Hard Cases

Suicide: Not in the Wrong Moment, Please![*]

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Abstract

The authors welcome the landmark decision of the *Corte Costituzionale* as the right step in the right moment. With a special accent on EU Law and Roman Law, they point out Italy's role in European Legal Science. The EU law paradigm of linguistic equality fits perfectly to Europe's long-term common interest, before and after Brexit. The future progress of those who want to develop the common project in the core of Europe is best served if everybody uses his own language.

1. It is an honour to be asked by an Italian journal to comment on an important decision of the *Corte Costituzionale*. What to do, however, if the author's competence in Italian Constitutional Law is based essentially on a 1988-89 course for incoming Erasmus students? According to an Italian public intellectual, Marcus Tullius Cicero, knowledge can also come from practical experience in the field. My field is essentially Roman Law, so I will only give some Romanist remarks. The *Consulta* rightly stated in its judgment that different scientific branches (*rami del sapere*) might need different considerations.

2. Roman Law is not an Italian (or German, or Spanish, just to name the most active scientific communities) organ. It is something we should understand

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within the paradigm of 'memory', nowadays very present in the humanities: every culture needs instruments of reflection on its own past, for current practical needs or for future challenges. It is sufficient to have some institutions that keep the ability to reflect for moments to come. Italy's amazing force in thinking and rethinking Roman Law is essential for Europe: more uncertainties show up on the horizon of European Law (see below 11 and what follows), more capacity to reflect on the common (and the uncommon) tools is needed. Those European countries that have radically cut their spending in the field of Legal History, Philosophy of Law, and other 'uneconomic' disciplines are living, in the long run, on the cost of Italy and other countries more sensitive to the *longue durée*. And the EU Member State that has most radically neglected the humanities is now exiting. We will return to that.

3. Just to sketch the general horizon before I come to the example of Roman law: the overall question if a *lingua franca* is needed or not has been debated time and again. There are practical advantages, especially for those who use such a *lingua franca* as their mother tongue. The others usually do not object, for vanity (as they overestimate their skills) or for other reasons. If there was any need for proof, it would be sufficient to mention the legal and illegal pressure Anglo-American institutions and enterprises exert in order to impose the exclusive use of English. This is a key problem in the EU,[1] and especially in the world of EU-financed research.[2] The loss of quality created by oversimplified communication between non-native speakers and by ignoring entire literatures has become serious. Law is so closely related to language that the linguistic choice necessarily matters (see also below 13 and what follows), and the effort of translation is the first step to detect problems as early as possible. Anyway, in the academic world there have always been *linguae francae*, from Latin to French to (for the time being) English. Latin and French rose and fell. German, by the way, in the 19th century was a candidate for such a position: until the disastrous consequences of first German nationalism, then later National Socialism, paved the way for the post-World War I and World War II situation.[3] The present historical situation is extremely interesting as Brexit will have a strong impact at least on Europe (we still do not know what exactly)[4] and the

[1] See F. Zedler, 'Mehrsprachigkeit und Methode. Der Umgang mit dem sprachlichen Egalitätsprinzip im Unionsrecht' *Heidelberger Schriften zum Wirtschaftsrecht und Europarecht*, Band 75 (Baden-Baden: Nomos, 2015).

[2] See M. Jantz, 'Sprachwahl und Wissenschaftsfreiheit' *Ordnung der Wissenschaft*, I, 41-50 (2017).

[3] For these developments, too, a recent overview has been given by S. Fisch, *Geschichte der europäischen Universität: Von Bologna nach Bologna* (München: C.H. Beck, 2015).

[4] For some first ideas, see M. Kramme et al, *Brexit und die juristischen Folgen. Privat- und Wirtschaftsrecht der Europäischen Union* (Baden-Baden: Nomos, 2017), and the continuous coverage of the topic in *Zeitschrift für das Privatrecht der Europäischen Union* and other EU Law journals.

Trump presidency on the World (ditto). English will not benefit from these events, but no one knows in which respect and to what extent it will lose. Whoever bets on English as the strongest language of the late 20th century should have an eye on these uncertainties. But my task is not to talk about the general horizon.

4. Roman Law was widely a German-speaking discipline in the 19th century, with important elements borrowed from the other European languages. The leading position passed to Italy in this case before World War I: because of changes in the academic systems but also because sharp-minded young Italians won exchange scholarships to Germany and brought their knowledge back to Italy.[5] Italy has remained in this position ever since. The bulk of monographs and articles are in Italian, and there are no signs of change. There is practically no subject to be studied within the realm of Roman law without at least a reading knowledge of Italian. Any serious specialist in Roman Law must follow the Italian debates, and young German researchers are sent to Italy (and *viceversa*): to learn the language and how to read the sources. The Erasmus program is an excellent opportunity to extend language skills: as most European countries require too little at school (only two languages minimum), an academic discipline like law that has to form future leaders can encourage high potentials to learn a third or fourth language in preparation for an Erasmus exchange (those who do not want to do so cannot be regarded as high potentials).

