*., p. 188.
[60] Per una storia accurata e affascinante di questo termine si veda R.K. MERTON, E.G. BARBER, *Viaggi e avventure della Serendipity*, Bologna, 2002.
[61] R.K. MERTON, E.G. BARBER, *op. cit*., pp. 171-172.
[62] Si veda in proposito il ricco repertorio allestito da F. GALGANO, *Atlante di diritto privato comparato*, con la collaborazione di F. FERRERI, G. AJANI, Bologna, 1999, 5° edizione apparsa nel 2011.

specialmente verso il confronto e la comparazione con altri stati, con altre culture giuridiche, o con altri istituti e riferimenti normativi esterni.

Il più alto tasso di propensione all'introversione si poteva riscontrare in quelle culture giuridiche, tipiche del continente europeo, che tendevano a restare entro uno spirito sistematico, e dunque tendenzialmente chiuso, del diritto; il diritto concepito come "sistema" non tollerava fuoriuscite dal proprio perimetro, ed era poco disponibile a confrontarsi con un diverso sistema giuridico, un diverso vocabolario e diversi presupposti culturali[63]. Naturalmente, le moderne teorie dell'interpretazione nate sul continente europeo erano un supporto fondamentale delle culture giuridiche di tipo sistematico: tipicamente, il presupposto della mancanza di lacune, l'organizzazione delle fonti secondo un disegno di tipo gerarchico, le esigenze di "coerenza", i paletti formali posti al processo interpretativo, come quelli fissati dal nostro articolo 12 delle Preleggi, erano altrettanti segni dell'intento di preservare la propria semantica giuridica, ed altrettanti modi per garantire lo spirito sistematico del diritto.

La situazione era alquanto diversa sul suolo americano dove mancavano le premesse per assicurare caratteri di completezza, perfezione e sistematicità alle regole giuridiche. Qui si faceva ricorso ad altri criteri per assicurare requisiti di coerenza all'assetto giuridico: ad esempio, nell'ambito del *judge-made law*, il riferimento al rispetto del precedente giudiziario, se pure poteva configurare, per il giudice di *common law*, dei confini interpretativi talora persino più ristretti, non conferiva alla sua operazione interpretativa quell'aura di sacralità che deriva dal riferimento ad un testo percepito come espressione di un credo "monoteistico". Dentro un quadro di evoluzione giuridica di tipo incrementale e fortemente decentrata, secondo i presupposti del *judge-made law*, il rispetto del precedente giudiziario lascia ampio spazio al cambiamento ed all'inversione di rotta, senza dover passare per formali percorsi di giustificazione in termini di "coerenza" del sistema o di gerarchia delle fonti. Anzi, in un sistema di tipo casistico come quello americano, di fronte all'aumento di diritto legislativo, può accadere che il giurista si sforzi di adattare gli *statutes* alla struttura di *common law*, cercando la regola «non tanto nella fonte primaria, quanto nella decisione giudiziaria che la interpreta»[64]. Dunque il raccordo semantico nel sistema di *common law* avveniva sulla base delle interpretazioni già date da altri giudici, spingendo l'evoluzione giuridica in senso puntiforme.

Qualcosa di simile sembra avvenire oggi nel sistema globale, dove l'assenza di fonti legislative trova una compensazione nell'importanza del ruolo svolto da giudici, corti internazionali e organismi giudiziari di vario tipo. Tra questi si sviluppa spesso una dinamica comunicativa che assume il nome di "dialogo tra corti" o "dialogo di costituzionalismo": quando questioni di diritti fondamentali o di diritti "umani" sono in gioco, i giudici (specie quelli costituzionali) tendono a far riferimento anche a fonti e sentenze provenienti da altri paesi. Anche se il ricorso a leggi o sentenze straniere viene fatto in via autoritativa, per aggiungere peso alle proprie argomentazioni, questa nuova modalità giudiziaria innova consistentemente l'orizzonte interpretativo dei giudici e costituisce l'annuncio più vistoso di una incipiente "giurisprudenza globale", come suggerisce Anne-Marie Slaughter[65].

