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## Interpretation of Multilingual Legislative Texts\*

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### 1. Introduction

This general report brings together the various developments analyzed in the country reports prepared for the *Interpretation of Multilingual Texts* session of the XVII<sup>th</sup> World Congress of Comparative Law. Although the different reports vary to a certain extent as regards their focus and the matters discussed, they offer numerous highly interesting opportunities for comparative analysis, the result of which is presented in this general report.

All the national reports were written on the basis of a questionnaire, which is reproduced at the end of the general report. It is important to note that any reference to private legal deeds has been deliberately omitted in the questionnaire, as information about this issue is often ambiguous and difficult to obtain. However, as some national reporters did refer to these type of acts, we have included a paragraph on this issue.

The interpretation of multilingual legislative texts emerges in various forums.<sup>1</sup> In the field of international treaty law this is partially addressed in Article 33 of the 1969 Vienna Convention on the Law of Treaties. The European Union encounters this issue too, which is not surprising as there are twenty official languages. On the national level the problem is

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\* Session IC2. L'interprétation des textes juridiques rédigés dans plus d'une langue. National reports received from: Belgium, J. H. Herbots; Canada, A. Grenon; Quebec, L. Lauzière; France, D. Lamèthe & O. Moréteau; Finland, V. Koivu & H. E. S. Mattila; Germany, R. Schulze; Greece, A. Christianos; Italy, P. G. Monaster; Japan, K. Nakatani & J. Tsuruta; Macao, S. Mancuso; New Zealand, A. H. Angelo; Switzerland, M. Schubarth & W. Hauck; UK, E. Örücü; US, G. A. Bermann.

<sup>1</sup> It is useful to recall that a similar topic, *Langue et droit*, was selected for the XV<sup>th</sup> International Congress of Comparative Law, held in Bristol in 1998. The proceedings of that session were published in E. Jayme (Ed.), *Langue et droit* (2000). The present topic is much more focused on a specific aspect of the relationship between law and language.

present as well, especially in countries where laws are enacted in various languages, such as Switzerland, Finland, Belgium and Canada. Some of these countries can best be described as bijural and bilingual: there are two major legal traditions (often common law and civil law) and two official languages. The State of Louisiana in the United States, as one of the centres of the French presence in North America, has experience in bilingualism as well. The French national report points out that in more recently established countries, such as Vanuatu, more than one language has been designated as being official. Even the UK has recently moved towards bilingual legislation, albeit limited to Wales. The remaining national reports show that law-making in their jurisdiction is monolingual. Yet, in certain countries, legislative or regulatory texts may be published in different language versions, but these are not authentic. An interesting case is New Zealand where legislation is enacted in English, although Maori is also designated as an official language.<sup>2</sup>

In general it seems that monolingualism prevails at the national level. This predominance is not surprising as in certain countries, for instance in France, linguistic unity is considered to be an important element of national unity and identity. From a political point of view, the following categories of national monolingualism can be distinguished. The first one favours the assimilation, for instance through the public education system, of minorities speaking a language which is different to the official one. The second category is based on tolerance towards communities speaking a language other than the official one. The third type focuses on the protection of the cultural identity of minorities. In this case the national state makes an effort, through positive actions, to stop the disappearance of minority languages as a result of the assimilation of minorities into the larger community of people speaking the national language. An example is regulations and other official acts in the UK which have been drawn up in various languages to protect linguistic minorities.

From a legal point of view, specific problems related to the translation and interpretation of legal texts usually occur when bilingual or multilingual laws are enacted. These problems represent the relationship between language and legal problems on which comparative law is called upon to shed some light. Given that the multilingualism of legal texts can be examined from different points of view (although this general report will be restricted to translation and interpretation problems), it is important to refer to two assumptions that are well known in modern legal theory. First of all, it is important to recall the difference between legal texts and legal rules. A 'text' intends to be a set of linguistic signs whose meaning corresponds to a given linguistic code. A 'legal rule' refers to a rule used to organize or evaluate human conduct. Presumably there is a link between the legal rule and the text; however an analytical distinction is useful. Secondly, a legislative text is a linguistic message which must be placed

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<sup>2</sup> The Maori Language Act 1987 does not require all legislation to be published in Maori. However, it provides a right to speak in Maori in legal proceedings. Since this Act makes Maori an official language, the use of the language in statutes has become increasingly common. *See* the New Zealand Report.

in a certain context in order to understand the intention of the legislator. The subject of the rule should be able to recognize the “*discourse*” [message] addressed to him, to interpret the text semantically and, finally, to interpret it pragmatically, in other words to relate a specific conduct to the text. In the case of monolingualism, the process of interpreting the text also takes place, but usually passes unobserved.

## 2. Monolingual Models

The linguistic unity in France is the result of a rather long history. Or better still, it is the result of a centuries-old coherent policy pursued both under the monarchy and in the Revolution and democratic phases. The Ordonnance de Villers-Cotterêts of 10 August 1539, one of the oldest laws still in force in France, stipulates that all judicial decisions as well as public and private deeds are written and read in French.<sup>3</sup> The aim for this clause was to avoid the use of Latin in legal documents and to demonstrate the suitability of the French language in this matter. Moreover, it also served the functional political purpose of confirming the identity of French as the language used in communication between the Sovereign and his subjects. Fernand Braudel recalls an episode of interest to us in his last great work dedicated to the identity of France. After taking the country of Bresse from the Duke of Savoy in 1601, Henri IV spoke to his new subjects and said: “Il était raisonnable que puisque vous parlez naturellement le françois, vous fussiez sujets au roi de France. Je veux bien que la langue espagnole demeure à l’Espagne, l’allemande à l’Allemagne, mais la françoise doit estre à moy.” His statement was also an expression of an ideology, as demonstrated decades later by the fate of Alsace.<sup>4</sup>

