

# THE CARDOZO ELECTRONIC LAW BULLETIN

FALL 2019

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IN WESTERN POLITICAL THOUGHT

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# LAW AND LANGUAGE: AN INTERDISCIPLINARY PERSPECTIVE<sup>1</sup>

*Mauro Balestrieri*<sup>2</sup>

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<sup>1</sup> A draft version of this article has been presented in a speech given at the international conference *Critical Legal Conference: Alienation* held in September 2019 at the University of Perugia, Department of Law. I wish to thank all the participants at the event for their precious insights and sharp suggestions.

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**Abstract**

In a famous passage of his 1919 essay *The Uncanny*, in an attempt to elucidate the meaning of the German word “*Das Unheimliche*”, Sigmund Freud concluded that any effort would have been in the end vain for the simple reason that «we ourselves speak a language that is foreign». With this paradoxical statement, Freud disclosed the radical alterity which exists between human beings and language. Even if usually we think about linguistic expressions as the cultural device which represents *par excellence* the real condition of human life, language could prove to be something elusive and mysterious. Our legal tradition has always grounded its cultural and political existence upon language: since the times of the German historical school, language, law and society were considered strictly intertwined. Anyway, with the coming of postmodernism and globalization, as well as of complex political frameworks, this simplistic narrative has been progressively thrown into crisis. Following authors like Saussure, Benveniste, Foucault and Appadurai, as well as the precious insights provided by the Legal Realist movement, this paper aims to investigate the conflicting connection which nowadays takes place in legal and economic discourses. If it is true that traditionally law and language appear so strictly intertwined, every deconstruction of legal words casts its dark shadows upon our material and concrete existence: the erosion of legal language necessarily leads to a certain loss of fundamental rights, that is, of justice. In the age of “surmodernity” – as the French anthropologist Marc Augè called it – language becomes then a testing ground for verifying the evolution of contemporary sovereignty.

**Keywords:** Language, Law, Sovereignty, Legal Realism, Cultural Studies.

## 1. Introduction: The *Problem* of Language

Despite its traditional and prolonged oblivion, contemporary comparative law is becoming increasingly aware about the relevance of language for the correct knowledge of legal traditions.<sup>3</sup> Language, so we read, is an essential tool for investigating the culture, the values, and the modes of thought embedded in each legal *mentalité*.<sup>4</sup> Language, we may add, is in itself a cultural experience, the mirror of the history, philosophy, and traditions which characterize each people.<sup>5</sup> In addition to this, and more generally, language exemplifies the historical evidence that law is essentially a system of communication, that is, a medium based on words, codes and symbols which conveys institutional settings, forms of powers, political practices and so on.<sup>6</sup>

For many aspects, language is then the solution and at the same time the *problem*.<sup>7</sup> This circumstance becomes particularly evident in the technicalities involved in translation issues and foreign law, as well as in the hermeneutic challenge involved in the majority of legal interpretations.<sup>8</sup> In a famous

<sup>3</sup> For a complete survey about the themes and the problems raised by the study of language in comparative law, see V. Grosswald Curran, 'Comparative Law and Language', in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2019) 681–709.

<sup>4</sup> K. Kredens, S. Gozdz-Roszkowski (eds.), *Language and the Law: International Outlooks* (Frankfurt am Main: Peter Lang, 2007).

<sup>5</sup> V.K. Bhatia, C.N. Candlin, and P. Evangelisti Allori (eds.), *Language, Culture and the Law. The Formulation of Legal Concepts across Systems and Cultures* (Frankfurt am Main: Peter Lang, 2008).

<sup>6</sup> See P. Goodrich, 'Law and Language: An Historical and Critical Introduction' (1984) 11 *Journal of Law and Society* 173–206.

<sup>7</sup> E. Haugen, 'The Problems of Language' (1973) 102: 3 *Daedalus* 1–4.

<sup>8</sup> For the translation issues, see F. Olsen, R. Lorz, D. Stein (eds.), *Translation Issues in Language and Law* (New York: Palgrave, 2009) and, more recently, S. Paolucci, 'Foreignising and domesticating strategies in translating legal texts' (2017) 2 *International Journal of Legal Discourse* 243–263; about

quote, Oliver Wendell Holmes expresses precisely this special relation which connects the use of words with the cultural environment of every legal tradition: “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used”.<sup>9</sup> Words – we may add – are the signs of the changes taking place both in national and global context. As it has been shown, in the problems raised by the emerging “legal globalization” language plays a pivotal – even if still underestimated – role.<sup>10</sup> As we will see, legal concepts are the crystallization of legal rules and legal customs.<sup>11</sup> The same division currently employed by comparative scholars between a civil law and a common law family relies upon a different use of terms and concepts in order to explain their history.