A ben guardare, il dialogo tra le corti dà piena visibilità all'insorgere di una cultura giuridica "estroversa" nel mondo globale. Questo dialogo assume come proprio il paradigma della traduzione, piuttosto che quello della interpretazione: i giudici coinvolti provano a fuoriuscire dal proprio recinto culturale e ad interrogarsi su come altri giudici di altri paesi abbiano ragionato di fronte a casi simili. Il confronto non avviene solo al fine di trovare ragioni di supporto e conferma delle proprie tradizioni, ma anche per scoprire motivi di smentite ed impraticabilità delle stesse. Non a caso, Julie Allard e Antoine Garapon parlano dei giudici impegnati nel dialogo di costituzionalismo come di "ambasciatori", il cui lavoro è in gran parte dedito a sancire i successi della *common law*, in quanto cultura giuridica che non è legata ad una specifica nazione[66].

Per l'Europa, il dialogo sul piano costituzionale tra le varie tradizioni giuridiche è intrinseco ad un cammino di convergenza tra i vari paesi-membri ed è inscritto nel progetto di integrazione in un'organizzazione di tipo sovranazionale. Il dialogo tra le varie corti statali e le corti europee è in corso da lungo tempo e, pur non

[63] Lo spirito sistematico degli ordinamenti europeo-continentali ha trovato il suo cantore estremo in Niklas Luhman, che lo ha interpretato ed analizzato in senso sistemico, così portando la chiusura al massimo grado, attraverso concetti come quelli di "autoreferenzialità" e di "autopoiesi".
[64] U. MATTEI, *op. cit.*, p. 170.
[65] A.M. SLAUGHTER, *A New World Order*, Princeton, 2004, p. 78 ss.
[66] J. ALLARD, A. GARAPON, *Les juges dans la mondialisation. La nouvelle révolution du droit*, Paris, 2005, p. 41 ss.

sottraendosi a svariate occasioni di conflitto, è una realtà ormai consolidata[67].

Mentre via via, in Europa, il riferimento al testo costituzionale di ogni stato, inteso come serbatoio del senso ultimo e decisivo per il processo interpretativo del diritto, si andava indebolendo parallelamente ad un processo di costruzione di un'identità condivisa tra i vari stati dell'Unione, negli Stati Uniti accadeva esattamente il contrario: il testo costituzionale diventava terreno di scontro per una battaglia tra coloro che si ergevano a guardiani della propria tradizione nazionale, sancendo oltre ad una supposta autosufficienza di quella tradizione, una "chiusura" quasi completa del senso e del vocabolario giuridico, in opposizione ad un mondo globale che sembrava andare in direzione opposta.

Se il dialogo che si sviluppa tra corti di stati diversi è il segno più vistoso della possibilità di dar luogo ad una cultura giuridica "estroversa", esso non trova certo il suo terreno di elezione sul suolo americano, dove suscita invece ampie riserve e produce un fiero scontro all'interno della Corte Suprema. Sempre più, su questioni chiave in materia di diritti, la Corte decide a maggioranza, rispecchiando opzioni opposte tra una parte dei suoi giudici, che vuole provare ad essere in sintonia con altri paesi e tradizioni, ed una parte che vuole invece sottolineare la specificità della propria tradizione, e che da questa non vuole staccarsi, anche quando essa, come nel caso della pena di morte, sbilancia gli Stati Uniti dal lato della tradizione asiatica, piuttosto che dal lato della tradizione occidentale inaugurata dall'Europa illuminista.

Se intorno al tema del dialogo tra corti si può dunque registrare un significativo divario di atteggiamento tra Europa e Stati Uniti, che ripercorre quanto detto in precedenza in tema di interpretazione, non è priva di interesse un'altra curiosa inversione di posizione che si può registrare tra questi due continenti in materia di traduzione.