It is commonly known that one of the main aspects in the French Revolution was the confirmation of the French language as the national language. Bertrand Barère, a member of the *Committee de Salut Public*, proclaimed: “chez un peuple libre, la langue doit être une et la même pour tous.”<sup>5</sup> At this stage, the fight was against local dialects and therefore a political choice was made to set up a monolingual school system. Coherent with this century-old policy choice, the Loi Toubon, an Act of 4 August 1994,<sup>6</sup> proclaims in Article 1: “Langue de la République en vertu de la Constitution, la langue française est un élément fondamental de la personnalité et du patrimoine de la France. Elle est la langue de l’enseignement, du travail, des échanges et des services publics. Elle est le lien privilégié des États constituant

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<sup>3</sup> Article 111 stipulates:

Et pour ce que telles choses sont souvent advenues sur l’intelligence des mots latins contenus dans lesdits arrêts, nous voulons dorénavant que tous arrêts, ensemble toutes autres procédures, soit de nos cours souveraines et autres subalternes et inférieures, soit de registres, enquêtes, contrats, commissions, sentences, testaments, et autres quelconques actes et exploits de justice, ou qui en dépendent, soient prononcés, enregistrés et délivrés aux parties, en langage maternel et non autrement.

<sup>4</sup> F. Braudel, *L’identité de la France*, in *Espace et Histoire*, volume I (1986), quotation at 290.

<sup>5</sup> See the French national report.

<sup>6</sup> Loi n° 94-665 du 4 août 1994 relative à l’emploi de la langue française.

la communauté de la francophonie.” This shows that the identity of the linguistic code used between legislators and citizens has to be the result of a policy choice and, over time, it will become a cultural fact.

As regards this model of monolingualism, it is natural to think that citizens have a ‘duty’ to understand laws, as if it is a linear process following the enactment of a law. It is also natural to think that citizens must observe the law in the *plain meaning* of the words of the legislator, because this is the reason why they are citizens of this state and not of another. To put it more precisely, it is useful to see how a linguistic identity implies that, in the absence of ambiguous wording, an expression will have the same meaning in the mind of the sender and that of the receiver. The use of interpretative methods other than literal interpretation is therefore limited to those cases in which the language of the legislator is ambivalent. Consequently, there is no substantial difference between a message that contains performatory statements and the one which contains descriptive statements only.

Other monolingualism systems differ from the French model. A striking difference concerns the legal language. In the French model referred to above, Latin legal terminology is no longer used in French law since the 1539 Ordonnance de Villers-Cotterêts stipulated that French should be used for these purposes. This often took place by translating a Latin word into French. This was not too difficult as French is a so-called Romance language and the difference between French and Latin words is minimal. However, this does not reduce the autonomy of the French legal language which is capable of producing a set of rules as complex as the Code civil using words in ordinary French only.

Other monolingual legal systems have separated legal language from ordinary language. This arises under two different circumstances. Japan is regarded the forerunner of the law reform processes. It is common knowledge that the modernisation of Japanese law took place through the massive transplantation of European legal systems, the French and German ones in particular. This involved the need for equally immense translations which had to take into account the cultural difference between the source language and the target language. This becomes most evident in the translation of terminology. According to the Japanese national report, during the implementation phase many Japanese legal neologisms were created by making use of the high word-building capacity of Chinese characters especially in the first half of the Meiji period (1868-1912). Most of the words which implied a legal concept unknown to the Japanese legal tradition are translated into Japanese by either creating Japanese legal neologisms, or making references to and quoting the legal words from *the Chinese translated versions* of legal books written in foreign languages. By using these methods, the foreign legal concepts could be absorbed from countries where French, English and German are used, but which were unknown in Japanese legal tradition. For example, according to Mitsukuri Rinshou (1846-1897), who translated the *French Civil Code* (*Code*

*Napoléon*) into Japanese and participated in drafting the former version of the *Japanese Civil Code* with Boissonade de Fontarabie, among many Japanese legal neologisms of Mitsukuri's own making were "dousan" ("meubles" in French), "fu-dousan" ("imeuble" in French) and "mihitsu-no-koi" ("dolus eventualis" in Latin). There are some Japanese legal neologisms which were imported from Japan into China and are now used as Chinese legal words, for example, "dairi" ("agency" in English), "touki" ("registration" in English) and "jikou" ("extinctive prescription" in English).

When an implementation/modernisation phenomenon of this type occurs, the myth of the homogeneity of the linguistic code used between Government and the people being governed is not confirmed.

The same phenomenon of divergence between legislative language and ordinary language also occurred in Germany, albeit for totally different historical reasons. In Germany, under the influence of the Pandect theory, jurists defined a special language to which the BGB legislator adapted.<sup>7</sup> If the legislative message can only be understood by those familiar with legal texts or legal concepts, it is clear that the linguistic code used between Government and its people no longer suffices and, therefore, there is a need for cultural codes. In these circumstances it is not easy to establish interpretation criteria based on the plain meaning of words, as it is clear that the extrapolation of the rule from the text requires a mastery of legal culture and terms.

### 3. Legislative Multilingualism

There are jurisdictions that fully adopt the multilingual legislation method. This occurs if people who speak a language which is different to the majority language live in one single State and the constitution expressly foresees that laws and other official deeds must be drawn up in these languages. Moreover, interpreters are expected or are used to checking the different language versions for interpretation purposes.

These experiences coincide with those in Belgium (where the two main languages are French and Dutch); in Canada, in particular in Quebec where the two languages are English and French; in Finland where the official languages are Finnish and Swedish; in Switzerland where the official languages are German, French and Italian; in the State of Vanuatu (English and French); and in the European Union where there are 20 official languages.