Anyway, the aim of this article will not be to scrutinize traditional problems as related to the linguistic phenomenon, but on the contrary to investigate the unexpected relations which connect law and language in five different fields: political studies (§2); history of law (§3); comparative law methods (§4); ancient Roman law studies (§5); and finally institutional economics (§6). In each of these subjects, language will show as an essential cultural artifact allowing to throw lights on the hidden links buried in the deepest roots of our Western legal tradition.

As it has been rightly said, we need to *rethink* the law and language relation, that is, to reflect on the nature of its genesis, on its paradoxes, on its political

the hermeneutical challenges see R. Poscher, ‘The Hermeneutics of Law: An Analytical Model for a Complex General Account’, in M. Forster, K. Gjesdal (eds.), *The Cambridge Companion to Hermeneutics* (Cambridge: Cambridge University Press, 2019) 326–353.

<sup>9</sup> O.W. Holmes writing for the majority in the case of *Towne v Eisner* [1918] 245 U.S. 418.

<sup>10</sup> J. Husa, *Advanced Introduction to Law and Globalisation* (Cheltenham: Edward Elgar, 2019) 147 ff.

<sup>11</sup> H.E.S. Mattila, *Comparative Legal Linguistics* (Aldershot: Ashgate, 2013) 137.

premises and consequences.<sup>12</sup> The only way for doing this is to take a different perspective, less close to the formalism and more sympathetic with the interdisciplinary attitudes of the *Law & Humanities* approaches.<sup>13</sup> After all, taking inspiration from what the philosopher Martin Heidegger once said, as well as of *being* language is also (and mostly) the house of *law*.<sup>14</sup>

## 2. Alienation and the Essence of Politics

In a short passage of his 1919 essay *The ‘Uncanny’*, Sigmund Freud started his analysis with a curious statement. Attempting to elucidate the meaning of the German word “*Das Unheimliche*”, Freud claimed that any linguistic effort to grasp the essence of this word would be in the end vain for the simple reason that «we ourselves speak a language that is foreign».<sup>15</sup> *Unheimliche* – literally, “unhomely” – indicates in German the opposite of what is familiar: the “uncanny” is then something which is not known, something mysterious, and for this reason frightening. Anyway, what Freud really wants to demonstrate is something different and at the same time more problematic, that is, the radical alterity between human beings and language or, in other words, the feelings of alienation and discomfort implied when we dive into

<sup>12</sup> J.M. Broekman, *Rethinking Law and Language: The Flagship ‘Speech’* (Cheltenham: Edward Elgar, 2019).

<sup>13</sup> For an original perspective in this way, see C. Hutton, *Language, Meaning and the Law* (Edinburgh: Edinburgh University Press, 2009).

<sup>14</sup> M. Heidegger, ‘Letter on “Humanism” (1946)’, in Id., *Pathmarks* (Cambridge: Cambridge University Press, 1998) 239: “Language is the house of being. In its home human beings dwell. Those who think and those who create with words are the guardians of this home”.

<sup>15</sup> S. Freud, *The ‘Uncanny’*, in J. Strachey (ed.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XVII (1917–1919): An Infantile Neurosis and Other Works*, (London: The Hogarth Press, 1955) 221.



the deep waters of our native tongue.<sup>16</sup> The term “uncanny”, in this sense, is just a small sign of a larger phenomenon related to the inner mysteriousness of language.

One way to understand Freud’s position is to think that, from the very first moment of our birth, as members of a speaking community we inherit a complex universe of words and meanings of which we are not the architects. Language precedes us for the simple reason that words, sounds and symbols belong to the tradition of our ancestors, so that every time we learn a language (even our own) we are thrown inside a realm that is foreign, extraneous and *alien*.

A clear indication of that is provided by the etymology of the word *infancy*, the earliest period of childhood. The “infant” is, literally, the subject who cannot speak (from Latin *in-*, “not”, and *-fari*, “to speak”). Infancy is the uncertain and ambiguous period of our life in which we are conscious but without the mastery of language. The Italian philosopher Giorgio Agamben once wrote that it is precisely this curious situation which marks the biggest difference between man and animals: «[a]nimals – Agamben writes – do not enter language, they are already inside it. Man, instead, by having an infancy, by preceding speech, splits this single language and, in order to speak, has to constitute himself as the subject of language – he has to say *I*».<sup>17</sup>

Usually, we consider human language in a completely opposite way, and specifically as the most natural function of human life. Language has a natural basis on human’s anatomy, and a practical use in the construction of social and political relations. It could be considered as an autonomous

<sup>16</sup> D. Punter, ‘Shape and Shadow: On Poetry and the Uncanny’, in D. Punter (ed.) *A New Companion to The Gothic* (Malden: Wiley-Blackwell, 2012) 262.