La questione della traduzione del diritto appare infatti una questione assai più avvertita in Europa che negli Stati Uniti. Certamente, in questo curioso posizionamento gioca un ruolo significativo il fatto che negli Stati Uniti, a dispetto dello spinto multiculturalismo che li caratterizza, si parli quell'inglese che è la lingua globale per eccellenza. Anche se, com'è noto, l'inglese non è la lingua ufficiale e subisce una crescente sfida dallo spagnolo, come lingua parlata specialmente in alcune aree del suolo americano, l'uso diffuso e crescente dell'inglese in tutto il globo fa probabilmente apparire agli americani (ed a tutti gli altri paesi anglofoni, Gran Bretagna in testa) la questione della traduzione come una questione appassionante per gli altri piuttosto che per se stessi.

Al contrario, l'Unione europea, avendo concepito il progetto di un (quasi) perfetto multilinguismo anche sul piano istituzionale, pone la traduzione al centro del suo scenario. Dalla sua angolazione, appare con evidenza un'ulteriore virtù della traduzione, che può permettere al mondo di "sfuggire alla lingua così come al pensiero unico"[68]. Dunque l'Europa, che vive in un universo linguistico differenziato, ha trasformato il senso della traduzione da quello di un'operazione a cui si è obbligati, per evitare la babele della diversità linguistica, in quello di un'operazione che assurge a posizione simbolica, in quanto vuole siglare la diversità europea, fino al punto da poter dire che "la lingua dell'Europa è la traduzione"[69].

Bibliografia

ALLARD, J., A. GARAPON, *Les juges dans la mondialisation. La nouvelle révolution du droit*, Paris, 2005.

CARTABIA M., (a cura di), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Bologna, 2007.

CHIASSONI, P. *Tecnica dell'interpretazione giuridica*, Bologna, 2007.

DAL LAGO, A., *Introduzione all'edizione italiana*, in C. GEERTZ, *Interpretazione di culture*, Bologna, 1998.

[67] Si veda M. CARTABIA (a cura di), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Bologna, 2007.
[68] F. OST, *Le droit comme traduction*, Conferenza, Collège de France, 6-13 dicembre 2006, p. 1, pubblicato nel 2009 da Presses De L'Universite De Lava.
[69] Ibidem.

DELMAS-MARTY, M., *Les forces imaginantes du droit (II). Le pluralisme ordonné*, Paris, 2006.

ECO, U., *I limiti dell'interpretazione*, Milano, 1990, ristampa 2016.

ECO, U., *Dire quasi la stessa cosa. Esperienze di traduzione*, Milano, 2006, ristampa 2024.

ECO, U., *La ricerca della lingua perfetta nella cultura europea*, Bari-Roma, 2006 (sesta ed.), 2017.

FERRAND F., (a cura di), *La procédure civile modelisée*, Paris, 2004.

FERRARESE, M. R., *Le istituzioni della globalizzazione*, Bologna, 2000.

FERRARESE, M. R., *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Bari-Roma, 2006.

FERRARESE, M. R., *Drafting e traduzione: un'insolita accoppiata. Si può scrivere il diritto in molte lingue?*, in IORIATTI FERRARI E.,(a cura di), *La traduzione del diritto comunitario ed europeo: riflessioni metodologiche*, Quaderni del Dipartimento di Scienze Giuridiche, Trento, 2007.

FERRARESE, M. R., *Il diritto comparato e le sfide della globalizzazione. Oltre la forbice differenze/somiglianze*, in Rivista critica di diritto privato, Vol. 31 N. 3, pp. 369-402, 2013.

FERRARESE, M. R., *Poteri nuovi: privati, penetranti, opachi*, Bologna, 2022.

FERRERI, S., *Falsi amici nelle corti. Leggere le sentenze di Common Law evitando le trappole linguistiche*, Milano, 2019.

FLETCHER, G., S. SHEPPARD, *American Law in a Global Context. The Basics*, Oxford e New York, 2005.

GALGANO, F., *Atlante di diritto privato comparato*, con la collaborazione di F. FERRERI, G. AJANI, Bologna, 1999; 5° edizione 2011.

GALGANO, F., *La globalizzazione nello specchio del diritto*, Bologna, 2006.

GEERTZ, C., *Interpretazione di culture*, Bologna, 1998.

GOLDSWORTHY, J. (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford, 2006.

GROSSI, P. *L'Europa del diritto*, Roma-Bari, 2007.

