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RECENZJA

Comparative Legilinguistics (International Journal for Legal Communication) is published four times a year by the Institute of Linguistics (Faculty of Modern Languages and Literature, Adam Mickiewicz University in Poznań, Poland). It contains articles, reviews and reports in English, French, Spanish, Chinese, Polish, German and Russian. The reviews are stored in the journal's editorial office. The articles are peer-reviewed by two reviewers (an external one and an internal one). The editorial board reserves the right to publish selected articles without external review.

Comparative Legilinguistics is devoted mainly to legi-linguistics (legal linguistics), forensic linguistics, theory of the law and legal language, and legal translation.

The main aim of the journal is

1) to broaden the knowledge in the field of legal languages and comparative legilinguistics (especially legal translation and court interpreting),
2) to develop the co-operation between lawyers and linguists in the field of forensic linguistics and legal linguistics,
3) to present comparative studies on the legal reality of different legal languages and the impact of such differences on legal communication, as well as
4) to educate adepts of legal translation.

Comparative Legilinguistics (International Journal for Legal Communication) jest czasopismem publikowanym przez Instytut Językoznawstwa (Wydział Neofilologii, Uniwersytet im. Adama Mickiewicza w Poznaniu), które ukazuje się cztery raz w roku. Zamieszcza artykuły, recenzje, sprawozdania w językach: angielskim, hiszpańskim, francuskim, chińskim, polskim, niemieckim i rosyjskim. Recenzje znajdują się w siedzibie redakcji czasopisma.

Redakcja zastrzega sobie prawo recenzowania nadsyłanych materiałów. Zasadniczo artykuły są recenzowane przez dwóch recenzentów.

Comparative Legilinguistics jest czasopismem zasadniczo poświęconym językoznawstwu prawniczemu (legilingwistyce), teorii prawa i języka prawa, językoznawstwu sądowemu oraz przekładowi prawniczemu i sądowemu

Celem czasopisma jest

1) pogłębianie wiedzy nad językiem prawa (lingua legis) i wiedzy w zakresie porównawczej legilingwistyki (w szczególności przekład prawniczy i sądowy),
2) rozwijanie współpracy pomiędzy prawnikami a językoznawcami w zakresie językoznawstwa sądowego,
3) porównawcze studia nad rzeczywistością prawną różnych obszarów językowych i wpływ różnic na komunikację w prawie, a także
4) kształcenie w zakresie przekładu prawniczego (m. in. kandydatów na tłumaczy przysięgłych).

Preface

Research in the area of legal language and the law has undergone rapid growth in the last few decades. More and more scholars find legal communication important and worth dealing with. The 16 papers come from both linguists and lawyers, distinguished scholars and researchers in the early stages of their careers, dealing with common and civil law jurisdictions. The contributions come from researchers working in 10 countries: Austria, Finland, France, Italy, Poland, Slovenia, Spain, Taiwan, the UK and Ukraine. Although we are aware of the diversity of papers, the decision to sacrifice depth in some cases to gain scope was a conscious one. As the contributions span a wide range of topics they have been grouped into four parts.

Part I deals with legal communication. Montserrat CUNILLERA and Joëlle REY (*Strategies argumentatives et attitude du locuteur dans les arrets de la cour de cassation française et du tribunal supremo espagnol: une analyse contrastive*) discuss argumentative strategies of locutors on the basis of the analysis of the expressions used to refer to the speaker or the institution involved and the discourse markers used to articulate textual sequences found in the sentences of the French *Cour de Cassation* and the Spanish *Sala Primera de lo Civil del Tribunal Supremo.* Sara PENNICINO (*Legal Reasonableness and the Need for a Linguistic Approach in Comparative Constitutional Law*) compares how the term reasonableness is understood in several civil law and common law countries.

Part II consists of one paper devoted to court interpreting by Ewa KOŚCIAŁKOWSKA-OKOŃSKA (*Interpreters in the Courtroom: the Importance of Competence and Quality*) who devoted her paper to the analysis of the concepts of competence and quality and their manifestation in the court interpreter's work. It is assumed that the interpreter's competence is accomplished in three basic fields, i.e., linguistic (embracing the perfect command of the mother tongue and the foreign language), cultural (knowledge on two cultural realities) and cognitive (combining such cognitive factors as intelligence, experience, general knowledge or motivation) and the quality is assessed on the basis of successful or unsuccessful performance of the interpreter.

Part III, consisting of 9 papers, investigates legal language and terminology. Swietlana GAŚ (*Польская и русская дипломатическая терминология: эквивалентность в словаре и тексте (на примере двухсловных терминосочетаний*) explores Polish and Russian diplomatic terminology found in two selected Polish and Russian dictionaries and analyses diplomatic compound terms. Anna KIZIŃSKA (*Polysemy in Contracts Establishong an Employment Relationship under the Law of England and Wales – A Case Study*) presents the analysis of the semantic frame of contracts establishing an employment relationship and the problem of interpreting polysemous terms and expressions. Maria Teresa LIZISOWA (*Sign character of the exponents of modality in a legal text*) and Aleksandra MATULEWSKA (*Deontic Modality and Modals in the Language of Contracts*) investigate the methods of expressing deontic modality in legal texts and the most typical exponents used in Polish and English statutory instruments. Joanna NOWAK's paper (*Lunfardo lexical units related to legal matters*) is devoted to Argentinian slang Lunfardo which came into

existence at the turn of the 19th and 20th and which is spoken mainly in Buenos Aires, La Plata and their surrounding. The article investigates the history of this linguistic phenomenon and its present situation with the emphasis put on lexical units related to the law. Antonios E. PLATSAS (*Making our Law Students Comprehend Foreign Legal Terminology: The Quest for Identifying Function, Context, the Semainon and the Semainomenon in the Teaching of Comparative Law*) provides a description of problems arising in the process of teaching comparative law and making law students comprehend foreign legal terminology. Anna SKOROFATOVA's contribution (Правовое и метазыковое сознание будущих правоохранителей) is devoted to legal consciousness in the structure of policemen's linguistic personality. The author describes the method of associative experiment which is used to assess the professional personality in the third-year students. Tanja WISSIK (*German legal terminology in the area of higher education – between national varieties and the use of English*) analyses the impact of English terminology on the German legal and administrative language employed in the higher education sector. Tzung-Mou WU's paper (Lost in Translation: the Verbal Change from *Persona* to *Person*) challenges the modern legal concept of "person" by analyzing the translation problems of some Roman law fragments. It shows why the Latin word "*persona*" cannot be the etymon of the vernacular "person," and argues that the modern use of "person" stems from the nineteenth-century German juridical literature.

Finally, Part IV consists of four papers on legal translation. Annarita FELICI (*Translating EU law: a new perspective to the paradox of multilingualism*) focuses on the equal authenticity of EU statutory instruments in the light of the fact that the EU law currently applies to 27 countries and is available in 23 languages which all carry equal status. Frederic HOUBERT (*Caught in the web of the law le traducteur juridique face à la métaphore*) discusses the importance and popularity of metaphors in common law system and the problems connected with translating them into French, which is not so rich in metaphors. Nina ISOLAHTI (*Метомарфозы языковой личности говорящего при переводе судебного допроса*) examines the speaker's lexicon features during court interpretation on the basis of the transcripts of the authentic interpreter mediated court investigations. She carries out the analysis using a corpus analytical approach. Alenka KOCBEK (*Kann Man Rechtstexte kulturell einbetten?*) argues in her paper that in some cases the functionalist principle of cultural embeddedness needs to be applied selectively, i.e. only with respect to some linguistic features of the text, while in a broader sense, as far as the cultural and/or legal foundations of the text are concerned, the source and the target text will have the same reference frame.

We like to think that this collection is capable of enriching the investigative perspectives of linguists and lawyers interested in legal language and legal communication. We also hope that this volume will encourage other authors to share their research results in the field by submitting their papers for publication in future issues of the journal.

STRATEGIES ARGUMENTATIVES ET ATTITUDE DU LOCUTEUR DANS LES ARRETS DE LA COUR DE CASSATION FRANÇAISE ET DU *TRIBUNAL SUPREMO* ESPAGNOL: UNE ANALYSE CONTRASTIVE

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Résumé: Les textes juridiques sont étroitement liés à une communauté linguistique et culturelle déterminée et reflètent le rapport de forces qui s'établit entre ses membres. Ce sont des textes d'une grande complexité qui obéissent à des conventions linguistiques assez rigides. Cependant, comme le soulignent Anscombre et Ducrot (1983), toute unité linguistique est porteuse d'un faisceau d'instructions sémantico-pragmatiques qui déclenchent une certaine orientation argumentative et reflètent un point de vue spécifique de la part du locuteur (Raccah 2005). Partant d'un corpus de textes composé d'arrêts de la première chambre civile de la Cour de Cassation française et d'arrêts prononcés par la *Sala Primera de lo Civil del Tribunal Supremo* espagnol, nous proposons d'analyser, d'une part, certains moyens expressifs employés dans ce type de textes pour se référer au locuteur et au responsable de l'arrêt et, d'autre part, certains marqueurs qui servent à articuler les différentes séquences textuelles. Dans ce sens, l'analyse contrastive des textes juridiques met en évidence que, sous une apparente objectivité, se dissimulent des points de vue caractéristiques de ce type de textes aussi bien au niveau macro-textuel qu'au niveau micro-textuel.

Abstract: Legal texts are closely linked to the linguistic and cultural community in which they are produced and as such they reflect the power relations existing between its members. They are highly complex texts submitted to rigid linguistic conventions. However, as Anscombre and Ducrot (1983) pointed out, any linguistic unit contains semantic and pragmatic instructions which trigger a certain argumentative orientation and reflect the point of view of the speaker (Raccah 2005). This analysis, which is based on a corpus of sentences dictated by the French *Cour de Cassation* and the Spanish *Sala Primera de lo Civil del Tribunal Supremo,* analyses, on the one hand, the expressions used to refer to the speaker or the institution involved and, on the other hand, the discourse markers used to articulate textual sequences. The contrastive analysis provides evidence that, under an apparent objectivity, these texts convey numerous points of view which are characteristics of this type of texts both on macrotextual and microtextual levels.

Introduction

Comme instruments de régulation de la vie sociale et économique, les textes juridiques sont étroitement liés à une communauté linguistique et culturelle déterminée et reflètent le rapport de forces qui s'établit entre ses membres. Ce sont des textes d'une grande complexité qui obéissent à des conventions linguistiques assez rigides mais qui n'échappent pas pour autant à la présence d'unités signalant l'intervention et la position d'un locuteur. Ainsi, notre étude entend montrer que les arrêts contiennent, comme tout texte, certaines marques qui, loin d'être de simples expressions figées, laissent entendre la voix du locuteur et son point de vue à l'égard de ce qu'il rapporte. Sur cette scène, le locuteur n'est jamais seul, il partage son espace discursif avec d'autres « personnages » qui contribuent aussi à la construction du sens textuel.

Les arrêts obéissent à une macrostructure déterminée par les conventions de chaque langue et culture. Dans ce sens, une analyse contrastive est utile pour mettre en évidence les principaux mécanismes liés à la manifestation des instances énonciatives et à l'orientation argumentative de ces textes. Dans ce travail, nous analyserons, en premier lieu, certaines constructions nominales et formes verbales qui se réfèrent au locuteur et au responsable de l'arrêt et, en second lieu, les marqueurs qui servent à articuler les différentes séquences textuelles tout en imprimant aussi un point de vue déterminé aux énoncés qu'ils relient. Nous espérons ainsi déceler les similitudes et les divergences essentielles entre les deux types d'arrêts confrontés.

Corpus analysé et prémisses théoriques

Le corpus est constitué de dix arrêts de la première chambre civile de la Cour de Cassation française et de dix arrêts de la *Sala Primera de lo Civil del Tribunal Supremo* espagnol. Le sujet de ces textes est commun et porte sur la responsabilité médicale ; du point de vue de la décision judiciaire, ils peuvent être de cassation, de cassation sans renvoi, de rejet ou de cassation partielle ; quant à la période chronologique choisie, elle va de 2001 à 2007.

Le rôle de ces hautes cours, qui ont été saisies d'un pourvoi, ne consiste pas à juger de nouveau les faits mais à vérifier que l'arrêt attaqué soit motivé en droit. Les arrêts qu'elles rendent sont importants dans l'ordre juridique de chaque pays d'origine parce qu'ils sont à la base de la jurisprudence et ils constituent donc l'une des sources indirectes du droit, au même titre que la doctrine et le droit international. Ces textes présentent une même situation énonciative dans laquelle les locuteurs sont des représentants de l'Administration de la justice, donc des initiés, qui produisent un discours pour deux types de récepteurs : un récepteur profane (le justiciable) et des récepteurs aussi initiés qu'eux au langage juridique (les avocats des parties).

La Cour de Cassation (ci-après CC) et le *Tribunal Supremo* (ci-après TS) sont les émetteurs des arrêts, donc les seuls responsables de la mise en texte et de la décision finale, mais lorsque ces entités construisent leurs discours, elles adoptent des points de vue différents et développent une argumentation particulière pour motiver leurs avis.

Notre étude contrastive prend comme point de départ la Théorie de l'Argumentation dans la Langue d'Anscombre et Ducrot (1983) et la Théorie de la

polyphonie de Ducrot (1984) dont nous emprunterons certains concepts particulièrement utiles pour expliquer les enjeux énonciatifs de nos textes ainsi que les stratégies argumentatives mises en place.

Selon Ducrot (1984a), la présence de certaines marques linguistiques dans l'énoncé indique les sources de son énonciation. Ce linguiste distingue d'abord le *sujet parlant* – un être de l'expérience externe au discours – du *locuteur*, qui est l'être discursif responsable des énoncés, celui qui parle et qui rapporte les événements. Ensuite il établit une distinction entre le *locuteur* et les *énonciateurs*. Les énonciateurs sont associés à des points de vue ou à des attitudes que le locuteur rend visibles. Le locuteur pourrait s'identifier à l'un de ces énonciateurs en le prenant comme représentant ou bien se limiter à les mettre en scène parce que leur apparition est pertinente sans s'identifier à aucun d'eux.

Ces trois instances énonciatives, essentielles pour notre analyse, seront reprises par la suite et précisées dans le contexte de notre corpus.

Attitude du locuteur et points de vue mis en scène dans les arrêts

En effet, dans le corpus analysé, nous avons relevé les trois modalités énonciatives mentionnées ci-dessus. Ainsi, le locuteur, qui est l'être discursif responsable du texte, rapporte les événements, les points de faits, les fondements juridiques et la décision finale. Les énonciateurs, qui sont les différents points de vue présentés par le locuteur, se manifestent à travers la voix du demandeur à la cassation, la voix des experts, la voix de la loi, etc. Le sujet parlant est ici l'autorité qui a élaboré le texte et qui le légitime en vertu de son rôle dans la société, c'est-à-dire le juge ; pour bien le distinguer du responsable du texte (le locuteur), nous le nommerons le responsable de l'arrêt.

Aussi bien dans les arrêts français que dans les arrêts espagnols, nous avons constaté l'emploi de stratégies discursives qui tendent à l'effacement des traces du locuteur et du responsable des arrêts en vue de parvenir à un degré d'objectivité élevé. Or, il semble que ces stratégies, bien qu'ayant le même but, varient d'un texte à l'autre.

Marques du locuteur et du responsable des arrêts en français

Dans les arrêts français, le locuteur se situe toujours à la 3^{e} personne du singulier (ps) et adopte la perspective d'un narrateur omniscient. Il reprend la voix d'autres énonciateurs lorsqu'il rapporte les faits, les moyens du pourvoi et la décision du responsable de l'arrêt, à savoir la CC.

La seule fois que le locuteur nomme le responsable de l'arrêt est au début du texte en utilisant le syntagme *la Cour*, qui est détaché du reste et présente la même forme dans tous les arrêts[1] ; par la suite il reste implicite. Ce n'est qu'à la fin du texte, dans le

[1] Il faut signaler que cette affirmation se réfère aux textes de notre corpus car nous avons pu constater que certains arrêts plus récents (2008-2009) présentent une formulation beaucoup plus explicite pour désigner le responsable de l'arrêt et pour introduire le corps du texte, par exemple :
« La Cour de cassation, deuxième chambre civile, a rendu l'arrêt suivant :
Statuant sur le pourvoi formé par (...) » (Arrêt nº1048 du 11 juin 2009)
Probablement ce choix obéit à une volonté de faciliter la compréhension du texte.

dispositif, que l'on découvre des marques se référant au responsable de l'arrêt sous forme de verbes performatifs conjugués à la 3ps qui explicitent sa décision (*casse et annule, remet, dit*). Le syntagme *la Cour* joue le rôle de sujet principal de tout le texte, mais il est tellement éloigné des verbes conjugués que, en surface, le texte devient complexe et cryptique. L'emploi systématique de la 3ps montre que le locuteur veut se maintenir à une certaine distance énonciative, qu'il rapporte la voix déterminante de la CC, mais qu'il ne s'associe pas à elle.

Tous les verbes dont le sujet est la CC sont à la voix active et au présent de l'indicatif. L'emploi de cette forme verbale permet de rapprocher les actes performatifs d'un temps permanent, figé, voire un présent général et universel, celui du droit. Dans le même sens, l'absence de sujet explicite dans le dispositif contribue à donner une vision plus objective de la décision judiciaire.

La volonté d'effacer le responsable de l'arrêt ainsi que le locuteur se manifeste également par la prédominance des formules figées qui servent à articuler les différents alinéas du texte. Les plus importantes sont la locution causale *attendu que* et les prépositions *sur* et *par*.

a) *Attendu que*

Ce connecteur introduit les parties les plus longues du texte, c'est-à-dire celles qui présentent les évènements, les moyens du pourvoi et l'argumentation de la CC. Son emploi constitue une marque d'objectivité dans la mesure où c'est une locution formée par un participe passé, donc par une forme verbale atemporelle et non personnelle, ce qui permet de se passer d'un sujet grammatical et d'omettre les marques qui désigneraient le responsable de l'énonciation, comme le montre l'exemple suivant :

> **Attendu que** Pascale Y..., née le 3 octobre 1970, qui avait été opérée à l'âge de neuf ans d'un craniopharyngiome a présenté, à la suite de cette opération, des troubles de croissance ;

En même temps, ce connecteur marque l'ouverture d'un mouvement argumentatif de type causal et permet de créer un espace discursif où le locuteur confronte des points de vue différents qui se juxtaposent ou se superposent. De cette façon, le locuteur construit son discours à partir de la voix d'autres énonciateurs, ce qui lui permet d'enchaîner sur ses propres conclusions et de les légitimer. En termes de Ducrot (1984b), son discours prend la forme d'un raisonnement d'autorité[2] et se fonde sur une autorité polyphonique[3], ce qui le rend plus objectif.

[2] Le locuteur montre un énonciateur disant P ; cet énonciateur, étant donné sa situation, ses compétences ou sa hiérarchie, ne peut pas se tromper lorsqu'il dit P ; cela permet au locuteur de relier P avec son propre énoncé Q dont il se montre responsable et de le soutenir avec plus de force et plus d'autorité. Par ex. : *selon l'article 1er du protocole n°1 à la Convention de sauvegarde* (...) *d'où il suit* (...).

[3] Le locuteur montre un énonciateur affirmant une proposition P, qu'il ne prend pas en charge mais qui lui sert comme point de départ d'un raisonnement et sert aussi à justifier une autre affirmation, celle de Q, qu'il prend en charge.

c) *Sur*

Cette préposition accompagne un énoncé normalement très court mais fondamental dans la mesure où il annonce le moyen – et le cas échéant ses différentes branches – qui par la suite sera évalué par la CC (*Sur le premier moyen/ Sur le moyen unique pris en sa première branche*, etc.). L'importance du segment introduit par la préposition *sur* est signalée typographiquement grâce aux caractères gras et à la ponctuation. L'élément *sur* permet, par conséquent, d'ouvrir directement la voie au moyen ou aux moyens sur lesquels s'appuie le demandeur à la cassation dans son pourvoi pour attaquer l'arrêt de la cour d'appel.

Dans cet énoncé si bref, de nouveau, il n'y a pas de sujet explicite ni de forme verbale aucune. Il est vrai que certains arrêts de la CC introduisent cet énoncé par le participe présent du verbe *statuer* (*statuant*), ce qui rend l'énoncé plus intelligible[4] ; mais dans notre corpus nous n'avons trouvé aucune occurrence de ce type et ces segments deviennent plus hermétiques.[5] L'unité *sur* est la seule trace qui reste du verbe *statuer*. On constate, encore une fois, une tendance à préférer des formules figées et impersonnelles qui donnent une impression d'objectivité.

d) *Par*

Cette unité apparaît dans la formule figée *par ces motifs* qui annonce la séquence la plus importante de l'arrêt : le dispositif. Son importance textuelle résulte de sa place dans le texte et des marques typographiques : elle figure en majuscules, en caractères gras et elle est suivie de deux points. De nouveau, nous nous trouvons en présence d'un degré d'objectivité non négligeable car, dans ce segment linguistique, les traces du locuteur et du responsable de l'arrêt brillent par leur absence.

Grâce à la formule *par ces motifs*, qui constitue le segment détaché le plus court du texte[6], le destinataire apprend qu'il est devant la décision finale de la Cour, celle qui expose le verdict que les parties attendent. Ce segment introduit donc la voix récapitulative de la CC qui va être déterminante pour les justiciables et sera source de jurisprudence. En même temps, cette formulation ouvre un mouvement argumentatif de type consécutif-conclusif en prenant la forme d'un syllogisme juridique, i.e. elle indique que la décision finale n'est pas arbitraire mais qu'elle résulte forcément de tout ce qui a été dit au préalable.

Marques du locuteur et du responsable des arrêts en espagnol

Dans les arrêts espagnols, le locuteur adopte plusieurs perspectives : il se situe aussi et surtout à la 3ps, mais le passage à des formes impersonnelles n'est pas exceptionnel et la 1^{e} personne du pluriel (pp) s'impose dans le dispositif.

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[4] On a constaté la présence de cette unité dans certains arrêts des années 90 et plus récemment dans certains arrêts de 2008 et 2009 ; pour en voir un exemple cf. la note en page 3 du présent travail.

[5] Le verbe *statuer* apparaît dans certains arrêts de notre corpus, mais il n'occupe pas cette place, puisqu'il figure uniquement dans la formule finale : « Par ces motifs et sans qu'il y ait lieu de statuer sur les autres branches du pourvoi » (arrêt nº 1, 24/1/2006).

[6] Bien qu'il puisse présenter aussi de petites variations qui l'allongent, par exemple: ***PAR CES MOTIFS****, et sans qu'il soit besoin de statuer sur les autres griefs : (...)* (Arrêt 133, 24 janvier 2006).

Dès le début du texte, le locuteur emploie la 3ps et adopte la perspective d'un narrateur omniscient. Comme le locuteur des arrêts français, il met en scène d'autres énonciateurs quand il rapporte les faits, les moyens du pourvoi et la décision du responsable de l'arrêt, c'est-à-dire le TS. Il semble se distancier de ce qu'il rapporte et ne pas s'impliquer dans la voix de ces énonciateurs, le résultat étant un degré élevé d'objectivité.

Les marques désignant le responsable de l'arrêt sont présentes dès le début du texte. Il apparaît sous deux formes différentes selon les arrêts : en tant que sujet actif (*La Sala Primera del Tribunal Supremo ... ha visto los recursos*), donc comme l'élément central du passage, ou bien, dans d'autres cas, comme un sujet passif. Dans cette dernière hypothèse, le responsable est relégué à une place secondaire, celle de complément d'agent (*visto por la Sala Primera del Tribunal Supremo*). Dans les deux cas, le responsable de l'arrêt se présente sous la forme d'une métonymie comme c'était le cas en français avec *la cour,* mais ici les formes sont plus variées et plus concrètes: *sala primera, sección, sede casacional*, etc.

Dans le corps de l'arrêt *(antecedentes de hecho* et *fundamentos de derecho)*, le locuteur adopte deux perspectives : la 3ps, qui prédomine, et la 1pp. En ce qui concerne la 3ps, outre les verbes conjugués à la voix passive et à la voix active, les formes impersonnelles sont fréquentes, comme si le locuteur ne pouvait pas nommer le sujet de l'action : *el motivo primero del recurso ... se desestima / la constancia de la existencia del daño se concreta en la demanda.* Quant à l'emploi de la 1pp, parfois elle a une valeur impersonnelle : *La sentencia recurrida ha determinado que estamos ante uno de los supuestos de responsabilidad médica (...)*. Mais dans d'autres cas elle fait allusion directement au locuteur et au responsable de l'arrêt (soit le TS): *consideramos que esta opción legal (...) entra de lleno en el estatuto personal de la mujer.*

À la fin des arrêts espagnols, pour annoncer le dispositif, on constate la présence d'une formule figée et de deux variantes. La formule figée complète est « ***Por lo expuesto****, en nombre del rey y por la autoridad conferida por el pueblo español* », dont l'expression *por lo expuesto* montre un point de vue similaire à celui de *par ces motifs* des arrêts français dans la mesure où les fonctions de reprise anaphorique et d'ouverture d'un mouvement argumentatif de type conclusif sont présentées de façon neutre. Les deux unités qui suivent toujours cette formule figée sont la 1pp du verbe *fallar* (*fallamos*) et le nom *fallo*. Elles sont détachées du texte et mises en relief typographiquement (en majuscules et en caractères gras) pour montrer leur pertinence discursive : elles introduisent la partie la plus importante du texte, la décision finale de la cour.

a) Avec *fallamos*, le locuteur change de forme énonciative, et donc de point de vue : il abandonne la 3ps pour adopter désormais la 1pp. En employant cette marque personnelle, le locuteur s'inclut dans le sujet collectif *nous* de sorte qu'il se rapproche beaucoup plus des faits et de la solution retenue. Ainsi, le locuteur et le responsable de l'arrêt convergent en une seule entité discursive. En même temps, on passe du langage figuré, plus indirect, avec la métonymie la *Sala*, la *Sección* ou la *Sede* à un langage plus littéral et plus direct à la fin du texte avec le sujet *nous*, qui renvoie aux juges.

A l'intérieur de l'alinéa qui suit immédiatement le verbe *fallamos* nous observons, dans notre corpus, des variations d'ancrage énonciatif du locuteur, qui correspondent aux trois modalités suivantes :

- Première modalité : le locuteur continue à parler à la 1pp en apportant une nuance sémantique importante, l'idée d'obligation exprimée par le verbe *deber*: *Que debemos declarar lo siguiente/ Que debemos declarar y declaramos*. Cette instruction sémantique permet de montrer un locuteur contraint à émettre cette décision, comme si l'application de la loi l'amenait irrémédiablement à conclure comme il le fait. La forme verbale de 1pp est suivie soit par des infinitifs (*haber /no haber lugar al recurso/ imponer a la parte recurrente*), soit par d'autres formes verbales aussi à la 1pp (*condenamos a la parte recurrente/ cuya resolución anulamos /desestimamos la demanda*).
- Deuxième modalité : le locuteur opte pour un degré plus élevé de neutralité car il n'emploie aucun verbe à une forme personnelle, les seules formes verbales étant des infinitifs et des participes présents ou passés, qui alternent avec des substantifs : *Declarar no haber lugar a los recursos de casación formulados / con imposición legal de las costas a la parte recurrente*. L'emploi des substantifs montre aussi le désir d'effacer les marques énonciatives du locuteur pour atteindre une plus grande abstraction ou virtualité.
- Troisième modalité : le locuteur alterne la 1pp avec la 3ps, qui est précédée d'un sujet métonymique. Par exemple : *declaramos no haber lugar al presente recurso de casación (...) si bien la Sala (...) señala en 1200 euros la cifra máxima (...)*.

b) Quant au lexème *fallo*, il figure dans certains arrêts à la place du verbe *fallamos*. Déjà en tant que substantif, il suggère un degré plus élevé d'objectivité étant donné qu'il permet de supprimer complètement les traces du locuteur. Or, les segments numérotés qui le suivent contiennent des verbes conjugués à la 1pp ainsi que certaines formes impersonnelles : *1. No ha lugar al recurso de casación interpuesto por ... 2. Declaramos la firmeza de la expresada sentencia. 3. Se imponen las costas ...* Cette alternance des formes verbales est donc semblable aux modalités décrites ci-dessus à propos des fragments introduits par l'unité *fallamos*.