<sup>17</sup> G. Agamben, *Infancy and History. The Deconstruction of Experience* (London: Verso, 1993) 52.

aesthetics object, as poetic art shows, or as a rational instrument, as in the case of logic. Moreover, language is the place of persuasion and of emotions.

This vision, inherited since the times of Aristotle, points toward the unique bond that connects human intelligence and speech (*lógos*, λόγος), a circumstance that is rooted in the same exceptionality of man.<sup>18</sup> As we have seen, it is certainly true that animals emit sounds in order to signal risks or share information, but for Aristotle man is the solely master of articulated words: as we may read in *Politics* (1253a) «language is the peculiarity of man, in comparison with other animals».<sup>19</sup> Jean-Pierre Vernant made a very similar point in his analysis of the ancient Greek polis:

The system of the *polis* implied, first of all, the extraordinary preeminence of speech over all other instruments of power. Speech became the political tool par excellence, the key to all authority in the state, the means of commanding and dominating others. This power of speech—which the Greeks made into a divinity, Peitho, the force of persuasion—brings to mind the efficacy of words and formulas in certain religious rituals, or the value attributed to the “pronouncements” of the king when he rendered final *themis* (judgment). Actually, however, we are dealing with quite a different matter. Speech was no longer the ritual word, the precise formula, but open debate, discussion, argument.<sup>20</sup>

<sup>18</sup> R. McKeon, ‘Aristotle’s Conception of Language and the Arts of Language’ (1946) 41 *Classical Philology* 193–206.

<sup>19</sup> Aristotle, *Politics* (E Barker trans, Oxford: Oxford University Press, 1995) 11.

<sup>20</sup> J.-P. Vernant, *The Origins of Greek Thought* (Ithaca: Cornell University Press, 1982) 49–50.

This passage quoted by Vernant becomes in our case crucial since he clearly connects the use of articulated language to the origins of a political community. Language is what gives sense and form to our social and juridical existence, allowing to declare what is “advantageous” and what is “harmful”, what is “just” and what is “unjust”. As a consequence, a crisis of language affects directly the political framework, the rule of law, and the same possibility of living inside a community.<sup>21</sup>

We find an unexpected derivation of Aristotelian’s teachings in one of the most notorious thinkers of European humanism: Brunetto Latini (1220-1295). In the third book of his didactic and allegoric treatise – *The Book of the Treasure* – following the teachings of Aristotle and of Cicero’s treatise *De invention*, Latini argues that language is the essential prerequisite for the existence of the city.<sup>22</sup> Language lies at the basis of justice, human friendship and peaceful community life, that is, of the only values upon which a commonwealth can be fruitful built.<sup>23</sup> Latini stresses in particular one point which in our case proves to be central. At the beginning of every political community, he imagines a group of enlightened man who persuaded the

<sup>21</sup> The strict correlation between language, society and the disintegration of a political community has been vividly emphasized also by B. de Jouvenel, *Sovereignty: An Inquiry into the Political Good* (Chicago: University of Chicago Press, 1957), 304: «The elementary political process is the action of mind upon mind through speech. Communication by speech completely depends upon the existence in the memories of both parties of a common stock of words to which they attach much the same meanings [...]. Even as people belong to the same culture by the use of the same language, so they belong to the same society by the understanding of the same moral language. As this common moral language extends, so does society; as it breaks up, so does society».

<sup>22</sup> B. Latini, *The Book of the Treasure - Li Livres dou Treasure* (New York: Garland, 1993). On Latini’s thought, see M. Viroli, *From Politics to Reason of State* (Cambridge: Cambridge University Press, 1992) 28 ff.

<sup>23</sup> B. Latini, *The Book of the Treasure*, cit., 279.

others about the preferability of a life spent with dignity of reason and wisdom instead of a barbaric one. Rhetoric was the mean by which they brought the rest of the population out of the savage and for this fact, Latini goes on, these wise men were regarded as *similar to the gods*.<sup>24</sup> At the opposite, for Latini litigations, conflicts and civil disorders raise from a failure of language: the ruler of the city, in order to prevent civil wars and riots convincing his citizens to restrain their passions, has to be a trained orator and a skilled peacemaker. The capacity of speaking, the ability of persuasion and the art of rhetoric, we may conclude, are not only the basic components of the state but also the skills which lead to political power and leadership.