GUASTINI, R., *Le fonti del diritto e l'interpretazione*, Milano, 1993.

IORIATTI, E., *Visualizing EU law through meta-concepts and legal formants*, in L. BIEL, H. J. KOCKAERT (a cura di), *Handbook of Terminology. Vol. 3 Legal Terminology*, Amsterdam 2023.

JOERGES, C., *Il ruolo interpretativo della Corte di Giustizia e la sua interazione con le corti nazionali nel processo di europeizzazione del diritto privato*, in *Rivista critica di diritto privato*, n. 2/2000.

KALSCHEUR, G.A., S.J., *Christian Scripture and American Scripture: An Instructive Analogy?*, in *Journal of Law and Religion*, vol. 21 (2005-2006).

LLEWELLYN, K., *The Common Law Tradition*, Boston, 1960.

MATTEI, U., *Stare decisis*, Milano, 1988.

MENEZES DE CARVALHO, E., *The Juridical Discourse of the World Trade Organization: The Method of Interpretation of the Appellate Body's Reports*, in *Global Jurist*, vol. 7, iss. 1 (Topics), art. 4, in www.bepress.com/gj/vol7/iss1/art4

MERTON, R.K., E.G. BARBER, *Viaggi e avventure della Serendipity*, Bologna, 2002.

MEYLER, B.A. *Towards a Common Law Originalism*, rep. in hppt://lsr.-nellco.org/cornell/clsops/papers/20.

MONATERI, P.G., *La battaglia tra le interpretazioni e la questione della verità*, in E. NAVARETTA, A. PERTICI (a cura di), *Il dialogo tra le Corti. Principi e modelli di argomentazione*, Pisa, 2004.

OST F., *Le droit comme traduction*, Québec, 2009.

OST, F., *Les détours de Babel. La traduction comme paradigme*, in J.-J SUEUR (ed.), *Interpréter et traduire*, Bruxelles, 2007.

PINELLI C., *La tutela multilivello dei diritti fondamentali. Una ricostruzione*, in *Studi in onore di Alessandro*

Pace, III, Napoli, 2012.

RICOEUR, P., *La traduzione tra etica e interpretazione*, Brescia, 2001.

ROSENFELD, M., *Interpretazioni. Il diritto tra etica e politica*, 2000.

SACCO, R., *Il concetto di interpretazione del diritto*, Torino, 2003, copia anastatica del volume del 1947.

ŠARČEVIĆ, S., *New Approach to Legal Translation*, The Hague, 1997.

ŠARČEVIĆ, S., *Language and Culture in EU Law. Multidisciplinary Perspectives*, Farnham, 2016.

SCALIA, A., *Common-Law Courts in a Civil-Law System: the Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A. GUTMAN (ed.), *A matter of Interpretation. Federal Courts and the Law*, Princeton N.J, 1997, ultima edizione 2018.

SILBERMAN, L.J., *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, http://lsr.nellco.org/nyu/-plltwp/18.

SLAUGHTER, A. M., *A New World Order*, Princeton, 2004.

SUNSTEIN, C. R., *How to Interpret the Constitution*, Princeton, 2023.

TARELLO, G., *Diritto, enunciati, usi*, Bologna, 1974, e ID., *L'interpretazione della legge*, Milano, 1980.

TIMOTEO, M., *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Padova, 2004.

TOOBIN, S., *The Nine. Inside the Secret World of the Supreme Court*, New York, 2007.

VIOLA, F., G. ZACCARIA, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Roma-Bari, 1999.

ZUMTHOR, P., *Babele*, Bologna, 2007.

Book Review: Introduction to Comparative Law, 2nd edition, by Jaakko Husa

(Oxford: Hart Publishing, 2023), ISBN 978-1-50996-356-0.

Johannes San Miguel Giralt[1]

A well-known pop single broke through the late 90s Hispanic America´s colorful Latin music environment: Bittersweet Symphony by The Verve. The sticky sound was suddenly popular among teenagers back in the day, even though we did not know the lyrics. We were attracted mainly by the singer´s attitude in the clip as he relentlessly walked the streets and, of course, the formidable and omnipresent string section.