5. In this general picture, the attitudes of Italian Romanists[6] can be roughly divided into three groups. One group reads essentially Italian, with more or less serious excursions in unavoidable foreign regions. As the essential language is in fact Italian, such an attitude does not necessarily affect the quality of research and teaching. It depends on the specific subjects of study, and typically, the level is high above an average text on the same subject by a foreign author. A second one is also fluent and active in the other key languages of the discipline (German, Spanish; and for certain issues, increasingly French and sometimes English) but works essentially in Italian; they create the international image of the Italian community. A third group, not very large or homogeneous, to some extent accepts the political pressure to publish or teach in English; sometimes the effort is real, sometimes it is superficial, especially depending on the language skills and foreign experiences of the persons involved.

[5] For an interdisciplinary analysis of these developments, see now G. Cianferotti, *1914: le università italiane e la Germania* (Bologna: il Mulino, 2016).

[6] For a picture of the Roman Law scene, see L. Vacca et al, *Nel mondo del diritto romano, Atti del Convegno del Centro di eccellenza in diritto europeo 'Giovanni Pugliese', Roma 10-11 ottobre 2014* (Napoli: Jovene, 2017). The present writer's point of view has been pre-published in a revised version by courtesy of the Italian colleagues: 'Tendenze della ricerca romanistica in Germania' *Quaderni Lupiensi di Storia e Diritto*, 37-54 (2016).

6. The situation of all three groups has one point in common: there is no Italian teacher nor foreign student of Roman Law who would gain anything by a course given in any language other than Italian. The students come to Italy in order to live there, and to hopefully speak Italian. A student who does not understand a lecture in the local language would better stay at home, as she or he will miss anyway the cultural experience of living abroad. This applies all the more to a discipline like Roman Law whose treasures are eighty per cent in Italian. In the worst case, a teacher not fluent in English would simplify a matter she or he could perfectly explain in her or his native idiom; and she or he would do so for students who could follow simplified versions of Roman Law more easily in their home countries. This kind of 'translation' kills the specific benefit of studying abroad. But even if such a method should motivate an atypical student – not fluent in Italian but especially interested in Roman Law – what could she or he do to take real benefit from this course, going on in specialised studies? Reading books and articles. Probably they will be in Italian, and they are not likely to be translated in any language.

7. A translation of millions of pages is improbable. However, in historical disciplines knowledge, ideas, theories remain relevant for centuries; legal texts from 1900 are not automatically outdated by texts from 2017. And, last but not least: no one will believe that Italian Roman Law science can be exported in written form to foreign countries just by translation. Those who want to read, know Italian; those who do not know, typically do not want to read. The examples are numerous: some German historians do not even read German publications in Roman Law (unfortunately, a problem that also exists the other way round), so they will not read in English, either; and in the Anglo-American 'law in context' scene there are specialists who do not even need the Digest to write about Rome (it is in Latin, and it is about law). So, translation is extremely useful for a lot of other purposes but it will not solve the problem of communicating Roman Law scholarship.

8. In a nutshell: Italians should read in all languages but they should continue to teach and write in Italian, in their own interest and for the sake of European legal science. This is an evident necessity for the *perdurante trasmissione del patrimonio storico e dell'identità della Repubblica*: this patrimony is European, not only Italian, and it is European in its own language, like all elements of what we call Europe. All the more as Brexit (or the cuts in the National Endowment for the Humanities decided by President Trump) surely will not create a new wave of British or American classical studies. On the contrary, a more continental and two-speed European Union (better, hopefully: *à géométrie variable*)[7] will

[7] For a Private Law approach to this field, see P. Jung and C. Baldus, *Differenzierte Integration im Gemeinschaftsprivatrecht* (München: Seller, 2007), and the four volumes of

urgently need Italy's experiences, tools and skills in Legal History.

9. To sum up, the Constitutional Court is right. It says what had to be said, and it could have gone much further in Italy's national and Europe's common interest. This is safe to say even from the point of view of a foreign observer. And what was said for Roman Law might also be said for some other disciplines, eg for European Union law (below 11 and what follows).

10. Everybody is free to damage his own interest. Even suicide is not illegal, let alone cultural or political suicide. Some prefer suicide to agony. Morally, this is complex, especially if others depend on the person who wants to die – or if others want the person to die. At any rate, it is stupid to commit suicide when survival, even a great future, and anyway not agony, is probable. As some old Italian said, *non omne quod licet honestum est*.