Structure des arrêts

En ce qui concerne la structure des textes et le déroulement de l'argumentation, on observe des différences entre les arrêts français et les arrêts espagnols. Dans le tableau ci-dessous nous présentons schématiquement la macrostructure des arrêts dans ces deux langues afin de mettre en relief ces différences :

Arrêts français	**Arrêts espagnols**
1) Titre ou entête : numéro, date, juridiction dont il émane. Ce sont les marques de son authenticité. 2) Identification des parties: le demandeur à la cassation *vs* le défenseur à la cassation. 3) Corps du texte : Les points de faits et les fondements juridiques se succèdent au long de cette même section. La structure du corps du texte s'appuie sur la présence de plusieurs	1) Titre ou entête: numéro, juridiction, nom du juge rapporteur et bref résumé. - Lieu et date complète. 2) Identification des parties avec leurs représentants légaux, du pourvoi et de l'organe dont émane l'arrêt. 3) Corps du texte : 3.1.) Points de faits (*antecedentes de hecho*) ordonnés comme une énumération ; chaque point, précédé d'un ordinal, présente les décisions des instances

alinéas introduits par *attendu que*.	antérieures. Nom du juge rapporteur. 3.2) Fondements juridiques (*fundamentos de derecho*), ordonnés aussi comme une énumération. Ils présentent le récit chronologique des événements. Référence aussi à la saisine du pourvoi. Évaluation que le TS fait de chaque moyen et justification après l'exposition de chaque moyen.
4) Dispositif 5) Noms des juges formant le tribunal et des avocats + fonctions	4) Dispositif 5) Formule finale figée + nom des juges

Ce tableau contrastif, permet de formuler quelques observations générales :
- Les deux types d'arrêts contiennent cinq grands blocs qui exposent les mêmes données essentielles, bien que l'information soit présentée de façon différente dans chaque langue.
- L'identification des parties (deuxième partie) est beaucoup plus concise et synthétique en français qu'en espagnol.
- Le corps du texte (troisième partie) en français contient moins d'information et celle-ci est moins détaillée que dans les arrêts espagnols. Les points de faits et les fondements juridiques en français se succèdent et se mêlent dans la même partie ; par contre, en espagnol, ils occupent deux parties bien différenciées intitulées respectivement *antecedentes de hecho* et *fundamentos de derecho*.
- Les noms des représentants légaux apparaissent à la fin du texte en français tandis qu'en espagnol ils se situent au début du texte, dans la deuxième partie.

Les divergences les plus intéressantes du point de vue linguistique se situent dans le corps du texte et c'est donc sur cette partie que nous focaliserons notre analyse. Dans les textes français, on relève un nombre limité de connecteurs, particulièrement au niveau inter phrastique, ce qui donne une impression de style télégraphique, d'énumération de faits dont on aurait éliminé toute trace de subjectivité.

Dans la partie expositive, le connecteur causal *attendu que* annonce toute une partie qui présente l'histoire chronologique des évènements, à partir du fait qui a déclenché la première action judiciaire, c'est-à-dire le grief, suivi des décisions des instances judiciaires de différents niveaux. La formule *attendu que* pose un point d'ancrage énonciatif et argumentatif qui permet des reprises par *que* précédé d'un point virgule, sans que l'on soit obligé d'introduire des connecteurs (qui, comme nous l'avons signalé, sont toujours porteurs d'une certaine subjectivité) :

> **Attendu que** M. X provoque l'accident et Mme Y subit une intervention chirurgicale….**; que** Mme Y est contaminée et l'EFS est condamné…**; que** l'EFS a assigné M. X. et son assurance en garantie…**; que** la cour d'appel a débouté l'EFS de ses demandes….**; que** la décision a été cassée…**; que** l'arrêt attaqué a jugé que M. X avait commis une faute…

Tous les éléments à prendre en compte sont ainsi introduits par cette même expression, aussi bien lorsque le locuteur mentionne une série d'événements que lorsqu'il

rend compte de décisions des différentes instances. Cependant, on observe plusieurs schémas dans le déroulement de l'argumentation. Dans certains arrêts, à l'intérieur de chaque moyen, le connecteur *attendu que* est combiné à d'autres marques qui permettent d'organiser, de hiérarchiser ou d'opposer une série d'arguments. En ce qui concerne les mouvements d'opposition, on relève deux cas de figure différents. Tout d'abord, dans l'exposition des faits ou l'examen du grief par d'autres instances judiciaires, un contraste s'établit entre ce qui s'est passé et ce qui aurait dû se passer selon l'auteur du pourvoi. Ce contraste est marqué par l'expression *alors que* qui s'insère dans le segment introduit par *attendu que*. On a ainsi :

> **Attendu qu**'il est fait grief à l'arrêt d'avoir déclaré X responsable de la contamination et de l'avoir condamné à réparation, **alors**, selon le moyen :
> 1º) **qu**'en retenant pour déclarer X responsable…la cour d'appel a violé….
> 2º) **qu**'en retenant pour estimer que la preuve... la cour d'appel a renversé la charge de la preuve...
> 3º) **qu**'en l'état de la seule circonstance…la cour d'appel s'est prononcée pour un motif abstrait…privant sa décision de base légale…

Comme le montre cet exemple, *alors que*, tout comme *attendu que*, permet l'ouverture d'une énumération par répétition du deuxième terme *que*. Dans cette série, qui présente les arguments du demandeur à la cassation, les segments sont organisés par des marqueurs d'intégration linéaire (Turco et Coltier 1988) qui, dans ce cas, sont dérivés du système numérique.

Le deuxième type d'opposition correspond au mouvement par lequel la CC introduit son évaluation des arguments précédents et se prononce soit en faveur du demandeur, soit en faveur de la cour d'appel. Ce mouvement est aussi marqué par *attendu que* qui, dans ce cas, se combine avec des connecteurs d'opposition plus au moins forts. On trouve ainsi: *Mais attendu que / Attendu, toutefois, que / Attendu, cependant, que*. Ces connecteurs d'opposition ont cependant un rôle primordial car ce sont les seuls éléments qui permettent d'identifier que c'est la voix de la CC qui est introduite.

Dans ce mouvement, la CC reprend un par un les différents points en utilisant encore la reprise par *que* précédé d'un point virgule et combiné à des marqueurs d'intégration linéaire. Mais dans ce cas, ce ne sont pas des chiffres qui sont utilisés mais des segments linguistiques comme la série *d'abord…, ensuite…, enfin...* Dans cette série, on considère que la marque d'ouverture *d'abord* et la marque de clôture *enfin* sont des éléments figés, mais qu'entre les deux, il est possible d'insérer d'autres éléments, introduits par *aussi, encore* ou d'autres marques d'ajout. On a ainsi:

> **Mais attendu que** la cour d'appel… n'avait pas à se référer à la directive; **qu**'elle a **d'abord** à bon droit retenu…; **qu**'elle a **ensuite** relevé…; **que** la cour d'appel a **encore** relevé…

On observe cependant dans les textes du corpus que, si la marque d'ouverture reste présente, l'opération de clôture est parfois exprimée non pas par un marqueur mais

par une construction verbale indiquant la conséquence ou la conclusion, comme : *qu'elle a pu en tirer ses constatations…, qu'elle a pu en déduire que…* .

Le corps du texte des arrêts espagnols présente un aspect tout à fait différent. Comme nous l'avons signalé, les différents points sont beaucoup plus développés et le style est beaucoup plus lié. On relève par exemple de nombreuses reprises anaphoriques sur des énonciations précédentes introduites par les expressions *como se ha dicho anteriormente…, como se ha dicho…* qui évitent précisément ce style télégraphique que nous avons observé dans les textes français.

Les mouvements d'opposition plus ou moins forte sont marqués par des connecteurs qui expriment une certaine attitude du locuteur, comme *ahora bien, pues bien, pero es más* :

> De nuevo hemos de remitirnos a la prueba pericial para dilucidar tales cuestiones, pericia que ofrece garantías tanto técnicas como de imparcialidad al ser realizada con todo detalle por un especialista (…). **Pues bien**, de dicha pericia se deduce que el diagnóstico y remisión al domicilio fueron correctos, (…)

Les connecteurs *ahora bien* ou *pues bien* marquent l'ouverture d'un mouvement d'opposition, mais ils se différencient d'autres connecteurs comme *pero*, ou *sin embargo*, car ils marquent un temps d'arrêt qui annonce un changement dans la trajectoire argumentative et valide implicitement tout ce qui a été dit auparavant. Ce sont des expressions que l'on pourrait paraphraser en langage courant par « jusqu'ici on est d'accord, mais… », c'est-à-dire des expressions qui rendent visible l'intervention du locuteur. Cette intervention est tout aussi nette dans l'expression *pero es más*, par laquelle le locuteur non seulement présente un argument anti-orienté mais, de plus, le présente comme un facteur aggravant une situation déterminée.

Quant aux mouvements de type consécutif-conclusif, ils sont marqués le plus souvent par des connecteurs comme *en suma, consecuentemente, en definitiva, en su consecuencia*, ce qui donne au locuteur une plus grande liberté dans le choix des verbes utilisés.

Conclusion

Notre analyse contrastive a permis donc de constater que le positionnement du locuteur dans les arrêts français est moins varié que dans les arrêts espagnols, c'est-à-dire que les formes énonciatives employées en français pour se référer au locuteur obéissent à un patron énonciatif plus figé et moins modulable. Ainsi, par exemple, la seule forme verbale du dispositif des textes français (3ps) contraste avec le large éventail de combinaisons énonciatives des textes espagnols (1pp, 3ps, infinitifs et formes impersonnelles). Le responsable de l'arrêt, lui, est nommé une seule fois, au début du texte, et toujours sous la même forme (*la Cour*) ; dans le reste du texte il reste implicite.

Dans les textes espagnols, le locuteur et le responsable de l'arrêt sont plus présents et se montrent sous des formes plus variées et plus explicites: des métonymies, le nom des juges et surtout la forme de la 1pp qui permet une identification entre le locuteur et le responsable de l'arrêt. Dans les textes français, par contre, le locuteur reste

toujours à la 3ps et ne s'identifie jamais au responsable de l'arrêt ; il tend à l'effacement par l'emploi de formules figées (*attendu que, par les motifs*, etc.).

En ce qui concerne la structure argumentative, on observe que les arrêts français sont beaucoup plus synthétiques et plus télégraphiques. Les connecteurs utilisés sont de préférence des locutions, comme *attendu que* ou *alors que* qui permettent la reprise par *que* précédé d'un signe de ponctuation, ce qui donne une impression d'énumération neutre. À l'intérieur de ces séquences, les arguments sont organisés par des marqueurs d'intégration linéaire qui donnent bien peu d'information sur l'attitude du locuteur. Dans les arrêts espagnols, par contre, on relève un nombre important de connecteurs et on observe que le locuteur utilise parfois des expressions qui non seulement marquent une relation logique, mais aussi reflètent certains points de vue.

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LEGAL REASONABLENESS AND THE NEED FOR A LINGUISTIC APPROACH IN COMPARATIVE CONSTITUTIONAL LAW

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Abstract: The paper focuses on the concept of reasonableness in several countries, in particular, comparing common and civil law systems. More specifically, it refers to the use of this word in the discourse of the judiciary and especially in the context of constitutional law. In the latter context reasonableness plays a crucial role in conveying values and thus construing "different" constitutionalisms; in fact it enhances the dynamics of the constitutional framework, while leaving the Constitution unaltered. Up to now, constitutional scholarship has devoted attention to the issue of reasonableness as a tool of adjudication (i.e. by including it in the wider framework of scrutiny techniques, such as strict scrutiny versus proportionality). On the contrary, the underlying hypothesis of this paper is that a solid linguistic approach will enhance the understanding of the role reasonableness plays as the quest for *minima moralia* in constitutional law.

Estratto: L'Autore analizza il concetto di ragionevolezza così come utilizzato nei sistemi giuridici di paesi diversi tenendo particolarmente in conto il confronto tra i paesi di tradizione continentale e quelli di *common law*. Più specificamente si analizza l'utilizzo del concetto di ragionevolezza nel contesto giuridico e, specialmente, costituzionale. In quest'ultimo caso, infatti, la ragionevolezza gioca un ruolo cruciale nel veicolare diversi valori e, di conseguenza, dare vita a differenti "costituzionalismi". Infatti, questo concetto favorisce il dinamismo della cornice costituzionale pur mantenendo la Costituzione inalterata. Fino a questo momento la dottrina costituzionalistica ha analizzato il concetto di ragionevolezza come strumento del controllo di costituzionalità (cioè come uno dei possibili strumenti concettuali utilizzati per vagliare la compatibilità di un atto con la costituzione, come per esempio lo *strict scrutiny* da un lato e la *proportionality* dall'altro). Al contrario, la tesi dell'autore è che un solido contributo da parte della scienza della linguistica favorirebbe la comprensione del ruolo svolto dal concetto di ragionevolezza come *minima moralia* nel Diritto costituzionale.

I. There are two reasons why as a lawyer, and more specifically as a comparative constitutional scholar, I should carefully define the object of this research. The first is that this paper is delivered in a conference of experts in legal translation, i.e. experts of linguistics, and since I am not one, I should specify in what terms I am concerned with linguistic aspects in the context of comparative constitutional law. Second, I am aware of the multiple connections that exist between language and law and the many standpoints that can be adopted to describe them, however I am exclusively interested in to those regarding public law in a comparative perspective. As a result, I believe that the easiest way to structure this premise is to list what this paper *will not* address.

First of all, this paper does not consist of philosophical research in other words language will not be taken under consideration to define what "law is" or "how a legal system should be defined". Second, this is not a theoretical study devoted to criteria of interpretation, i.e. how a legal text should be read in order to avoid (or solve) contrasts between legal sources. Third, I have not opted for a strictly constitutional perspective in fact this paper does not focus on the techniques of interpretation of legal texts having constitutional relevance.

However, by limiting the scope to comparative law one should consider that there are numerous ways in which language plays a role in legal comparison that for brevity I will divide into two groups. The first group is concerned with the most obvious way language plays a role in legal comparison regards how to acquire the knowledge of foreign law, i.e. to access information concerning a specific foreign legal system. For example, Italian comparative private law scholarship (Grande, 2006, p. 117), notwithstanding its internal diversity, reveals a common interest especially regarding legal translation and legal language (Sacco 1986; Ajani 2003; Gambaro 2004; Pozzo, 2005) and this, according to certain authors, is partly due to the fact that Italian «is not a dominant language so that scholars have to be particularly careful when it comes to terminological issues» (Grande 2006, 121-2; in the context of public law Frosini, 31-56 and 183-210).

The second group mainly regards what has been defined as legal transplant. This definition can refer to a wide series of cases, for example many Latin American countries adopted their form of government (i.e. the frame of government) on the basis of the American presidential executive (Garcia Belaunde, et al. 2002; Frosini and Pegoraro 2008, 44-45). Another example could be the ombudsman. First created 200 years ago in Sweden, the *Justitieombudsman* was «initially envisaged as the trustee of Parliament, i.e. he was in charge of supervising whether the laws approved by Parliament (*Riksdag*) had actually been implemented by the executive» (Frosini and Spasić 2005, 337). His core activity was to limit the "absolute" power of the King thus granting a balance between the legislative and the executive power. However, nowadays in many European countries the ombudsman is seen as a body that protects citizens from potential abuses due to bureaucracy. It should be noted that the idea of *legal transplant* was elaborated in the context of private law, while there is still a debate as to whether this notion can be employed in public law. Recently, the metaphor of *migration* (Choudhry 2006) was identified as an alternative to *transplant* when referring to constitutional ideas. In fact, the latter are strictly related to the definition of the identities of national communities and they are more sensitive than any other legal tradition operating in business law or private law in general. In this perspective, the milder metaphor of a *migration* seems to better frame what is supposed to be a dialogue in equal terms among legal systems, rather than an import-export of legal solutions, that sometimes lead to a *rejection crisis*.

However, notwithstanding the diverse reasons why language is relevant to comparative law, one should note that the core activity, which preludes all the others, is legal translation. Indeed, whether it is written or spoken, the action of rendering the meaning of a word or text in another language represents one of the premises of legal comparison. However, this is not an exclusive of comparative law. For example, certain international and supranational legal systems (eg. ECHR and EU), due to the high level

of integration and development, adopt a multi-lingual approach. The latter, on the one hand, requires drafting laws in different languages, but on the other it requires national legal sources and supranational or international laws to be intelligible both at the domestic and international level. Similar considerations can be made regarding countries with more than one official language, such as Canada or Switzerland, where judges are sometimes obliged to cross reference translations of the same law in order to solve the case. For example, the Swiss Federal Constitutional Court when called upon to interpret art. 119 par. 1 of the criminal code concerning the number of physicians to be consulted before legally carrying out an abortion could not answer on the basis of the German version. German is the predominant language in the federal system, because laws are first drafted in German and then translated into the other official languages. However, in this case the Court could not use the expression contained in the German version of the criminal code («nach ärztlichem Urteil») because it did not clearly specify the number of medical opinions necessary to certify the risk of physical and psychological damages caused by the pregnancy. As a consequence the Court had to decide on the basis of the Italian («giudizio di *un* medico») and the French («*un* avis medical») translation which clarified that one medical opinion was sufficient (Gerotto 2004, 3651).

In the light of these examples of the possible relations between language and law, this paper will argue in favour of the necessity for comparative lawyers, and especially those interested in constitutional law, to open up their field of research and apply the techniques borrowed from other sciences and, in particular, linguistics. It should be underlined that the definition of what comparative law is itself has not yet been given, nor its correct methodology has been identified, therefore on the basis of the fact that «the classical technique of legal methodology» still is «reading texts of all kinds hoping for insight» (Örücü 2007, 43) the least one can advocate is the collaboration of comparative lawyers with other social scientists. This argument is particularly strong when it is used in relation to empirical sets of data, but it could fit the linguistic problem as well (Grosswald Curran 2006, 679). More specifically I agree with those who warn against the excessively abstract nature of certain analytic approaches to the study of the law, because they tend to transform a legal analysis into a terminological contest; on the other hand any «comparative work, particularly, if it is empirically based, will have to include a pragmatic dimension» (Harding, Leyland, 2007, 331) otherwise it is ineffective.

The people of most countries have a specific legal language whose peculiarities are the product of this country's history and culture; in particular, when legal systems belong to different legal families (such as civil law, common law, Sharia law, Hindu Law, etc.) they recognize different legal categories and conceptualizations. For example, among civil law systems one can distinguish the French and the German tradition based on the different level of abstraction of legal categories, and this is testified by the very well known example of *contract*. According to the French tradition a contract can be burdensome o gratuitous, on the contrary, German law identified a further category: the contract is part of another more general *genus*, i.e. *Rechtsgeschäft*, which can be both unilateral and multilateral (Galgano 2002) On the basis of these conceptual differences, how can *Rechtsgeschäft* be translated in English? E.J. Cohn or G. Danneman opted for «legal transaction» (Danneman 1993, 11; Cohn 1968.); unfortunately, this expression only corresponds to bilateral *Rechtsgeschäft* thud it needs to be accompanied by

explicatory notes. Cohn underlines that the «term *Rechtsgeschäft* is wider than the term contract or even agreement. It includes acts in which one party only becomes active… The conception of *Rechtsgeschäft* is one of those characteristically abtract conceptions which have become possible in German law…».or that of the legal category, typical of common law systems, of *torts* which is hard to find a parallel in civil law systems. According to some authors, these theoretical and conceptual differences are the ones that especially support idea that to translate legal concepts is impossible because each language is too peculiar. Regardless of the fact that I agree with the idea that the context highly influences the meaning of legal terms, I believe that certain words pertain to the common core of the form of state, meant as the covenant between the ruled and the ruler. Nowadays, the concept of constitutional system embodies this covenant and it also requires a high degree of adaptability to different "constitutionalisms". According to the theory of Pound (Pound 1923, 641-662), the legal system itself is composed of three elements: normative elements, philosophical elements and the concepts. In a historical perspective, the first two elements are very dynamic and change frequently, while concepts tend to be more stable. The reason for this difference is that these concepts act as swinging doors that allow different values to enter the legal system. As a result, these concepts loose their original meaning in order to play a dynamic function. Reasonableness, the specific object of this paper, is one of those very concepts.

II. The paper focuses on the concept of reasonableness in several countries, in particular, comparing common and civil law systems. More specifically, it refers to the use of this word in the discourse of the judiciary with the aim of highlighting its implications at a normative level and, in particular, from a constitutional standpoint. Indeed, in the context of constitutional law, the concept of reasonableness plays a crucial role in conveying values and thus construing different constitutionalisms. This concept enhances the dynamics of the constitutional framework, while leaving the Constitution unaltered. This also explains why reasonableness mainly pertains to the language of the courts and, especially, to the discourse typical of constitutional adjudication.

Up to now, constitutional scholarship has devoted attention to the issue of reasonableness as a tool of adjudication (i.e. by including it in the wider framework of scrutiny techniques, such as strict scrutiny *versus* proportionality). On the contrary, this paper analyses the concept of reasonableness starting from the meaning of the word and the cultural implications of its use in judicial interpretation in order to highlight its stratified meaning that comprises: its use in common language (strongly influenced by philosophical views); its legal (legal *stricto sensu*) meaning and the constitutional (legal *latu senso*) meaning. Focus will be put on the third aspect so as to comprehend the complexity of the role played by reasonableness in the constitutional case law of common law and civil law systems. The underlying hypothesis is that a solid linguistic approach will enhance the understanding of the role reasonableness plays as the quest for *minima moralia* in constitutional law. The paper is consequently structured in three parts. The first is devoted to the etymology of the word, i.e. to the classical roots of reasonableness. The second part focuses on the propagation of reasonableness from private to public law. The third deals with constitutional case law while the final section is devoted to establish whether reasonableness can be identified as the core element of modern constitutional

law despite the different linguistic and legal meanings that the word may assume from country to country.

III. The roots of the word reasonableness are to be found in the Latin term *rationabilitas* that means, as the greek term *logos*, *calculus*, i.e. identifies the technical concept of "counting or calculus". However, reasonableness as a concept also recalls Aristotle's *Nicomachean Ethics* and its specific reference to the concept of *phrónēsis*. It is very well known that Aristotle's philosophy can be classified, in very general terms, in two parts according to the existence of two basic types of intellectual virtues by which we live our lives. The two intellectual virtues Aristotle refers to are wisdom and *phrónēsis*. The first, wisdom, is used to discover and comprehend the external world, physical and metaphysical; in fact, it can be gained and increased throughout one's life through experience and time. Aristotle's wisdom is more similar to a scientific knowledge that potentially is a feature of any intellect. On the contrary, the second intellectual virtue, *phrónēsis*, cannot be acquired through education, i.e. cannot be drawn from books or any other form of codified source of information, because it is learned and built through the exercise of social interaction and everyday life experiences.

Phrónēsis «is concerned with human affairs…» and it therefore depends on time and experience in the context of every individual's life and his/her social encounters thus granting to human beings the ability to make good judgements and decisions throughout life. However, *phrónēsis* does not only refer to the idea of taking good decision in one's self interest only, but it also regards the human virtue of being able to take the best decision so as to grant the general welfare. This communal aspect of the intellectual virtue of *phrónēsis* is probably the most interesting to those investigating its legal implications; indeed, it identifies the capability of men and women to act according to a balance between its personal interest with that of mankind.

The contrast between wisdom and *phrónēsis* also lies in the different aim they have. One is finalised to find the true and only answer to describe a state of facts, or to solve an issue, and such an answer could not, as a necessity, be different; on the contrary, the second is functional to the practical philosophy which takes care of the *anthropeia philosophia* (the philosophy of human affairs). The latter does not have the aim of finding a single answer which corresponds to the truth, but rather it takes under consideration the specific differences and the unpredictable sides of life, i.e. *phrónēsis* refers to the margin of discretion belonging to individuals in deciding how to act, even in those cases where they lack freedom. In other words, *phrónēsis* is, according to Aristotle, that specific form of wisdom which allows men and women to decide, in all sorts of situations, what are the best means to reach a determinate goal. Notwithstanding the fact that this cannot be defined as anything close to scientific truth, *phrónēsis* should put individuals in the condition to identify a goal, indisputably good and correct. As a consequence of this worthiness such pragmatic truth will have some sort of universal value, as for example that human beings seek what is good and avoid what is bad.

Both intellectual virtues could be defined as dynamic because their development strongly depends on time (education in the case of wisdom and experience in the case of *phrónēsis*), however in the perspective of the result of the application of these virtues wisdom is definitely more static. *Phrónēsis*, in fact, operates according to the

contingency typical of real life experiences; as a consequence it implies that the same "indisputably good and correct goal" cannot be reached with the same means and the same behaviours at any time and in all places.

To better clarify these concepts Aristotle refers to two concrete examples: Pericles and Socrates. The former was a model of wisdom, but certainly not a philosopher. In fact, while pursuing what he believed to be a correct and good goal, i.e. the welfare of the people of Athens, he keenly adopted the best solutions to realize this. Socrates, instead, was an authentic practical philosopher who sought human welfare regardless of the factual circumstances and contingencies.

Phrónēsis, as the virtue capable of granting individuals a degree of certainty compatible with the uncertainty of human vicissitudes, was then adopted and reinterpreted by the Christian culture.

For example, the translation of the Greek version of the Letter of St. Paul to the Romans, 12,1, New Testament, into Latin makes reference to a «rationable obsequium vestrum» which can be translated in «spiritual creed». This translation, which involved the concept of an immanent spirit, most probably inspired Locke to (controversially) entitle one of his works "Reasonableness of Christianity" where he also argued against a sharp-cut separation between faith and reason which would lead to the incapability of individual worshippers from having access to revelation by merely reading the Bible.

Partly this is also connected with Saint Augustine's distinction between *rationalis* and *rationabilis* where the first refers to rationality as a (potential) human feature, while the second is rather to be used to value the quality of actions and statements, thus qualifying reason with a divine connotation.

Rationabilis is probably the bridge that best explains how the concept of reasonableness was first conveyed into the English legal vocabulary where it is first used to define the parameter of a negligent conduct.

At this point, most probably the original Roman concept of reasonableness and that of negligent conduct take different paths. In fact, civil law systems will not adopt reasonableness as a legal criterion to achieve compensation for injuries and the same function will be carried out through the introduction of the concept of *buon padre di famiglia* (wise man) that has little to spare, from an etymological standpoint, with the idea of reasonableness.

As far as the first use of reasonableness in the field of public law is concerned, again one must look to the English common law system. Up to this very day, the principle of *reasonableness* is applied in British administrative law, where it is used as the parameter and the remedy against the abuse of discretion of public authorities (Wade and Forsyth 2004, p. 351; Leyland and Woods 2002, 256-321). More specifically, the activity of administrative bodies in the UK is bound by the doctrine of *ultra vires* of which an unreasonable conduct constitutes a violation. It should be also noted that reasonableness is the concept on the basis of which the judge decides on the substantial aspects of the administrative act. In other words this is not a procedural type of review, but rather a review of the content of the administrative decision.

The first use in administrative law of the concept of reasonableness in the British legal system is usually found to be at the end of the 16th century in the so called *Rooke's case*. In this case the Court had to decide whether the decision of the

Commissioners of Sewers (administrative body) to assess Mr Carter a fee of 8s for every acre he had adjoining the River Thames, to pay for maintaining the bank from collapsing and causing floods. They assessed him because there was an ancient prescriptive obligation of the holder of his lands to maintain the bank, but there were many landowners whose lands would be flooded, from whom the commissioners did not assess any fees at all. The Court asserted that even though the prescription existed, the statute required that the commissioners should have assessed the costs to everyone who benefited from the flood prevention, not just the bank-owner. This case is one of the earliest examples of judicial review of an administrative act and often thought to be a foundation of modern administrative law.

Reasonableness plays in this case the function underlined by the Court in the premise to the judgment: «Notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law» (Wade and Forsyth, 2004, 351), i.e. it is called to be the parameter for the review carried out by the judiciary on the discretionary exercise of power by public authorities. From this moment on the echo of this new doctrine will be found more and more frequently, not only in similar cases, such as the *Keighley's Case* or in *Estwick v. City of London,* but also in different times and context, as for example in *Leader v. Moxon*.

However, regardless of the fact that reasonableness has been used in English administrative law since ancient times, it will be redefined after World War II in a case, which is currently considered to be the cornerstone of administrative judicial review, i.e. *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* delivered in 1948. In this judgment, Lord Greene confirms that an unreasonable administrative decision has to reviewed because it represents an illegitimate exercise of discretionary power, but he also adds that «It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could have ever come to it, then the courts can interfere», i.e. he introduced the so called substantive sense of unreasonableness.

IV. From this moment on the concept of reasonableness consolidated its legal function of acting as a limit to the exercise of discretionary powers and, in the case of judicial review of administrative decisions it even incorporated the name of the Wednesbury case so as to qualify a specific doctrine, i.e. the Wednesbury reasonableness. The habit of coupling reasonabless with case titles implies strong legal consequences. For example, the fact that in *Council of Civil Service Unions v. Minister for the Civil Service* of 1985 Lord Diplock used *irrationality* as a synonym of Wednesbury reasonableness raised a wide debate among English legal scholars. In fact, other judges have underlined that overlapping irrationality to Wednesbury reasonableness is inadequate because the first means «devoid of reasons» while the other rather means «devoid of satisfactory reasons» (See for example Lord Scarman in *R. v. Secretary of state for the Environment ex p. Nottinghamshire CC* and also the opinions in *R. v. Home Secretary ex p. Brind*).