As I read *Introduction to Comparative Law, 2nd edition*, by Jaakko Husa, I was fondly reminded of this clip with the undaunted, bold walk ahead by Ashcroft. With the northern Europe made-seal, the sound and the clip could completely cut through cultural differences and make a leading position in the top ten inside the vibrant, unmatched late-90s Latin pop scenario. For better, the same is going to happen with comparative law in Hispanic America: the holistic, antiformalist, interdisciplinary conceptions along with the plurality of methods, the dual methodological-disciplinary nature, and the exploration beyond the borders of auxiliary fields of knowledge and social sciences will finally settle at our native comparative law studies.

The purpose of this review is to briefly explore some of the main features in Jaakko Husa´s Introduction to Comparative Law from a Hispanic-American comparatist perspective, considering the cultural context and, above all, the global trends in the circulation of legal knowledge.

Ab initio, the author starts with a fair warning, in my opinion, the central thesis:

> However, the reader should remember that there are no generally accepted theoretical frames, established terminology, or aims set in comparative law[2].

Following this assertion, the author develops, in a detailed and organized manner, a comprehensive full set of a conceptual and methodological framework for comparative law still to gain traction south of the border. Some of these ideas include the need for basic studies about comparative law, the rejection of *prêt-a-porter* conclusions and solutions, the pragmatic approach with a needed adjustment to the current local context, the double effort to build an organized conceptual system of knowledge, and the same time stressing the importance of openness and inclusiveness; the integrative attention to the non-formalist approach to define, distinguish and characterize legal families and traditions around the world; and last but not least, the relevance granted to cultural data throughout the book.

1. *Orderly Exposition of Idea and the Distinction between Comparative Law and Comparative Law Studies*

The consistent and orderly exposition of ideas unfolds a much-needed understanding of the distinction between comparative law and theoretical comparative legal research, emphasizing the latter to provide a systematic framework without strangling the autonomy to pick methods. Concisely and clearly, the author surgically dissects two different phenomena. On one side, comparative law (German *Rechtsvergleichung*, French *droit comparé*) concerning the analysis of different sets of applicable law rooted in large-scale organized normativity, as labeled by the author himself. On the

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[2] J. HUSA, *Introduction to Comparative Law*, Oxford, 2023, 1.

other hand, comparative legal science (German *Vergleichende Rechtswissenschaft*, French *science du droit comparé*). This is important for Hispanic American comparatists because we still lack theoretical research on comparative law. Our efforts have been focused chiefly on comparing legislation from different countries or writing handbooks using early-century concepts[3].

Thereupon, the author offers a reasoned exposition of contents to draw the lines of boundaries in the science of comparative law, including the analysis of comparative legal research through phases and stages. In the same line of reasoning, Husa stresses the empirical, interactive, and interconnected nature of comparative law, the purposes of the researcher, and the use of research hypotheses as a *praesumptio* of formal correction in stand-by position until the final confirmation or rebuttal. It is also worth mentioning his advice on how to organize updated and in-point sources of research.

It is particularly innovative and relevant for Hispanic American comparatists the way the author lays the foundations to build an *ad hoc* methodological framework mixing insightful research features with the needed plurality of methods. As a result, the author lays down a *numerus apertus* catalog of research approaches for comparatists to be used in any cultural and epistemic context. *As per* the first component concerning the research process through phases, the author mentions the previous survey, the methodological decision-making process regarding the *tertium comparationis*, the thick description, and the explanatory phase. This is a massive deal for Hispanic-American comparatists because this leads our efforts of proper organization and research planning, and also fills a void in most of the comparative legal work in the region: the need for methodological and theoretical accountability to the audience and the scholar community. The basic premise to be considered is that legal research is such a severe activity (despite its social nature away from natural sciences) that researchers are ethically compelled to explain, in the most detailed form possible, the methodological grounds and path leading them to the conclusions.