### 3. Von Savigny, the *Volksgeist* and the Spirit of the Law

In the history of western legal tradition, the clearest example about the essential role of language in the formation and development of political and juridical entities can be found in the famous short book published by Friedrich Carl von Savigny (1779–1861), *Of the Vocation of Our Age for Legislation and Jurisprudence* (1814).<sup>25</sup> As it is known, Savigny's purpose was to hinder any kind of codification of private law, since all existing codes – the Napoleonic one, but also the Austrian and the Prussian – were totally inappropriate for the unique cultural and political situation of German people. Law, in Savigny's mind, should have been the product of the spirit of the people – the *Volksgeist* – and not the result of an artificial and unnatural import from other countries. In a famous passage, Savigny argued that: «[...] this organic connection of law with the being and character of the people, is also

<sup>24</sup> B. Latini, *The Book of the Treasure*, cit., 280.

<sup>25</sup> F.C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (London: Littlewood & co., 1831).

manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages».<sup>26</sup>

In constructing his rhetorical argument against the Napoleonic code, Savigny claimed that both law and language share the same genetic substance: they are similar and proceed hand in hand, acting like latent forces embedded inside culture. As a consequence, they cannot be isolated, nor shaped by «the arbitrary will of a legislator».<sup>27</sup> As Harold J. Berman wrote, Savigny «emphasized the intimate relationships between the law of a given people and its whole culture (its language, its customs, its common legal consciousness) viewed in historical perspective».<sup>28</sup> Precisely for this reason, Roscoe Pound noted that in the Historical School «law is found, not made».<sup>29</sup>

We know how much this paradigm must have influenced later scholars. In his famous *Law, Legislation and Liberty* (1973–1979), Friedrich August von Hayek (1899–1992) argued for example that both law and language, as well as morals, money and markets, are the result of a spontaneous growth, emerging undersigned from the reciprocal interaction of men: it constitutes a persistency of the constructivist fallacy to conceive linguistic structure as the product of an artificial reason.<sup>30</sup>

<sup>26</sup> Savigny, *Of the Vocation*, 27.

<sup>27</sup> Savigny, *Of the Vocation*, 30.

<sup>28</sup> H.J. Berman, *Law and Language. Effective Symbols of Community* (Cambridge: Cambridge University Press, 2013) 124.

<sup>29</sup> R. Pound, *Interpretations of Legal History* (New York: Macmillan Company, 1923) 16.

<sup>30</sup> F.A. von Hayek, *Law, Legislation and Liberty* (London: Routledge, 2013) 24. See also A.I. Ogus, 'Law and Spontaneous Order: Hayek's Contribution to Legal Theory', (1989) 16 *Journal of Law and Society* 393–409.

Anyway, it is hard to deny the particular construction of language performed by jurists. Language, after all, «is *the* tool of the lawyer». <sup>31</sup> Jurisprudence is a ‘word science’, and the formation of legal concepts proceeds hand in hand with a technical jargon. According to some scholars, this is particularly true also from an etymological point of view: the Latin term for “law” – *lex* – could be the linguistic root of *lexicon*, as meaning “word”, both deriving from the Greek verb λέγειν (*légein*) “to say”. <sup>32</sup> Language then *re*-presents law, that is, it makes law present, visible and alive. Moreover – as in the case of Savigny and Aristotle – language contributes to build the cultural and political framework around which a system of law can exist and be in force. Without a communality of language, that is, without a shared belief about the meaning of words, law is nothing more than an empty formulation released from any existential foundation.

#### 4. Linguistic Aspects in Comparative Law

It would surely be an exaggeration to say that law is “solely” language. We know that throughout Western history, legal institutions have shown their existence also with non-linguistic acts (gestures, tacit customs, images, performances, and so on). Anyway, it is hard to deny how relevant have become the impact of words upon legal systems. <sup>33</sup> Statues are coded in language; justice is administered by means of documents and written procedures; legal definitions contribute to the creation of rights and duties, regulating society and determining the inclusion (or the exclusion) of subjects from the legal system. As typically happens with declaration of rights, the

<sup>31</sup> B. Grossfeld, *The Strength and Weakness of Comparative Law* (Oxford: Clarendon Press, 1990) 85.

<sup>32</sup> B. Grossfeld, *The Strength and Weakness*, 94.

<sup>33</sup> J. Gibbons, ‘Language and the Law’, in (1999) 19 *Annual Review of Applied Linguistics* 156–173.

inscription of natural life inside the juridico-political order of the nation-state is necessarily performed through language, and mostly through a process of writing.<sup>34</sup>

But in the globalized legal order which nowadays we inhabit, far from being the solution language is often the problem. The specific way in which legal concepts are expressed, for example, or the exact meaning which words possess, are a constant source of discomfort among lawyers.<sup>35</sup>

An echo of this thinking is well present in some contemporary comparatists. Pierre Legrand, appealing to a radical impossibility of mutual understanding between cultures, grounded his strenuous opposition about the convergence of *civil law* and *common law* traditions precisely upon the exceptionality of language and juridical lexicon.<sup>36</sup> For Legrand «[...] a significant part of the very real emotional and intellectual investment that presides over the formulation of the meaning of a rule lies beneath consciousness because the act of interpretation is embedded, in a way that the interpreter is often unable to appreciate empirically, in a language and in a tradition, in sum, in a whole cultural ambience».<sup>37</sup> In every legal culture there are cognitive structures which epistemologically shape the legal *mentalité*, marking in a unique way the lexicon of lawyers, judges and legal

<sup>34</sup> For these suggestions, see G. Agamben, *Homo Sacer. Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998) 127.