Each of these jurisdictions is characterized by specific features which depend on the linguistic and constitutional context of each one. In fact, the equal authenticity of the different

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<sup>7</sup> When the legislator of the former DDR decided to create its own *Zivilgesetzbuch*, its primary objective was to delete all terms that recalled the sectoral language of jurists and it thereby adopted a terminology taken from ordinary German.

language versions of one and the same law is ratified at the constitutional level, but the relation between the different language texts is a matter of equilibrium whose dynamics depend on many factors.

The example of Vanuatu mentioned in the French report is instructive in this sense. The New Hebrides were colonized by both the British and French in the 18<sup>th</sup> century. The two countries eventually signed an agreement making the islands an Anglo-French condominium, which lasted from 1906 until 1980, when the New Hebrides gained their independence as Vanuatu. The new State preserved “les lois anglaises et françaises en vigueur au moment de l’indépendance.”<sup>8</sup> The national language of the Republic of Vanuatu is Bislama. The official languages are Bislama, English and French. The principal languages of education are English and French. However, the French report points out that French law is:

presque été oublié après l’indépendance. La common law domine; lois et jugements sont rédigés sur le modèle anglais Les projets de lois, rédigés en anglais, sont traduits souvent à la hâte par les Services linguistiques, rattachés au bureau du Premier ministre, lesquels avouent ne pas avoir toujours le temps d’intégrer les amendements dans la traduction une fois les textes adoptés.<sup>9</sup>

The US report mentions that, initially, the constitution of the State of New Mexico foresaw bilingual legislation: English and Spanish. However, this did not materialize and the subject was dropped. The bilingualism of law in the books is frail if it is not supported by a community of people who speak the two languages.

In Canada, the balance between French and English is complex. English and French are the two official languages of Canada and have equal status and equal rights and privileges as regards their use in the institutions of the Canadian Parliament and Government. Similarly, English and French are the official languages of New Brunswick and have equal status and equal rights and privileges as regards their use in the institutions of the Parliament and Government of New Brunswick. In Quebec, laws and regulations are drawn up in both English and French and the two versions have the same legal value, but in the case of differences the French text prevails.

In Switzerland, German is the working language in 90% of the laws and federal regulations, and this language is spoken by most of the population.

French, Dutch and German are the official languages in Belgium, but only the first two are used for the authentic version of a law. The German translation is only published in *Moniteur Belge* at a later stage, and therefore it has an informative function for German-speaking citizens. Belgium pays particular attention to achieving effective parity between French and Dutch.

Apart from the socio-linguistic balance between different official languages, another element of differentiation is the distance from or the closeness to the cultural roots of the

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<sup>8</sup> Art. 95(2) of the Constitution.

<sup>9</sup> See, for further information, the French Report.



various legal languages. Belgium, Finland and Switzerland have common roots in the civil law tradition, although the legal concepts are expressed in different languages. For this reason there are few translation problems. In general, translation problems are minimal where the text of the law refers to material objects. Translation problems tend to arise when a text refers to legal concepts. When the cultural roots of the law, although expressed in two or more different languages, are the same, the legal translation problems are also less serious. However, they are not totally non-existent. The Belgian report gives the example of the Dutch terms “*neef en nicht*” which refer not only to a nephew and niece (*neveu et nièce*), but also to a cousin (*cousin et cousine*). This could create problems if the French version would refer to ‘nephew and niece’ as the Dutch version would automatically include ‘cousin’ as well.

On the other hand, as regards private law, in Canada the texts of laws drawn up in French and English refer to legal cultures which are traditionally different. In these circumstances, the connection between language structure and legal culture emerges. In fact, the legal terminology in both languages does not correspond because the basic legal concepts on which private law is based are different. The same can be said for the style and syntax of the language which differ greatly. The reports on Canada and Quebec recall the fact that for rather a long time the French versions of Canadian laws were merely a word for word translation of the English text. When this method is used, the text of the target language becomes rather stilted in terms of style. In fact, outside the legal field, this technique is sometimes used to create a comical effect. A text with a stilted style makes the jurist who interprets the text uneasy and forces him to read the text in the source language. In Canada this translation technique had been perceived to contradict the principle of the equality of the two languages. Therefore the method used to draw up laws in French and English has evolved in order to avoid a literal translation and to ensure that, as regards private law, it can be understood in the legal context of both civil and common law. The importance of bilingual drafting has been emphasized by the Government of Canada in a 1999 Cabinet Directive on Law-Making.

The *Constitution Act 1867* requires federal laws to be enacted in both official languages and makes both versions equally authentic. It is therefore of primary importance that bills and regulations be prepared in both official languages. It is not acceptable for one version to be a mere translation of the other. For this reason, sponsoring departments and agencies must ensure that they have the capability to develop policy and to consult and instruct legislative drafters in both official languages. Both versions of legislation must convey their intended meaning in clear and accurate language.

The adoption of the co-drafting method has given rise to perceived changes in federal legislation:

[...] the historical rigidities of bilingual drafting have been relaxed to a degree. It is no longer necessary for the French version to track the sentence structure and wording of the English version. [...] On the English side, common law drafting has evolved toward a higher level of generality and abstraction, which has brought it more in line with civilist style. Since the introduction of co-drafting, English drafters have been free to follow the lead of their French co-drafters in including two sentences with a single section or subsection, in declining to paragraph and the like.

The difference between bilingual and bijural legislation should be underlined here. Federal legislation is described as being bijural when it is supplemented by provincial property and civil rights concepts. For example, unless federal legislation provides otherwise, any reference to the term “secured creditor” in a federal statute will necessarily constitute a reference to that term as it is understood in the provinces. When federal legislation refers, either directly or indirectly, to these underlying private law concepts, the latter complement the former and a “complementarity” relationship is said to exist between federal legislation and provincial law. Conversely, if federal legislation excludes the application of provincial law, the former is said to be “dissociated” from the latter. For example, dissociation will occur when, as a matter of public policy, there is a need to ensure the uniform application of federal legislation throughout Canada and a bijurally-crafted rule would not achieve this result.