2. Rejection of the Prêt-a-porter Fashion in Comparative Law

In broad terms, comparative law in Hispanic America still follows a *prêt-a-porter* fashion, dragging the long-standing obsession to build massive blackhole-styled conceptual systems able to swallow every category, term, or new idea. This is an outdated approach in comparative law based on the wrongful assumption that the great work made by the German *Pandektenrecht* theorists with the abstract category of the legal transaction (*Rechtliches Geschäft, Rechtsgeschäft, negotium juridicum*) and French exegetics scholars with the contract (*contrat*) can be somehow emulated or repeated. This is not feasible; simply put, not worth trying.

Given this, the author conveys a key idea: how important is to abandon every aspiration for this one-size-fits-all fashion and embrace a singularized research endeavor consistent with the scholar´s interests and the nature of the legal phenomenon under analysis. Thus, the author lays down a catalog of possible aims and purposes a researcher in comparative law may be driven to:

> The criteria for the comparison do not emerge from the study objects on their own. The scholar´s knowledge-interest is in a significant position […][4]

In a compelling way, Husa refers to the research interests -German *Erkenntnisinteresse*- to clarify that comparative law research must not be divorced from the researcher's purposes and possibilities. This idea is coupled with an open and inclusive classification of research aims: the integrative-harmonizing purpose, the contradictive purpose to pin down non-harmonizable differences, the pragmatic purpose

[3] This ancient formalist approach has been duly noticed and called out by a small number of authors who brought to the region the new theoretical approach to face legal comparison, ie Jorge Esquirol and Daniel Bonilla Maldonado.
[4] J. HUSA, *op. cit.*, 138.

to create knowledge starting from the description of similarities and differences -according to the German idea of *Auslandsrechtskunde*-; and the theoretical purpose of building new comparative law theory.

Tradition plays against the need for epistemic evolution. Law school *syllabi* and research protocols by undergraduate and graduate students in most of the Hispanic-American context still fall into this hackneyed formal comparison. Again, there is still a widely extended scholarly trend in the region to purport a comparative law analysis through the arbitrary and random selection of some jurisdictions or large-scale organized normativity without proper methodological accountability. Usually, these authors pick two neighboring countries in the same area or sub-region, mention the applicable law, and single out differences in the statutory wording without further reference to the social context[5].

This is the research landscape in a region characterized by the strong presence of indigenous traditions (a strong legal pluralist context widely recognized and cherished in their identity and legal effectiveness and validity by many constitutions) and a slow but almost unstoppable movement to the recognition of legal personhood extension to animals and environmental realities through new arguable categories like "non-human person" and "rights of nature." However, these regional trends reinforced by the global concerns still lack a solid methodological background in comparative law. Comparatists in the region still work with tools and ideas from the XIX century codification movement.

At this point, *Introduction to Comparative Law* invites us all to face global legal realities, quit the one-size-fits-all approach, and build our comparative research experience from a new perspective deeply rooted in our interests more than the formalistic description of differences in the statutory wording.

3. Particularly Pragmatic and Context-Adjusted Approach

More than 200 years have passed since the awakening of most Hispanic countries to independent republican life. The first hundred years were dedicated to the disaggregation of new countries out of regional chunks of land, settling border conflicts, affirmation of the Creole elite class, formation of the national culture, State, and an incipient institutional framework; and the definition of economic and productive features to characterize each country until the present day. The second hundreds of years did not add up much more: Hispanic America is not more prosperous, more productive, more inclusive, or more prone to entrepreneurship than it was in the first hundreds of years (exception made for the amount of economic growth related to the exponential demographic surge). This description is relevant because the author emphasizes the need for a pragmatist perspective while embracing a theoretical framework. The former supports the latter, and vice versa:

> If comparison is applied to "spice up" the study of the law in force in one´s own country with decorations from foreign law, the whole setting has something that is intellectually untenable: scholarly boasting with ingredients from foreign law does not serve any sensible aim; it is just a ritual relic of the legal thinking from the beginning of the twentieth century. In short, the study of foreign law needs to serve a meaningful purpose, whether academic or practical[6].