<sup>35</sup> J. Engberg, 'Word Meaning and the Problem of a Globalized Legal Order', in P.M. Tiersma, L.M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press, 2012) 175–186.

<sup>36</sup> P. Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 *Maastricht J. Eur. & Comp. L.* 111–124.

<sup>37</sup> Legrand, 'The Impossibility of 'Legal Transplants'', 115.

operators.<sup>38</sup> The distance separating legal traditions – in this case *civil law* and *common law* – is then more the product of those nearly ‘untranslatable words’ than a direct consequence of legal technicalities. Following Jacques Derrida, for Legrand the supposed translation turns out to be rather a *transposition*, that is, a *resignification*.<sup>39</sup> Language is conceived as a “collective consciousness”, not easily transportable among places or people; law, in turn, is the product of a genuine cultural experience, rooted in a certain time and space.<sup>40</sup> There is no objectivity of knowledge about the world (and especially about the law) since everything, on Legrand’s view, is already «linguistically pre-structured»<sup>41</sup>, so that «in order to translate a language, or a text, without changing its meaning, one would have to transport its audience as well». <sup>42</sup> In the absence of any kind of meta-language, we are doomed to rest inside its prison, hostages of our own world-view and unable to escape.<sup>43</sup>

<sup>38</sup> P. Legrand, ‘European Legal Systems Are Not Converging’ (1996) 45 *The International and Comparative Law Quarterly* 60.

<sup>39</sup> P. Legrand, ‘Word/World (of Primordial Issues for Comparative Legal Studies)’, in A.L. Kjær, M. Rask Madsen, H. Krunke, H. Petersen (eds.), *Paradoxes of European Legal Integration* (London: Routledge, 2016) 193. See on this point J. Derrida, *Positions* (Paris: Editions de Minuit, 1972) 31: «à la notion de traduction, il faudra substituer une notion de transformation: transformation réglée d’une langue par une autre, d’un texte par un autre».

<sup>40</sup> P. Legrand, ‘Comparative Legal Studies and the Matter of Authenticity’ (2006) 1 *Journal of Comparative Law* 388: «[l]egal experience is immersed in a cultural context: it is modulated. It is indeed the legal culture – a notion that makes specific reference to the sub-culture that is constituted amongst law specialists, especially as regards the repository of those elements that partake in the stable, general, and unconscious – that provides the ‘internal logic’ of the law »

<sup>41</sup> Legrand, ‘Word/World’, 195.

<sup>42</sup> E. Hoffman, *Lost in Translation. Life in a New Language* (London: Minerva, 1991) 275.

<sup>43</sup> Legrand, ‘Word/World’, 202.



This idea, extreme as it may appear, has its origins in the principle of relativity in language.<sup>44</sup>

A famous example of this approach can be found in the important studies about the condition of “primitive” cultures realized by the American anthropologist Benjamin Lee Whorf. For Lee Whorf, in order to properly understand how native populations think and act we must move from a simple psychological perspective to a more cultural one: language, in this view, becomes the high road for decoding cultures and mentalities.<sup>45</sup> As Whorf writes, «[e]very language contains terms that have come to attain cosmic scope of reference, that crystallize in themselves the basic postulates of an unformulated philosophy, in which is couched the thought of a people, a culture, a civilization, even of an era».<sup>46</sup> This is true not only for native communities, we could say, but also for our own tradition: words like “reality”, “substance”, “cause”, “space”, “time”, and so on, are signatures of a universe of thought, that is, inscriptions of an implicit philosophy buried in the deepest layers of history. In a famous article, the French linguist Émile Benveniste argued something very similar: for him, the philosophy of Aristotle is more the result of the structure of ancient Greek grammar, than

<sup>44</sup> The classical opposition between the theory of language as a universal mirror of reality (realism), and language as the expression of different world views (linguistic relativity thesis) is specifically analyzed in A.L. Kjær, ‘A Common Legal Language in Europe?’, in M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004) 380 ff.

<sup>45</sup> B. Lee Whorf, ‘A Linguistic Consideration of Thinking in Primitive Communities’, in J.B. Carrol (ed.), *Language, Thought, and Reality. Selected Writings of Benjamin Lee Whorf* (Cambridge MA: The MIT Press, 1956) 65.