A similar phenomenon can be found in Belgium, but only in terms of syntax. In fact, the Belgian report points out that the draft of bilingual legislative texts takes into account the fact that Dutch is a Germanic language with a language structure that does not follow the rhythm of French and, therefore, Belgium tends to free itself from the word for word “traduction servile” to draw up laws in good and proper Dutch.

All reports highlight the fact that the task of translation is entrusted to specialized bodies at government or, more rarely, at parliament level. However, the said bodies may indifferently indulge in a word for word translation or understand the fact that the text to be translated is a legal text. We have already mentioned the fact that translation problems are rather simple when a legislative text refers to objects. In the EU the Commission has desperately tried to legislate – also concerning private law – using a language which refers directly to things or actions described as objects. The result has been pitiful and recently the Commission announced that it wants to tackle the problem of terminology which is suitable for expressing abstract legal concepts. In fact, in the language of jurists, abstract terms such as contract, tort, sale are used as category words, i.e. they are referred to as a set, meaning a group of paradigms included in the same class which is taxonomically identified by the legal term.

Obviously this triggers a series of references to the term which encompasses a group of rules of various origins: legislative, case-based or cultural.

It is also useful to note how, for this purpose, words may also be taken from ordinary language such as “property”, “heir”, “succession”. However, we must not be deceived by this as these terms acquire functions in the legal context which are not present in common vocabulary, in other words they take on a connotative function typical of all taxonomies.

In fact, this function is more important than the connective function that leads back to their conceptual origin, because basically it helps to exclude certain elements from the designated set and therefore from the subject-matter under discussion.



Consequently, if the English term “contract” is used, the result will be to exclude a gift or the assignments of immovable property, acts constituting a guarantee, all those transactions which, on the other hand, are included within the meaning of the French word “*contrat*”.

The countries which have been practising bilingualism for a longer period of time have organized themselves in order to seriously take into consideration the characteristics of legal language.

#### 4. Minority Protection

In Germany, Italy, New Zealand, and the UK special legislation is promulgated to provide for the protection of minority or regional languages. In Germany this is the case for Danish, Serbian and Slavic. The law allows administrative authorities to draft documents in one of these regional languages. German is the language used for legislation and for hearings and judgements in court. As is stated in the German report, the use of languages other than German in the German legal system is exceptional, but it is not excluded in principle.

Italian legislation goes even further. In recent years, the constitutional principle of the protection of minority languages has been established in Italy. Contrary to what occurs in France, the Italian Constitution does not establish the language of law. Therefore, in theory, Italian is *not* necessarily the official language of the country. On the contrary, the role played by the Italian language can be inferred from the provisions on the protection of linguistic minorities in certain border regions, and from the provisions that regulate deeds drafted by notaries, transcriptions in public registers and trial deeds. Article 3, paragraph 1 of the Constitution stipulates: “*All citizens have equal social dignity and are equal before the law, without distinction of any kind such as sex, race, language, religion, political opinions, personal and social conditions.*” Article 6 of the Constitution provides that “*the Republic shall protect linguistic minorities with special rules*”. The Italian Law No. 482 (Art. 2) of 15 December 1999 provides that: “*In implementing Art. 6 of the constitution and in harmony with the general principles established by European and international bodies, the Republic shall protect the language and culture of Albanian, Catalan, Germanic, Greek, Slovenian and Croatian populations and those speaking French, Franco-Provencal, Friulian, Ladin, Occitan and Sardinian.*”<sup>10</sup>

Many Italian laws, including the Codes, have been translated into German. However, the language of interpretation remains Italian. The decisions of the Italian “*Corte di Cassazione*” (“Court of Cassation”) that guide the interpretation of laws only take into account the text written in Italian and never refer to texts written in other languages, because these are

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<sup>10</sup> For the implementing regulation *see* Decree of the President of the Italian Republic no. 345 of 2 May 2001 amended by Decree of the President of the Italian Republic no. 60 of 30 January 2003.

considered as merely translations that do not reveal the intention of the legislator. In other words, the texts written in languages other than Italian are only a source of information for communities speaking a different language but do not contribute to the creation of legal rules.

Maori is the language mostly used in addition to English in New Zealand. As far as legislation is concerned, texts are in English, but some texts are also in Maori or some Maori words are inserted into a specific Act. The trend, however, is towards limited bilingual legislation. The Ngati Ruanui Claims Settlement Act 2003 and the Ngati Awa Claims Settlement Act 2005 have whole sections and schedules in Maori. A substantial amount of the text is in both Maori and English, but there is no indication which language takes priority in the event of a conflict.

At present there seems to be a similar situation in the UK. The UK has recognized that there are five regional or minority languages in the UK: Welsh, Scottish Gaelic, Irish, Scots and Ulster-Scots with English being the main language. In 2003 the UK also recognized Cornish and Manx as languages to which the Charter applied. However, only Welsh has the status of being regarded as equal to English and this only applies in Wales. Section 47 of the Government of Wales Act 1998 deals with the “equal treatment” of the English and Welsh languages. It reads:

(1) The Assembly shall in the conduct of its business give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality. (2) In determining how to comply with subsection (1), the Assembly shall have regard to the spirit of any guidelines under section 9 of the Welsh Language Act 1993. (3) The standing orders shall be made in both English and Welsh.

Also Section 122 provides that the English and Welsh texts of bilingual legislation are of “equal status”. The 1993 Act places a duty on the public sector to treat Welsh and English on an ‘equal basis’ when providing services to the public in Wales as well as giving Welsh speakers an absolute right to speak Welsh in the courts and it establishes the Welsh Language Board to oversee the delivery of these promises and to promote and facilitate the use of the Welsh language. The primary duty of the Board is to implement the 1993 Act.