U.S. Administrative law as well provides for instruments to limit administrative discretion however it did not "import" the concept of reasonableness as a word with a specific legal meaning referring to a peculiar doctrine. On the contrary, the *Administrative Procedure Act* of 1946 rather refers to arbitrariness or capriciousness. The

arbitrary and capricious test is one of the possible schemes to follow when judicial administrative review is carried out. The structure of this test is very similar to the so-called loose rational relation test, which is one of the three tiers of scrutiny applied by the U.S. Supreme Court to constitutional adjudication, however the word reasonableness does not substantially qualify this doctrine. On the contrary, the word reasonableness is used elsewhere in the U.S. legal vocabulary, and more specifically in the case of the reasonable doubt doctrine, which is the basis for the trial by jury.

During 20th century the principle of reasonableness, as applied in Administrative law, and the idea of it being linked to the review of the exercise of discretionary power of public bodies certainly constitutes a common feature of European administrative law and, nowadays, also of global administrative law. However this same idea developed in different ways in systems that do not belong to common law.

In France, notwithstanding the fact that the word *rationalité*, and some kind of consequent principle of *rationalité*, is often mentioned in administrative law, the common law criterion of reasonableness is more often translated with the doctrine of the *erreur manifeste d'appreciation*. The latter appeared for the first time applied in relation to the *fonction publique* in 1961 in a case regarding the equivalence between jobs and school degrees; on that occasion the Council of State found *une absence manifeste d'équivalence*, in other words it found that notwithstanding the legitimacy of the discretionary power of the public administration the Court believed it was entitled to review all decisions biased by *erreurs très graves* and *évidentes*. Also in German and Spanish administrative law a similar the concept of *Zumutbarkeit* and in the Spanish legal system that of *razonabilidad* are used.

Generally speaking, in most civil law systems the administrative concept of unreasonableness is usually more related to the idea of rationality so as to mean one of the possible declinations of the abuse of power in terms of cogency of administrative bodies' decisions. In Italy, an independent type of scrutiny based on reasonableness has been developed through case law on the impulse of scholarly works that argued its autonomous relevance in respect to the doctrine of abuse of power. It should however be underlined that the Constitutional Court first introduced reasonableness in Italy as a test to review legislation by highlighting its independence from the administrative scheme of the abuse of (legislative) power by construing it on the basis of the principle of equality. This pro-activeness of the Italian Constitutional Court could be read as one of the reasons that pushed the Administrative courts to elaborate a reasonable test aimed at weighing the balance struck by the public administration between two competing values in terms of proportionality.

In conclusion, reasonableness, although extremely diverse when analysed in a wider perspective, is functional in public law to the idea of the ultimate constraint for discretion and, therefore, it is extremely adaptable as an instrument of constitutional adjudication.

V. It was just recalled how reasonableness made its appearance in the Italian legal system in the Constitutional Court case law. This doctrine puts reasonableness relation to art. 3 of the Constitution that embodies the principle of equality. This example

helps to highlight how the concept of reasonableness changed its function when it was finally adopted in constitutional law.

Before moving to the core of this section it should be noted that post WWII constitutionalism has changed the very idea of rule of law (legality) because it now implies the implementation of constitutionally entrenched values, thus requiring laws to pass not only a test of abstract compatibility with a superior and external system of rules, but also one of reasonableness. The first aims at ensuring that rules are not contradictory, while the second requires the legislator to be persuasive.

Regardless of the above-mentioned development of 20th century constitutional doctrine, the U.S. Supreme Court has carried out reasonableness tests throughout the 19th and the beginning of 20th centuries. Actually the reasonableness test was the very core of constitutional adjudication. An extensive analysis of the judgments delivered during that period of time shows how recurrent the concept of reasonable, and unreasonable, was. The Court has no doubt in affirming its exclusive competence in deciding what is and what is not reasonable, as specified by Justice Waite in *Munn v. Illinois* of 1877 «the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question». Up until 1915, with very few exceptions, the Court has very clear in mind what reasonable means: *laissez faire*. Liberalism as an ideology provides for a clear hierarchy of values and individual property stands fierce at the apex of the pyramid. In the 1915 case *Lochner v. New York* the «question of which of two powers or rights shall prevail the power of the State to legislate or the right of the individual to liberty of person and freedom of contract» is answered by the majority of the Court in accordance with the consolidated doctrine of *laissez faire*. The Court found that «There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker». However the dissenting opinion of Justice Holmes, which became very popular in the history of U.S. Constitutional law, stated that «a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez fair*e». Justice Holmes thus put an end to the rigid attitude towards the protection of the right to property.

Justice Holmes was certainly a liberal judge, in the sense that he belonged to the generation of those who were educated and believed in the liberal state, however he had a less intransigent position compared to other more conservative members of the bench. In the context of the U.S. liberal state the concept of reasonableness served so as to grant the chance for new values to be introduced in the constitutional framework. This instrument was able to cope with changes up until the ideology of the liberal state ended to leave pace to the New Deal and, after that, to a new hierarchy of constitutional values. This also led to the introduction of a new system of scrutiny and a setting aside the reasonableness test based on the due process of law clause; the first explicit sign of this change was *footnote four* Justice Stone in *United States v. Carolene Products Co* of 1938: «There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider

now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry».

The new ideology breaks through the new apical role demanded to the I amendment of the Constitution and, more in general, on the idea that the presumption of legitimacy of any law entering the scope of any part of the Bill of Rights should be decreased or even abolished, thus imposing a reversal of the burden of proof on the legislator.

Nowadays the reasonableness test can be associated to what is currently defined as loose rational relation test, a blunt scrutiny which is applied to matters regarding economic and social rights, that does not imply a reversal of the burden of proof. On the contrary, in matters such as the I amendment, due process of law, racial discrimination, etc. the Court now applies the so-called strict scrutiny.

In Europe, on the contrary, the German and Italian Constitutional Courts developed a precise doctrine of reasonableness rooted in the principle of equality. At the beginning of its activity the German Constitutional Court used the concept of *Willkürverbot* which embodied the doctrine of non arbitrariness (arbitrary classification) and required laws to have a *vernüftig* reason. However, during the 80s, the Court integrated the *Willkürverbot* thus judging not only the arbitrariness of the law, but also the concrete way it was implemented. In case of a different treatment granted to different addressees of the same law will be considered in the light of the reasonableness test. However it should be noted that the German Constitutional Court has also elaborated the proportionality test (*Verhältnismäßigkeit*) based on three conditions: *Erforderlichkeit* or *Notwendigkeit* (necessity), *Geeignetheit* (suitability) and the *Gebot des mildesten Mittels*.

The *Conseil constitutionnel*, nowithstanding the peculiarities of the French *a priori* review of legislation, has introduced both a test on suspect classifications based on public interest and one of proportionality. More specifically the latter was introduced on the basis of the limitation clauses contained in articles 8, 9, 13, 14, 17 of the 1789 Declaration of rights and as a transplant from the Administrative law doctrine of the *erreur manifeste de appreciation*.

As far as Italy is concerned, one could easily state that the *giudizio di ragionevolezza delle leggi* represents the most extensively used test by the Constitutional Court and it applies to all types of review carried out by the Constitutional Court (i.e. the review of statute law, the resolution of disputes between branches of government and between Regional and Central bodies). Reasonableness, when applied to disputes between the State, the Regions and local government translates into the well-known case law on interests and when applied to disputes between branches of government, it translates into the principle of loyal cooperation. Moreover, reasonableness is also invoked in judgments on the admissibility of abrogative referendums, which is the least

concrete of all types of review. Italian constitutional scholars have devoted a lot of effort in analysing in abstract terms the *giudizio di ragionevolezza* as a technique, trying to decide whether proportionality is one of the steps of the reasonableness test or rather an independent test. Many argue over the balancing test in the same terms. However, on the basis of these analyses the role of the word reasonableness in the constitutional context almost looses all its relevance. On the contrary, a pragmatic approach oriented to what courts decided through the application of the reasonableness test reveals that it functioned exactly as it did in the U.S. liberal state context.

An emblematic example can help clarify this point. In Italy procedures of expropriation of private property for the general interest has never resulted in a full compensation for those deprived of their property. In many decisions the Constitutional Court has argued that compensation did not necessarily had to be equivalent to the market value of the property (no. 5 of 1980 and previously no. 61 of 1957). This was justified for many years on the basis of the necessity for Italy to develop its infrastructures and the simultaneous critical financial situation of the State. However in 2006 the ECtHR decided the case *Scordino v. Italia (1)* and it clearly stated that although member states do have discretion in matter of economic rights, an extreme sacrifice of private property can be considered reasonable only as long as the state is undergoing a radical political change or structural economic reform. Italy did not comply with any of the listed conditions and was therefore declared liable. Soon after this ECtHR judgment was delivered, two similar claims were filed before the Italian Constitutional Court. Two separate decisions (348 and 349 of 2007) were delivered and both declared illegitimate any compensation in case of expropriation of private property not equivalent to the market value; however the first was based on the "Convention argument" (i.e. Italian laws cannot be in contrast with the ECHR) while the second was based on mere unreasonableness.

This very example shows how the word reasonableness, in the constitutional context, does not have a specific meaning but acts as that swinging door, mentioned in the premise, which allows new values to enter the legal system. In other words a partial compensation that had always been defined as reasonable suddenly becomes unreasonable due to the change of the position of values in the Constitutional hierarchy.

VI. Although constitutional adjudication is a common feature of the great majority of legal systems, the third section of this paper demonstrated that the word reasonableness is used in very different ways from country to country. However, differences do not only regard the formula which is used, but also what level and quality of scrutiny is required according to what area of the legal system is taken into consideration. Moreover, among the various differences, certain also regard which sectors of the law can actually be scrutinized through a reasonableness test. Even a quantitative analysis of how recurrent reasonableness is in constitutional case law reveals all sorts of different scenarios. In fact, certain legal systems seem to prefer (in quantitative terms) defining what is reasonable on the basis of the principle of equality, while others do the same according to the proportionality of the limitation imposed on individual rights.

However, all these national differences did not stop the European Court of Justice from declaring both equality and proportionality as "common principles" of the European Union.

From a strictly legal stand point this has enormous consequences in particular in legal systems that do not carry out a judicial review of legislation, such as the UK. The latter represents a perfect example of how a word that did not have a specific legal meaning, proportionality, has integrated the notion of Wednesbury reasonableness as a consequence of the incorporation of the ECHR at a domestic level. The incorporation of an international codified charter of rights implies that national laws ought to be compatible with it, as confirmed by Lady Hale in *R. (Jackson) v. Attorney- General*: «Parliament has also, for the time being at least, limited its own powers by the European Communities Act 1972 and, in a different way, by the Human Rights Act 1998. It is possible that other qualifications may emerge in due course. In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional» (par. 159). In this quotation the adjective "constitutional" is used in a way very far from the usual British tradition (Bradley 2007, 41 and particularly footnote 90).

The British case leads us to a series of concluding remarks.

«The point to stress here is that all nations have a constitution of some kind, but constitutionalism is only established in the true sense where political behaviour is actually contained within certain boundaries» (Harding and Leyland 2007, 324). In the light of this statement reasonableness is the word that best represents the *minima moralia* of constitutional law, i.e. the constraint of state powers.

On the other hand, it has been argued that reasonableness pertains to the domain of those concepts that, according to Pound's theory (supra § I), allow constitutionalism to evolve through interpretation. This has a practical consequence from the perspective of legal translation. Words such as reasonableness have been part of the legal vocabulary for a long time and applied in very different area of the legal systems (private law, administrative law, constitutional law, and so forth), moreover they also have a common meaning that derives from its everyday use, thus implicating a series of critical issues related to the stratification of meanings. In fact, reasonableness is not simply a *false friend*, i.e. a word changing its meaning depending on the context (eg. *acuerdo* which in Spanish can mean agreement, but also opinion), nor it is a legal term that has no correspondence (eg. *loi de abilitation* or *loi de orientation* as compared to the Spanish *ley de base*) but rather a multi-layered and at the same time meaningless word in the legal context.

I believe reasonableness is a good example of a word and a concept that requires a close collaboration among researchers in different fields of science. A lawyer can provide for a legal framework, for example in this paper I attempted to elaborate the legal concept of reasonableness as a swinging door to convey values through constitutional interpretation; however an expert in linguistics could give a significant contribution in terms of investigating the interactions between common language, popular culture and legal vocabulary.

In conclusion, I believe that a closer collaboration among legal experts and translators is auspicable for the same reasons, especially since, as a consequence of the deconstruction of old legal categories (particularly in the field of public law), new

concepts are introduced especially at a European level. Words such as governance, devolution, subsidiarity, proportionality appear in Italian legal texts more and more often and may times they also enter the everyday language. For example, the secessionist Italian party Northern League has campaigned in favour of "devolution", using the same word of the British laws on decentralization, but what they really meant was federalism. Where do words come from? How is this heritage to be considered when they acquire a specific sector based meaning? And how important is the type of discourse (political, legal, etc.) in which they are more often used? These questions may sound naive to experts of legal translation, but the answers could be very useful to Comparative constitutional law scholars.

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INTERPRETERS IN THE COURTROOM: THE IMPORTANCE OF COMPETENCE AND QUALITY

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Abstract: Court interpreting is becoming an increasingly important issue in Translation Studies and interpreting research. The article will be devoted to the analysis of the concepts of competence and quality and their manifestation in the court interpreter's work. It is assumed that the interpreter's competence is accomplished in three basic fields, i.e., linguistic (embracing the perfect command of the mother tongue and the foreign language), cultural (knowledge on two cultural realities) and cognitive (combining such cognitive factors as intelligence, experience, general knowledge or motivation). Quality is the concept in interpreting closely related with successful performance and communication (with all its aspects). The attempt at quality description, apart from subjective impressions resulting from our understanding of the importance of features that good – competent – translation and effective communication should have, cannot be devoid of focusing on three principal factors, i.e., the interpreter (as the text author/ producer), interpreting process and product, which is the result of this process and involvement (and competence) on the part of the interpreter. All the above aspects pose a real challenge for the court interpreter.

Abstrakt: Tłumaczenie sądowe (ustne) staje się coraz istotniejsze w badaniach nad przekładem w ogóle i tłumaczeniem ustnym w szczególności. Artykuł poświęcony jest analizie takich pojęć jak kompetencja i jakość oraz ich realizacja w pracy tłumacza sądowego (przysięgłego). Przyjęto założenie, że kompetencja tłumacza jest realizowana w trzech głównych domenach, a mianowicie językowej (obejmującej doskonałą znajomość języka obcego i ojczystego), kulturowej (wiedza dotycząca dwóch rzeczywistości językowych) oraz kognitywnej (łączącej takie czynniki poznawcze jak inteligencja, doświadczenie, wiedza ogólna czy motywacja). Pojęcie jakości w przekładzie ustnym jest ściśle związane z dobrym tłumaczeniem i skuteczną komunikacją. Próba opisu jakości powinna również koncentrować się na trzech głównych filarach tłumaczenia, a zatem na tłumaczu (jako autorze/twórcy tekstu), procesie tłumaczeniowym i jego produkcie z tego procesu wynikającym oraz zaangażowaniu i kompetencji tłumacza. Powyższe aspekty stanowią prawdziwe wyzwanie dla tłumacza sądowego (przysięgłego).

The concepts of translation competence and quality

The generally accepted definition of translation competence assumes the ability to express the source language message in the target language on all language levels, also including cultural elements present in the text or utterance. This transfer is to be accurate and should reflect the complexity of the original. In this article we approach competence as a system of knowledge (both declarative for storing patterns and rules, and procedural for storing rules, procedures and strategies; cf Sternberg 1999), mechanisms

of information processing, decision-taking, problem-solving and other cognitive factors such as memory or intelligence; moreover, culture and communication are equally important for translation performance.

The variety of approaches towards competence in translation is manifold. All of them can be slightly arbitrarily divided into a number of categories that are based on concepts significant for the operation of competence. Hönig (1991) stresses the importance of inherent and inborn translation competence, and Toury (1995) puts emphasis on inborn predispositions; Snell-Hornby (1992) focuses on the integration of culture and language in translation. Due to space limitations these approaches, vital in the development of theories on translation competence, shall be only signalled.

Hönig (1991) distinguishes between inborn translation competence understood as the activation of scenes and frames (in line with Fillmore 1977) by means of the source text and automatic linking with lexical units and syntactic structures of the target text. Thus problem-solving strategies form an integral part of all translation tasks, and for that reason inborn translation competence is (or rather should be) accompanied by strategic competence; these two create general translation competence. In Hönig's view, translation competence is transfer competence (and the very term of translation competence is restricted to the acquired strategic and general translation competence). Transfer competence should be monitored and should operate as a macrostrategy which is adopted by the translator/interpreter and refers to the entirety of the translation task in order to comply with the needs of the client or translation commissioner and with specific translation goals (which is in harmony with the functionalist approach to translation that Hönig postulates).

Toury (1995) sees competence as a realisation and effect of inborn predispositions, which results in the concept of 'native translator' (for further elaboration on the concept see Toury 1995). He also stresses that competence resultant of professional development might be related with a specific nature of translation tasks; this requires from the translator/interpreter the creation of an entire system of problem-solving strategies that might occur while translation. This system may help the translator/interpreter to avoid errors or generate such problem-solving strategies that allow to spare time and energy for more difficult elements (thus compensating, for instance, for the lack of specialist knowledge, memory load, etc.)

Snell-Hornby (1992) perceives translation competence in relation to the role of language, as it is a part of a larger realm, on which the translator/interpreter operates; other parts include general and specialist knowledge, experience and cultural competence. Thus the main objective for the translator/interpreter are not lexical and syntactic units (such as words or phrases), but texts, and translation competence is manifested in verbalisation of cultures, in which a given text is to function.

Therefore, approaches to translation competence focus on a variety of its manifestations that are considered as priority, depending on the branch of translation studies, or research interests, on which scholars concentrate. This relation might be perceived as resultant of the general concord as to their relevance for the

translator/interpreter. The presence of a number of competence elements tends to yield various component models of translation competence propounded by such scholars as Nord (1997) and her functionalist approach, and Pym with his concept of transfer competence (1992). Problem-solving strategies were the focus of competence research done by Krings (1986), Lörscher (1991, 1992), Wilss (1996), Kiraly (2000), whereas cognitive and psychological factors were strongly emphasised by Shreve (1997) and Risku (1998). Risku presented an interesting model of translation competence, in which we can observe the operation of mechanisms controlling cognitive processes in translation. She refers, similarly as Hönig (1991), to Fillmore's (1977) scenes-and-frames semantics and highlights the role of scenes in building microstrategies (i.e., strategies embracing smaller parts of the translation task) and frames for externalising information as well as their importance for the translator's self-reflection. This model embraces four synergistic fields: planning and decision making, information integration, constructing macrostrategies (for dealing with texts as a whole) and, finally, organisation.

The above deliberations allow us to postulate a number of components of translation competence, without which its operation and manifestation in a variety of realms would not be possible. These components encompass: knowledge (linguistic, extralinguistic including cultural one) and access to specialist knowledge, the ability to understand and analyse the source text, experience, professional ethics, the ability to choose one optimal option out of a whole range of possible options and a variety of cognitive factors such as intelligence, creativity, motivation, self-confidence, strategies of problem-solving and decision-making and development of automatic mechanisms. Thus competence can be reduced to the three domains: linguistic, extralinguistic and cognitive; these domains are vital and indispensable for the operation of translation competence.. The growing number of terms and definitions relating to translation competence may result in its increasing vagueness as the concept per se is extremely useful; it tends to be a cover-term for all manifestations of successful translation performance.

The aforementioned domains might be conceptually connected in order to postulate a tentative definition of translation competence as perceived in the light of this article: translation competence is a complex socially- and culturally-determined cognitive operation which allows to transform and process texts in order to transfer meaning; this transfer requires knowledge and experience. The transfer of meaning must be effective, i.e., the meaning is to be conveyed on all language levels and in all related domains. This efficiency results from the interpreter's competence that is manifested in his or her (high) quality performance.

The concept of quality has been one of pivotal issues in translation and interpreting research, and it became the focus of interest of researchers only as late as in the 1980s. The lack of a clear, unambiguous and, first of all, one definition of quality resulted in a whole spectrum of potential suggestions and postulates concerning this concept. Empirical research aiming at specification of quality and its parameters was conducted by such scholars as Bühler (1986), Kurz (1989, 1993), Marrone (1993), Kopczyński (1994), Moser (1995), Mesa (2000), Kadric (2000) or Pöchhacker (2000). What is worth noting is the fact that the research made a distinction between quality evaluation perspectives: there were interpreters themselves and interpretation users (listeners).

For the absence of space in this article we are not going to discuss the above research; their general conclusions showed that quality in interpreting tends to be evaluated rather subjectively due to various expectations of participants of an interpreting event. Nevertheless, a few criteria vital for quality evaluation might be distinguished such as clarity, accuracy, precision and sense consistency with the original message. Moreover, since quality in interpreting is viewed as effective communication (see Viezzi 1996), four main pillars responsible for its operation are (again) accuracy, appropriateness, equivalence and usability (Pöchhacker goes along the same lines and lists adequacy, accuracy, equivalence and (communicative) success as key pillars of effective and high-quality interpreting; see Pöchhacker 2002). Thus the domains of information, function, interaction and context are 'operation areas' of quality. The process of establishing or specifying standards that professionals should adopt has been changing dynamically, therefore at present it would be rather difficult to determine any binding criteria for quality assessment. This assessment seems to be based on an entire spectrum of methods that do consider varying expectations and needs of users.

In efforts aiming at defining quality we should concentrate on a triad of factors vital for successful performance, i.e., the interpreter (as the author/ producer of the text), the interpreting process and the interpreting product. The product itself is the final stage in the quality-operation mechanism as it is the stage in which quality of the interpreter's performance is revealed. This quality is the result of the operation of the aforementioned linguistic, extralinguistic and cognitive domains. The interpreting product is subject to quality-oriented assessment (including also formal requirements such as professional standards or codes of ethics in force). The interpreting process encompasses specific stages of the process (e.g., preparation for the task, information collection and research).

The notion of quality is inevitably related with standards and requirements that professional interpreters should observe. These rules – or codes of ethics – vary from one country to another, or – in case of court interpreting – from one court to another, yet there are some universal and commonly binding features that can be distinguished. An interesting distinction was postulated by Mikkelson (2000, 2008); she listed four key characteristics of professional interpreter, i.e., fidelity, impartiality, confidentiality and, finally, professional conduct.

Fidelity refers to the necessity, or rather obligation, to transfer the entire meaning of the message uttered by the speaker. The interpreter is not allowed in this sense to alter, add or omit anything contained in the utterance. This obligation is not only of professional nature but, most of all, of legal one. The text translated into the target language is to contain all elements (both linguistic such as grammatical or lexical structures, and non-linguistic such as body language, voice tone or pauses in speech) that occur in the original. Another duty of the interpreter in this respect is to report any problems with faithful interpretation (e.g. too high tempo of speech, no breaks while interpreting, too long sentences or speech fragments that are a burden to memory).

Impartiality is the feature that should be inherent to all interpreters at all times, regardless of the venue of an interpreting event. The interpreter, and the court interpreter in particular, should be impartial and neutral, and his or her personal stance on certain case-related issues should not affect his or her performance (see Gile 1995 for his term

'rotating side-taking' applied for shifting loyalty while interpreting). In court interpreting, as parties to the case might be in conflict and tend to distrust one another, the interpreter is in control of the communicative situation and must interpret everything in a precise and accurate manner so as to provide both parties with a conviction that nothing what is said and interpreted is distorted or altered.

As far as confidentiality is concerned, the court interpreter should never either disclose or take benefit of the information obtained in his or her work. This rule requires from the interpreter to avoid making any comments in public on issues or cases they are to interpret.

The last feature, i.e., professional conduct, refers to respecting the court and its protocol; it also concerns the ability to cooperate with other interpreters, providing them with support if necessary or seeking help with others. The interpreter should also be honest and perform tasks for which he or she has appropriate qualifications; if they accept a given assignment they should be adequately prepared by means of doing any necessary research and collecting vital information. This is strictly related with the obligation of every interpreter to be motivated to develop constantly and broaden their knowledge through, e.g., taking part in conferences, professional symposiums and meetings, exchanging experiences and ideas with other professionals and being up-to-date with literature on a specific field, in which they specialise.

From the above we might infer a claim that requirements concerning interpreters in general, and in the context of this article court interpreters in particular can be subsumed under the following headings: perfect command of both languages, constantly extended knowledge (general and specialist/legal), knowledge of (textual) conventions which is especially important in the very formal and formalised domain of law and, last but not least, professional ethics. Yet, for few decades now, interpreters have been facing a new challenge, namely, community interpreting. Since the area of community interpreting shall stay beyond the frameworks of this article, we will only very briefly refer to the priority of community interpreting, i.e., successful communication between parties of (unequal) status. As Garber says:

> *„The community interpreting has arisen from a completely different tradition than conference and diplomatic interpreting. In many countries, the tradition out of which the community interpreting has risen is one of social justice and equity. Underlying the development of community interpreting is the recognition that many individuals are deprived of access to services to which they are entitled because they do not speak the language of the institution or service provider*" (Garber 2000, 13).

Thus the objective here is to enable communication between representatives of (usually state) institutions and foreigners without the knowledge of a given official language. This occurs in a variety of circumstances such as welfare and healthcare centres, courts, or police, to name but a few. The role of the community interpreter assumes not only gap-bridging between various cultures and languages but also building (or re-building) relations between participants of a communicative (interpreting) event that would be based on equality. Court interpreting really does share some characteristics with community interpreting in that it is work performed, for which the interpreter is paid, and this work is done in the above mentioned welfare or healthcare centres, etc. The problem with equality-based relations on the part of the interpreters is connected with the

conviction interpreters might have at times that they are not treated as professionals, as a conviction is still well rooted among certain environments connected with the judiciary that interpreters should be passive and unobtrusive 'transmitters' of messages between two languages in a courtroom (also see Niska 1995 and 2007).

One of the features mentioned earlier, i.e. impartiality (or neutrality) of the interpreter "does not exclude having a sense of responsibility for the people one works with" (Niska 1995, 314). Professional court interpreters, apart from broad linguistic and extralinguistic knowledge that we referred to before, should also possess good communicative and technical skills (including the knowledge of a variety of techniques and strategies useful for successful interpreting performance). Undoubtedly, they are experts in communication between cultures, even if this sometimes requires interference and a dose of obtrusiveness. This is all done for the sake of effective communication. The research done by Hale (2008) showed how this effective communication may be achieved through the interpreter's adoption of certain roles. She postulated five roles the (court) interpreter may take.

The first role is the role of the advocate for the minority language speakers (MLS), in which – as MLS are not only unfamiliar with the languages, but also with the system (including the legal one) and the culture of a given country – the interpreters become advocates, and instead of interpreting alone, they rather tend to be spokespersons for MLS. The general assumption is that MLS are discriminated against by institutions of a given state and the interpreter is supposedly expected to add additional information, to moderate utterances if they are perceived as slightly aggressive, to make the speech of MLS more logical and their statements more reliable.

The second role is the role of the advocate for the institution or the service provider. While adopting this role the interpreter respects the needs and expectations of either the institution or the service provider rather than those of the client. Thus the interpreters tend to omit those fragments of MLS' utterances which they consider to be illogical, incoherent or irrelevant in connection with a particular case. Similarly, they ignore the MLS' need to understand everything what is going on in the courtroom and they do not perform whispering interpreting.

The role of the gatekeeper refers to the interpreter exceeding his or her scope of responsibilities and instead of interpreting when a question is asked and an answer given, they tend to omit vital information or provide information or advice having no proper training.

The interpreter acting in his or her fourth role, i.e., the facilitator of communication, combines roles 1 and 2 as he or she wants to offer support to both parties in the case so that they could communicate in an effective way, and they accept responsibility for achieving this purpose.

The last role of the faithful renderer of others' utterances is suggested by all professional codes of ethics. On the other hand, this faithful rendition might sometimes result in certain misunderstandings, since word-for-word translation is not faithful in the sense that it does not give the idea of the original meaning (see Mikkelson above). Professional interpreters are cognisant of nuances of meaning and of the importance of transferring culturally-rooted elements in the message. Thus the responsibility of the interpreter is to understand the intention (even implied) of the speaker and attempt at its

conveyance which would be as accurate and faithful as possible. Obviously, the result of these efforts might be perceived as subjective, therefore the interpreter should strive at being "faithful to their own interpretation of the original utterance, as that is the best they can be expected to do" (Hale 2008, 115).

The adoption of a particular role by the interpreter affects the entire interpretation process and product; it also yields consequences as to the communicative interaction between parties or participants of an interpreting event. Faithful rendition in line with Role 5 assumes efficient training and good preparation on the part of the interpreter, provided that working conditions also play a certain role and they do affect performance as well. Therefore, the more linguistically skilled, the more culturally-aware and well-trained the interpreters are, the better, more accurate and effective their performance will be.