<sup>46</sup> B. Lee Whorf, ‘An American Indian Model of the Universe’, in J.B. Carrol (ed.), *Language, Thought, and Reality*, 61.

the invention of a “new” thought.<sup>47</sup> Precisely for this reason, Lee Whorf goes on, language is a «cohesive aggregate of cultural phenomena».<sup>48</sup> The task of the ethnologist – but we could say: also of the jurist – is to «light up the thick darkness of the language, and thereby of much of the thought, the culture, and the outlook upon life of a given community».<sup>49</sup>

## 5. Language and Roman Law: The Magic Realism of Words

As it has been shown, the constitutive power of language is extremely relevant for understanding how legal concepts emerged from past to present times. Without too much risk, it is possible to argue that the evolution of Western law is essentially the development of the way in which legal terms are articulated. Concepts do not exist in nature *per se*; quite on the contrary, they emerged from the artificial invention of experts and wise jurists which bent the language to new uses giving birth to something never seen before. Law was then the slow product of tradition, forgotten uses and ancient customs.

This idea had its counterpart in the rigid formalism which surrounded the practice of law since ancient times. Formalism is something that we can find both in Roman and German law where the incorrect pronunciation of specific formulas or names determined mechanically the loss of the legal

<sup>47</sup> E. Benveniste, ‘Categories of Thought and Language’, in E. Benveniste, *Problems in General Linguistics* (Coral Gables: University of Miami Press, 1971) 57: «[n]ow it seems to us—and we shall try to show—that these distinctions are primarily categories of language and that, in fact, Aristotle, reasoning in the absolute, is simply identifying certain fundamental categories of the language in which he thought».

<sup>48</sup> B. Lee Whorf, ‘A Linguistic Consideration’, 65.

<sup>49</sup> B. Lee Whorf, ‘A Linguistic Consideration’, 73.

provision. A classic example is the *actio de arboribus succisis* mentioned in the ancient XII Tables and accorded to a landowner for the screw cutting: the roman jurist Gaius curiously informs us that a claimant who sued another for cutting his vines, instead of pronouncing the correct formula *arboribus* (“trees”) wrongly pronounced in its place the word *vitibus* (“vines”) thereby losing the case (Gai, IV, 11).<sup>50</sup>

Precisely in this sense there is a particular passage in Savigny’s study which deserves further attention. Focusing on the ancient laws’ sacred form, on the archaisms and on the solemn ceremonies which pervaded the practice of Roman institutions, Savigny argued that this “symbolic acts” – so puerile and irrational as they may seem to be – constitute on the contrary «the true grammar of law in this period».<sup>51</sup> Formal acts like wedding ceremonies, oaths, trials by ordeals, or other judicial procedurals often retain an invisible symbolism which is the most striking proof of the complex cultural framework hidden behind juridical institutions.

In very different circumstances of time and place than Savigny, the English anthropologist Bronisław Malinowski considered rites such as initiation, marriage, reconciliation, etc., as essential means in creating a social and political bond between the members of a community. In a relevant passage of his *Coral Gardens and Their Magic* (1935) – the last book of the trilogy dedicated to the ethnography of Trobriand Islanders – Malinowski emphatically wrote:

<sup>50</sup> See the original Latin text: «Unde eum, qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est eum rem perdidisse, cum quia debuisset arbores nominare eo, quod lex XII tabularum, ex qua de vitibus succisis actio competeret, generaliter de arboribus succisis loqueretur» in Gaius, *Institutiones, or Institutes of Roman law* (Oxford: Clarendon Press, 1935) 454–455.

<sup>51</sup> Savigny, *Of the Vocation*, 26.

Whether the marriage vows are treated as a sacrament or as a mere legal contract – and in most societies they have this twofold character – the power of words in establishing a permanent human relation, the sacredness of words and their socially sanctioned inviolability, are absolutely necessary to the existence of social order. If legal phrases, if promises and contracts were not regarded as something more than *flatus vocis*, social order would cease to exist in a complex civilization as well as in a primitive tribe.<sup>52</sup>

Speech acts like that involved in marriage rites are not simply the expression of a venerable tradition transmitted from generation to generation, but the real glue that unites a small group of people ensuring a peaceful existence. The spoken word is *sacred* because it performs a function which goes far beyond the simple completion of the ritual. Legal terms, contracts, trials, religious sacraments and so on make present the binding force of a formula, and at the same time the moral and political ideas which lie behind them. The liturgy of the spoken word is what allows a community to erect a wall against social disorder, chaos and in the end anomy. In primitive societies this function is particularly evident and remains intact in modern situations: the words of the law need to be accepted and trusted by all the members of a community to become effective and respected. In the age of documents and digital data, words still maintain the critical role of measuring the degree of acceptance and of trustworthiness among the public sphere.