Among the functions transferred to the Welsh Assembly created under the 1998 Act is the making of Assembly General subordinate legislation under enabling primary legislation passed by the Westminster Parliament. Although the Assembly is an executive body, it also acts as a legislative body using delegated powers. “Unless in a particular circumstance it is inappropriate or not reasonably practical” for the draft subordinate legislation to be in both languages, it may only be approved by the Assembly if the draft is in both languages (section 4). Treating the two languages “on a basis of equality” also applies to the courts.<sup>11</sup>

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<sup>11</sup> See the UK Report.

Given the fact that the introduction of a form of bilingualism has only recently been introduced, the hermeneutic procedures of the courts do not seem to be influenced by the presence of Welsh next to English as the language of the laws enacted by local authorities.

In fact, there are no signs that show a differentiation between the Welsh and English legal cultures. In these circumstances, the use of Welsh has a mere informative function and has the role of protecting the language and general culture of Welsh-speaking people.

## 5. Legal Language and Culture

The link between legal language and culture and the possibility that the latter may prevail over the former is evident in the State of Louisiana, as referred to in the French and United States reports. As mentioned in the United States report, during the 19<sup>th</sup> century the State of Louisiana went from French-English bilingualism to monolingualism which only recognized English as the language of law. However, the law of Louisiana had strong cultural roots in the French experience and therefore civil law was encoded, a fact that – in itself – was of minor relevance. The first Civil Code of Louisiana was written in French. The review in 1825 was made on the basis of a draft prepared in French and later translated into English. Over the years, the Louisiana courts consistently favoured the French language version of the Civil Code, although their precise reason for doing so varied from case to case. However, the Revised Civil Code of Louisiana of 1870 marked a break with the state's prior codes. Consistent with the then Constitution of 1868,<sup>12</sup> it was enacted and promulgated in English only, and no official French language version was ever published. Despite this, the Supreme Court of Louisiana continued to prefer the French version. This is evident from its case law, for instance in the case of *Sample v. Whitaker*.<sup>13</sup> The question there was whether the non-use of a servitude for a period of ten years “extinguished” the servitude, in which case the servitude could no longer be asserted even by a minor, or merely caused the “prescription” of the servitude, in which case the minor's rights would not be affected. In determining that the minor's rights were preserved, the Court relied, in part, on the fact that the French text of the parallel article of the 1825 Code used the expression “extinguished or prescribed”, unlike the provision in the English version of that Code which merely used the term “extinguished”. The Court simply concluded that “[w]here there is a conflict between the English and French texts of the Code of 1825, the French text prevails.”<sup>14</sup> As stated in the US report “the case is striking of course because it did not entail the application of the 1825 Code, whose French version the court had good reason to prefer – in case of conflict – over the English version

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<sup>12</sup> Louisiana Constitution Art. 109 (1868).

<sup>13</sup> See the US Report.

<sup>14</sup> See the US Report.

into which it had been translated. Rather, the case entailed application of the 1870 Louisiana Revised Civil Code, which had been promulgated only in English and which had carried forward the language of the English translation of the 1825 Code.”

In fact, in this case we are dealing with a complete transformation of the literal interpretation criteria with the aim of giving priority to the cultural roots (French) of the civil law of Louisiana which the judges of that State wanted to preserve. As we will show below, a similar phenomenon took place in the autonomous region of Macao, although it has a bilingual and not a monlingual system.

The relationship between language and legal culture also emerges in countries that are formally classified as having a multilingual system.

In the autonomous region of Macao, part of the Popular Republic of China, two languages are used: Portuguese and Chinese. Most of the population (90%) speak Chinese and have not mastered Portuguese very well, but most of the members of the legal community feel at ease using Portuguese. Laws are enacted in both languages, although there is political pressure urging a wider use of Chinese. For a certain period after the return of Macao to China, some laws were only published in Chinese. At present, more than 40% of the laws are originally written in Chinese. Despite this, Portuguese is still the predominant language in the legal sector, given that the basic structure of the legal system of Macao is that of Portuguese law with which the legal community wants to keep in contact.

Similarly, in Finland, Finnish has slowly replaced Swedish as the law-making language. Although laws are to be published in both languages, about 97% of laws are originally written in Finnish and then translated into Swedish. However, the Swedish language represents the connection with the legal past of Finland and with the Swedish legal model which is often referred to also in pursuit of the policy of legal cooperation between Nordic countries. In brief, as the Finnish report stated, the mother tongue of many highly esteemed legal scholars and practitioners in Finland is Swedish. The works and articles written by them are often published, initially or exclusively, in Swedish. They are also read by their colleagues whose mother tongue is Finnish. In particular, judges of the Supreme Court and the Supreme Administrative Court resort to all relevant materials, whether they are in Finnish or in Swedish, when deciding cases. In addition, the Finnish report rightly underlines that it should also be remembered that the legal system has developed over a long period of time, especially in such social conditions where legalism and legal permanence are emphasized, as is the case in the Nordic countries. In the fields of land rights and the law of property, in particular, it is necessary to look back in time at centuries ago. When this is done, all interpretation materials to be found are in Swedish. The same applies to the second half of the 19<sup>th</sup> century when laws and legislative materials were published in both Swedish and Finnish. As Swedish

was still the original language of law drafting in Finland at the end of the 19<sup>th</sup> century, the Swedish versions of statutes dating back to this period are preferred by judges when resolving interpretation problems.<sup>15</sup>

Often, if we concentrate on the link between a specific language and a specific legal culture, we can see that the cultural choice of the interpreter often prevails over the linguistic choice of the legislator.