Conclusions

Court interpreting is undoubtedly a demanding and challenging task. In some cases it is a combination of translation (should the need arise) and interpreting with all potential problems related with differences between those two modes, with differing specificities of the job, and with a variety of areas to be covered. It requires the knowledge of an entire spectrum of fields and domains, not to mention the legal one, which in this particular type of the interpreter's work is especially important. The need for constant development, improvement of one's skills and learning is a burdening task as it is to be done throughout the entire active professional life. Training and exchange of experience with other colleagues and professionals is an inherent part of this life-long-learning. The observance of formal rules cannot be in conflict with fidelity to the original meaning, and for that reason the interpreter applies a variety of translation strategies. The interpreter is always neutral (or at least tries to remain as impartial as possible) and all information obtained while performing the task is kept secret. The professional interpreter is aware of the load of responsibility for the interpreting success, i.e., effective communication which is enabled owing to his or her competence that is manifested in high quality of their performance. The above profile of the interpreter seems to be an ideal or even an idealised one, yet professionals should always strive at achieving the top possible standard in their work. This is, to a large extent, a guarantee of equality and justice in the courtroom, and thus the importance of the interpreter's competence and quality is vital.

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ПОЛЬСКАЯ И РУССКАЯ ДИПЛОМАТИЧЕСКАЯ ТЕРМИНОЛОГИЯ: ЭКВИВАЛЕНТНОСТЬ В СЛОВАРЕ И ТЕКСТЕ (НА ПРИМЕРЕ ДВУХСЛОВНЫХ ТЕРМИНОСОЧЕТАНИЙ)

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Аннотация: Дипломатический язык, как и политический язык, остается актуальной темой. К настоящему времени изменились формы дипломатической коммуникации, на первый план выдвинулись новые разновидности дипломатии. Все это, безусловно, может найти отражение в языке. Настоящая статья состоит из двух сравнительно независимых частей. В первой части автором рассматривается проблема фиксации дипломатических терминов в выбранных польском и русском словарях. Во второй части исследования предлагается общий анализ двухсловных дипломатических терминосочетаний, затрагиваются некоторые аспекты сравнительного анализа терминов на русском и польском языках, а также рассматривается употребление терминосочетаний в тексте. В приложении включена таблица *Польские и русские дипломатические словосочетания: текстовые эквиваленты*.

Abstract: Diplomatic language and political language still constitute a topical problem. Nowadays ways of communication in diplomacy have changed; new forms of diplomacy have appeared. There is no doubt that those changes find reflection in language. This paper consists of two relatively independent parts. In the first part the author analyses the problem of representation of diplomatic terms included in two selected Polish and Russian dictionaries. The second part of the paper refers to a general analysis of diplomatic compound terms, touches upon some aspects of a comparative analysis of Polish and Russian terms and compound terms in use. The appendix includes a table with *Polish and Russian diplomatic compound terms: textual equivalents*.

Введение

Предметом исследования в данной работе являются дипломатические термины. Дипломатическая лексика и шире, дипломатический язык, дипломатический стиль или дипломатический дискурс, изучены уже достаточно широко. Несмотря на это, лингвисты, терминологи, когнитивисты продолжают обращаться к разным аспектам данной функциональной разновидности языка[7]. Обращение к этой теме обусловлено как экстралингвистическими, так и

[7] За последние несколько лет написана и успешно защищена не одна диссертация.

собственно лингвистическими факторами. Экстралингвистические факторы связаны с изменениями в дипломатическом праве, а также с появлением новых способов коммуникации (например, Интернет-коммуникация). В частности, Ю. Сутор перечисляет некоторые существенные преобразования в дипломатической и консульской деятельностях:

1) возрастает роль дипломатии глав государств, премьер-министров, министров иностранных дел, и в связи с этим уменьшается роль глав дипломатических миссий;

2) в настоящее время огромное значение начинает приобретать многосторонняя дипломатия;

3) возрастает роль разного рода специальных миссий;

4) бурное развитие экономических и научно-технических отношений в современном мире приводит к перераспределению функций консулов и дипломатов (в консульствах и посольствах появляются специальные отделы, занимающиеся именно экономическими и научно-техническими вопросами) (Sutor 2008, 16-17).

К собственно лингвистическим факторам можно отнести, например, новые лингвистические теории и идеи.

Данная статья написана в рамках и в результате работы над составлением *Польско-русского словаря дипломатической лексики*. В связи с тем, что размеры публикации не позволяют рассмотреть всю дипломатическую терминосистему, предмет нашего анализа сузим до двухсловных терминосочетаний, а материал ограничим двумя типами текстов: терминофиксирующими и терминосоздающими (Лейчик 2009, 146-147). Добавим, что дипломатическую лексику будем рассматривать в синхронии.

На современном этапе развития лингвистики и терминоведения различные трактовки понятия *термин* сводятся к двум основным (по Лейчик):

1) термин – это «функциональная единица» (лингвистический подход);

2) «лексическая единица этого языка является естественноязыковым субстратом термина» (терминологический подход) (Лейчик 2009, 30).

Несмотря на различия в вышеуказанных подходах, оба они развивают мысль Винокура, высказанную им в 1939 году: «В роли термина может выступать всякое слово, как бы оно ни было тривиально» (Цитирую по: Лейчик 2009, 27).

Предметом настоящего исследования являются термины дипломатического языка как одного из языков для специальных целей. Дипломатический язык как разновидность политического языка обладает рядом особенностей. В частности, следует отметить, что политическая лексика общедоступна, понятна большинству носителей языка, не являющихся специалистами в данной области. Другая важная особенность – оценочность некоторых терминов. Нас же интересует тот факт, что ядро политической и дипломатической терминосистем пересекаются с юридической терминологической системой.

Дипломатические терминосочетания в словарях

Материалом для выборки двухсловных терминов послужил польский терминологический словарь *Leksykon dyplomatyczny*. Выбор мотивируется следующим:

1) актуальность словаря (словарь отражает состояние дипломатического права и шире проблематики международных отношений на важном для Польши этапе – вступления в Европейский Союз);

2) отражение сознания профессионала (составитель словаря – дипломат-практик и теоретик – включает в словарь выражения, в том числе и профессионально терминированные наименования, терминологичность которых осознают специалисты).

При отборе мы исключили иноязычные сентенции (чаще всего латинские или французские), собственные наименования, историзмы (отмеченные как таковые самим составителем). Таким образом, всего собрано 177 словосочетаний на польском языке. Затем в *Русско-английском дипломатическом словаре* были найдены предложенные составителями эквиваленты на русском языке. Обращение к вышеуказанному переводному словарю объясняется следующим:

1) в настоящее время это один из самых объемных переводных дипломатических словарей на российском рынке (включает в себя около 50 тысяч слов и словосочетаний);

2) широко представлена лексика по темам: «дипломатическая служба и протокол, консульская служба, международные отношения (история и современность), внешняя и внутренняя политика, вопросы военной политики и стратегии, гонки вооружений и разоружения, ООН и международные организации, международное право, дипломатическое и консульское право, вопросы международного космического, морского и воздушного права, вопросы международных экономических отношений, текущие международные отношения» (Русско-английский словарь 2006, V).

Главным недостатком рассматриваемого нами переводного словаря является фиксация актуальных и устаревших терминов без соответствующих помет. Всего было найдено 77 эквивалентов на русском языке для 177 выбранных словосочетаний на польском языке. Другие словосочетания пользователь словаря может составить сам (ср. *dyplomacja dwustronna* – см. отдельно *двусторонний* и *дипломатия*). Однако такая организация переводного словаря не обеспечивает правильного употребления терминосочетаний.

С формальной точки зрения, 88% двухсловных дипломатических терминов на польском языке представляют собой словосочетания с согласованными определениями. Подобное распределение наблюдается и в словосочетаниях на русском языке. Особо следует проанализировать словосочетания в форме множественного числа. Сутор в своем словаре фиксирует 28 терминосочетаний в форме множественного числа, для 18 терминов в русском переводном словаре также предлагаются термины в форме множественного числа. В большинстве случаев форма множественного числа отражает узус, специфику употребления лексических единиц в дипломатическом языке (например, *funkcje konsularne* –

консульские функции, *organizacje międzynarodowe – международные организации* и др.). Более того, можно говорить не только об устоявшемся, принятом употреблении, но и в определенной степени осознанном применении формы множественного числа[8]. Употребление формы множественного числа, по нашим наблюдениям, связано с семой 'несколько' или 'много' (ср. *misje specjalne – специальные миссии, funkcje konsularne – консульские функции*). С другой стороны, составители переводного словаря не всегда придерживаются данного критерия. Так, например, если в польском словаре предлагается термин *państwa progowe* в форме множественного числа, то в *Русско-английском дипломатическом словаре* фиксируется форма единственного числа *«пороговое» государство*. Кроме того, составители словаря графически (кавычками) выделяют данное словосочетание как профессионально терминированное наименование. Нами замечена и непоследовательная фиксация грамматических форм в *Русско-английском словаре*. Так, например, в одной словарной статье употребляется словосочетание *консульские ранги* в форме множественного числа, а в другой – *дипломатический ранг* в форме единственного числа.

Кроме того, наблюдается несовпадение некоторых эквивалентов в словаре и тексте. Так, если в *Консульской конвенции* и словаре *Leksykon dyplomatyczny* употребляются одинаковые термины *państwo przyjmujące* и *państwo wysyłające*, то в *Конвенции* на русском языке и *Русско-английском дипломатическом словаре* появляются различные варианты: *государство пребывания, представляемое государство* и *принимающее государство, направляющее* или *посылающее государство* соответственно.

Терминологические словосочетания в тексте

В данной работе мы остановимся лишь на одном, но исключительно важном тексте – *Консульской конвенции между Республикой Польша и Российской Федерацией*. Двусторонняя консульская конвенция является основным документом, регулирующим консульские отношения между двумя государствами, базирующимся на *Венской конвенции о консульских сношениях*. Таким образом, можно ожидать, что в этом документе, составленном на двух языках, появятся базовые термины консульского права. При отборе двухсловных (на польском языке) терминов мы руководствовались следующими критериями:

1) дефинитивность;

2) осознание терминологичности данного выражения;

3) принадлежность к официально-деловому функциональному стилю[9].

Всего было отобрано 70 словосочетаний, которые на польском языке соответствуют вышеуказанным критериям. Затем термины были разделены на три

[8] Ср. объяснение формы множественного числа термина *listy wprowadzające*: *„Liczba mnoga w nazwie wywodzi się z tradycji dosyć odległej przeszłości, kiedy listy te składały się niekiedy z kilku egzemplarzy tych dokumentów*" (Sutor 2008, 205).

[9] Подробнее о критериях выделения терминов см. *Бекишева Е.В. 2007. Формы языковой репрезентации гносеологических категорий в клинической терминологии*. Автореферат диссертации на соискание ученой степени доктора фил. наук. М.

группы: высокочастотные термины, среднечастотные термины и низкочастотные термины (см. таблица). Оказалось, что частотность как один из основных критериев фиксации в терминологических словарях лексических единиц при ориентации на конкретный текст не всегда себя оправдывает. Так, к низкочастотным терминам в анализируемой конвенции относятся не только юридические термины, но и важные собственно дипломатические термины, к тому же часто выполняющие правовую функцию (ср. *консульское агентство, генеральное консульство, консульские архивы*). Иными словами, частотность не должна быть основным показателем при анализе терминов. Это наблюдение важно учитывать при составлении терминологических текстонаправленных словарей.

Уже поверхностный анализ содержимого таблицы позволяет сделать вывод, что постулат многих терминологов[10] и переводчиков[11] о применении одного выбранного варианта термина/эквивалента в пределах одного текста в данном документе не реализуется в полной мере (например, *представляемое государство/направляющее государство – państwo wysyłające, официальная корреспонденция/служебная переписка – korespondencja urzędowa, юридическая помощь/правовая помощь – opieka prawna*). Некоторые варианты связаны с дипломатической практикой. Так, например, в современном дипломатическом дискурсе чаще всего употребляется термин *консульские отношения*, однако в наименовании *Венской конвенции* появляется словосочетание *консульские сношения*, поэтому оба эти терминосочетания должны были появиться в тексте двусторонней конвенции. Следует заметить, что частота появления одних и тех же терминов в текстах на польском и русском языках может быть нетождественна. Эти расхождения часто вызваны заменой терминоэлемента местоимением в тексте на одном языке при повторе всего терминосочетания в другом тексте.

По формальной структуре польские терминологические словосочетания в основном совпадают с текстовыми эквивалентами на русском языке. И в первом, и во втором случаях, преобладают словосочетания с именем существительным и согласованным определением (93 % для польского языка и 84 % для русского языка), при этом 14 терминосочетаний на польском языке и 15 терминосочетаний на русском языке содержат терминоэлемент *консульский/konsularny* и 7 словосочетаний с прилагательным *дипломатический/dyplomatyczny*. Мы считаем эти термины-прилагательные ключевыми лексическими единицами в дипломатическом дискурсе.

Анализ выбранных терминов позволяет отметить одну, по нашему мнению, важную особенность терминологичности выражений. Итак, нам кажется, что в сознании непрофессионалов-носителей разных языков (в данном случае польского и русского) терминологичность одного и того же термина в разных языках может быть выражена в разной степени (ср. *masa spadkowa - наследство, udziały spadkowe – часть наследства*).

Назовем еще один аспект данной проблематики, названный нами категорией понятности/интернациональности терминологии. Мы попытались

[10] Об этом подробнее см. *Лейчик 2009*.
[11] Ср. *Jopek-Bosiacka 2008*.

оценить в процентном содержании «понятность» выбранных терминологических словосочетаний на русском языке для носителей польского языка, не владеющих русским языком. Этот вопрос на самом деле является важным, ибо в польских СМИ в текстах, посвященных России, весьма часто употребляются русские лексемы в функции ключевых слов. Итак, большинство высокочастотных и среднечастотных терминов могут вызвать затруднения в понимании, однако почти 30% низкочастотных терминосочетаний могут быть поняты «без переводчика». Словами-стимулами, позволяющими правильно определить терминосистему, могут быть прилагательные *консульский* и *дипломатический*.

Вместо заключения

В настоящей работе мы попытались лишь указать на некоторые важные, по нашему мнению, аспекты сравнительного терминоведения. Так, представляют интерес исследование текстовой и системой эквивалентности, «старое» и «новое» в дипломатической терминологии и лексике вообще, частотность лексических единиц в дипломатическом языке как языке для специальных целей, осознанность носителями языка-профессионалами статуса профессионально терминированных наименований, интернациональность дипломатической лексики, сравнительный анализ степени терминологичности слов и словосочетаний в сознании носителей языков-непрофессионалов и др.

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Приложение

Таблица 1: *Польские и русские дипломатические словосочетания: текстовые эквиваленты*

Двухсловные термины в тексте на польском языке[12]	Русские текстовые эквиваленты

[12] В таблице выделены термины, встречаемые в *Leksykon Dyplomatyczny*.

1. Высокочастотные термины	
państwo przyjmujące	государство пребывания
państwo wysyłające	представляемое государство, направляющее государство (1)
urząd konsularny	консульское учреждение
urzędnik konsularny	консульское должностное лицо
2. Среднечастотные термины	
członek rodziny	член семьи
korespondencja urzędowa	официальная корреспонденция, служебная переписка
kurier konsularny	консульский курьер
okręg konsularny	консульский округ
poczta konsularna	консульская вализа
pracownik konsularny	консульский служащий
przedstawicielstwo dyplomatyczne	дипломатическое представительство
funkcje konsularne	консульские функции
3. Низкочастотные термины	
agencja konsularna	консульское агентство
archiwa konsularne	консульские архивы
dokumenty konsularne	консульские документы
dokumenty ratifikacyjne	ратификационные грамоты
droga dyplomatyczna	дипломатический путь
immunitety dyplomatyczne	дипломатические иммунитеты
immunitet jurysdykcyjny	иммунитет от юрисдикции
kapitan statku	капитан судна
konsulat generalny	генеральное консульство
kontrola celna	таможенный контроль
kontrola paszportowa	паспортный контроль
kontrola sanitarna	санитарный контроль
konwencja konsularna	консульская конвенция
kurator spadku	попечитель наследства
kurier dyplomatyczny	дипломатический курьер
listy komisyjne	консульский патент
masa spadkowa	наследство
nietykalność osobista	личная неприкосновенность
jednostka latająca	летательный аппарат
jednostka pływająca	плавающее средство
obowiązki wojskowe	воинские повинности
opłaty hipoteczne	ипотечные сборы
opłaty komunalne	районные сборы
opłaty konsularne	консульские сборы
opłaty państwowe	государственные сборы
opłaty regionalne	местные сборы
opłaty rejestracyjne	регистрационные сборы

opłaty sądowe	судебные сборы
opłaty stemplowe	гербовые сборы
opieka prawna	юридическая помощь, правовая помощь
organizacja międzynarodowa	международная организация
osoba niepożądana	неприемлемый
państwo trzecie	третье государство
pisma pozasądowe	несудебные документы
pisma sądowe	судебные документы
poczta dyplomatyczna	дипломатическая вализа
podatki komunalne	районные налоги
podatki państwowe	государственные налоги
podatki pośrednie	косвенные налоги
podatki regionalne	местные налоги
pomieszczenia konsularne	консульские помещения
postępowanie spadkowe	наследственный процесс, судопроизводство по делу о наследстве
powództwo główne	основной иск
powództwo wzajemne	встречный иск
prawa własności	право собственности
przedstawiciel dyplomatyczny	дипломатический агент
przywileje dyplomatyczne	дипломатические привилегии
skutek prawny	юридическое значение
służba wojskowa	служба в вооруженных силах
służba publczna	государственные повинности
statek powietrzny	воздушное судно
stosunki konsularne	консульские отношения, консульские сношения
świadczenia osobiste	трудовые повинности
udziały spadkowe	часть наследства
umowy międzynarodowe	международные соглашения
wody wewnętrzne	внутренние воды
wody terytorialne	территориальные воды
wykonawca testamentu	исполнитель завещания

POLYSEMY IN CONTRACTS ESTABLISHING AN EMPLOYMENT RELATIONSHIP UNDER THE LAW OF ENGLAND AND WALES – A CASE STUDY

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Abstract: In the first part of the article, by way of an introduction the unique features of the style of English legal language as well as the term polysemy from the cognitive linguistics point of view are presented. The second part demonstrates the analysis of the semantic frame of contracts establishing an employment relationship, its obligatory and optional sections (*inter alia*: *termination of employment, probationary period* and *confidentiality*). Next, the key polysemic words and expressions appearing in the contracts in question together with examples of their legal and colloquial meaning (*to terminate, a termination, to second, a remedy, to settle, to govern* etc.) are discussed. Subsequently, the paper concentrates on both polysemic words and expressions supporting key expressions as well as other polysemic expressions (*amalgamation*, *a schedule, to incorporate*) to present their meanings in various contexts. The research was carried out on ten model employment and internship contracts as well as secondment agreements under the law of England and Wales by virtue of which an employment relationship is formed.

Abstrakt: W pierwszej, wprowadzającej części artykułu przedstawiono charakterystyczne cechy angielskiego języka prawa oraz pojęcie polisemii z punktu widzenia językoznawstwa kognitywnego. Druga część artykułu dotyczy analizy ramy semantycznej umów, na mocy których powstaje stosunek pracy, jej elementów obligatoryjnych i fakultatywnych. Następnie przedstawione są wyrażenia polisemiczne występujące w tego typu umowach wraz z przykładami ilustrującymi ich wieloznaczność. Wyrażenia polisemiczne zostają podzielone ze względu na funkcję, którą pełnią w umowie (wyrażenia będące częścią normy prawnej, wyrażenia występujące w przepisie prawnym oraz pozostałe, pojawiające się m.in. w definicjach czy nagłówkach). Wyniki badania wskazują na to, że większość wyrażeń polisemicznych stanowi element normy prawnej oraz, że niektóre z badanych wyrażeń stanowią nie tylko termin prawny, ale równocześnie są też fachowymi terminami medycznymi i lingwistycznymi. Badanie zostało przeprowadzone na 10 wzorcach umów o pracę, umów o praktykę oraz umów o przeniesienie, stanowiących typowe umowy rodzące stosunek pracy.

English legal language

The legal language of every legal system differs significantly from everyday language used by non-lawyers. What is more, there exists also the distinction between the normative language (język prawny) and the language of the jurists (język prawniczy). It

is vital to separate the *legal language* from *judicial languages*, the latter being languages used during legal proceedings such as trials, questioning, etc. (Witczak 1996, 413).

Legal documents have everything to do with culture. They are pregnant with it, which is especially true for documents from countries with different legal traditions (Obenaus 1995, 249). As a consequence, comparing legal languages bound to legal systems belonging to different legal traditions may lead to what Smith describes as "culture clash" (Smith 1995, 179).

Each legal system "has a vocabulary used to express concepts, its rules and arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of law in that society" (David and Brierley 1985,19).

The following general characteristics of English legal language were formulated by Witczak-Plisiecka (Witczak-Plisiecka 2004): some words common in language acquire special technical meaning when used within the system of law; wide retention of archaic relicts (usually Norman French or Latin) and formal old-fashioned words to create specialised terms and formal old-fashioned words (e.g.: high frequency of deictic words and expressions; specific, or even unique, use of English modal verbs, especially of *shall* which in English legal writing has been traditionally used with the directive function); unique features of style (such as very long sentences containing numerous provisions, action rules, stipulation rules, definition rules, complex nominal and prepositional phrases and a higher frequency of using passive voice and the language aiming at being impersonal, precise, rational, authoritative, decontextualised).

Polysemy

In accordance with the list of terms constituting the appendix of „Lectures in Cognitive grammar" by Langacker, polysemy is the phenomenon where two or more semantic values have the same phonological representation. It may seem that every notional category is represented by one language category – one word and that one word represents one notional category – one meaning. But words have usually more than one meaning. A word which has several different meanings combined with one another is a polysemic word (Tabakowska 2001, 46).

Polysemy "the association of two or more related senses with a single linguistic form" (Cuyckens and Zawada 1997, xi), is ubiquitous in natural language and therefore deserves linguists' attention. Although the importance of the question of polysemy for the semantic study of language was already recognized in the historical-philological tradition, it is not until recently that polysemy has become a central issue again in linguistic semantics. Polysemy has certainly become a core area of study in cognitive linguistics (Cuyckens and Zawada 1997, xi).

The importance of the study of polysemy is, evidently, not confined to the field of cognitive linguistic semantics. Indeed, polysemy has also received considerable attention in psycholinguistics, in cognitive psychology and in artificial intelligence and computational linguistics. For computational linguistics in particular, polysemy continues to present a real challenge, in that word sense identification/disambiguation in natural

language processing is still not unproblematic. It seems safe to say "that the study of polysemy is of fundamental importance for any semantic study of language" (Cuyckens and Zawada 1997, xi).

Research

The objective of the paper is to examine the functions (in a contract) and meanings of legal terms constituting polysemic expressions appearing in contracts establishing an employment relationship. The research was carried out on ten model employment and internship contracts as well as secondment agreements under the law of England and Wales by virtue of which an employment relationship is formed. Methodologically the research is based on the cognitive linguistic approach which views polysemy as a normal, expected state of affairs in lexical semantics (Taylor 2003, 36). Components of the contracts in question are as follows:

1. name of contract
2. name and data of company, data of employee
3. start date and duration of contract
4. termination of employment relationship
5. probationary period (optional component)
6. job title and duties

6a. secondment (only in secondment agreements)

7. place of work
8. remuneration
9. expenses incurred by employee
10. working hours
11. holidays
12. company sick pay or statutory sick pay
13. prohibition to work in any other company or in any other company competing company in relation to the company/ obligation to notify about any other work
14. confidentiality
15. disciplinary and grievance procedures
16. collective agreement (optional component)
17. personal data protection
18. final provisions
19. positions of parties, signatures

In the chart below there are listed polysemic words and expressions appearing in contracts establishing an employment relationship, being characterised according to their function in a clause. Key words and expressions constitute a crucial part of a legal norm (hypothesis, disposition and sanction), supporting ones occur in the articles but do not create a legal norm, other polysemic words and expressions appear in definitions, headlines etc. The function of a given expression in a clause was consulted with lawyers. Polysemic key words and expressions are marked with number one, polysemic words

supporting key words and expressions – number two, other polysemic words and expressions – number three.

No.	Word or expression	Contract component	Function/significance
1.	to incorporate	2.	3.
2.	to terminate/termination	4.	1.
3.	to expire/expiration	4.	1.
4.	to breach/a breach	4.	1.
5.	to second/secondment	6a	1.
6.	a schedule	18.	3.
7.	a provision	all	3.
8.	a benefit	8.,12.	1.
9.	a notice	4.,18.	1.
10.	to remedy/a remedy	4.	2.
11.	an amalgamation	4.	2.
12.	an amalgamation	--	3.
13.	to authorise/authorisation	6a.	2.
14.	to govern	18.	1.
15.	to settle/a settlement	18.	1.

From the chart above, it can be stated that key words and expressions constitute more than 53% of polysemic words and expressions occurring in the contracts, while supporting and other polysemic ones make up only approximately 20% and 26% respectively. Most of polysemic words and expressions (50%) appear in the contract clause concerning termination of an employment relationship and (36%) in final provisions. Significantly fewer polysemic expressions appear in the remaining contract components. On the basis of the short analysis, it would seem that polysemy is the characteristic of the expressions constituting a legal norm. Furthermore, the results indicate that in one of the indispensable provisions of a contract (concerning its termination) the phenomenon of polysemy is the most frequent.

Presented below are the examples of the meanings of the polysemic words examined. Starting with the legal meaning, the paper subsequently shows their various meanings in other branches i.e. medicine and linguistics.

1.to incorporate

Legal term:

The agreement was made on X between Y a company incorporated in England and Wales.

Incorporating a small business has been faster, easier or more affordable.

Colloquial meaning:

The Union Government, however, had military necessity and economic reasons to incorporate the territory into the Union after the war.

Agencies must incorporate the plan/schedule in their 2005 Technology Plan.

When buying a home, you cannot incorporate a car loan into the mortgage loan.

2. to terminate, termination

Legal term:

Either Party A or Party B may terminate this Agreement on the expiry of not less than X month(s) prior written notice given to the other.

Nothing in this clause gives you any rights to continuation of existing benefits following termination of your employment.

Medical term:

Recently, several authors have reported the use of misoprostol to terminate pregnancy.

As the numbers show, there are many women who decide that a termination is the best option in their circumstances.

Colloquial meaning:

X terminates merger discussion with Y.

This train terminates in Oxford.

The deadline for this translation terminated on 3 February 2007.

Linguistic term:

-tropism(-tropism) is a word termination affixed to a stem denoting the nature of the stimulus (phototropism) or the material or entity for which an organism or substance shows a special affinity (neurotropism), usually applied to nonmotile organisms.

3. to expire, expiration

Legal term:

This act expires July 1, 2014.

He has no reasonable expectation of continued employment beyond the expiration of his contract on August 31, 1979.

Colloquial meaning:

The trial version of X Application Server V6.0 Plug-in Edition license will expire 60 days after the first invocation of Plug-in utilities.

He/she will be the keeper of the corporate seal and at the expiration of his/her term of office turn over all items and properties belonging to the club to his/her successor.

He is a Class III director and his term expires in 2010.

Medical term:

The patient expires into the reservoir tube. Toward the end of expiration, the bag fills and positive pressure opens the valve, allowing expired gas to escape.

A spirometer can measure the volume of expired air before and after exertion.

Expiration is the act of breathing out, or expelling air from the lungs.

In contrast, all eight untreated rats expired before the cocaine infusion was complete.

Nursing staff in attendance at the time of patient expiration should notify the house staff officer.

4. a breach

Legal term:

During the continuance of this Agreement Party B shall not do or omit to do anything which would cause Party A to breach any of its obligations to the Employees.

Either party has the right to terminate this Agreement forthwith and without liability by notice in writing if the other party commits a material breach of any of the provisions of this Agreement and fails to remedy such a breach within seven days of

receiving a written request from the innocent party specifying the breach and requiring it to be remedied.

Colloquial meaning:

The report indicated that a competitor may have committed a gross breach of good manners and sportsmanship.

Less than three months ago-in the immediate aftermath of the breaching of the Berlin Wall –the Chancellor's closest aids were predicting that five to eight years may still be needed before unity become a reality.

X ends breach in relations with Y.

A claim for breach of confidence will arise if (a) the information concerned has the necessary quality of confidence; (b) it is communicated in circumstances imposing an obligation of confidence; and (c) there has been an unauthorised use of the information to the detriment of the owner.

5. to second, a secondment

Legal term:

XXX means those employees employed by Party A who are to be seconded to Party B.

Party A will second the Employees to Party B.

Party B may notify Party A that it requires further or additional services to be provided in which case the Schedules may be varied by agreement to provide for further secondments and/or the provision of further or additional services.

In 1997, he was seconded for twelve months to the United Nations Police in Bosnia and Herzegovina.

During his secondment Michael will return frequently to New Zealand, keeping in touch with the New Zealand firm and clients.

Colloquial meaning:

Member X seconded the motion.

Mr. X proposed speaking rights for the observers. Mr. Y seconded him.

One day one of his friends asked him to second him in a fight.

6. a schedule

Legal term:

The names are set out in Schedule A.

In such a case the Schedules may be varied by agreement to provide for further secondments.

Colloquial meaning:

The official schedule is the printed version available from the Secretariat of the Commission.

7. a provision

Legal term:

Either party has the right to terminate this Agreement forthwith and without liability by notice in writing if the other party commits a material breach of any of the provisions of this Agreement.