11. European Union law is a mandatory subject in the curricula of all (or nearly all) law faculties in the European Union. It is the normative backbone of the Union and either directly applicable in (presently) twenty eight Member States or obliges their legislators, administrators and judges to transpose it into national law. Its substantive concept is based on Art 3 of the Treaty on European Union (TEU) and its content flows from this concept. While the tripartite general objective of the Union is described as promoting peace, its values and the well-being of its peoples, the four operative main objectives contained in Art 3 TEU orientate its substantive law: viz the internal market law, the law of the area of freedom, security and justice, the law of the economic and monetary union and the law of the common external action.[8] European Union law is the very essence of the European Community of law ('*Europäische Rechtsgemeinschaft*') – a term coined by Walter Hallstein, the first President of the Commission of the European Economic Community and former university professor for private law and business law.[9]

12. European Union law can properly serve these objectives only if it is uniformly interpreted and applied in all Member States. The physical existence of law is words – hence language (see above 3). Thus at first glance the easiest means for uniform interpretation and application of a European law text might be expected from its embodiment in one single legal language and, in terms of

the *Convergence* series (2011-2013): the last one is G. Schulze, *Europäisches Privatrecht in Vielfalt geeint. Der modernisierte Zivilprozess in Europa - Droit privé européen: l'unité dans la diversité. Le procès civil modernisé en Europe* (München: Walter De Gruyter, 2013).

[8] P.C. Müller-Graff, 'Verfassunsziele der Europäischen Union', in M. Dauses ed, *Handbuch des EU-Wirtschaftsrechts* (München: Beck, 31. EL 2012).

[9] W. Hallstein, *Die Europäische Gemeinschaft* (Stuttgart: Econ-Verlag, 5th ed, 1979), 51; A. Vauchez, *L'Union par le Droit* (Paris: Presses de Sciences Po, 2013).

the formation of lawyers in this area of law, from university courses taught in a *lingua franca* of Union law.

13. However, the cornerstones of European Union law, namely the TEU and the Treaty on the Functioning of the European Union (TFEU), are authentically embodied not in one language, but in (presently) twenty four languages. Article 55 TEU reads:

> 'This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic (…)'.

Hence Rome is the guardian of the Union's multilingual basic legal texts. Among these languages Dutch, French, German and Italian are the authentic founding languages of the EEC of 1958. English became an additional authentic language only in 1973 and could lose this status with Britain's withdrawal from the Union, if Ireland or Malta do not dispense with Irish or Maltese respectively.[10]

14. As a consequence, the legal world of the Union is multilingual. EU legislation has to be adopted in all official languages,[11] and publications of the European Court of Justice (ECJ) published in all of them (with gradually ceasing derogations for Irish with a view to ending them at the end of 2021).[12] The language of a case before the ECJ can be in any of the official languages.[13] This enables national courts to refer questions of interpretation of Union law to the ECJ (Art 267 TFEU) in their proper official normative language, as far as it is one of the official languages of the Union,[14] and enables in the same linguistic way any individual or legal person as well as Member States to pursue annulment procedures against measures of the Union (Art 263 TFEU)[15] or Member States to defend themselves against an infringement procedure brought against them by the European Commission before the ECJ (Arts 258, 260 TFEU).[16] Moreover

[10] P.C. Müller-Graff, 'Brexit – die unionsrechtliche Dimension' *Integration*, IV, 267, 270 (2016).

[11] Council Regulation No 1 of April 1958 determining the languages to be used by the European Economic Community, OJ L 17 of 6 October 1958, 385.

[12] See Consideration 3 and Art 4 of Council Regulation (EU, Euratom) 2015/2264 of 3 December 2015 extending and phasing out the temporary derogation measures from Regulation no 1 of April 1958 determining the languages to be used by the European Economic Community, OJ L 322/1.

[13] Art 36 Rules of Procedure of the Court of Justice, OJ L 265/1.

[14] Art 37 para 3 Rules of Procedure of the Court of Justice, OJ L 265/1.

[15] Art 37 para 1 Rules of Procedure of the Court of Justice, OJ L 265/1.