## 6. The Language of Laws and Interpretation Criteria

Canada is the most advanced in harmonizing two legal languages and two legal cultures, and it is not surprising that the Canadian report introduces the major question of interpretation. In fact, the difference between legislative monolingualism and multilingualism can best be understood in terms of the criteria used for interpretation. We have already mentioned the fact that absolute monolingualism favours literal interpretation criteria. It is important to consider that in a legislative multilingual system the said criteria are less important. This is clearly highlighted in the examples of Canada, Belgium and also the EU.

Where the basic principle that all linguistic texts are equally authentic has been acknowledged, it is logical to assume that all versions are presumably the same and that they therefore convey the same rules and statements. However, this is a simple assumption which is contradicted by evidence that there are discrepancies between the different versions. When there are different authoritative language versions, the interpreter has to examine more than one version. This means that in the case of equally authentic texts, none of the language versions will be dominant when interpreting the text. This rule can be found in the Vienna Convention on the Law of Treaties. Indeed, if we would seek recourse to standard hermeneutic criteria based on legislative monolingualism, every ambiguity in the different authentic language versions could lead to a divergence in the application of the law in the different language areas. Therefore, the reconstruction of the text by comparing the different versions has to be done first. This is unquestionable from the point of view of correct hermeneutic procedure, but in actual practice this criterion is hardly ever followed. It is important to note that a good example should be given at the top and this should filter down to the lower echelons. The Supreme Courts are organized in such a way as to be able to compare the various language versions of one and the same text. Over time, this method has spread to lawyers. In Belgium it is the duty of the interpreter to have available the various language versions of one and the same legal text. In Canada one considers whether a lawyer who does not examine both versions may be accused of negligence.

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<sup>15</sup> See, for more details, the Finnish report.

Interpretation criteria based on the comparison of different linguistic texts solves the problem of legislative multilingualism and transforms it into an advantage for the interpreter. I shall call this the hermeneutically positive aspect of legislative multilingualism. In terms of interpretation techniques, this is akin to the principle of the ‘minimum common denominator’ already used in international law. If all texts are to be considered as equally authentic, then the one that uses the less imprecise expression prevails over the others simply because this text cannot ratify interpretative hypotheses admissible on the basis of other texts that use vaguer expressions.

An example is offered in the Belgian report. The German text of Article 329, 2<sup>nd</sup> paragraph of the Swiss Code Civil stipulates that an obligation alimentaire between brothers and sisters depends on their relationship being ‘bonne’ (*sich in günstiger Verhältnissen befinden*), whereas the French and Italian versions require that “qu’ils vivent dans l’aisance”, and this expression is much more precise. Another example from the Belgian report is taken from a Permanent Court of Justice judgment where the French text uses a very generic expression “sans distinction aucune” and is chosen over the more precise expression in the English text “without discrimination”.

Naturally, the advantage is that – in the case of a multilingual text – there are less interpretative hypotheses admissible to a further hermeneutic evaluation. In fact, assuming that each linguistic sign used to compose the legal text has a central core with a certain meaning and a halo of more uncertain meanings – it is easy to understand that as the words that make up a specific terminology, according to different linguistic codes, even when they do not have the same core of meaning, present haloes of possible meanings which do not correspond, – the common area is probably more restricted than the one that surrounds one single word in one single linguistic code.

Naturally, this is a relative advantage. Lawyers who work in an environment of linguistic pluralism have fewer resources for arguments of an exegetic nature compared to their colleagues working in a monolingual environment. This is also the reason why the latter have some difficulties with the EU’s set of rules. For example, I assume that the Italian lawyer of a private plaintiff was quite disconcerted when the Ordinary Courts publicly rebuked him for having used a literal topic in the interpretation of the former article 85 (now 81) of the establishing treaty, using only the Italian version. “The applicant may not rely on the Italian version of Article 85 of the Treaty in order to require the Commission to demonstrate that the agreement had both an anti-competitive object and effect. That version cannot prevail by itself against all the other language versions, which, by using the term “or”, clearly show that the condition in question is not cumulative but alternative.”<sup>16</sup>

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<sup>16</sup> Case T 143/89.



Examining the matter carefully, the criterion to refer to more than one text in the case of legislative texts drawn up in different language versions is justified in particular in the case where there may be differences in meaning. In this case, we are faced with a case similar to one of antinomy, that is to say when two rules prescribe contrasting forms of conduct. However, in the case of antinomy stemming from two language versions of one and the same legislative text, it is not possible to use the 'hierarchy' criterion which is normally used: the level of the source (a statute/act prevails over a regulation) or the date of enactment (the most recent legislation repeals the previous one). Therefore in the case of antinomy deriving from two language versions of one and the same legislative text it is necessary to try to reconstruct the legislator's intention by looking at all the various language versions and at the preparatory work. The result will be that at least one of the language versions has no regulatory value. I shall call this the repealing effect of linguistic pluralism.

A case that occurred in the EU describes this effect clearly. A Community regulation on subsidies for agriculture provided the very complicated methods to be used to harvest cannabis in order to receive Community subsidies (in reality one of the reasons for the complexity was the desire to avoid the possibility of cannabis collected with Community subsidies from being used as an illegal drug). In the Netherlands the harvest was carried out in different ways and for this reason the Commission reduced subsidies by 50%. During the appeal, the Dutch government pointed out that in the Dutch version of the Regulations, the collection methods which were not allowed were limited to flax and did not refer to cannabis contrary to the other language versions. Therefore the Dutch government maintained that before defining the financial consequences of the violation, the Commission should have taken into account, as a point for reflection, the difficulty in the interpretation due to the incorrect translation of the EU rule and to the failure to rapidly discover the misunderstanding. In the judgement of 14 March 2002 No. C. 132/99, the Court of Justice, in conformity with its consistent line of decisions and following the conclusions of the Advocate General, rejected the argument of the Dutch government, stating that, as the Dutch version was different from the other language versions of the same provision, it obviously contained an easily recognizable mistake and therefore no justification was admitted.