Either party has the right to terminate this Agreement forthwith and without liability by notice in writing if the other party commits a material breach of any of the provisions of this Agreement and fails to remedy such a breach within seven days of receiving a written request from the innocent party specifying the breach and requiring it to be remedied.

What were the exact provisions of the treaty of Tokyo?

Be sure to consult an attorney to make sure you include all the necessary provisions in your license agreement.

Colloquial meaning:

The European Commission has adopted a proposal on the provision of food information to consumers.

Effective joint working between the X and local authorities is essential to ensure the provision of high-quality community equipment services.

8. a benefit

Legal term:

Party D shall continue to pay to the Employees their salaries and other **benefits** in accordance with their contracts of employment.

Colloquial meaning:

He gives me the benefit of his advice.

9. a notice

Legal term:

Either party has the right to terminate this Agreement forthwith and without liability by notice in writing if the other party commits a material breach of any of the provisions of this

Colloquial meaning:

Later in the day a notice was hammered to a tree.

10. a remedy, to remedy

Legal term:

Either party has the right to terminate this Agreement forthwith and without liability by notice in writing if the other party commits a material breach of any of the provisions of this Agreement and fails to remedy such a breach within seven days of receiving a written request from the innocent party specifying the breach and requiring it to be remedied.

How to remedy infringement of contract agreement?

Colloquial meaning:

The reason why the daily seafood diet is such a powerful remedy for many kinds of cancer and so many 'incurable' diseases is very simple.

Summit produces plan to remedy deficiencies in the care of cats.

11., 12. an amalgamation

Legal term:

Either party has the right to terminate this Agreement forthwith and without liability by notice in writing if the other party enters into liquidation either compulsorily or voluntarily (save for the purpose of reconstruction or amalgamation without insolvency).

Amalgamation which allows two or more companies to merge into one of the companies or form a new company is a major amendment to the Companies Act 2005.

Colloquial meaning:

It is difficult for several tenaciously observed traditions to exist in each other's presence without some degree of amalgamation.

13. to authorise, an authorisation

Legal term:

Neither party shall have authority or power to bind the other, to act as agent of the other or to contract in the name of or create liability against the other in any way or

for any purpose save as expressly authorised in writing by the other from time to time.

I hereby authorise you to disclose information relating to me to the Dealer / Vendor.

Colloquial meaning:

I understand that the interview(s) or photo session(s) are being carried out upon my consent and authorization.

14. to govern

Legal term:

This Agreement should be governed by, construed and take effect in accordance with English law.

Contracts for sale involving goods are governed by Article 2.

Colloquial meaning:

The Parliament governs the country.

These are the immutable laws the govern the cosmos.

How do genes govern personality?

Govern Your Temper!

Linguistic term:

A transitive verb governs a noun in the objective case.

15. to settle, a settlement

Legal term:

The courts of England shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of or in connection with this Agreement (including, without limitation, claims for set off or counter-claim) or the legal relationships established by this Agreement.

Under the terms of the settlement, X will receive a cash payment.

Colloquial meaning: (several meanings, *inter alia*:)

He settled comfortably into his big chair.

Emigrants from Italy in the earliest period of emigration settled in New Orleans.

In this book the territorial restrictions on the settlement of Jews in the Russia Empire are discussed.

From the examples above, it can be concluded that more than 14% of polysemic expressions examined constitute simultaneously legal, medical as well as linguistic terms. Expressions functioning as legal and medical or legal and linguistic terms make up 7% of expressions in question each. On the basis of these findings, it can be stated that different meanings of legal terms being polysemic expressions hardly ever function in more than one scientific branch (e.g. law and medicine).

Summarising, the results of the research indicate that the words and expressions constituting a crucial part of a legal norm make up more than a half of polysemic words and expressions occurring in the contracts establishing an employment relationship under the law of England and Wales. Moreover, interestingly, different meanings of legal terms being polysemic expressions sometimes function in more than one scientific branch e.g. the expression *to terminate/termination* is simultaneously a legal, medical and linguistic term.

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SIGN CHARACTER OF THE EXPONENTS OF MODALITY IN A LEGAL TEXT

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Abstract: The thesis of this article is that the texts of legislative acts represent the most natural speech. Legal language becomes complete in depicting the world as well as in expressing the will of a legislator and his attitude to what is said by him, both on deictic and symbolic level. Informality in legal language is a desired feature – working on the assumption that an ordinary ethnic language is correctly interpreted.

Abstrakt: W artykule stawia autorka tezę, że model języka aktów normatywnych ma charakter naturalny. Wychodząc od Bühlerowskiej teorii konstrukcji świata w płaszczyznach deiktycznej i symbolicznej etnicznego języka potocznego twierdzi, że zarówno deiktyczny świat przedstawień, jak i symboliczny świat woli ustawodawcy, są wpisane w potoczny model komunikacji językowej, a ustawodawca wskazuje w akcie stanowienia normy prawnej – jak w sytuacjach dnia codziennego z pozycji egocentrycznej – status obowiązków adresata i zarazem uprawnień recipienta działania ustanowionego normą wysłowioną w przepisach prawnych. Metatekstowa rama („ustanawiam") konstruuje obraz świata norm prawnych z pozycji psychologicznego źródła wypowiedzi („ja") organizującego podstawową (pierwotną) funkcję adresatywną sfery odniesienia przestrzennego („to" – „ten" – „tamten") i organizuje relację należności i powinności, które rządzą konstrukcją ustanowionego świata norm. Wypowiedź ustawodawcy symbolizuje wskazane podmioty oraz wskazany przedmiot regulacji prawnej i jest modalizowana deontycznie, jak w art. 356 § 1 k.c. – np. *wierzyciel* („tamten") *może żądać* (orzeczenie modalne) *osobistego świadczenia* („to") *dłużnika* („ten"), co odczytuje się także, że dłużnik („ten") powinien świadczyć (orzeczenie modalne) osobiście na żądanie („to") wierzyciela („tamten"). Autorka uzasadnia, że błędne jest twierdzenie, jakoby system języka dopuszczał nieprecyzyjne wysłowienie intencji ustawodawcy. W systemowym odniesieniu znaków językowych wypowiedź prawna nie różni się od wypowiedzi potocznej i uwzględnia eliptyczny charakter języka etnicznego. Tekst aktu prawnego może być natomiast nieprecyzyjnie rozumiany lub różnie interpretowany – podobnie jak wypowiedzi potoczne – gdyż naturalną jego właściwością jest eliptyczność wypowiedzi wymagająca interpolacji brakujących składników w odbiorze i redundantność znaków języka, których referencję zapewnia nadawca tekstu.

Object world in colloquial and in legal language

According to the theory of Karl Bühler the structure of the world in language shows itself on two levels: deictic and symbolic. The imperfection of language, according to this psychologist and philosopher, lies in the fact that one word is used to depict several things. Multiplicity of depictions allows one in return to see or to imagine some things from different points of view.

Language skills are realised through statements, questions and commands due to a speaker's will and the perceptive ability of a recipient. Change in language efficiency always includes a particular change of a depiction of the world understood as a whole, signalised through individual attitudes of the speakers. Language is not only an organ of cognition - Bühler states further on – but also provides us with an impulse to several actions, stands between reality and people, distorts and reshapes the heart of the matter.

The world of depictions, according to K. Bühler's theory of language, is an intentional use of language signs, which serve as a symptom from the position of a speaker, as a signal from the position of a receiver and as a symbol from the position of the phenomena of the outside world. The real world – objects, actions and relations between them – is depicted deictically and symbolically with the use of two categories of signs in an ordinary language, namely a dictionary and a grammar. Grammatical rules of an ordinary ethnic language as well as specialised vocabulary of a legislatively regulated branch of science or technology are the means to create an object notion in the world of law. Language of legislative acts is, by genre, a legislative and specialised language and this is what singles it out as a functional variety of an ordinary language, which is stylistically marked.

Deictic world of depictions

Deixis is a demonstrative expression from the point of view of a speaker, which is an inherent part of the model of language communication. An analysis of a utterance requires considering
contexts, in which demonstrative words act as signals. Keeping in mind the psychological rudiments of types of demonstrative utterances typical for the languages belonging to the European culture, Bühler assumes four categories of *deixis*: the first – "ja" ("I"), the second – "ty" ("you"), the third – ten ("this")/"to" ("it"), the forth – "tamten" ("that"). These types of demonstrative utterances create a system – realised in a text in various ways. Positional values of language categories introduced in situational context give an ordinary depiction of a reference for the perceptive purposes in primary use – the so-called dramatic utterance, different from the epic utterance in narrating happenings of the past. In situations of every-day, "I" and "you" indicate agents of different roles in the process of speaking; "this" indicates a person in the area of surrounding environment; "that" in an opposition to "I" and "this" considers the area beyond the borderline, beyond a zone which is psychologically perceived as a dividing line.

According to K. Bühler, deictic expressions are signals and also symbols with regard to sensually perceivable components of situations. Communication which is poor in vocabulary is not primitive, but it constitutes a "refined elliptic speech", which specifies and defines words with the use of positional values of syntactic structures.

In the language of law the world is seen from the perspective of human actions, which are regulated by a legislator through socially authorised legislative acts. With relation to the object world, communicated and perceived in every-day language behaviour, it is much more limited. Language signs are assigned to objects and states of things not in the object world, but in the virtual world of relations and legal, thetical norms. This world is constructed both of an egocentric world of always the same person,

a legislator, and the outside world of objects and states of things within social relations created only on account of norms constituted by legislative bodies of a state. It lacks the deictic category "ty" ("you") because legal articles in the text of an act are directed not to someone, but for someone. A meta-textual framework fundamentally changing the sense of a utterance – verbalised or only intentionally transmitted by the author of a text – transforms the heart of the matter in an act of communication. "To" ("it") indicates the object of regulation; "ten" ("this") – is always the recipient of a norm verbalised in a legal text; "tamten" ("that") – is a recipient of an action constituted by a legal article, someone absent, but also present within the scope of awareness.

Legal articles are verbalisations of instructions and circumstances of the period when an article is legally binding. While the intention of a legislator is constituting the law, in ordinary language a communicative intention could be – depending on a situational context – a statement, a command, a question, etc. The world of a text becomes fulfilled on three levels: of depiction, of expression given from the point of view of the speaker, and of an appeal from the point of view of a recipient of the text. In a situational context the positional values of the categories give an ordinary depiction of references only in performative dramatic speech. Similar composition is typical of quasi-legal ordinary utterances.

The symbolic world of will

Entirely symbolic is the second level of a utterance. This level in ordinary ethnic language presents the subject of cognition. In the language of law, it presents mainly the subject of regulating people's deeds. Therefore, it intermediates in a different way between reality and people, it transforms the reality and provides an impulse to act.

Ordinary way of reference introduces symbolic language signs into the situational contexts of so very different acts of speech. Their meta-textual framework constructs a depiction of the world signified through disparate attitudes of the speakers. Symbolic value of deictic expressions becomes intensified when their syntactic position in a statement is taken by naming expressions: proper names or common names, eg.: "ja" ("I") – a teacher; "ty" ("you") or "ten" ("this") – Jack, a student; "tamten" ("that") – Charles, a colleague; "to" ("it") – a book. These expressions, inscribed in a situational context from the point of view of a speaker, arrange themselves in the following syntactic pattern: [=Ja mówię, że] ten daje tamtemu to – tamten bierze to od tego. / [= I say, that] this gives it to that – that takes it from this. This pattern indicates the agents in the process of speaking:

(1) [Opowiadam / twierdzę, że:] Jacek dał Karolowi książkę, a Karol wziął książkę od Jacka.
[I say / claim, that:] Jack gave Charles a book, and Charles took a book from Jack.
[Opowiadam / twierdzę, że:] Uczeń dał koledze książkę, a tamten kolega wziął książę od tego ucznia.
[I say / claim, that:] A student gave a colleague a book, and that colleague took a book from this student.
(2) [Pytam, czy:] Ty dałeś koledze książkę, a tamten kolega wziął książę od ciebie?
[I ask if:] You gave this colleague a book, and that colleague took a book from you?

(3) [Nakazuję:] Ty daj koledze książkę, a tamten kolega niech weźmie tę książę od ciebie.

[I order:] You give this colleague a book, and let that colleague take this book from you.

(4) [Ja, nauczyciel, postanawiam:] Uczeń może dać koledze książkę, a tamten kolega niech bierze książę od tego ucznia.

[I, the teacher, decide:] A student can give a colleague a book, and let that colleague take a book from this student.

Examples 1-4 show a structure of the object world inscribed into the model of language communication taking into account an entire system of reference in a concrete text realisation. Yet they present artificial syntactic creations. In every-day use of language a speaker is required to apply syntactic ellipsis, which results in utterances logically incomplete and a recipient has to guess the missing components, drawing on his own knowledge and communicative competence.

A meta-textual framework classifies a utterance as a narrative or a statement being the epic utterance (1) or as a question, an order or a decision being the dramatic utterance (2-4). A special type of an act of speech is the performative use of language (4), in which a speaker with the use of words constitutes the state of binding of that, what has been said. A performative act of speech is of a creative nature with relation to extra-textual reality through an authorised person.

It is not difficult to notice that a legal utterance differs from an ordinary utterance exactly in that, that its meta-textual framework is always performative. Since in this type of a utterance a personal diacrisis directs the attention of a recipient to an individual signal of a speaker, understood as an attribute of legal authorities, eg.:

> Wierzyciel może żądać osobistego świadczenia dłużnika tylko wtedy, gdy to wynika z treści czynności prawnej, z ustawy albo z właściwości świadczenia. (art. 356 § 1 k.c.)
>
> A creditor can demand a personal testimony from a debtor only when it results from the contents of legal measures, from a legal act or from the property of a benefit.

This legal act should be read with a supplement:

> [*Ja, ustawodawca, stanowię:] Wierzyciel może żądać osobistego świadczenia dłużnika tylko wtedy, gdy to wynika z treści czynności prawnej, z ustawy albo z właściwości świadczenia.
>
> [*I, the legislator, decide:] A creditor can demand a personal testimony from a debtor only when it results from the contents of legal measures, from a legal act or from the property of a benefit.

Signified by a performative framework the psychological source of a utterance ("ja", ang. "I") organises the primary addressive function of its spatial reference ("to", ang. "it" – "ten", ang. "this" – "tamten", ang. "that"). Through a personal attitude to that, what is verbalised in a text, organises also the relationship of responsibilities and obligations, which govern the construction of a constituted world of norms verbalised in a

text. Since the subject of regulations is an authorisation ("to" – *osobiste doświadczenie*, ang. "it" – *a personal experience*) reserved for a recipient ("tamten" – *wierzyciel*, ang. "that" – *a creditor*) and at the same time on this account in the proceedings also an obligation of the addressee ("ten" – *dłużnik*, ang. "this" – *a debtor*). Actions of both these subjects of a legal norm are modalised deontically through lexical exponents *może – powinien*, ang. *can – should*, or their textual equivalents, such as *ma prawo żądać – świadczy*, ang. *has the right to demand – testifies*, and the like.

A speaker, a recipient and a subject of communication determine the backgroung of a utterance – a situation of constituting and binding of that, what is constituted as a relationship of right and obligation. If on this background appear names (*a creditor*, *a debtor*, *a personal benefit*) – they are significant names – they symbolise signified subjects and a signified object.

In a type of a legal text the intension to constitute does not come from the contents of words. A text allows one to draw conclusions about the will, the power and the competence of a legislator from the fact that it is announced in certain media (eg. in "Dziennik Ustaw"/"Journal of Law of the Republic of Poland" or in "Dziennik Urzędowy"/"Official Journal"). It informs indirectly about the speaker, but it does not announce him. It is a symptom of a cultural activity which links a legal body with every recipient, even the one who does not necessarily understands the contents of a text. A psychological reaction of a recipient is to receive the characteristic of the text as legally binding.

Deontic modality

Deictic and symbolic world of depictions does not determine particularity of a legal text. What differentiates the legal functional style is restricting the perfomativeness of a utterance to the power to constitute legal thetical norms as well as restricting deontic modality to classification of proceedings, which a legal article directs to an addressee of a norm and to a recipient of an action constituted by this article – proceedings being relatively a subject of obligation and entitlement in the world of virtual legal relations. Legal articles are deontic sentences, communicating that a given person is obligated to carry out a given action in given circumstances, and another person is allowed to keep indifferent to this action.

Modal predicate is the centre of a legal utterance, but this centre is inscribed into the background of a deictic plane. Utterances communicate a certain attitude of a legislator to the expressed contents of a text, namely the attitude to the relation of duty – obligation in legal relations through assigning a modal qualification of duty of an addressee of a norm and an entitlement of its recipient, therefore if:

> Wierzyciel może żądać osobistego świadczenia dłużnika,
> A creditor can demand a personal testimony of a debtor,

it also means, that:

> *Dłużnik powinien świadczyć osobiście na żądanie wierzyciela.
> *A debtor should testify in person on demand of a creditor.

Modal expression in legal text does not differ in interpretation from an expression in ordinary language, if we consider the systematic reference of signs. The exponent of modality in a full situational context is specified similarly, through the use of the *deixis* category "tamten" – "ten", ang. "that" – "this", like *wierzyciel – dłużnik*, ang. *creditor – debtor*. A symbolic sign consisting of an auxiliary verb (*może,* ang. *can*) and an infinitive (*żądać*, ang. *to demand*) is a connotation of a real subject of a legal regulation "to" (*osobiste świadczenie*), ang."it" (*personal testimony*), is also a connotation of not only the subject in his own environment (*wierzyciel*, ang. *creditor*), who has the right to a supposed action (*może żądać*, ang. *can demand*), but at the same time it is a connotation of an absent, omitted on the principle of ellipsis, an obligated subject (*dłużnik*, ang. *debtor*), who must carry out that supposed action (*powinien świadczyć osobiście*, ang. *should testify in person*). In the elliptic form of the article of course only a part of this communication is verbalised.

Redundancy of the signs of legal modality

It is a misconception that in legal language the verbal signs which determine the attitude of a legislator to what he constitutes are not precise – they are only misunderstood because of the lack of knowledge and understanding of the deictic system of an ordinary language, and less often imprecisely communicated. The attitude of a legislator to what is being constituted is being expressed in the aspect of actions, states of things and phenomena in terms of a method in which they must or can exist in a language communication pattern which takes into consideration systematic categories of *deixis*. Full information would require a legislator to indicate two subjects of a legal norm and at the same time a real object of a legal regulation, from the point of view of obligations and entitlements of the subjects, as well as from the point of view of a necessity of action by one subject and a possibility of indifference to this action by the other of the two subjects. Therefore information is given in several articles complementing one another, see: an analysis of examples from the legal act Prawo prasowe (ang. Press legislation), in which the stylistic varieties of modal predicates would be possible:

> Art. 11. 1. Dziennikarz jest uprawniony do uzyskiwania informacji w zakresie, o którym mowa w art. 4.
>
> dziennikarz jest uprawniony do uzyskiwania informacji
może/ma prawo uzyskać informację } equivalent utterances
>
> [= dziennikarz może uzyskać informację z racji swojego uprawnienia i zarazem obowiązku innej osoby]
>
> Art. 15. 1. Autorowi materiału prasowego przysługuje prawo zachowania w tajemnicy swego nazwiska.
>
> autorowi przysługuje prawo zachowania
autor może zachować
ma prawo zachować } equivalent utterances

[= autor może zachować (to w tajemnicy) ze względu na prawo, które mu przysługuje z racji jego uprawnienia i zarazem obowiązku innej osoby]

Art. 15. 2. Dziennikarz ma obowiązek zachowania w tajemnicy:
1) danych umożliwiających identyfikację autora materiału prasowego…

dziennikarz ma obowiązek zachowania
powinien zachować
zachowuje
} equivalent utterances

[= dziennikarz powinien mieć obowiązek zachowania (tego w tajemnicy) z racji uprawnienia do zachowania (tego w tajemnicy), które to uprawnienie przysługuje innej osobie]

Art. 11. 1. A journalist is entitled to obtain information within the scope defined in art. 4.

a journalist is entitled to obtain information
can/has the right to obtain information
} equivalent utterances

[= a journalist can obtain information due to his entitlement as well as due to another person's obligation]

Art. 15. 1. An author of a press material is entitled to keep the right to maintain confidentiality of his name.

*an author is entitled to keep the right to maintain
an author can maintain
has the right to maintain
} equivalent utterances

[= an author may keep (it confidential) because of the right which he is entitled to due to his entitlement as well as due to another person's obligation]

Art. 15. 2. A journalist is obligated to keep confidentiality of:
1) any information which would allow to identify an author of press material...

a journalist is obligated to keep
should keep
keeps
} equivalent utterances

[= a journalist should be obligated to keep (this confidential) due to the right which he is entitled to, to keep (it confidential), which is the right of another person]

In formulating a legal norm it would seem logical to use every time all deictic exponents and modal predicates applied to them. But it does not happen in this way because of a language custom which implies omitting redundant information – a text of a legal act which would list all objects would be artificial as well as absolutely incorrect and incomprehensible. In whatever manner a legal article is formulated, it always communicates the necessity of an obligatory action of an addressee of a norm, as well as an indifferent action of a recipient and at the same time the predispositions of both the subjects to the particular action. Moreover, a legislator most often specifies only one thing – and this also following different rules of an ordinary language.

Words examined within the syntactic framework of a sentence symbolise the attitude of a legislator to the constituted subject, or to the person of an addressee of a norm verbalised in a text, or to its recipient. Therefore predicates *powinien / może czynić*, ang. *should / may act* pronounce the modality of an action of a subject ("to", ang. "it"), which is a problem to be resolved on the basis of a norm verbalised through a legal article – at the same time indicating an addressee of a norm ("ten", ang. "this") or a recipient ("tamten", ang. "that"). Whereas predicate *ma obowiązek czynić*, ang. *he is obligated to act* pronounces the predisposition of an addressee of a norm ("ten", ang. "this"), and predicate *jest uprawniony (do czegoś)*, ang. *is entitled (to something)* pronounces the predisposition of a recipient ("tamten", ang. "that").

Deontic modality organises the reference of language signs used by an author who composed a legal act. The way of depicting and communicating through words and through context fulfils the goal of influence of a legal text on interpretation and evaluation of actions by an addressee of a norm and by its recipient. The words of a text have the power of assigning only two things to actions and states of the subjects – the status of necessary obligations and at the same of possible entitlements.

DEONTIC MODALITY AND MODALS IN THE LANGUAGE OF CONTRACTS

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Abstract: The purpose of this paper is to present most typical methods of expressing deontic modality, namely obligation, prohibition and permission in Polish, American and British contracts. The author has analyzed the corpora of about 45 contracts formulated in British-English, American-English and Polish, namely: (i) deeds of conveyance, (ii) contracts of sale, (iii) contracts of lease, (iv) logistic contracts, (v) deeds of partnership and company-related contracts, (vi) contracts for rendering services and (vii) contracts of employment. After presenting the exponents of deontic modality, the author compiles the results in tables to show potential translative equivalents. The listing of such exponents of modality may serve translation purposes in accordance with textual-normative equivalence (cf. Kierzkowska 2002).

Abstrakt: Celem pracy jest przedstawienie najbardziej typowych metod wyrażania modalności deontycznej (tj. nakazu, zakazu i przyzwolenia) w brytyjskich, amerykańskich i polskich umowach. Autorka dokonuje analizy 45 umów sformułowanych w polskim, amerykańskimi brytyjskim języku prawniczym. Zanalizowano następujące umowy: (i) umowy przeniesienia własności, (ii) umowy sprzedaży, (iii) umowy najmu i dzierżawy, (iv) umowy logistyczne (dystrybucji i magazynowania), (v) umowy spółek kapitałowych i osobowych, (vi) umowy świadczenia usług, (vii) umowy o dzieło, umowy zlecenia oraz umowy o pracę. Autorka przedstawia przykłady i dokonuje zestawienia wykładników modalności deontycznej w tabelach. Zebrane przykłady mogą stanowić ekwiwalenty przekładowe zgodnie z zasadą stosowania ekwiwalencji tekstowo-normatywnej (cf. Kierzkowska 2002).

Introduction

The aim of the paper is to show the exponents of deontic modality used in Polish and English contracts. The author focuses on the methods of expressing obligation, prohibition and permission.

The author has analyzed the following types of contracts formulated in British-English, American-English and Polish: (i) deeds of conveyance, (ii) contracts of sale, (iii) contracts of lease, (iv) logistic contracts, (v) deeds of partnership and company-related contracts, (vi) contracts for rendering services and (vii) contracts of employment. The detailed list of source documents under scrutiny in Polish, British, American and Plain English may be found at the end of the paper after references.

The method of parallel text comparison has been applied to establish potential translative dynamic equivalents. It should be stressed here that at the level of grammatical and syntactic structures only dynamic equivalence (connotates) is applicable. Sometimes that type of equivalence is called textual-normative equivalence (Kierzkowska 2002:96)

and it does not depend on the translation orientation (source-language or target-language oriented translation) at the level of terminology.

General remarks on deontic modality

Deontic modality 'odnosi się do świata norm i ocen i dotyczy działań człowieka, które z woli indywidualnego lub zbiorowego sprawcy są mu nakazane lub dozwolone [refers to the world of norms and judgments and it relates to the actions of people which at the will of an individual or collective actor are imposed on him or permitted to be performed by him]' (Jędrzejko 1987: 19). Deontic utterances are present not only in colloquial speech but also in languages for special purposes. As far as legal language is concerned we may find deontic utterances in almost all legal genres starting from statutory instruments and contracts and ending on judgments, and testaments. In case of contracts, their nature (the synallagmatic character of contracts which means that the contract imposes reciprocal obligations and is characterized by mutual rights and duties) results in using deontic utterances. Contracts state rights and duties of parties to them. Those the duty imposed on one actor (one party to the contract) is at the same time a right of another actor (another party to the contract) and vice versa. However, in contracts to statutory instruments, the actors freely agree on accepting the duties imposed on them in return for the benefits (consideration) set in the contract.

The following three pure modal meanings have been distinguished for the purpose of the analysis of contracts:

(i) obligation,
(ii) prohibition, and
(iii) permission.

Deontic modality and modals in the language of contracts

Contracts are legal texts which serve the purpose of establishing rights and duties of parties to the contract. As they are considered mutually binding documents, the obligation for one party is at the same time a right for the other party and vice versa. Obligation, prohibition and permission in contracts may be expressed by modal verbs and other exponents of deontic modality.

Obligation

Obligation is understood here as the duty to perform. Within the meaning of obligation three potential sub-meanings may be distinguished that is to say:

(i) unlimited duty;
(ii) conditional duty; and
(iii) external duty.

Unlimited duty

Unlimited duty is understood here as an obligation to perform which is binding no matter the situation (it is a contractual obligation).

In Polish contracts the most frequent form used is *present tense indicative* of various verbs. Apart from that three special verbs expressing obligation may be found

that is to say: *obowiązywać* [to bind, to be in force], *wymagać* [to require], and *zobowiązywać się* [to oblige oneself] and *mieć obowiązek* [to have a duty]. Moreover, there are also rare cases when the drafters of contracts use verbs in *future tense indicative*.

Example 1. Polish contracts.

> Strony **postanawiają / ustalają** co następuje:...
> Sprzedawca **sprzedaje**, a kupujący **nabywa**…
> Przedmiotem umowy **jest** świadczenie usług logistycznych przez Usługodawcę na rzecz Usługobiorcy.
> Strony **zobowiązują się** w drodze aneksu nieważne postanowienia zastąpić nowymi, zgodnie z obowiązującym stanem prawnym.
> Umowa niniejsza **wchodzi w życie** w dniu … i obowiązuje na czas nieokreślony.
> Zmiany i uzupełnienia umowy **wymagają** formy pisemnej pod rygorem nieważności.
> Na podstawie niniejszej umowy Najemca **ma obowiązek** korzystania z przedmiotowego lokalu mieszkalnego przez zamieszkiwanie w nim osobiście lub z członkami najbliższej rodziny (rodzice, dzieci, małżonek) przez okres, o którym mowa w § 3 ust. 3 niniejszej umowy.
> Najemca **jest zobowiązany** regulować należności za wymienione w pkt 1 świadczenia bezpośrednio Wynajmującemu.
> Po zakończeniu dzierżawy Dzierżawca zwróci Wydzierżawiającemu przedmiot dzierżawy w stanie niepogorszonym, wynikającym z jego prawidłowej eksploatacji na podstawie postanowień niniejszej umowy i obowiązujących przepisów prawa.

The most common modal verbs used in British and American contracts are *shall* and *will*. It should be stressed here that *shall* still dominates (is more frequently used than *will*). *Will* is considered to be used in less formal contracts (Faber, Hjort-Pedersen and Klinge, 1996/97:67). Both modal verbs are followed by the verb in active or passive voice. However, in some contracts drafted in accordance with the suggestions of the Plain English Campaign we may encounter *will* and *must* which express future and present obligations. The division into future and present obligations depends on whether the contract is to be performed the moment it is concluded and signed or whether the performance will take place after some time from the moment of contract conclusion and signing. However, the difference is not visible on the level of the sentence surface structure but it depends on the context.