<sup>52</sup> B. Malinowski, *Coral Gardens and Their Magic: A Study of the Methods of Tilling the Soil and of Agricultural Rites*, in Id., *Trobriand Islands, vol. 2: The Language of Magic and Gardening* (London: George Allen & Unwin, 1935) 234.

Anyway, the strict correlation between things, acts, and the “magical” power words as described so far has not gone unnoticed by legal scholars.

The founding father of Scandinavian legal realism, Axel Hägerström, devoted important reflections about the mysterious roots of religious and legal institutes. One of his most relevant works – the first volume of the colossal *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung* (1927) – bears a subtitle particularly illustrative in this direction: *Die Obligation als mystische Gebundenheit einer Person durch eine andere* (literally: “the obligation as a mystical bond on persons by means of another person”).<sup>53</sup>

The book is a meticulous study of the archaic forms of Roman private law, especially of contracts, settlements and agreements as philologically reconstructed in all their distinctive features. In particular, for Hägerström the three most important forms of contracts – *gesta per aes et libram*, *in iure cessio*, and *sponsio* – clearly showed the influence of the ritual and magical character of Roman’s culture. In these three forms of *negotium* is indeed the loyal respect of solemn forms, the practice of certain gesture, and finally the pronunciation of specific words that produces legal effects. From the beginning, Roman law is then deeply rooted in a ritual and symbolic dimension without which it is simply incomprehensible: as it has been rightly said, “[i]n the realm of contracts, these covenants would only be papers with scabbled words if they were deprived of the ritual and its significance”.<sup>54</sup> But Hägerström did not concentrate only on the scenic façade of rituality, postulating something rather more radical and at the same time foundational. The “magical words”

<sup>53</sup> A. Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung*, Vol. I (Upsala: Almqvist & Wiksell, 1927). For a general survey about Scandinavian realism, see J. Bjarup, *Skandinavische Realismus. Hägerström, Lundstedt, Olivecrona, Ross* (Freiburg: Alber, 1978).

<sup>54</sup> P. Mindus, *A Real Mind. The Life and Work of Axel Hägerström* (New York: Springer, 2009) 208.

at the core of the ritual and symbolic practices of ancient Roman law were not simply the fulfillment of an archaic memory: they produced tangible social and political effects because they reached the psychological response of citizens, judges and officials which from the moment of birth were institutionally conditioned by such culture, education and religion.<sup>55</sup> The entire experience of ancient law – its institutes, as well as its actors and practitioners – was then immersed in the magic fluid of sacredness, receiving substance and effects from the solemn forms of ritualization.<sup>56</sup>

Some years later, the Swedish jurist Karl Olivecrona took inspiration from this debate remarking the theory developed by Hägerström.<sup>57</sup> As in the ancient Roman experience, words are, for Olivecrona, tools for regulating the life of a community. In the magical view, language determines the creation of rights and duties, as well as their transference and extinction, but modern view is not very distant from this fact. In our contemporary experience, legal language is not simply “descriptive language”, but a “directive” one.<sup>58</sup> Law implies a regularized and repetitive morphology which became more and more connected with the use of organized power: legal terms are then means for achieving goals, instruments for keeping the peace or – as Olivecrona bitterly notes – “for sending men to death on the battlefield in time of war”.<sup>59</sup>

As is well known, the entire field gained its philosophical relevance with the well-known theory of *performatives* as developed by John Austin in his

<sup>55</sup> On this point, see also E. Pattaro, *Il realismo giuridico scandinavo I – Axel Hägerström* (Bologna: Cooperativa libraria universitaria editrice, 1974) 239 ff.

<sup>56</sup> A. Hägerström, *Obligationsbegriff*, cit., 36 ff.

<sup>57</sup> K. Olivecrona, *Law as Fact* (London: Stevens & Sons, 1971) 245 ff.

<sup>58</sup> Olivecrona, *Law as Fact*, cit., 253.

<sup>59</sup> Olivecrona, *Law as Fact*, cit., 254.

posthumous *Philosophical Papers*.<sup>60</sup> In particular, for Austin performatives are a kind of utterance very similar to a statement, with the important difference that they don't simply describe or analyze something but rather *do* something.<sup>61</sup> In his book *Speech Acts* (1969), John Searle finally summed up the entire debate discussing what he called "institutional facts": marriages, promises, judgments and so on are phenomena different from mere "brute facts" because they presume the existence of legal institution by virtue of which they can acquire social and juridical value.<sup>62</sup>

## 6. Conclusion: Neoliberalism and the Collapse of Meaning

Recently, an interesting and innovative theory has been advanced by the Indian American anthropologist Arjun Appadurai about the origins of the global and financial crisis of 2007. For Appadurai, the main cause behind the collapse of economic systems must be traced not solely in greed, selfish ambitions and weak regulation, but primarily in a «failure of language».<sup>63</sup> As is well known, derivatives – the specific contracts employed in financial markets for risky investments in which two or more contractors agree on the future prices of financial assets – played the major role in the explosion of the subprime market. Overturning the established view according to which they are ordinary tools in investment management, for Appadurai derivatives

<sup>60</sup> See S. Castignone, "Il linguaggio del diritto. Karl Olivecrona", in Id., *Diritto, linguaggio, realtà* (Turin: Giappichelli, 1995) 211.