In fact two aspects must be examined when a legislative message is conveyed in different language versions.

First of all, the legislative text used to deduce – by means of interpretation – the rules is in fact, as mentioned above, a metatext made up of all the language versions in which the legislative message is drawn up. This means that it disappears (or rather loses its sense as a text) in the true sense of the word because the univocal materiality of the sign that composes it is missing.

Secondly, when the different versions of the same text are addressed to communities with different language codes and when there are significant cultural differences between the codes (in Europe this only occurs with reference to legal language), then it is impossible for the legislator to accurately convey the meaning it wishes to convey through those words. So, it is impossible for the interpreter to follow the legislator's intent and to use the criterion of plain meaning to perceive it.

These two factors have led to the devaluation of the literal criterion and it cannot be used as a primary hermeneutic criterion.

### 6.1. The Teleological Method

In reports based on the medium or long-term experiences of multilingualism and on European Community experiences, we can find examples where the comparison of different language texts is not helpful in finding the correct meaning of the text. In these circumstances more than in others, the interpreter is induced to search for the intention of the legislator which does not have much in common with intention in a psychological sense. It is more a matter of attributing to the rules a sense which is in conformity with the purpose assigned to them.

In effect, in Community case law, the teleological criterion prevails even if it is used in an unrefined way compared to the masterful teachings of Aharon Barak.<sup>17</sup> Evidence of this can be found in the *Océano case* (case C. 240/98), which is one of the most important judgements of the Court on European private law as recalled by M. Hesselink.<sup>18</sup> In this case it was a matter of knowing whether it was possible to deduce, from the directive on abusive clauses in consumer contracts, that the national judge is obliged to determine *ex-officio* the non-binding nature of a clause which conferred jurisdiction on a court in the territorial jurisdiction in which the seller or supplier has his head office instead of the place of the consumer's domicile. The problem concerned the Spanish legal system which did not provide suitable criteria to solve the problem, given that previous court decisions on this point had been contradictory. The Directive which was applied in this case directly includes the fact, as part of Member States' obligations, that they must establish that: "no vincularán al consumidor, (en las condiciones estipuladas por sus derechos nacionales,) las cláusulas abusivas que figuren en un contrato." Equally the Italian version states that "Gli Stati membri prevedono che le clausole abusive contenute in un contratto stipulato fra un consumatore ed un professionista non vincolino il consumatore"; and the French text states that "Les États membres prévoient que les clauses abusives figurant dans un contrat conclu avec un consommateur par un professionnel ne lient pas les consommateurs." The English text states

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<sup>17</sup> A. Barak, *Purposive Interpretation in Law* (2005).

<sup>18</sup> M. W. Hesselink, *La nuova cultura giuridica europea 78 et seq.* (2005).

that the said clauses shall “not be binding on the consumer”; and the German text naturally uses the term *unverbindlich*. The meaning of the various texts was quite homogeneous and, apart from what can be deduced from the English concept of “non-binding”, in none of the jurisdictions related to the languages mentioned does the expression “non-binding” lead to the conclusion that the judge must deduce *ex-officio* that a term of the contract is void.

Without doubt, in this case an interpreter experienced in national interpretation procedures would have answered in the same way as the Public Prosecutor of Barcelona who was faced with the question before the Court raised the EU preliminary matter. By emphasizing the literal meaning of “non-binding”, the judge answered that the consumer who was guilty of default was not obliged to appear before the Court of Barcelona but – since the domicile of the plaintiff was one of the optional courts foreseen by the standard code of procedure – that court was without doubt competent and the preliminary matter was superfluous. Instead, the Court of Justice reasoned in different terms and established that

(§ 26) El objetivo perseguido por el artículo 6 de la Directiva, que obliga a los Estados miembros a prever que las cláusulas abusivas no vinculen a los consumidores, no podría alcanzarse si éstos tuvieran que hacer frente a la obligación de plantear por sí mismos el carácter abusivo de dichas cláusulas. [...] De ello se deduce que sólo podrá alcanzarse una protección efectiva del consumidor si el Juez nacional está facultado para apreciar de oficio dicha cláusula.

Therefore this leading case established that the literal meaning does not count and the European interpreter must focus on the purpose of the policy of EU law. Without reaching the levels of hermeneutic confidence attained by the EU Court of Justice, also other countries which practice bilingualism are moving towards purposive criteria. This is underlined in the Belgian report. The most interesting case is the Canadian one where the practice of bilingual and bijural legislation is driving hermeneutic procedures towards teleological criteria even if these criteria are very distant from the traditional ones applied in common law. In fact the plain meaning criterion, the literal interpretation and the prohibition on referring to preparatory work are all criteria that appear to be very unsuitable for dealing with bilingual legislation in which, as observed, the text, in material terms, is lost.

## 6.2. Interpretation of International Treaties

All reports mention procedures to interpret international treaties. On this matter, it is important, first of all, to make a distinction between those countries which have an authentic version of the treaty in their own language and those countries that do not. An extreme case is France, given the fact that there always seems to be an official French version of an international treaty. Other countries must first of all face the problem of translating the text of the treaty into their own language. The Ministry of Foreign Affairs is usually entrusted with this task. The task of interpreting the treaty is on the other hand entrusted to the national judge. Nearly all systems mentioned follow the rule that the authentic text is the official

one while the translation in the national language is only used for information purposes. The Greek report mentions the problem of interpreting terms that convey legal concepts not recognised by municipal law. An example is the expression “wilful misconduct” which appears in the Convention de Geneve of 1956 in relation to the contract for the international transport of goods. The term generated long discussions between Greek judges before the Supreme Court met in plenary session and recognized that such a concept does not exist in Greek law and does not correspond to the notion of ‘intent’ or ‘negligence’. The German report gives examples of the interpretation of international treaties based on the official languages and not on the German translation.<sup>19</sup> However, in the UK the problem does not seem to occur as the role of the courts is simply to interpret the Act of parliament that implements the international treaty at the national level without attributing importance to the origin of the law.