Example 2. British contracts

> This agreement **shall be construed** in accordance with the laws of England and Wales and **shall be subject to** the exclusive jurisdiction of the English courts.
> All communications including notices required to be given under this Agreement **shall be in writing** and **shall be sent** either by personal service or first class post to the Party's respective addresses.
> The Vendors **will sell** and the Purchaser **will purchase** the goodwill of the business now carried on by the Vendors.

Example 3. American contracts

SHIPPER **shall tender** to CARRIER and CARRIER **shall transport** a series of shipments between points designated by SHIPPER.
SHIPPER **shall pay** CARRIER for the **transportation** services described herein at the rate agreed to by both parties.
All loss and damage claims and any salvage arising therefrom **shall be handled and processed** in accordance with the regulations in the code of Federal Regulations (49 C.F.R. 1005).
Buyer and Seller agree to comply with FIRPTA and at or prior to closing Seller **will provid**e documentation of exemption or withholding **will be made** at closing.

The Plain English Campaign movement recommends using simplified language in contracts. Therefore, they suggest using modals: *must* and *will* in contracts (cf. example 4 below) instead of *shall* which is nowadays considered archaic in colloquial speech (used only in a very limited number of structures, mainly questions). But translators should be aware of the fact that lawyers tend to oppose the Plain English Campaign claiming that the interpretation of the old-fashioned legal language is well known and unambiguous and thus introducing the changes in contracts which "must stand alone" in common law system seems very risky. Therefore, it is not recommended to use Plain English Campaign equivalents in translation especially if the English language version of a contract is to prevail in the event any disputes arise.

Example 4. Plain English Campaign approved contracts

We **will carry out** the work set out in the attached documents (the work) for the price set out below.
You **must confirm** any notice given over the phone or face-to-face in writing as soon as possible before or after the due date.

It is also possible to use non-modal verbs which express obligation. The most frequent ones are *to agree* and *to undertake*. However, other variants may also be found (such as: *warrant*, *represent*, *supersede*, etc.). Those non-modal verbs are usually used in present simple (active or passive voice).

Example 5. British contracts

NOW THEREFORE, (…), the parties, intending to be legally bound, **agree** as follows: …
IT **IS AGREED** as follows: …
In consideration for the employment of the Employee by the Company the parties **agree** as follows:…
WITNESSETH that it **is mutually agreed** between the said parties as follows:…
The Seller also **warrants** that the Property is in good working condition as of this date.
This Agreement **contains** the entire agreement between the parties and **supersedes** all prior arrangements and understandings whether written or oral with respect to the subject matter hereof and may not be varied except in writing signed by both the parties hereto.
The Distributor **undertakes** to properly train customers of the Products in its operation and use.

Example 6. American contracts

> CARRIER **agrees** to compensate, defend, release and hold SHIPPER and its Customer harmless from all liability, costs, expenses for loss of or damage to property and/or injury to or deaths of person (including, but not limited to the property and employees of each party hereto) when arising or resulting directly, or indirectly from any acts or omissions of CARRIER, its agents, employees, or invites associated with or arising out of this Contract.
> ... the following terms **are hereby made** a part of that contract and **supersede** any terms to the contrary in said contract.

Conditional duty

Conditional duty is understood here as an obligation to perform only in specific circumstances (it is a contractual obligation).

In Polish contracts conditional duty is expressed by the same exponents of deontic modality as unlimited duty that is to say: *present tense indicative*, *future tense indicative*, and special verbs expressing obligation such as: *zobowiązywać się*, *mieć obowiązek*, etc.

Example 7. Polish contracts.

> W przypadku zainstalowania w przedmiotowym lokalu urządzeń ułatwiających korzystanie z niego Najemca **zobowiązuje się opłacać** wszelkie koszty wynikające z ich instalacji, funkcjonowania oraz ewentualnej deinstalacji.
> Z upływem okresu najmu umowa **ulega** automatycznie przedłużeniu o rok, jeżeli żadna ze stron niniejszej umowy nie wypowie jej pisemnie w czasie trwania okresu najmu.
> Kaucja **będzie zwrócona** Dzierżawcy po zakończeniu umowy, po potrąceniu z niej ewentualnych należności czynszowych bądź kosztów naprawy sprzętu.

Similarly, as in the case of unlimited duty, conditional duty in British and American contracts is usually expressed by *shall* and *will*. Both modal verbs are followed by the verb in active or passive voice. The most frequent structure used in such clauses are different types of conditionals. Conditional clauses may be introduced by *if*, *in the event (that)*, *unless*, *in the case of*, *as long as*, *so long as*, *on condition that*, *even if*, etc.

Example 8. British contracts

> If any provision of this agreement should be held to be invalid it **shall** to that extent **be severed** and the remaining provisions **shall continue to have full force and effect**.
> In the event of any inconsistency or ambiguity between the Polish language version and the English language version, the English language version **shall prevail**.
> If Buyer is unable to obtain said loan prior to closing, Buyer's entire earnest money deposit **shall be refunded** immediately.
> Upon completion as aforesaid the Vendors **will** if required by the Purchaser and at the expense of the Purchaser **send** to the customer of the Vendors in connection with the Business a circular in a form approved by the Vendors' Solicitors announcing the transfer of the goodwill and Business to the Purchaser.

Example 9. American contracts

> If SHIPPER is responsible for any of the above, or injury or death of CARRIER'S employees, CARRIER **shall indemnify** SHIPPER the amount thereof, including all expenses and attorney fees incident thereto.
> If Seller's proceeds at closing are not enough to cover the required withholding, Seller **will provide** additional funds at closing as necessary.
> In the event Seller will hold a mortgage under this contract, said mortgage **will be** on a standard form used by lenders in the area and contain a "due on sale clause."

Example 10. Plain English Campaign approved contracts.

> To accept this quotation and contract, you **must sign** the bottom of this page and return it to us by (date).
> If there is more than one reason, You **must give** each reason and the amount which applies to it.

External duty

External duty is an obligation to perform imposed on the actor not by the contract but by other factors such as statutory instruments (it is a non-contractual obligation).

In Polish contracts usually the following expressions are used to express external duty: *mieć zastosowanie*, *regulować*, *należy stosować*. In Polish contracts there are special contractual clauses which inform about the provisions which are to be applied in case of matters not regulated by the contract. Such clauses usually are not found in British and American contracts.

Example 11. Polish contracts.

> W sprawach nie unormowanych niniejszą umową, a odnoszących się do niej, **mają zastosowanie** odpowiednie **przepisy** Kodeksu Pracy i Kodeksu Cywilnego.
> Poza niniejszą umową stosunki pomiędzy Sprzedającym a Odbiorcą **regulują** w szczególności: ...
> Strony ustalają, że wygaśnięcie niniejszej umowy **nastąpi na zasadach określonych w ustawie** z 21 czerwca 2001 r. o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego (tekst jedn. Dz.U. z 2005 r. Nr 31, poz. 266 ze zm.).
> W sprawach nieuregulowanych niniejszą umową **należy stosować odpowiednio przepisy** ustawy z 21 czerwca 2001 r. o ochronie praw lokatorów, mieszkaniowym zasobie gminy i Kodeksu cywilnego (tekst jedn. Dz.U. z 2005 r. Nr 31, poz. 266 ze zm.).
> W sprawach nieuregulowanych niniejszą umową **stosuje się przepisy** Kodeksu cywilnego.

The external duty is rarely present in British and American contracts which is probably due to the fact that English contracts "must stand alone". However, a few examples of such sub-meaning of obligation may be found in the analyzed corpora (see examples 12 and 13 below).

Example 12. British contracts:

> The Vendors **will do** such acts and things and execute such deeds and documents **as may be necessary** fully and effectively **to vest** in the Purchaser the assets hereby agreed to be sold and to assure to the Purchaser the rights hereby agreed to be granted.
>
> Any disputes **shall be referred to** a sole arbitration **pursuant to** the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force.

Example 13. American contracts:

> No modification or change in this contract shall be binding **unless in writing and signed by the party to be bound thereby**.
>
> The seller of any interest in residential real property **is required to** provide the buyer with any information on lead-based paint hazards from risk-assessments and inspections in the seller's possession and and notify the buyer of any known lead-based paint hazards.

Moreover, the following phrases are used to refer the reader to a statutory instrument: in *compliance with (provisions of)*, *in accordance with (provisions of)*, which are not direct exponents of deontic modality but due to the contextual meaning they express obligation to refer to some provisions of statutory instruments.

The table below contains the comparison of detected exponents of obligation found in Polish, American and British contracts.

Table 1. Exponents of obligation in the language of contracts.

Polish contracts	***British contracts***	***American contracts***
Unlimited duty		
verb in present tense indicative verb in future tense indicative zobowiązywać się in present tense indicative wymagać in present tense indicative obowiązywać in present tense indicative mieć obowiązek in present tense indicative	shall to agree will	shall will to agree to supersede
Conditional duty		
verb in present tense indicative verb in future tense indicative zobowiązywać się in present tense indicative	shall will	shall will

wymagać in present tense indicative obowiązywać in present tense indicative mieć obowiązek in present tense indicative		
External duty		
mieć zastosowanie regulować stosować następować na zasadach określonych w...	Sb will do sth as may be necessary to do shall+verb+pursuant to if so required by in compliance with (provisions of) in accordance with (provisions of)	to be bound by to be required to in compliance with (provisions of) in accordance with (provisions of)

Prohibition

Prohibition is understood here as the duty not to perform or refrain from performing or acting. Within the meaning of prohibition three potential sub-meanings may be distinguished that is to say:

(i) unlimited prohibition;
(ii) conditional prohibition; and
(iii) external prohibition.

Unlimited prohibition

Unlimited prohibition is understood here as the prohibition to perform which is binding no matter the situation (it is a contractual prohibition). In fact prohibition may be considered as an obligation to refrain from performing or acting. Therefore the exponents of prohibition are usually the exponents of obligation followed by *not* or other forms of negative sentences.

In Polish corpora unlimited prohibition may be expressed by modal verb *móc* [may]+*not,* as well as the following phrases: *zobowiązywać się +nie+verb in infinitive* [oblige oneself not to do sth], *zobowiązywać się* [oblige oneself]+*negative deverbal noun*, *negative verb in present tense indicative*, and *not+wolno+verb in infinitive* [is not allowed to do sth].

Example 14. Polish contracts.

> Najemca **nie może** bez pisemnej zgody Wynajmującego oddać osobie trzeciej przedmiotowego lokalu do odpłatnego bądź nieodpłatnego korzystania.
> Najemca **zobowiązuje się nie dokonywać** zmian w elementach estetyki zewnętrznej budynku, w którym znajduje się przedmiotowy lokal, a w szczególności **zobowiązuje się do niewywieszania** reklam.
> Za prowadzenie spraw Spółki Partner **nie otrzymuje** wynagrodzenia.
> Biorącemu do używania **nie wolno oddawać** Lokalu do korzystania innym osobom.
> Spadkobierca Partnera **nie wstępuje** do Spółki w miejsce zmarłego Partnera.

Shall and *will +not* have been the most frequent exponents of unlimited prohibition in the analyzed British and American corpora. Apart from them the author has also encountered the following structures: *shall not be entitled to*, *may not* and *have no right*.

Example 15. British contracts:

> During the continuance of the Partnership **neither** Partner **shall** without the written consent of the other **engage** in any business or occupation other than that of the Partnership.
> The Tenant **will not do or omit to do** anything on or at the Property which may be or become a nuisance or annoyance to the Landlord or owners or occupiers of adjoining or nearby premises or which may in any way prejudice the insurance of the Property or cause an increase in the premium payable therefore.

Example 16. American contracts:

> Mortgagee **shall** look only to the collateral for security and **not be entitled to** any deficiency judgment.
> The CARRIER also **has no right of** recourse to attempt to collect such nonpayment from customer of SHIPPER in any way and that all collection efforts will be performed by SHIPPER.

Conditional prohibition

Conditional prohibition is understood here as the prohibition to perform only in specific circumstances (it is also a contractual prohibition).

The most frequent methods of expressing conditional prohibition include in Polish corpora include *nie+móc* [may not] and negative sentences in *present tense* and *future tense indicative.* However other possibilities may also be encountered (usually the same as in the case of unlimited prohibition).

Example 17. Polish contracts.

> Wykonawca **nie może** bez zgody Zamawiającego przekazać praw i obowiązków wynikających z niniejszej umowy w całości lub w części na rzecz osób trzecich.
> Naruszenie tego zakazu spowoduje, iż osoba trzecia **nie zostanie dopuszczona** do wykonania jakichkolwiek czynności i nie otrzyma z tego tytułu żadnego wynagrodzenia.

The most frequent exponents of conditional prohibition found in the English corpora under scrutiny are the following: *may not*, *shall not*, *will not* as well as *to agree not to do sth*.

Example 18. British contracts:

> This Agreement contains the entire agreement between the parties and supersedes all prior arrangements and understandings whether written or oral with respect to the subject matter hereof and **may not be varied** except in writing signed by both the parties hereto.
> Should any portion of this agreement be held to be invalid, unenforceable or void, such holding **shall not have** the effect of invalidating the remainder of this

agreement or any other part thereof, the parties hereby agreeing that the portion so held to be invalid, unenforceable, or void shall, if possible, be deemed amended or reduced in that scope.

The Employee **agrees not to use** any such information or material for himself or others, and not to take any such material or reproductions thereof from the Company, at any time during or after employment by the Company, except as required in the Employee's duties to the Company.

The Tenant **will not** without the Landlord's prior consent **allow or keep** any pet or any kind of animal at the Property

Example 19. American contracts:

If Seller is to remain in possession of the property at closing, Seller's proceeds **shall not be released** until Seller has fully vacated the property, and Buyer shall be entitled to $_____ per day for each day Seller holds over.

In the event any clause in this contract is held to be unenforceable, or against public policy, such holding **shall not affect** the validity of the remainder of the contract unless it materially alters the terms hereof.

No prior or present agreements or representations **shall be binding** upon the parties unless incorporated into this contract.

Neither party **will be liable for** failure to fulfill its obligations when due to causes beyond its reasonable control.

This Agreement contains the entire agreement between the parties and supersedes all prior arrangements and understandings whether written or oral with respect to the subject matter hereof and **may not be varied** except in writing signed by both the parties hereto.

In the event Seller will hold a purchase money mortgage under this Contract, said mortgage **shall contain no** prepayment penalty, be fully assumable, and allow a thirty-day grace period on late payments.

External prohibition

External prohibition is the prohibition to perform which is imposed on the actor not by the contract but by other factors such as e.g. statutory instruments (it is a non-contractual prohibition).

There have been no examples found of external prohibition in Polish, British and American contracts.

The table below contains the comparison of detected exponents of prohibition found in Polish, American and British contracts.

Table 2. Exponents of prohibition in the language of contracts

Polish contracts	***British contracts***	***American contracts***
Unlimited prohibition		
nie móc zobowiązywać się do nie robienia czegoś zobowiązywać się nie robić czegoś nie+verb in present tense indicative	shall not neither+noun+shall+verb will not+verb	shall not have no right shall not be entitled to

nie+verb in future tense indicative		
Conditional prohibition		
nie móc zobowiązywać się do nie robienia czegoś zobowiązywać się nie robić czegoś nie+verb in present tense indicative nie+verb in future tense indicative	shall not may not will not+verb to agree not to do sth	shall not+verb shall+verb+no+noun may not no+noun+shall+verb neither party will be liable for
External prohibition		
-/-	-/-	-/-

Permission

Contractual permission is the right to which the party to the contract is entitled or an authorization to exercise one's rights. Within the meaning of ***permission*** the following three potential sub-meanings may be distinguished:

(i) unlimited permission;
(ii) conditional permission; and
(iii) external permission.

Unlimited permission

Unlimited permission is understood here as the right which may be exercised no matter the situation (it is a contractual permission).

In Polish corpora usually the modal verb *móc* [may] is used. Apart from that exponent of deontic modality it is also possible to use the phrase *mieć prawo* [have a right].

Example 20. Polish contracts.

> Rozwiązanie niniejszej umowy **może** nastąpić:
> a) w każdym czasie na mocy porozumienia Stron wyrażonego w formie pisemnej,
> b) przez pisemne oświadczenie jednej ze Stron z zachowaniem okresu wypowiedzenia 30 dni – licząc od dnia złożenia tego oświadczenia drugiej Stronie.
> Abonent **ma prawo** wglądu do swoich danych oraz ich poprawiania.
> Każdej ze stron **przysługuje prawo** rozwiązania umowy ze skutkiem na ostatni dzień miesiąca następującego po miesiącu, w którym doręczyła drugiej stronie wypowiedzenie w formie pisemnej pod rygorem nieważności.
> Każdej ze stron **służy prawo** rozwiązania umowy z zachowaniem miesięcznego okresu wypowiedzenia.
> Sprzedający **jest uprawniony** do nieograniczonego przeniesienia tych praw na Kupującego.

The most popular exponent of unlimited permission in English contracts is the modal verb *may*. Apart from may we may also encounter modal verb *will* accompanied

with verbs carrying the meaning of permission such as: *allow*, *permit*, *be entitled to* and the structure *to be able to* which in accordance with modern grammars expresses rather ability than permission, but as may be seen from example 22 below in the case of contracts expresses permission. It is also possible to use the phrase *to have a right to/of*.

Example 21. British contracts:

> The Employer **may terminate** this Agreement by giving written notice to the Employee as follows...
> The Employee **may terminate** this Agreement by two weeks' written notice to the Employer.
> The Partners **shall be entitled** in each calendar year **to** 20 days holiday in addition to public holidays.

Example 22. American contracts:

> Either party **may cancel** this Contract by giving the other party at least thirty (30) days written notice of the date of termination.
> Buyer **may assign** this contract and all rights and obligations hereunder to another person, corporation, or trustee.
> Mortgagor **shall be permitted to** miss one monthly payment per loan year and **shall be able to substitute** other collateral of equal equity at any time.

Conditional permission

Conditional permission is understood here as the right which may be exercised only under specific circumstances (it is also a contractual permission).

Similarly as in the case of obligation, the same exponents o permission are used for unlimited and conditional permission, that is to say *móc* [may] and *mieć prawo* [to have a right].

Example 23. Polish contracts.

> Wynajmujący **ma prawo** jednostronnego rozwiązania umowy, jeśli Najemca zalegałby z czynszem przez kolejne dwa miesiące bądź naruszałby istotne postanowienia umowy.
> W razie naruszenia powyższego obowiązku Wydzierżawiający **może** dzierżawę **wypowiedzieć** bez zachowania okresów wypowiedzenia.
> Wydzierżawiający **zastrzega sobie prawo do wypowiedzenia** niniejszej umowy bez zachowania okresu wypowiedzenia, jeżeli Dzierżawca zalega z zapłatą czynszu za 2 miesiące pełne okresy płatności lub narusza inne istotne postanowienia umowy.

Similarly as in the case of unlimited permission in English contracts, the most frequent exponent of conditional permission is the modal verb *may*. The cases of *shall* followed by verbs carrying the meaning of permission such as: *allow*, *permit*, *be entitled to* and *to have a right of/to* have also been encountered (see examples 24 and 25 below). The exponent of conditional permission used in the Plain English Campaign recommended contracts, however, is the modal verb *can*.

Example 24. British contracts:

> The books of account and value added tax relating to the Business shall become the property of the Purchaser from the actual completion date but shall be available to

the Vendors if required for a period of six months from the date thereof and during that period the Vendors **may inspect and make** such extracts therefrom as he may think fit relating to the business prior to the actual completion date.
Each Partner **shall be entitled to draw out** of the funds of the Partnership any undrawn balance of his entitlement to profits shown in any profit and loss account at any time after such account has been signed by both Partners.
Upon either of the Partners leaving the Partnership all documents relating to the Partnership **shall be allowed to** remain in the hands of or be delivered to the other Partner.

Example 25. American contracts:

In the event Seller defaults hereunder, Buyer **may proceed** at law or in equity to enforce his or her rights under this contract.
Mortgagor **shall have a first right of** refusal at any time mortgagee desires to sell the note and mortgage at a discount, and mortgagor **may have released** from the mortgage, parts of the property proportional to the principal paid.
In the event Buyer defaults hereunder, Seller **shall be entitled to** the earnest money deposited herewith as liquidated damages.

Example 26. Plain English Campaign

If a dispute arises, you **can** only **withhold** payment after the due date for any payment owed to us, if you give us notice: before the final date for that payment.
However, if you can change those requirements, while still meeting your obligations under condition 12, you **may do** so.

External permission

External permission is understood here as the right which may be exercised under statutory instruments (it is a non-contractual permission).

There have been no examples found of external permission in Polish, British and American contracts under scrutiny. In the Plain English Campaign recommended contracts, however, we have encountered the pharse: *to have the right to*.

Example 27. Plain English Campaign

You **have the right to** receive insurance money or a local authority grant.

The table below contains the comparison of detected exponents of permission found in Polish, American and British contracts.

Table 3. Exponents of permission in the language of contracts

Polish contracts	***British contracts***	***American contracts***
Unlimited permission		
móc mieć prawo przysługuje prawo prawo służy	may shall be entitled to	may shall be permitted to shall be able to
Conditional permission		
móc	may	may

mieć prawo przysługuje prawo prawo służy	shall be entitled to shall be allowed to	shall have a right of/to shall be entitled to
External permission		
-/-	-/-	-/-

Concluding remarks

To sum up, the exponents of deontic modality used in contracts differ from those used in statutory instruments to some extent. First of all the catalogue of exponents of deontic modality in contracts is narrower than in statutory instruments. Furthermore, the modal verb *must* which is becoming more and more popular in contemporary statutory instruments and which at least in the United States of America starts replacing *shall* as less ambiguous is actually not present in contractual clauses (apart from the contracts drafted in accordance with the recommendations of the Plain English Campaign).

Due to the limited corpus of contracts which have been analyzed for the purpose of this study it should be assumed that the exponents of deontic modality listed in table 4 below are interchangeable for translation purposes.

Table 4. The listing of most frequent exponents of deontic modality used in Polish, British and American contractual clauses for translation purposes.

Polish contracts	***British contracts***	***American contracts***
Unlimited and conditional obligation		
verb in present tense indicative zobowiązywać się in present tense indicative wymagać in present tense indicative obowiązywać in present tense indicative mieć obowiązek in present tense indicative	shall will to agree to undertake [rarely possible other verbs]	shall will to agree to undertake [rarely possible other verbs]
Unlimited and conditional prohibition		
nie móc zobowiązywać się do nie robienia czegoś zobowiązywać się nie robić czegoś nie+verb in present tense indicative nie+verb in future tense indicative	shall not may not will not+verb have no right of/to neither+noun+shall+verb to agree not to do sth	shall not may not have no right of/to shall not be entitled to shall+verb+no+noun no+noun+shall+verb Neither party will be liable for
Unlimited and conditional permission		
móc mieć prawo	may shall have a right of/to	may shall have a right of/to

przysługuje prawo prawo służy	shall be entitled to shall be allowed to to have a right of/to	shall be entitled to shall be permitted to shall be able to

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LUNFARDO LEXICAL UNITS RELATED TO LEGAL MATTERS

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Abstract: The article deals with the Argentinian slang Lunfardo which is spoken mainly in Buenos Aires, La Plata and their surroundings. The main objective of the paper is the lexicological analysis of Lunfardo lexical units related to legal matters. Lunfardo came into existence at the turn of the 19th and 20th centuries when a great amount of immigrants from different European countries came to Argentina, mainly to its capital Buenos Aires. The languages and dialects spoken by immigrants started to mix with Spanish (its Argentinian variant) and Lunfardo started to develop. The article investigates the history of this linguistic phenomenon and its present situation. It tries to characterize Lunfardo focusing on its linguistic features and social background of its users.

Abstrakt: Artykuł dotyczy argentyńskiego slangu lunfardo, ktory używany jest głównie w Buenos Aires, La Placie i ich okolicach. Jego głównym celem jest analiza leksykograficzna jednostek leksyklanych lunfardo związanych z prawem, językiem prawnym i prawniczym. Lunfardo powstało na przełomie XIX i XX wieku, kiedy do Argentyny, a zwłaszcza Buenos Aires napłynęły bardzo duże liczby imigrantów z Europy. Języki i dialekty używane przez imigrantów zaczęły mieszać się z językiem hiszpańskim (jego argentyńską odmianą) i w ten sposób zaczęło rozwijać się lunfardo. Artykuł zajmuje się historią oraz obecnym kształtem tego zjawiska językowego. Charakterystyzuje lunfardo koncentrując się na jego cechach lingwistycznych oraz społeczym pochodzeniu jego użytkowników.

The origin and charateristics of Lunfardo

„There is nothing more difficult than giving a definition of Lunfardo which would satisfy at the same time linguists, Lunfardo's enthusiasts and its speakers" (Gobello 2003, 9, transl. J.N.). This is the opinon of José Gobello, author of many books and dictionaries of Lunfardo, president of *Academia Porteña del Lunfardo* in Buenos Aires which promotes scientific research on it. Generally, Lunfardo is a lexicon of words that are used in colloquial speech in Buenos Aires, La Plata and their surroundings in Argentina.

It cannot be considered an independent language because it is based on Spanish morphology and syntax. It should be emphasized, however, that it is not identical with the Argentinian variant of Spanish. Lunfardismos, i.e. words that come from Lunfardo, generally are not listed in dictionaries of Spanish and are difficult to understand to native speakers of this language who are not acquainted with Lunfardo. Recently some of Lunfardo words have been introduced to *Diccionario de la Real Academia Española* (2005) ('Dictionary of the Spanish Royal Academy, henceforth DRAE), e.g. *piba* 'girl',

but some of them, even if they can be found in this dictionary, have a meaning different from the one they have in Lunfardo, e.g. *merlo* in Lunfardo means 'stupid', while the definitions of DRAE dictionary refer only to the bird and fish species.

Lunfardo originated at the turn of the 19th and 20th centuries in Buenos Aires and its surroundings, as great numbers of immigrants, mainly from Europe, were coming to Argentina. It is estimated that between 1870 and 1950 about six millions of Europeans arrived in Argentina. The majority of them came between 1870 and 1914 (Allendes and Solimano 2007, 12). The most numerous group of immigrants were Italians and Spaniards, but there were also Jews, Germans, Poles, people of French, British, Sirian and Lebanese origin. They lived mainly in poor districts, the docks and the suburbs of Buenos Aires. The various languages, dialects and slangs brought by them started to mix up with the local variant of Spanish. Although Lunfardo was created on the basis of loanwords it should be stressed that is not simply a conglomerate of words borrowed from different languages. According to Conde (2005), internationalisms also should not be classsified as Lunfardo because a loanword needs to undergo some transformation in order to become a Lunfardo word.

Many words in Lunfardo were borrowed from other languages but changed their meaning or form. For instance, *parlar* from Italian *parlare* 'to speak': the word changed its form (acquired the Spanish inflectional suffix) but the meaning remained the same; *guerra* 'war' is a loanword from Spanish which in Lunfardo changed its meaning and refers to 'love affair'. One of the characteristic features of Lunfardo is *vesre.* The name of this linguistic mechanism comes from Spanish *revés* 'reverse'. *Vesre* is a way of coining new words that is based on reversing the order of the syllables in a word, for example: *choma* from *macho* 'man', *gotán* from *tango*, *dorima* from *marido* 'husband'. There were many different ways of changing the order of syllables in a word and adding or omitting a letter or a syllable was also possible. For example, *vesre* can involve changing the order of the last syllables so that the first one remains at the same position, e.g. *ajoba* from Spanish *abajo* 'under', *congomi* from Spanish *conmigo* 'with me'; the last syllable may take the position of the first one, and the rest of the word remains without changes, e.g. *jotraba* from *trabajo* 'work' and others (Gobello 2003, 255-56).

At the beginning, Lunfardo was used only in speech. It is said that one of the first written records of Lunfardo were police records from interrogations of suspects and witnesses of crimes (cf. Antoniotti 1998). The first time the word *Lunfardo* appeard printed in relation to this linguistic phenomenon was in 1878 in an anonymous note in the press in which also the relation between Lunfardo and the criminal underworld was suggested. A year later, two articles by Benigno B. Lugones, former policemen, appeared in the newspaper *La Nación*. In these articles, he described methods of committing crimes by thieves and other criminals as well as the language they used. He adduced some examples of Lunfardo words and stated that it was a special and secret language of criminals. The name given to this linguistic phenomenon, *Lunfardo*, was a synonim of the word 'thief' (it shoud be remarked that it is no longer used in this meaning). According to Amaro Villanueva, the word probably comes from Italian *lombardo* 'the inhabitant of Lombardy'. In the Roman dialect it meant 'thief', and in Sicilian 'inhabitant of Lombardy' but also, metaphorically, 'a dishonest man' (Gobello 2003, 159). Also in other books Lunfardo was described as a secret slang of criminals, invented and used in

order to be incomprehensible to others. These books include: *Los hombres de presa* ('Predatory men') written in 1888 by criminologist Luis M. Drago, *El idioma del delito* ('The language of crime') written in 1894 by Antonio Dellepiane, *Memorias de un vigilante* ('Memories of a guard') written in 1897 by José S. Álvarez and *El lenguaje del bajo fondo* ('Language of the lower social classes') written in 1915 by policeman Luis Villamayor. As noticed by Óscar Conde (Conde 2007), one of the contemporary Lunfardo authorities, these authors were people professionally related to the underworld and therefore the first time they heard Lunfardo words was from criminals. This is why they labelled Lunfardo as a slang typical of thieves. These books and articles written not by linguists but by policemen and criminologists lack a more profound analysis of this linguistic phenomenon. At the same time, the first articles written by journalists appeared in the press in which Lunfardo words and dialogues were used and associated with the street slang rather than with a secret language of criminals. It seems that journalists were more aware of the diversity of the society and knew that not only criminals were using these specific words (Conde 2007).