Again, entelechies are overshadowed by the real world. That is why the pragmatic perspective should be considered in our regional research experience. Concerning the realities of the social context under

[5] The lack of quantitative random studies, with a previous appropriate sample design to find curricular and research trends in Hispanic American comparative law is the hardest hurdle to achieve a comprehensive study on the subject. Current papers and research protocols are far away from the methodological diversity needed.
[6] J. HUSA, *op. cit*., 37.

research, allow me to mention the catalog of theoretical paradigms in comparative legal research set forth by the author as another huge step forward for Hispanic-American comparatists. This is probably the most needed feature for our regional legal academia to abandon the classical formalistic approach. The author, in an illustrative form, analyzes the functional comparison (pp. 122-130, 157-159, 190, 191), structural comparison (pp. 132-136), dynamic comparison (pp. 137, 138), systemic comparison (pp. 138-140) and the critical comparison (pp. 140-144). Every one of these items means, in my opinion, a compass to guide comparatists along the due process of methodological research accountability.

4. Open and Inclusive Conceptual Systematization of Comparative Legal Research Studies

Out of the many remarkable features in the book, it should be noted that the author stated that the book is not intended to go beyond an introductory survey. However, Husa has developed a well-balanced formula between general remarks and setting out an organized system for analysis. As a result of that, the author sets himself on an explicit and convincing path against using the same uniform for every comparative law research project. He invites us all to embrace methodological openness, a radial-expansive knowledge exposition style more than a pyramidal-hierarchized one.

We can mention, as very well-designed elements in his systematization of legal families, the plural definition of comparative law methods, emphasizing their inability to produce accurate results (pp. 102, 103); the needed link to basic-core disciplines (pp. 60, 61, 148); the usefulness of the *learning by approaching* (p. 215); a catalog of levels or stages in comparative legal research; the distinction between doctrinal, legislative, case and praxis comparison, among other features. As a significant part of these efforts to provide a systematized open and inclusive conceptual framework of analysis, the author describes the basic knowledge-interest (pp. 74, 75), the integrative knowledge-interest (pp. 75, 76), the contradictive knowledge-interest (pp. 75-80), the practical knowledge-interest (pp. 36, 37, 153, 246, 257, 258) and the theoretical knowledge-interest (pp. 247, 277).

5. Integral Non-Formalistic Analysis of Legal Families

I particularly praise the author for his updated conceptual analysis of legal families. This has been an overall issue since the beginning of the book, but we can find the best theoretical build-up on the subject in chapter 9, which is dedicated to macro-comparison. The author´s reasoning for a deeper analysis of legal families starts with his ubiquitous concept of organized large-scale normativity. Later, macro-comparison and micro-comparison are defined and distinguished[7].

Additionally, the author provides clear guidance on essential ideas like the diversity of methodological frameworks for macro-comparison (p. 107), the current status of sub-disciplines (pp. 127-129), valuable parameters for macro-comparison (p. 101), the classification of macro-constructs (pp. 234, 260) and its importance to reach the *initial knowledge threshold* (pp. 229, 247); the usefulness of classificatory efforts to understand our domestic law (pp. 247-249); the link to other categories like Weber´s ideal types -*idealische typus*- (p. 230); etc.

Comparatists in the region should also be aware of the dynamic nature of the legal family classification set forth by the author. That is to say, Hispanic American comparatists cannot overlook all the details provided and how the categories may constantly be evolving (i.e., the fundamental presence of Indigenous traditions, the colonial history fingerprints in mixed systems of law, etc). The classification of legal families is such a complex issue that it does not fit into the simple and Manichaean binary distinction between civil law and common law.

[7] J. HUSA, *op. cit*., 218, 100-106, 233.

6. To the Rescue of the Cultural Environment

In his book, Jaakko Husa also presents us Hispanic readers with a special gift, an analysis of the link between written law and the social context in comparative law, which produces a new normative experience resulting from such an interaction, ie. the living law. This concept is deeply rooted in Nordic and American legal realism. Through these ideas, the author warns us that comparative law cannot live without these realistic considerations.