It is important to note that all reports refer to the rules of interpretation established by the Vienna Convention on the Law of Treaties. This is also the case if the State in question has not yet ratified the Convention. Therefore, apart from the interpretation differences that may also arise as regards the interpretation of provisions, there is a set of common rules.

Once again the EU provides the most interesting examples. Indeed, in the large body of European legislation it is impossible to avoid the possibility that a legal concept is unfamiliar in the jurisdiction of a member state. In these circumstances the question is whether to translate the concept or not. For instance, the expression *acquis communautaire* is generally not translated. When a legal concept is translated then the question arises how to acknowledge that the word is familiar but the concept is not.<sup>20</sup>

## 7. Private Legal Deeds

As mentioned in the introduction, certain reports, and especially the French one, also mention the subject of private legal deeds. In the globalisation era, the phenomenon of private legal deeds written in a language different to that of the Court is destined to grow. There are consumer protection rules, establishing that the contract, in particular if it is a standard contract, must be written in the national language of the consumer. Similarly, in the case of a labour contract the national language of the worker is compulsory. However, in most cases the language of the contract can be chosen by the parties. All the reports which tackle this matter underline, however, that in the case of a dispute, the rules of civil procedure establish that the

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<sup>19</sup> The German report states, however, that German courts tend to cite the national translation only if there is no reason to doubt the clarity of the German text.

<sup>20</sup> See the German Report.

judge must be given a translation in his national language. It seems that the judge may, at his own discretion, refer to the text translated in his own language or to the original one, as is the case in France.

It is generally accepted that in the case of a text of a private deed written in a language different from that of the court, the judge has the same powers of interpretation normally attributed to him. The problem becomes more serious when the translation supplied contains a translation error that distorts the sense of the clause expressed in the original text. At this stage there are two possibilities. One is to give priority to the original text correcting or accepting the correction of the translated text and the other is to determine that the national contracting party only gave its consent on the basis of the version prepared in its own language. It seems that also in this case it is necessary to make a difference between contracts with consumers and workers, on the one hand, and commercial contracts on the other.

An option would be to allow the judge to ask for the assistance of an expert to interpret a private deed written in a language other than his own. None of the reports, however, mention this, in my view, desirable solution.

## Questionnaire

1. In your legal system are there any legislation, decrees, regulations, or more general public acts, which are published in more than one language?
  - 1.1 If the answer to the above question is yes, could you mention which are those languages ?
  - 1.2 Again if the answer to the first question is yes, which is the working language normally used to draft the text ?
  - 1.3 Can you describe how the translation service – from the working language to others in which the text is officially published – is organised?
  - 1.4 Is the translation from working language to others made only by a technical office outside the authority that has enacted the act, or on the contrary is there an effective participation or a final check by the mentioned authority above the translated text?
  - 1.5 What would occur in case of discovering an error or omission in the translated text?
  - 1.6 What happens in the case of a relevant error? Is it corrected by the interpreter or, on the contrary, is the official text to be considered mandatory even if it contains a translation error giving rise to divergence with the text published in the working language?
2. Are normative Acts deriving from supranational sources such as international treaties, WTO rules and European Union directives officially published in the national language or in one of the official languages contemplated by supranational instrument?
  - 2.1 In case of divergence in the meaning between the international text and the translation in the national language, which one of the two meanings prevails?
  - 2.2 Is there any non-official translation (by private organisations) of legislative texts which derive from supranational sources?
3. How do translated words which imply a legal concept unknown to the legal tradition correspond to the most used language? Eg. Trust for the civil law tradition or *abus de droit* for a tradition different from the civil law.
  - 3.1 Has your legal language created neologisms to give evidence in the translated language of expressions provided by the working language?
  - 3.2 In the normative texts are there any officially published foreign words which have not been translated?
  - 3.3 How are ambiguous words translated? Eg. *Possession* (French) in English?
  - 3.4 How does your legal language treat some particular expressions which are characterized by strong cultural features? Eg. Fairness, Rechstaat, Rule of Law.
  - 3.5 How do you translate expressions which refer to legal institutions that are not considered by the legal system of the translation language? Eg. Judicial Review
  - 3.6 Which is the adopted syntax by which the eventual rhetoric style of working language is transferred in the translation language?
  - 3.7 Does the translation language assume a different style or lexicon from the one used in the common language?

4. Which is the linguistic text used as a basis by lawyers, judges and officials in their interpretative activity?
- 4.1 Considering the above-mentioned interpretative activity: are there some cases where reference is made, for the same act, to the text drawn up in a different language with respect to the one more often used by the local Forum?
- 4.2 Always with reference to the above-mentioned interpretative activity: how are foreign words eventually insert into the text of the Act? How are neologisms translating foreign words dealt with?
- 4.3 Making reference to the above-mentioned interpretative activity: Do special hermeneutic rules exist for the interpretation of normative texts deriving from supranational sources? As an example, do the interpreters take into consideration the necessity to give a uniform interpretation to the rules whose goal is to make the laws of the different States uniform?
- 4.4 Are the same criteria adopted for the interpretation of municipal (domestic) law whose text is enacted in more than one language?
- 4.5 Considering the case of a *casus omissus* (gap) in a multilingually enacted text, which is the hermeneutic policy mostly used or followed?
  - 4.5.1 Is the gap filled in following common rules?
  - 4.5.2 Is it normal to refer to the same act enacted in an another language?

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