Lunfardo was created in a way in opposition to the language of the rest of society and was widely used mainly in port districts and suburbs. It cannot be denied that there were many thieves and other criminals in this environment and that they created and used specific words. However, it is evident that Lunfardo was not limited to the criminal or prison slang and was used also by law-abiding citizens. At the beginnig of Lunfardo history, the rest of society, not interested in the lowest classes living in poorer districts, did not have many opportunities to get familiarized with Lunfardo. What is more, people often tend to stereotype immigrants as criminals who are a threat to the rest of society. Undoubtedly, these were the reasons why Lunfardo has often been erroneously classified as a slang of criminals. With the passing of time Lunfardo gained more popularity and started to be used in written texts – mainly in texts of tangos but also in poetry and literature which focused on the topics and social groups which earlier were excluded from the public debate. Later it was used also in lyrics of blues and rock songs. Gradually, Lunfardo started to permeate into colloquial speech of all social groups. It is a vivid linguistic phenomenon which is still developing.

Summing up this short introduction to Lunfardo, it may seem that it is easier to determine what Lunfardo is not than to describe this linguistic phenomenon by means of a single term. Nevertheless, it seems that Lunfardo could be understood as a kind of slang. To this respect, de Klerk writes:

In defining slang, one needs to remember four vital aspects: firstly, slang is typical of the spoken, colloquial, informal aspects of human interaction (...) Secondly, typically such words are restricted in their social status and distribution, and they are more metaphorical and transitory than standard language, rapidly going in and out of fashion within the particular subculture that knows and uses them. (...) A third feature of slang is the fact that it is generally vague in meaning, and slang words are notoriously difficult to define. (...) Also, many slang words refer to taboo aspects of life, where secrecy is important. (de Klerk 2006, 407)

Lunfardo meets all of these criteria. Although it has been used in written language, it is still peculiar to colloquial speech. Lunfardo words are used in place of those of standard language. It is still developing, some words are not longer in use, because of the changing reality, or are simply out of fashion. Frequently, it is a matter of discussion whether particular words should be classified as Lunfardo or not. Lunfardo is a kind of street slang with many words that are vague in meaning and polysemic. Many of them refer to taboo aspects of life, like the underworld, prostitution, sexuality, names of sexual organs etc. Although some Lunfardo words spread to other areas of Argentina or to Urugway, it is peculiar to Buenos Aires, La Plata and their surroundings. However, Lunfardo is no longer limited to one social group as it was at the beginning. It is present in colloquial, everyday speech of all members of the society.

Lexicological analysis of Lunfardo lexical units related to legal matters

Lexicological analysis of Lunfardo lexical units related to legal matters has been based on *Nuevo diccionario Lunfardo* by José Gobello (Gobello 2003). In his dictionary, Gobello made use of various sources: a corpus of authentic texts in which Lunfardo appears, various studies devoted to Lunfardo and the analysis of spoken language. Many (but not all) entries contain etymological information as well as quotations from written sources in which Lunfardo words are used in context. All etymological information given in this paper is based on that presented in the dictionary. In his dictionary, Gobello included not only words that originated at the turn of the 19th and 20th centuries, but also contemporary ones that he considered belonging to Lunfardo. However, some of these contemporary words may raise doubts as to whether they should be classified as Lunfardo, e.g. *capuchino*, which is a loanword from Italian that not only was not morphologically or semantically transformed but is also wide-spread in many languages.

All entries of the Gobello's dictionary have been analysed in order to excerpt words and phrases connected to legal matters. More than 100 such words have been identified, almost all of which concern criminal law and police service. The majority of these words are nouns and verbs[13]. Polysemic words (which have also other meanings, not referring to legal matters) have been included in this group as well. The study focuses on main entries of the dictionary, which means that not all possible derived forms of the main entries are discussed here in detail[14]. The excerpted words can be divided into the following basic semantic categories:

- Terms concerning the judiciary,
- Terms concerning the police,
- Terms concerning imprisonment,
- Terms concerning theft:

– Words denoting the act of stealing and thieves,
– Terms concerning various types of thieves and thefts,

[13] It should be stressed that as Lunfardo is not an independent language and its lexis is limited, it consists mainly of nouns, verbs and adjectives.
[14] Word formation in Lunfardo is generally based on rules of the Spanish language.

– Terms concerning thiefs' accomplices,
- Terms concerning criminal assault,
- Others.

The most represented category is undoubtedly the one referring to theft. It is remarkable that not only there are many words denoting the act of stealing and thieves but there is a highly diversified group of words referring to various kinds of thieves (it could be said – their professional specialisation), the tools they used and various thieves' accomplices. There are not many words referring to other types of criminals. In what follows, the above mentioned categories are discussed in detail.

Terms concerning the judiciary

Only few words occur in Gobello's dictionary that can be included in this category. *Ave negra* refers to 'prosecutor' or 'barrister', literally it means 'a black bird'. This term was coined in association with the black clothes that prosecutors and barristers wear in the court. The term *lavandero* also refers to 'barrister' and comes from Italian slang *lavandaio* with the same meaning. *Confesor* refers to 'judge'. *Cantar*, literally 'to sing', means 'to confess one's guilt' and comes from colloqial Spanish *cantar* with the same meaning. *Muerte*, which in Spanish means 'death', in Lunfardo acquired another meaning: 'incriminating evidence'. There is also a word *chicana* which does not refer directly to the judiciary but means 'abuse of legal formalities'. The expression *por izquierda* (from Spanish 'on the left') in Lunfardo means 'illegally'. The fact that these words are not used with a specialised meaning in a consistent way (e.g. *ave negra* can refer to a barrister or a prosecutor) suggests a rather loose understanding of legal terms.

Terms concerning the police

This group consists of numerous synonyms of the word *policía* 'police officer': *abanico*, *botón*, *cana*, *ciapoli*, *chafo*, *chancha*, *mayorengo*, *milico*, *varita*, *yusta*. *Abanico* in Spanish means 'fan' ('a folding circular o semi-circular device made of paper or silk that is waved to and fro by hand to produce a cooling current of air' (NPED 2000, 500), in Lunfardo it refers to a police officer. This noun, as claimed by the author of the dictionary, comes from the *germanía*, a slang of thieves and procurers, in which it reffered to an old prison in Madrid. The word *botón* means 'button' in Spanish. According to Gobello, this noun acquired this meaning during the uprising in 1890, when insurgents were shooting at policemen aiming at buttons of their uniforms. The expression *tirar a los botones* 'to aim at the buttons' was created then and thus policemen started to be called *botones*. *Ciapoli* is an example of *vesre* – it is a reverse form of the word *policía*. The next three words come from Italian slang: *chafo* comes from *ciaffo* 'police officer'; *mayorengo* comes from *maggiorengo* 'chief, mayor, senior' (Lunfardo *mayorenguería* means 'police station'); *yusta* or *yuta* comes from *giusta* 'urban police'. *Milico* is an apocope of Spanish *miliciano* 'a member of militia'.

Other words refer to police officer's specialisations. *Zorro gris* and *varita* denote 'traffic policemen/policewomen'. *Zorro gris* refers to the colour of the uniforms worn by such police officers in the fifties. *Varita* in Spanish means 'wand'. The word *cosaco*, meaning 'policemen on horseback', comes from Spanish, in which it refers to 'Russian

soldier of light cavalry'. *Tira* (also *tirante* or *tirolés*) refers to 'investigator (police officer) in plain clothes'. This word also comes from Italian slang: *tira* 'a police spy'.

There are some other words connected with the police and their work. Two of them refer to investigation: *asador* is 'interrogator' and *cartón* 'identikit portrait', the latter coming from Spanish *cartón* 'cardboard'. *Ratonera* in Lunfardo means 'trap prepared by the police to catch a thief', in Spanish this word means 'mousetrap'. *Hotel del Gallo* is a term for 'the former Police Department in Buenos Aires' because Spanish *gallo* means 'cock', which was a symbol of the police in Buenos Aires. There is one more, quite old word connected to the police: *cincuenta* 'fifty' – it was a fifty-peso fine for indecently accosting women in the public.

Terms concerning imprisonment

There are many words referring to 'prison': *canasta*, *capacha*, *cufa*, *cuja*, *estaribel*, *jaula*, *juiciosa*, *la Nueva*, *la Tierra*, *devoto*. It can be observed that some of them have their origins in words denoting various types of baskets, both in Spanish and other languages. *Canasta* is a paronomastic wordplay of Lunfardo *cana* 'prison' or 'police officer' and Spanish *canasta* 'basket'. Also Spanish *capacha* refers to a kind of basket. *Cufa* comes from Genoese *cõffa* which means 'basket'. *Cuja* denotes 'bed' or 'prison', the second meaning being probably influenced by the aforementioned *cufa*, which is phonetically similar.

The next group of words consists of the names of three former prisons in Argentina: *la Nueva*, *la Tierra* and *Devoto*. *La Nueva*, Spanish 'new', was a national prison functioning between 1877 and 1961 in Buenos Aires. *La tierra* was a prison located in the province of Tierra del Fuego in the South of Argentina. *Devoto* was a prison situated in Buenos Aires, in the district Villa Devoto.

Estaribel comes from *caló* (a Spanish slang of criminals), in which it has the same meaning. *Jaula* means 'cage' in Spanish but colloquially also refers to 'prison' (verb *jaular* means 'to imprison'). There is also an expression *a la sombra* 'in prison', which means 'in the shadow' in Spanish.

There are also numerous words with the meaning 'to imprison'. Many of them are derivationally related to the above-mentioned nouns denoting 'prison': *encanar*, *encanastar*, *encufar*, *jaular*, *ensombrar*. Other words that mean 'to imprison' are *guardar* and *amurar*. *Amurar* comes from Genoese *amurrá* 'to make (a ship) run aground', metaphorically 'to paralyze'. *Guardar* comes from Spanish, in which it means 'to keep, watch'. There is also a word *mesada* 'detention that is extended for 30 days' (the maximum that can be imposed by the police), which comes from the Spanish *mes* 'month'.

The last group of words concerning imprisonment are those referring to prison guards: *telangive* is *vesre* from the Spanish noun *vigilante* 'guard'; *esbiro* comes from Spanish *esbirro* 'thug'; *gallipín* is connected with the noun *gallo* 'cock', the symbol of the police in Buenos Aires. *Gavilán blanco* is 'prison employee who does the clandestine shopping for prisoners'. The author of the dictionary does not explain the etymology of this phrase. Nevertheless, Spanish *gavilán* denotes a small predatory bird, specifically the Eurasian Sparrowhawk and *blanco* means 'white'.

Terms concerning theft

As this is the most numerous and diversified group of words, this category is divided into three subcategories, which are analysed in detail below.

a) Words denoting the act of stealing and thieves

The words discussed here are frequently derived from one another, cf. for instance *shacador* 'a thief' from *shacar* 'to steal'. Therefore, only the words listed as main entries in Gobello's dictionary are discussed here in detail. The group of words referring to 'thief' comprises the following nouns: *grata* from colloquial Italian *gratta* 'thief'; *grupo* (a polysemic word of uncertain origin); *ladriyo* from Spanish *ladrillo* used in the *germanía*, i.e. a slang of thieves and procurers, which is a diminutive of Spanish *ladrón* 'thief'; *lunfardo* (described in the first part of this paper). *Golpe* means 'theft' and comes from Italian slang *colpo* 'theft'.

As far as words denoting the act of stealing are concerned, the following words can be listed here: *afanar*, *granfiñar*, *hacer*, *tocar el piano*, *solfear*, *shacar*, *trabajar*, *soliviar*. There are two words that refer to stealing as if it was work: *afanar* and *trabajar*. *Afanar* comes from colloquial Spanish, in which it means 'to work'; also the forms *fanar* and *vesre anafar* exist (*afane* and *afano* mean 'theft'). *Trabajar* means 'to work' in Spanish. *Granfiñar* comes from Italian slang *sgranfignare* 'to steal'. The word *hacer* ('to do' in Spanish) is a literal translation from Italian slang, in which *fare* means 'to steal', while in general Italian it means 'to do'.

The expression *tocar el piano / tocar el pianito*, in Spanish 'to play the piano', refers to the movements of fingers, which in both cases, playing the piano and stealing, has to be very quick and efficient. In associaton with this expression, Spanish *solfear* 'to sol-fa' gained the meaning 'to steal'. The expression *do re mí*, connected with *solfear*, means 'theft'.

Shacar (also *chacar*) means 'to wheedle money from someone by means of tricks or false promises' and 'to steal'. It comes from Genoese *sciaccă* 'to break', vulgarly 'to force, to violate'. *Shacamiento* or *chacamiento* means 'theft' (cf. *shacador*, *chacador* and *achacador*, all meaning 'thief'). *Soliviar* cames from Spanish *soliviar* 'to help to pick up / lift something'.

b) Terms concerning various types of thieves and thefts

This is one of the most diversified groups of words. It concerns various professional specialisations among thieves. It can be observed that these words refer to petty thefts. In this group, there are five words connected with pickpockets. *Culata* means 'hip pocket' and comes from Italian *culatta* 'back side of something'. On the basis of this word, the expression *trabajar de culata* 'to work as a pickpocket' and the noun *culatero* 'pickpocket' were coined. The verb *capear* means 'stealing money from a wallet of a victim without taking the wallet out of the pocket'. *Shuquero* means 'pickpocket'; the origin of this word is uncertain. The expression *Tomador del dos* (literally 'someone who takes something by using the two') refers to 'a pickpocket who uses his two fingers for stealing' and comes from Spanish slang. *Punga* and *pungista* mean 'pickpocket'. These words come from Southern Italian *punga* 'pocket'. *Punguerar* refers to 'pickpocketing' but also 'stealing' in general.

The next group of words is generally associated with the kind of things stolen by thieves. *Rastriyo* (also *rastriyante*) denotes 'thief of small things' (*rastriyar* 'to steal small objects') and comes from Spanish *rastrillo* 'rake'. *Maletero* means 'thief who steals suitcases from passangers, mainly in railway stations'. It comes from Spanish *maleta* 'suitcase'. *Santero* refers to 'thief who steals in churches' or 'thief's accomplice', it is associated with the Spanish adjective *santo* 'saint'. *Mechera* denotes 'a woman who steals clothes in shops, hiding it in the clothes which she is wearing'. Also an *escamoteador* steals mainly in shops. *Cuatrero* means 'thief of livestock' (*cuatrerear* 'to steal livestock'). *Esquifrunista* (also *schifrunista*) is 'a thief who collaborates with prostitutes stealing money from their clients'. The next group of words refers to the means of stealing rather than to the type of the stolen goods. *Yavero* is 'a burglar who breaks into houses during the absence of the inhabitants using various picklocks and keys'. The dictionary does not give the etymology of this word but certainly it is connected with Spanish *llave* 'key'. *Voltear* and *escrushar* (or *escruchar*) also mean 'to break into a house' (*escruschante* or *escrushante* means 'burglar'). *Descuido* refers to 'theft which is made by taking advantage of somebody's inattention'. It comes from Spanish slang *descuidero* 'thief who practices *descuido*'; in Buenos Aires this type of thief is called *descuidista*. *Atrapar* means 'to steal from homosexuals'.

There is also a verb *mancar*, which refers to theft in general, which means 'to catch someone stealing'. It comes from Italian *mancare* 'to fail, not to occur'.

c) Terms concerning a thief's accomplices

The first group of words are those connected with the loot. *Cambalachero* refers to 'a person who buys and sells the loot'. It comes from the Argentinian variant of Spanish *cambalache* 'second-hand shop'. The verb *astiyar* means 'to divide the loot'. *Rostrear* means 'said of a thief: to keep the whole loot to oneself without sharing it with accomplices'. This word comes from Genoese *rostî* 'to bake' or 'to defraud', by association with Spanish *rostro* 'face'. There are also two words referring to the loot itself: *brodo* and *toco*. *Brodo* has its origins in Italian *brodo* 'soup, stock'. *Toco* means also 'any part of the loot distributed among the thieves' and 'money (in general)'; it comes from Genoese *tòcco* 'piece'.

Campana refers to 'a thief's accomplice who helps him/her to steal'. It comes from Italian slang *campane* 'ears', connected with Genoese expression *stă de campana* 'to be on guard'. *Tanga* means 'person who accompanies a pickpocket in order to learn the profession of stealing'. It comes from Spanish slang *tanga* 'accomplice'. *Esparar* means 'to help a *pungista* ['pickpocket'] by distracting their victim'. This verb has its origin in Italian slang *sparâ el tir* 'to notify, to warn'. *Entregador* refers to 'a thief's accomplice who gives him information necesarry to carry out a theft' or 'an informer'. It comes from the Spanish verb *entregar* 'to give, to deliver'.

There are many words denoting various kinds of picklocks, keys and other tools used by thieves to break into houses, shops etc. However, due to the fact that they are are not directly connected to the subject of this paper, they will not be discussed here in detail. This subcategory comprises the following words: *ferramenta*, *jica*, *lanza*, *otario*, *paleta*, *pata de cabra*, *shua*, *torniquete*, *banderita* and *escalera*.

Terms concerning criminal assault

This group of words is not very numerous. It comprises of four words referring to various kinds of criminal assault and some words denoting an action of punching somebody. The word *biaba* means 'violent assault'. Also its diminutive form, *biabusa*, and augumentative one, *biabazo* are used in this sense. Two types of *biaba* are usually distinguished: *biaba caldosa* or *biaba con caldo*, which refers to 'bloodshed', and *biaba seca*, which means 'assault without bloodshed'. This term has a vast metaphoric meaning. It comes from *beava*, a word used in various Italian dialects, in which it means 'food that is given to animals' and, metaphorically, 'beating, punishment'. *Furca* refers to a particular type of an assault. The dictionary describes it as follows: one of the criminals is distracting a victim, while the other atacks him/her from behind by putting his arm around the victim's neck in order to immobilize him/her. It comes from Sicilian *furca* 'gallows'. The term *corbata*, from Spanish *corbata* 'tie', refers to a kind of *furca*.

There is also a group of words concerning criminal assault which denote an action of punching somebody: *boyo*, *cazote*, *miqueta*, *socotroco*, *torta*, *viento*, *cros*, *mamporro*, *contramoco*. *Cazote* comes from Italian *cazotto* with the same meaning. *Miqueta* comes from Genoese *micchetta* 'bread roll'. *Socotroco* is said to be an onomatopoeic word. *Torta* comes from colloquial Spanish, in Buenos Aires it is also used in the augmentative form *tortazo* (*torta* means 'cake' in general Spanish). *Cros* comes from English *to cross. Mamporro* refers to 'a violent punch' and comes from Spanish *mamporro* 'not very strong blow or knock on the head'. Only one word referring to rape has been listed in Gobello's dictionary, viz. *becerro* 'multiple violation'.

Others

A group of words which it is difficult to assign to one of the categories presented above, will be discussed in this place. The majority of the words analysed so far refer to rather petty crimes, nevertheless there are three words that are connected with murder, namely: *enfriar* 'to kill', *limpiar* 'to kill' and *achurar* 'to kill using cold steel'. *Achurar* means 'to gut'. *Limpiar* comes from Spanish, in which it means 'to clean'. *Limpio*, 'clean'in Spanish, denotes 'a criminal that is not known to the police yet' in Lunfardo.

There are some words denoting criminals: *malandrino* 'criminal' comes from Italian *malandrino* 'mugger'; *mejicano* 'smuggler'; *levantador* 'someone who steals everything which is not watched over'. *Godino* means 'criminal who abuses minors'. It is derived from José Santos Godino, who was sentenced for life imprisonment in 1914 for four homicides and seven attempts of homicides in which the victims were minors.

There are also some terms referring to fraud. *Guiya* means 'fraud', committed especially during shopping, when one asks for change and in this time replaces one banknote by another, a less valuable one. This term comes from Brasilian Portuguese *guilha* 'fraud'. The noun *cuento*, which means 'story' in Spanish, refers to different strategies used by criminals in order to deceive others and obtain money. *Baratín* means 'a roll of paper resembling banknotes which is used in frauds'. It comes from Italian slang *barattina* 'replacing a thing with a false one'.

Conclusions

The Lunfardo words analysed above refer generally to criminal law. There are only few words, e.g. *confesor* 'judge', that can be associated also with other law disciplines, e.g. civil law. There is quite a numerous group of words reffering to the police and imprisonment. As far as terms concerning imprisonment are concerned, various terms for 'prison', 'to imprison' and 'prison guards' were found in the dictionary. However, no other words concernig life in prison, especially no word denoting a 'prisoner', can be found there. This confirms the claim that Lunfardo should not be viewed as a prison slang. For comparison, in the analysis of the Polish prison slang, Oryńska notices that the second most numerous group of words concernig person are various terms referring to prisoners (Oryńska 1991, 86).

The majority of Lunfardo lexical units connected to legal matters that have been analysed in this paper concern petty crimes, mainly theft. This group of words is the richest and the most diversified one. It might seem that the results of this analysis support the thesis that Lunfardo was a slang of criminals. Nevertheless, these are not the only categories of words that are present in Lunfardo. Other groups of words that can be found in the dictionary refer mainly to prostitutes, gambling, amorous relations between man and woman, tango and common, everyday activities. The reason for this is that Lunfardo was a slang of street, poor districts and suburbs and that it developed mainly among immigrants, mostly young men, who frequently did not have a stable work and tried to make their living by making the most of every opportunity. On the one hand, in such environment there must have been criminals, but on the other hand, one cannot forget that people tend to stigmatize immigrants and the poor. Over the years, Lunfardo started to permeate the colloquial speech of all social groups and today it forms a part of the identity of the people who use it.

To sum up, it can be said that today Lunfardo is a set of vocabulary of various origin that is used in colloquial speech, parallely to standard language, and is widespread in all social classes of Argentina (Conde 2007). While being a kind of slang, it is not limited to a particular social group (as it was at the beginning of its history) or age group which would use it in order to distinguish itself from the rest of the society.

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‘MAKING OUR LAW STUDENTS COMPREHEND FOREIGN LEGAL TERMINOLOGY: THE QUEST FOR IDENTIFYING FUNCTION, CONTEXT, THE *SEMAINON* AND THE *SEMAINOMENON* IN THE TEACHING OF COMPARATIVE LAW’

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‚In my own teaching of comparative law I have often felt that, like Bagehot’s monarch, I had a duty to warn and a duty to encourage. To teach students not to be lured by homonyms and not to be afraid of synonyms’. (Kahn-Freund 1965, 19)

Abstract: This paper will explore the implications in relation to the possibility of making law students comprehend foreign legal terminology. The starting point of our analysis, our hypothesis, will be that the law student is not necessarily equipped with foreign language skills. For this reason the author will attempt to demonstrate that comparative lawyers must familiarise their unfamiliarised (students of law) with familiar domestic[16] terminology *where* this is *possible*. If no such familiar concepts can be found, the comparative lawyer should attempt to proceed with ‘translating’ foreign legal concepts by the use of ‘close (functional) terminological equivalents’ in one’s domestic legal language (school of functionalism). If, on the other hand, no parallel legal devices for the foreign legal term are found in one’s domestic jurisdiction, the comparative lawyer should proceed by deploying a contextual approach in his analysis/teaching (school of contextualism). Above all, one is reminded that words are mere conventions. So too legal terms are mere conventions. As a result, it would be neglectful to not state that our students must be assisted in identifying the *semainon* (*ζημαίνον*) and the *semainomenon* (*ζημαινόμενον*), that is assisted in identifying the signified and the signifier, when they engage themselves with foreign legal terminology in their comparative law studies. Additionally, as Van Hoecke has argued, apparently disconnected notions, concepts or areas of law may well be relevant to each other (Van Hoecke 2004, 175). Yet, it would be perfectly ‘legitimate’ on certain occasions for one to compare *prima facie* connected terms such as ‘*Interprétation* – Interpretation or Construction – *Auslegung*’ respectively in French, English and German, since these terms are a perfectly valid comparative trio (all words basically refer to the same intellectual activity) (Platsas 2008, 6; quoting Van Hoecke,

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[16] *Cf.* Zweigert and Kötz 1998, 35; according to them the comparatist can only reach ideal results, if he ‘eradicates the preconceptions of his native legal system.’

op. cit., n. 3). All in all, the paper will conclude that the comparative lawyer should be constantly reminded of the difficulties that his/her students might have when dealing with foreign legal terminology, because of one has it that even experienced comparative lawyers can face problems of comprehension when dealing with foreign legal terminology.

Αυτό το άρθρο πραγματεύεται τις συνυπαιτιότητες του πιθανού σε σχέση με τη δυνατότητα να αντιλαμβάνονται οι φοιτητές της νομικής ξένη νομική ορολογία. Σημείο εκκίνησης, η υπόθεση εργασίας αυτής της πραγματείας, είναι ότι ο μέσος φοιτητής νομικής δεν έχει τις γλωσσικές βάσεις για να αντιληφθεί ξένη νομική ορολογία. Για το λόγο αυτό ο γράφων θα προσπαθήσει να επιδείξει πως οι διδάσκοντες συγκριτικό δίκαιο πρέπει να εξοικειώσουν τους φοιτητές της νομικής με την εγχώρια[17] αντίστοιχη των ξένων όρων νομική ορολογία, *όπου* αυτό ειναι *δυναηό.* Αν τέτοιοι όροι δεν μπορούν να βρεθούν, ο επιστήμονας του συγκριτικού δικαίου οφείλει να προχωρήσει σε αυτό του το έργο 'μεταφράζοντας' τους ξένους νομικούς όρους. Τούτο μπορεί να το επιτύχει προσπαθώντας να βρει «λειτουργικά ορολογικά ισοδύναμα» ξένων όρων στην εγχώρια γλώσσα (λειτουργισμός). Απο την άλλη πλευρά, εάν δεν υφιστανται παράλληλα δικαιικοί μηχανισμοί στο εγχώριο σύστημα δικαίου, ο επιστήμονας του συγκριτικού δικαίου οφείλει να ακολουθήσει την πλαισιακή μέθοδο στα αναλυόμενα/διδασκόμενα (πλαισιασμός). Εν πάση περιπτώσει, ας μην λησμονούμε ότι οι λεξεις είναι συμβάσεις/συνθήκες. Έτσι και οι νομικοί όροι ειναι κατά συνθήκη ορισμένοι. Ακολούθως, θα ήταν αμελές να μην αναφέρουμε πως οι φοιτητές μας πρέπει να βοηθιούνται στη διαδικασία αναζήτησης σημαίνοντος και σημαινομένου, ιδιαίτερα ως προς την ενασχόληση τους με ξένους όρους στη μελέτη του συγκριτικού δικαίου. Επιπρόσθετα, όπως σχολιασε ο Βαν Χόκε, φαινομενικά άσχετοι όροι ή περιοχές δικαίου μπορεί τελικώς να σχετίζονται αναμεταξύ τους (Van Hoecke 2004, 175). Ακόμη, θα ήταν απολύτως λογικό να συγκρίνουμε αυτά που εκ πρώτης όψεως σχετίζονται μεταξύ τους όπως π.χ. οι όροι '*Interprétation* – Interpretation/Construction – *Auslegung*' αντιστοίχως στα γαλλικά, τα αγγλικά και τα γερμανικά, διότι αυτοί οι όροι αποτελούν μία τελείως βάσιμη συγκριτική τριάδα (εξαιτίας του γεγονότος ότι αναφέρονται στην ίδια πνευματικη δραστηρίοτητα, την δραστηριότητα της δικαιικής ερμηνείας) (Platsas 2008, 6; quoting M Van Hoecke, *op. cit.*, n. 7). Στο σύνολό του, το άρθρο θα καταλήξει στο συμπέρασμα πως ο επιστήμονας του συγκριτικού δικαίου θα πρέπει να έχει υπόψη τις δυσκολίες που οι φοιτητές του πρόκειται να αντιμετωπίσουν, όταν συναντούν ξένους νομικούς όρους, αφού και έμπειροι συγκριτικολόγοι δικαίου μπορούν να αντιμετωπίσουν προβλήματα στην αντιληψη τέτοιων νομικών όρων.

> *„Comparative lawyers are called on to do everything our domestically focussed colleagues do, but we also have to master an entire foreign legal system, in another language. In our domestic work we can be hedgehogs, but in our foreign law work we must be foxes. How many of us are to it?'* (Merryman 1999, 31-32)

Introduction

Let us be honest: our law students do not seem to understand Latin and French terms used in legal English, let alone words that come from the terminology of a legal system which operates in a different language altogether. Typical foreign words used in every day legal English are such terms as *ab initio* (from the beginning), *caveat emptor*

[17] (*Cf.* Zweigert and Kötz 1998, 35). Σύμφωνα με τους συγγραφείς ο συγκριτικολόγος δικαίου μπορεί να πετυχεί ιδεατά αποτελέσματα, εάν εξαλείψει προκαταλήψεις προερχόμενες από το εγχώριο δικαιικό σύστημά του.'