In many different moments in the book, we find references and analyses related to the living law. The author holds that receptions, incorporations, and xenografts from foreign law into domestic legislation do not necessarily yield the expected results. Each institution, concept, or theoretical category in law behaves like an animal or vegetal species, producing a certain impact in every new specific ecosystem they are inserted into. This can be applied *mutatis mutandis* to receptions in comparative law. The constant visit to the category of living law and its relevance for comparatists probably stems from the importance Nordic countries grant to observation and scrutiny of social trends following legislation.

Sadly, this is not the case in most Hispanic countries, where comparative research moves forward dragging the divorce between socio-cultural dynamics and academic-legislative trends. The answer might be in the cultural and historical differences between both legal worlds concerning the praxis of advocacy. Additionally, the author launches the proposal for the rescue of anthropological, sociological, and ethical analysis (pp. 4, 61, 68). In the matter, allow me to further develop this idea through an abbreviated form of propositional logic:

Cultural context is the main variable when explaining different experiences in similar normative settings. Practical experience in law is different because the cultural context is also different, despite the similarities in the formal legal order. That is to say,

Being,

Ɛ = legal experience; describing the normative experience as lived by all the participants in the legal system: attorneys, judges, prosecutors, administrative officials, notaries, etc.

ν = domestic legal order; describing the structure of a specific domestic legal order; and,

σ = context; describing the social, economic, political, cultural, linguistic, religious, geographic, and climate-related extralegal set of factors converging in the domestic legal system of a specific country.

Then:

For the classic positivistic approach:

Ɛ = ν; the normative experience by the participants is equivalent to the legal domestic order´s structural design.

For different national legal systems:

$\epsilon_a = \upsilon_a$

$\epsilon_b = \upsilon_b$

…

$\epsilon_n = \upsilon_n$;

Whereas the normative experience in every different country is equivalent to the structural, legal design of the domestic law in that country.

For the cultural approach:

$\varepsilon = \nu + \sigma$;

The normative experience by the participants is equivalent to the domestic law´s structural design added to the impact of other contextual items: social, economic, political, cultural, linguistic, religious, geographical, and climate-related factors in the very same country:

$\varepsilon_a = \upsilon_a + \sigma_a$;

$\varepsilon_b = \upsilon_b + \sigma_b$;

…

$\varepsilon_n = \upsilon_n + \sigma_n$;

Hence, the normative experience in every country is equivalent to the domestic legal structure added to the contextual extra-legal factors and related to the specific country.

With all the previous data,

For the classic positivistic approach:

$if\ \nu_a \approx \nu_b$;
$then\ \mathcal{E}_a \approx \mathcal{E}_b$;

That is to say, if the domestic legal structures in two different countries are equivalent (never consider they can be the same; this is factually and legally impossible), then the normative experience by participants in both countries would be almost the same. Real-life experience in law proves that the latter proposition does not have a chance. The contextual variable needs to be inserted into the equation.

Then, **for the integral approach** considering extra-legal factors in the normative experience:

$if\ \nu_a \approx \nu_b$;
$and\ \sigma_a \neq \sigma_b$;
$then\ \mathcal{E}_a \neq \mathcal{E}_b$;

Meaning, that even in the case of similar domestic legal structures, the normative experience of the participants would be completely different because the contextual factors are different.

7. Conclusions

This book is handy for two reasons. First, it has proven helpful as the first coherent, comprehensive, yet pedagogical approach for researchers recently landing as *aficionados* in comparative law. Second, it has also proven helpful as a consultation text because it is synthetic, theoretically consistent, and comprehensive. The author does not wander unnecessarily, goes straight to the controversial points in every book chapter, and always carries the basic premise: methodological autonomy yes, arbitrary impositions by the researchers no.

It must be said that this book is mainly linked to a previous book in which the author set the records straight on an essential modern requirement of seriousness and *rigueur* in comparative legal research: interdisciplinarity demonstrated through the constant use of many tools out of an extensive toolbox of research methods, instruments and resources originated in many different fields of knowledge in social sciences[8]. Finally, I believe this is the handbook of reference for scholars, professors, and researchers aiming to get into comparative law along with its current challenges. Totally a recommended reading.

[8] J. HUSA, *Interdisciplinary Comparative Law*, Cheltenham, 2022.