[16] Art 37 para 1 letter a Rules of Procedure of the Court of Justice, OJ L 265/1.

any person may write to the institutions of the Union in one of the languages of the Treaties and is entitled to receive a response in the same language.[17]

15. A specific consequence of this language regime pertains to the interpretation of Union law. Since any of its linguistic embodiments enjoys equal authority the objective of uniform interpretation requires equal recognition of the different formulations. This has consequences for the method of interpretation and the preliminary reference procedure. First: the grammatical content of a provision may not coincide in any language version. One famous example is the criterion for determining the origin of sea products for the purpose of customs duties in Regulation no 802/68, for which the English version uses the phrase 'taken from the sea' (taking the fish out of the water), while the German version uses '*gefangen*' (catching the fish). This provision became relevant in a case before the ECJ in which a number of vessels flying different flags cooperated in a joint fishing cooperation. This divergence in language led the ECJ to decide on the meaning of this provision in the light its purpose,[18] and hence found decisive 'carrying out the essential part of the operation of catching fish', namely 'the location of the fish and netting them so that they can no longer move freely in the sea'.[19] Second: for a national court of last instance in the sense of Art 267 para 3 TFEU that is confronted with a question of interpretation of Union law, its obligation to refer it to the ECJ is lifted, if (inter alia) 'it has established (…) that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt'.[20] However, the ECJ requires national courts to assess the existence of such a possibility on the basis of the characteristic features of Community law, and given the Community law is drafted in several equally authentic language versions, the ECJ concludes, that 'an interpretation of a provision of Community law thus involves a comparison of different language versions'.[21] This obviously a challenge for a national court.

16. Hence a question comes to mind: couldn't the education of lawyers in European Union law in a transnationally single language overcome the problems of a law that is embodied in different languages? It could create a *corps juridique*, able to transnationally communicate among themselves in one specific terminology with the same terms and understanding and, by that, (perhaps) guaranteeing uniform interpretation and application of Union law in all Member States. Wouldn't such an approach in law faculties open the path to a wonderful uniform legal world in the Union?

[17] Art 41 para 4 CFR.
[18] ECJ, Case 100/84 *Commission* v *UK*, [1985] ECR 1169 note 17.
[19] ibid note 21.
[20] ECJ, Case 283/81 *Srl CILFT* v *Italian Minister of Health* [1982] ECR 3415 note 21.
[21] ibid note 18; see F. Zedler, *Mehrsprachigkeit und Methode* n 1 above, 168.

17. However, this idea immediately raises counter-questions: On the *technical* level the question arises as to which language would qualify best for such a purpose: Latin, Esperanto or a 'living' language (with unjustified advantages for native speakers)? For the codified continental law system of the Union, it could hardly be English (with its specific inadequacies as a legal language).[22] On the *substantive* level the multilingual commitment of Art 55 TEU and the parallel Art 358 TFEU points to deeply rooted legal wisdom. Since language is the physical embodiment of law it is the rule of law, one of the values on which the Union is founded (Art 2 TEU), which requires the presence of the relevant law in the language of its addressees: citizens, enterprises, public services, local, regional and national legislators, administrators, judges and politicians. Every legal language evokes specific meanings, concepts and contexts. In European Union law the objective of a provision may find a better expression in one language than in another (see the example above 15) and this can vary from provision to provision. Hence the comparison of different language versions may help to better understand the teleology or 'soul' of a provision.

18. There are, of course, even more reasons for fostering multilingualism in the Union: political acceptance of the Union through seriously respecting its linguistic diversity. If the Union is not present in the different languages of its citizens, it is not present as their own *res publica* and democratic life, but felt as being located beyond their borders (this is a specific linguistic challenge for representatives of the Union). Consequently the Union is bound to respect linguistic diversity (Art 22 Charter of Fundamental Rights of the European Union) shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity (Art 167 TFEU) and develop the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States (Art 165 para 2 TFEU).

19. In the light of this specific character of the European Union and the quality requirements for legal education and professions, law students should learn European Union law first of all in the language of their respective countries. This includes the chance to profit from the best intellectual capacities of their domestic academic teachers who usually express themselves best in their own language, while guest lectures in other languages from professors from other Member States can enrich the curriculum. Erasmus students should profit from the specific linguistic embodiment of Union law in the country of their host university and from the specific views and concepts connected to Union law in the legal order of their host country. Studying European Union law in Bologna

[22] See D. Cao, *Translating Law* (Bristol: Multilingual Matters, 2007), 80, referring to *Großfeld's* opinion that the English legal language, compared with the German legal language, is less concentrated, or more 'open-textured', and that English legal concepts are more vague.

in any other language than Italian would not be a desirable or optimal use of Erasmus time, but an experience as authentic as attending an Irish pub in Florence.

20. In summary: in the light of teaching European Union law, the *Corte Costituzionale* has a point (provided that guest lectures in other languages are not interdicted). Teaching European Union law in Italian language at Italian universities is an essential contribution to its understanding and authority – and moreover to the understanding of the specific character of the Union as described by the Constitutional Treaty with the words: *unità nella diversità*.[23]

[23] Art I-8 Treaty establishing a Constitution for Europe.