<sup>61</sup> J.L. Austin, "Performative Utterances," in *Philosophical Papers* (Oxford: Clarendon Press, 1961) 235; Id., *How to do Things with Words* (Oxford: Clarendon Press, 1961).

<sup>62</sup> J. Searle, *Speech Acts. An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969).

<sup>63</sup> A. Appadurai, *Banking on Words: The Failure of Language in the Age of Derivative Finance* (Chicago: The University of Chicago Press, 2016) 1 ff.

cannot be conceived as conventional financial contracts: behind their technical appearance, they hide indeed the subtler form of a *promise*, and in particular of a *failed* promise. In the chain of financial products which characterize the framework of the system, a derivative is more than a simple tool: it is a linguistic phenomenon, «a referent to something more tangible than itself», in particular a future profit or some other underlying asset.<sup>64</sup> Its form is the same of the *sign* in linguistics which, in Saussurian theory, is the dyadic composition of a “signifier” and a “signified”. The derivative is the mirror of the same distinction: it is a linguistic artifact referring to a value implied as benchmark in order to limit losses or multiply gains.

The logic of promissory finance is then inseparable from a distorted theory of language in which the abuse of these contracts, as well as of the indefinite dissemination of promises, alienated the ideal and the reality of economic exchange. Translating from financial jargon, in the critical view provided by Appadurai a derivative becomes a broken promise supported by the creation of profit as detached from any real condition – a profit often fruit of the desire of money *as itself*.<sup>65</sup> If language is a social activity, then derivatives are precisely its denial, that is, the radical separation between words and social purposes, reality and economics. At the dawn of 2007, when the global market was entirely driven by these products, the system collapsed together with the complex and intricated chain of contracts which precariously sustained it. Stock market fell, big insurance companies were forced to hire thousands of employees, real estate market crashed but what was really lost

<sup>64</sup> Appadurai, *Banking on Words*, cit., 4.

<sup>65</sup> On this point, see N. Yuran, *What Money Wants: An Economy of Desire* (Stanford, Stanford University Press, 2014).



was something central and at the same time more structural: the meaning of words, of trust relationships, and of language.<sup>66</sup>

If Appadurai's main interest is a general deconstruction of contemporary economic logic with the aim of showing the permanence of some archetypical anthropological categories in our behavior, it cannot be denied anyway that the real consequences of his analysis imply a general rethinking about the mutual bond of language, law and politics. The American scholar James Boyd White in a book emphatically entitled "When Words Lose Their Meaning", stressed the strict correlation between words and political action: if our linguistic structures collapse – as in the case of the subprime market analyzed by Appadurai –, if a given community lose the linguistic framework at the base of its culture, what is lost is the true possibility of acting, preventing and correcting dysfunctions and abuses.<sup>67</sup>

In conclusion, following and extending the reasoning of White, we can argue that differently from the standard approach developed in modern linguistic studies, words should not be regarded simply as the object of a theoretical contemplation, but as the necessary precondition for systemic change to operate. Obviously, this does not intend to be a sort of abstract logocentrism but on the contrary the simple acknowledgement that it is the way we use language which influences the creation and the existence of fundamental rights.<sup>68</sup>

<sup>66</sup> Appadurai, *Banking on Words*, cit., 14.

<sup>67</sup> J.B. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago, University of Chicago Press, 1984) 7–8.

<sup>68</sup> White, *When Words Lose Their Meaning*, x. See also Id., *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006) 1–13.

«*The limits of my language mean the limits of my world*»<sup>69</sup>: this famous statement is certainly true also in jurisprudence. The greatest risk in our times is precisely that words lose their charge, becoming empty forms alienated from meaning: if this will occur – as too often happens to see – what will remain are just *rules* and not *laws*.<sup>70</sup>

<sup>69</sup> L. Wittgenstein, *Tractatus Logico-Philosophicus*, prop. 5.6 (London, Routledge, 2001) 68.

<sup>70</sup> See A. Harris, 'Language and Alienation', in B. Bain (ed.), *The Sociogenesis of Language and Human Conduct* (New York: Springer, 1983) 106: «Speech is often equivocal. [...] *Language is at the service of relations of production and reproduction which also distort and alienate*» (emphasis of the author).

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