(let the buyer beware), *modus operandi* (a way of doing things), *prima facie* (on the face of things) and *travaux préparatoires* (preparatory works for the enactment of legislation) (Haigh 2009, 304-309). These words do not always make sense to the average law student.

To make matters more worrying, one cannot escape the fact that we lawyers are lost in translation, when it comes to actually 'translating' legal jargon in the language of the very legal system in which we operate. It would seem, therefore that English is one thing and legal English is quite another. The legal language in English speaking countries is difficult: the writing conventions are different to everyday language and a large number of peculiar words and phrases are used (Haigh 2009, 3). English looks misleadingly easy as a language and 'it may well be easy to gain quickly a modest – au pair – level of proficiency in English but in fact English, in particular written English, is rather a difficult language. This is all the more true when it comes to legal English' (Triebel 2009, 148). So too one identifies a number of legal terms of art (e.g. bailment, lien), legal jargon (e.g. corporate veil, examination-in-chief) and generally legal terms which have a very different meaning in every day language (e.g. consideration, tender, construction) (Haigh 2009, 4-5). For English lawyers the language used in law is what has been described by Lord Denning as a 'jungle'; he stated as follows in *Davy v Leeds Corporation* [1964]:

> 'I must say that rarely have I come across such a mass of obscurity, even in a statute. I cannot conceive how any ordinary person can be expected to understand it. So deep is the thicket that…both of the very experienced counsel lost their way. Each of them missed the last 20 words of subsection 8 of section 9 of the Act of 1959. So did the expert tribunal itself. I do not blame them for this. It might happen to anyone in this jungle'.[18]

Legal English is concerned by definition with coherence and precision (Crystal 2009, 374); maybe this is why the language which lawyers use is abstract. Maybe this is why lay people in the English speaking world will never be able to fully comprehend terminology. The realm of legal English is impenetrable (Crystal 2009, 374) and the few residents that are found within this realm are not always quite sure what the language of this realm always stands for. As a result, the task of making the same people (law students and lawyers) comprehend foreign legal terminology could be readily described as an onerous one.

Comprehending Foreign Legal Terminology

On the other hand, the comparative lawyer must be aware of a number of facts when it comes to foreign legal terminology so that his teaching task becomes easier (and by extension the learning task of his students becomes easier). First of all, one must be aware of the fact that there are certain conceptual differences between cultures due to language (Crystal 2007, 15). Second, the fact that a language may not use a word for a similar legal concept is not to say that the speakers of this language cannot grasp the concept (Crystal 2007, 15). However, even though language may not determine our mode

[18] [1964] 3 All ER 390, [1964] 1 WLR 1218, 16 P&CR 244, 62 LGR 628, [1964] RVR 776, 128 JP 541.

of thinking, it does influence our overall patterns of perception and recollection; this is what Crystal has forwarded as a weaker version of Sapir-Whorf's hypothesis (Crystal 2007, 15).

Close to this comes the fact that our comparative law students normally lack the conceptual background (Kischel 2009, 16-17) needed for the comprehension of foreign legal terminology. To add to this, one is warned that on certain occasions not even comparative lawyers themselves fully understand each other (let alone comparative law students comprehending foreign legal terminology). 'Language…proves to be one of the main obstacles [for the comparative lawyer]' (Brand 2009, 18). Also, the task of the comparative lawyer is particularly difficult when he deals with jurisdictions which do not belong to his/her wider legal circle of systems. Thus, it is one thing translating terms from western legal systems and quite another thing translating terms from a Muslim legal system to a western language (and *vice versa*) (Brand 2009, 21-22).

Language is an instrument (Anscombe 1968, 151e (§569)) then: an instrument of cognition for us, comparative law teachers and our students alike. The former use this powerful instrument to make the latter penetrate foreign legal microcosms. Language conveys thoughts (Anscombe 1968, 102e (§304), 139e (§§501, 507)). We are reminded at this point that the largely accepted presumption on which this analysis acts is that the majority of legal concepts 'exist within the realm of language' (Brand 2009, 19). Furthermore, as Pound once said the science of comparative law is a 'science of words' (*Wortwissenschaft*) (Pound 1954, 7-16).

Function

Functionality is the governing principle of comparative law analysis (Glendon, Gordon and Osakwe 1994, 11; Platsas, 2008; Brand 2009, 31). A sort of obsession to comparative lawyers, the comparative lawyer *must* detect the 'functional equivalent' in the foreign jurisdiction in order for him/her to proceed with his/her analysis. Nonetheless, our students should not be lured by homonyms, as Kahn-Freund once warned us (Kahn-Freund 1965, 19). That is why Kischel has argued recently that 'linguistically equivalent legal notions will frequently have different contents in different jurisdictions' (Kischel 2009, 7). Quite pessimistically though, he argued that 'the question in legal translation Is not which translation is right, but, much more modestly, which one is less wrong' (Kischel 2009, 7). As a result, one agrees with Kischel's former point but disagrees with his latter point. Such a disagreement with his latter point emanates from the fact that Academia generally serves realistic goals (as opposed to generally serving perfectionist goals). Thus, as Van Hoecke has argued:

> 'Strong epistemological *pessimism* has a perfectionist view on understanding. If you do not fully understand something, you do not understand anything. In practice this means that almost nobody can understand almost anything. A rather frustrating conclusion, especially for those whose professional life is centred around teaching and publishing' (Van Hoecke 2004, 171).

One must be able to make his/her students 'see'. How do we achieve this then? The litmus of functionality basically requires the comparatist to take a practical approach

in the matter of his comparisons. It acts on the generally[19] accepted hypothesis/presumption that legal systems around the world face similar legal problems (*presumptio similitudinis*) (Zweigert and Kötz 1998, 40).

Legal translation is quite similar to translating poetry. It is not a translating machinery which we require here; it is the art of translating which is needed. Meanings must go through; not words. As de Groot has recently argued, we can argue that a word is properly translated into another, if they both describe the same concept or idea (de Groot 2006, 424). In other words, we seek semasiological equivalence (de Groot 2006, 425-426). Our aim is to make our students understand through the use of proper legal translations as opposed to understand through the use of literal translations (Sacco 1994, 475-490); (Wallow 2006, 11). How do we actually achieve that aim for our students, when we know that any given legal language presents problems of comprehension, even if that legal language operates in the confines of the language with which these students were raised?

Let us use the now refer to some classical examples in comparative law. Our first example deals with the terms '*Interprétation* – Interpretation or Construction – *Auslegung*'. It would be perfectly 'legitimate' on certain occasions for one to compare *prima facie* connected terms such as '*Interprétation* – Interpretation or Construction – *Auslegung*' respectively in French, English and German, since these terms are a perfectly valid comparative trio (all words basically refer to the same intellectual activity) (Platsas 2008, 6; quoting M Van Hoecke, *op. cit.*, n. 3). Our second example is that of '*contrat – Vertrag – contract'*, respectively in French, German and English law. These too make a perfectly valid comparative trio (Platsas 2008, 6; quoting M Van Hoecke, *op. cit.*, n. 3). However, in our second example there are some caveats to be borne in mind. Accordingly, '*contrat*' is offered two different significations in Articles 1101 and 1108 of the French Civil Code (Brand 2009, 30), whereas common lawyers perceive 'contract' as a much more confined term (Brand 2009, 30), something which is apparent by the fact that uniform instruments of law would take a wider approach in the matter. Moreover, the differences between Franco-German contract law and English contract law are stressed by the fact that in England we seek the so-called *objective meeting of minds* (Nicholas 1993), whereas in Continental Europe we seek the so-called *subjective agreement of the wills* (Nicholas 1993). In civilian contract law we will we will try to enquire into the true state of minds of the parties (Nicholas 1993), whilst in England we will ask what the dispassionate observer would have thought as to the existence of a contract (Nicholas 1993).

The situation in comparative law is echoed in the writings of international law. For instance, Bilder has dealt with the term of 'sovereignty' in the sphere of international law by referring to six (6) different meanings (Bilder 1994, 10-11) as quoted in (Beaulac 2004, 2) of the same term, whilst Crawford argued that '[t]he term 'sovereignty' has a long and troubled history, and a variety of meanings.' (Crawford 1979, 26 as quoted in Beaulac, 2004, 2).

[19] The presumption is generally accepted for, as Kötz himself characteristically states, 'the [*praesumptio similitudinis*] is a rebuttable presumption, and rebutted it must be when there is evidence for doing so.' See (Kötz 2003, 212)

The function of words in law is most significant. As Beaulac has recently argued:

> 'Words are the origins of everything, of all aspects of human reality, which they both represent and create. […] Indeed, words and expressions constitute irreducible neurones, which are necessary to communication within the shared consciousness of society'.

Law and language are inseparable (Grosswald Curran 1998, 43, 54). Therefore, if law's 'unique vehicle is [that of] language' (Beaudoin 2009, 143), one must be able to appreciate the value of detecting functional equivalents in two (or more) legal languages from different jurisdictions. At other times though a functional approach cannot suffice for the purposes of comparative analysis; it is context then which our comparative law teachers have to take into account for familiarising their students with foreign legal terms.

Context

Context affects comparative legal analysis to a significant degree. Law should normally be taught in context (Örücü 2004, 68). It has been said that '[r]eal world practice problems, not hypotheticals, are the best context' (Maharg 2007, 116). Our approach in comparative law follows the contextual pattern to a significant degree, because our students appreciate (and should appreciate) not only the law of foreign lands but also the surrounding legal atmosphere and the legal cultures of these lands (Maharg 2007, 116). More interestingly, our students evaluate their own legal culture by evaluating the legal cultures of others (Maharg 2007, 116).

Legal translation –one must admit– deals with the epiphenomenon of a legal reality; a reality which always has multicultural and multilingual ancestry, despite the reductionist approach which may be taken in the matter, i.e. that there is only one ancestry in a given legal culture (Stein 2009, 3). The typical example against this here is the use of legal Latinisms in many different languages around the world (Kischel 2009, 11-12). So too Roman law has been affected by Greek legal theory in that *aequitas* (*επιείκια*) was a foreign term to original Roman law.

Legal culture results in defining legal language in judgments (Kischel 2009, 13-14) and the very structuring of legal texts (Kischel 2009, 15) which differs immensely from jurisdiction to jurisdiction. The contextualist approach to legal translation operates –at best– at an embryonic level. Brand states that the followers of this approach are still working on 'proto-methodological' level (Brand 2009, 32).

However, context is important in one's legal analysis. Hart for instance has argued that 'we cannot properly understand the law unless we understand the conceptual context in which it merges and develops' (Wacks 2009, 100). By way of analogy, the expectation is that legal translation of foreign terms in one's native language has to take into account *two* contexts (the legal/linguistic context where the translating terms comes from and the legal/linguistic context where the translating term is to be used). This has been referred to elsewhere as a relationship between a source culture and language on the one hand and a target culture and language on the other hand (Doczekalska 2009, 119 quoting Schäffner 1998, 84). Considerable parallels can be found here in relation to legal harmonisation projects and the underlying legal cultures which are to implement those unified legal standards: 'Our own legal cultures remain, for the time being, in certain

areas, an important limiting factor to our harmonisation because […] the application of the same rule may lead, despite all good intentions, to strikingly different results' (Lazareff 1999, 36 as quoted in Gotti 2009, 69). However, in our case, this approach presents a number of advantages in that it results in [acceptable] forms of differentiation between the source and the resulting text (Gotti 2009, 75). Accordingly, the comparative lawyer who 'translates' material from the legal microcosm of one language over to the legal microcosm of another should arrive at forms which are the 'outcome of negotiations between cultures and the norms and conventions involved' (Trosborg 1997, 146 as quoted in Gotti 2009, 75).

Semainon* and *Semainomenon

The *semainon* (signifier) and the *semainomenon* (signified) are key to our understanding of foreign legal terminology. These two concepts emanate from the subject of semantics, i.e. the subject which examines the meanings of language or more simply the meaning of words (Crystal 2007, 100). It is noted that semantics can have two different applications: application in the field of languages and application in the field of logic (Akmajian et al. 1990, 193). In this analysis we are interested in the application of semantics in the field of languages. Generally, words are mere conventions (Baskin and de Saussure 1960, 68). These words then are only one instance of a system of representative signs, the system here being that of language (Beaulac 2004, 19). Our thesis here is that comparative law teachers have to achieve for their students what linguists and legal translators achieve through their expertise, that being semantic equivalence (e.g. Doczekalska 2009, 116) (between source language and target language). Comparative law students find it difficult, however, to comprehend that one word in their language being written in the same way in another language has a different meaning altogether. They somehow seem to automatically 'register' this word as a linguistic (and hence legal) functional equivalent. They are lured by homonyms.[20] For instance, 'jurisprudence' in French legal terminology refers, as a term, to case law, whereas the same term in English legal terminology refers to what we generically call legal theory. This is a case where our students 'believe […] what one wants or believes' (Bollack, J. *Sens Contre Sens* as quoted by Legrand, 2000-2001, 1033). Or to put it, as Wittgenstein put it, since language can be perceived as a correlate of the world (Anscombe 1968, 44e (§96)), then our English students correlate the term *jurisprudence* to *their* common law world experience. The fact that the term *jurisprudence* being interpreted the way it is interpreted and misinterpreted by our English students, when the same term is found in French legal terminology, verifies the point that language is agreed (Freeman 2008, 33-34, 1044 quoting Wittgenstein's approach on developing a conventional usage of words in particular types of activity) and it is not an agreement of opinions but rather an agreement in form of life (Anscombe 1968, 88e (§241)). The reason behind this classic misunderstanding occurring amongst comparative law students is one that occurs by virtue of the fact that '[w]hen one resorts to a word, he or she must be deemed to refer to what it is usually and customarily

[20] For Kahn-Freund's classic warning (Kahn-Freund 1965, 19) in relation to homonyms and synonyms in comparative legal analyses see the abstract herein.

accepted to represent in a highly complex system of (linguistic) signs within his or her society' (Beaulac 2004, 20). In other words, to refer back to Wittgenstein, there is interference of domestic linguistic *convention* (Anscombe 1968, 113e) vis-à-vis the semantics of foreign legal terminology here. If this point has some validity, then it is only a natural misunderstanding for English law students of comparative law to initially define French 'jurisprudence' as amounting to legal theory (as in their native English law). Equally, it is only a natural misunderstanding for French law students of comparative law to initially define English 'jurisprudence' as amounting to case law (as in their native French law). Words travelling from legal culture to legal culture do not result in the same semantic qualities (Legrand 2000-2001, 1038). They acquire a local meaning which makes them original (Legrand 2000-2001, 1039). Or, to put it in semantic language, the same signifier here (jurisprudence) results in two different signifieds (case law under French legal terminology and legal theory *mutatis mutandis* in English legal terminology). Equally, as David argued some time ago:

> 'To translate into English technical words used by lawyers in France, in Spain, or in Germany is in many cases an impossible task, and conversely there are no words in the languages of the continent to express the most elementary notions of English law. The words *common law* and *equity* are the best examples thereof; we have to keep the English words […] because no words in French or in any other language are adequate to convey the meaning of these words, clearly linked as they are to the specific history of English law alone' (David 1980, 39).

Other misunderstandings arise when we have to translate expressions which should not otherwise present problems e.g. *fair and regular trial* as *juicio justo y imparcial* (Spanish), *procès juste et équitable (*French) and *díkaiē kaí adékastos díkē* (Greek) (Gotti 2009, 57; translation into Greek made by the author of this article). Equally, *reasonable* in common law terminology does not necessarily and automatically translate into *raisonnable* (French) or *vernüftig* (German) (Gotti 2009, 57). *Mortgage* is not an automatic synonym to the German *Hypothek*, as the former signifies 'a transfer of an interest in land subject to an equity of redemption' (Triebel 2009, 150), whereas the latter is merely 'a legal [as opposed to an equitable] charge on the immovable property of another' (Triebel 2009, 150). The occurrence of this state of affairs is more frequent in comparative law works and the main consideration here is the lack of linguistic equivalence (and hence lack of functional equivalence) or to make things even more worrying the vagueness of the conceptual terms used (Gotti 2009, 57). Our main concern as comparative lawyers here is that, even if we were to accept that the above translations qualify as 'linguistic equivalents', should we automatically jump to the conclusion that these are 'functional equivalents' in law? Our illustration of the example in relation to the word *jurisprudence* points to the fact that our analysis should be precise.

What is the responsibility of the comparative law teacher then? How should he make sure that this divergence of meaning between the foreign *semainon* and the foreign *semainomenon* does not make his law students misunderstand? The author understands that there are three (3) methods/approaches in relation to closing the semantic gap:

- 'Familiarisation with the unfamiliar through the familiar' approach[21]
- Periphrastic approach (through analysis and explanation) (See e.g. Anscombe 1968, 83e (§208))
- Immersion approach (Grosswald Curran 1998, 44, 45, 57)

In any case, our response should be one that is conducive to our old call in comparative law, i.e. we have to proceed with discipline and imagination, as Zweigert and Kötz have argued (albeit in a slightly different context) (Zweigert and Kötz 1998, 36-37). Our voyage into foreign legal terminology is one which investigates terms and concepts found in other legal systems; this is an expression of academic interest (Anscombe 1968, 151e (§570)), a common academic interest found amongst comparative law teachers and students alike. Our investigations into the foreign are driven by this interest. Maybe then we should proceed with discipline when it comes to finding the appropriate linguistic equivalents in other languages and we should proceed with our imagination when it comes to testing whether these linguistic equivalents present functional equivalents for our comparative purposes. As it has been rightly suggested, '[l]aw is not an exact science. […] [I]t is entirely dependent on discourse […]' (Beaudoin 2009, 137). Constructive imagination can then be used where the material which is taught to our students is 'linguistically approximated' (Šarčević 1997). Without doubt in relation to the former, we are in need of assistance of experienced legal translators, whereas legal translators should open a form of dialogue with comparative lawyers to verify whether linguistic equivalents and functional equivalents correspond. Therefore, Gotti's point, that translators working in this field 'should have two different types of competence: not only linguistic, but also legal' (Gotti 2009, 59), has considerable value. It is also true that the exercise of legal translation in comparative analyses leads 'far beyond – just – legal issues. It is (also) about identity, about entering a new world, first of all in terms of discourse, then (later) in terms of rights and commitments' (Lambert 2009, 91). This is an exercise of de-coding and re-coding (Grosswald Curran 2008, 679). Many of the problems that comparative lawyers face in the area, are also found in the operatives of the translating machinery of the European Union (EU) in that legal information has to be transferred in a number of other languages without loss of validity in the process of transfer from one language to another. In a sense, the work of the translator in an environment such as the EU[22] does not differ much from that of the comparative law teacher in that both have to make sure that their translated material makes sense to their addressees. Effectively, we speak of a sort of discourse here; discourse which the comparative lawyer and the legal translator have to initiate with themselves in the first instance. It then becomes clear that the work of the comparative lawyer vis-à-vis his/her students is very reminiscent of what legal translators do; to draw an analogy one could perceive the comparative law exercise in relation to foreign terms as an 'act of communication' (Šarčević 1997, 50-86, 108-110, 227, 271, 276, 304), because the delivery of law (just as translation) is an act of communication.

[21] See e.g. Brand's point on conceptual comparisons (Brand 2009, 32); further see Zweigert and Kötz's point of terminological familiarisation on established concepts such as good faith, reasonableness and equity (Zweigert and Kötz 1998, 188-191).

[22] For a recent detailed account of the translation approach e.g. in the European Court of Justice see (McAuliffe 2009, 99-115)

Conclusion

The analysis has shown that the comparative lawyer is to govern his approach under the headings of function, context and semantics. As has been shown, his/her teaching would greatly benefit by such an approach. In doing so there are three particular approaches: one approach is *to introduce the unfamiliar via the familiar* e.g. by attempting to make 'conceptual comparisons' (Brand 2009, 32). Another approach would be one to be *periphrastic*, i.e. analytical and explanatory. And certainly, one could make students think in foreign terms, after he/she has introduced his/her students to a foreign system, i.e. by operating under the *immersion technique* (Grosswald Curran 1998, 43). At times, we, comparative lawyers, should seek the assistance of experienced linguists (Brand 2009, 32), because –arguably– our approach would be less legalistic then. We should also seek the help of our colleagues, other comparative lawyers, who can act as correctives to the research which we undertake (Örücü 2004, 68). We should learn foreign languages and be trained in foreign legal terminology. We should listen to our students. We comparative lawyers are then rather like legal translators in a sense, who 'must be taught to keep the reader in mind when drafting their texts' (Beaudoin 2009, 144). So too, we should be reminded that we have to keep our students in mind, because they are not experts (nor have they to be). Above all, however, it is the re-alignment of our learning and teaching strategy that we should pursue here; effectively, we have to learn how to think so that we take into account the needs of our students.

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ПРАВОВОЕ И МЕТАЯЗЫКОВОЕ СОЗНАНИЕ БУДУЩИХ ПРАВООХРАНИТЕЛЕЙ

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Аннотация: В данной статье понятие *метаязыковое сознание* определено как область знания человека о своем языке, а *профессиональное языковое сознание* как психолингвистическая модель, реконструирующая систему основных образов сознания, формируемых и овнешняемых с помощью профессионально ориентированных языковых средств. Специфика языкового сознания будущих правоохранителей такова, что его центральной частью должно быть сознание *правовое*.

В статье выявлены элементы правосознания в структуре языковой личности правоохранителя на основании реконструирования концептов, представляющих специфические правовые категории и понятия: *права и обязанности, закон и законность, суд, правосудие, преступление, наказание* и др. С этой целью был применен *метод ассоциативного эксперимента*, в результате которого можно утверждать, что процент терминоориентированных языковых единиц в языковом сознании будущего правоохранителя (61,5%) указывает на недостаточную степень формирования профессиональной личности в курсантах 3-го курса. Тем не менее, в сознании будущего правоохранителя имеются профессионально маркированные когнитивные структуры. В реконструированных ассоциативных полях актуализируются связи правовых концептов с определяющими признаками правового общества (24,0%), обобщающими (родовыми) и конкретизирующими видовыми правовыми понятиями (11,0% и 3,8%), правоприменительной деятельностью (13,7%), аутентичностью государственного языка (3,8%), нормативно-правовыми актами (3,0%), общенаучной сферой (2,2%). Однако эмоционально-оценочные компоненты исследуемых концептов для профессионального языкового сознания курсантов также оказались актуальными (38,5%).

Abstract: In this article the notion of *metalinguistic consciousness* is defined as an area of a human being's knowledge about the language, and *professional linguistic consciousness* is defined as psycholinguistic model that reconstructs the system of basic images of consciousness formed by professionally oriented means of language. It is the specific of future policemen's linguistic consciousness that the central part of it must be *legal consciousness*.

In the article the elements of legal consciousness in the structure of policemen's linguistic personality are exposed on the basis of reconstructing concepts that present specific legal categories and notions: *right and duties, law and legality, court, justice, crime, punishment* and others. The method of associative experiment was used. As a result of the experiment it is possible to assert that

the percent of terminological linguistic units in the future policemen's linguistic consciousness (61,5%) shows that professional personality in the third-year students is not formed enough. Nevertheless, there are professionally marked cognitive structures in future policemen's consciousness. In reconstructed associative fields become actual the connections between legal concepts and basic signs of legal society (24,0%), generalizing and specifying legal concepts (11,0% and 3,8%), law applying activity (13,7%), authenticness of official language (3,8%), legal acts (3,0%), scientific sphere (2,2%). However emotional and evaluating components of investigated concepts for students' professional linguistic consciousness are also appeared actual (38,5%).

Для современной лингвистики понятие *языкового сознания* является ключевым. Осмысление сознания как способности отражать действительность в лингвистическом преломлении связано с традиционным вопросом „язык и мышление" и ориентировано на процесс „мышление на языке". В современной лингвистике с позиций языкового сознания описываются механизмы лингвокреативной деятельности человека (Б.А. Серебренников, А.В. Кравченко), устанавливается роль языка в процессах получения, обработки и хранения информации (Е.С. Кубрякова), разрабатывается новое понимание природы метафоры (В.Н. Телия), познаются закономерности формирования лексических структур текста (Н.Е. Сулименко), осуществляется разработка культурных концептов (Е.С. Яковлева, А.Д. Шмелев, Л.О. Чернейко), изучаются различные виды дискурса (В.В. Красных). Во всех упомянутых научных направлениях язык является субъектом исследования.

На лингвистическом уровне в качестве познающего субъекта выступает языковая личность, а в качестве внешнего мира, объекта отражения – язык. Язык в этом случае является объектом познания. Любой носитель языка в той или иной мере осознает структуру своего языка, нормы и правила его употребления, особенности функционирования и т.д. Область рационально-логического, рефлексирующего языкового сознания, направленного на отражение языка-объекта как элемента действительного мира, получила название *метаязыкового сознания*. В широком смысле метаязыковое сознание – это область знания человека о своем языке. Сформированный метаязыковым сознанием образ языка является преобразованной реальностью, отражающей уровень развития сознания своего времени, горизонты смысла данной социально-культурной общности. На фоне типических закономерностей осмысления языка выявляются общественно-групповые и индивидуальные различия, обусловленные личным речевым опытом, индивидуальными психологическими и ментальными особенностями.

По мнению А.А. Леонтьева, наряду с индивидуальными вариантами существуют инвариантные образы мира, понимаемые как совокупность „абстрактных моделей, описывающих общие черты в видении мира различными людьми. Такой инвариантный образ мира непосредственно соотнесен со значениями и другими социально выработанными опорами, а не с личностно-смысловыми образованиями как таковыми. С теоретической точки зрения таких инвариантных образов мира может быть сколько угодно – все зависит от социальной структуры социума, культурных и языковых различий в нем и т.д. В последнее время возникло даже понятие „*профессионального образа мира*",

формирование которого является одной из задач обучения специальности. Вообще процесс обучения может быть понят как процесс формирования инвариантного образа мира, социально и когнитивно адекватного реальностям этого мира и способного служить ориентировочной основой для эффективной деятельности человека в нем" [Леонтьев, 1997, с. 273]. Таким образом, если придерживаться деятельностного подхода к общению, можно сказать, что наряду с традиционным для лингвистов изучением языка как орудия деятельности необходимо исследовать языковое сознание субъектов деятельности.

Специфика общения при взаимодействии людей разных профессий состоит: 1) в специфике выбора речевых стереотипов, осуществляемого в соответствии со стратегиями действий, которые формируются в профессиональном сознании; 2) в специфике образов сознания, отображающих предметы конкретной корпоративной культуры [Харченко, 2000, с. 208].

Е.А. Климов подчеркивает важную роль языкового сознания (хотя не использует данный термин): „Чтобы ориентироваться в какой-то предметной области, то есть, чтобы заметить возникающие впечатления, переживания, да еще и не путать их друг с другом и сохранить в сознании, в опыте, надо располагать некоторыми специальными средствами. К числу средств такого рода относятся, прежде всего, слова-названия… Скажем, стекольщик смотрит на стекло и видит там „мадежи", столяр видит в древесине „крень", „метики", „отлупы", ткачиха в своем предмете труда – „близны" и многое другое; осмотрщик-ремонтник вагонов, встречая поезд, слышит, а не видит „наклепы на колесах", дирижер в благозвучном аккорде слышит вдруг „петуха" и т.д. А для исследователя, исходящего из общеязыковых эталонов, этого всего может и не быть; в результате – идея переоценки невербальных составляющих сознания профессионала" [Климов, 1995, с. 26–27].

Таким образом, профессиональное языковое сознание – *психолингвистическая модель, реконструирующая систему основных образов сознания, формируемых и овнешняемых с помощью профессионально ориентированных языковых средств* [Алферова, 2007, с. 16].

Изучение структур языкового сознания людей определенной профессиональной группы наиболее эффективно может быть осуществлено на примере исследования концептов, представляющих основные категории в сфере их профессиональной деятельности. Специфика языкового сознания будущих правоохранителей такова, что его центральной частью должно быть сознание правовое.

Правосознание – явление, требующее изучения в качестве особого объекта правовой теории, через которое теория права „выходит" на такие важные вопросы, как сущность права, его генезис, культурная специфика юридического регулирования в рамках той или иной цивилизации, деформации правового поведения, источники и причины преступности и иной социальной патологии и т.д. Правосознание наиболее полно и разносторонне отражает идеальную, духовную сущность права как элемента культуры, инварианты жизненного уклада данного народа. Замечено, что в разных типах цивилизации, различных культурно-исторических сообществах существуют весьма неоднозначные представления о

нормах поведения, о должном, о способах регулирования тех или иных ситуаций и т.д.

В теории правоведения различаются несколько видов правосознания. *Обыденное правосознание* – массовые представления людей, их эмоции, настроения по поводу права и законности. Эти чувства возникают под влиянием непосредственных условий жизни людей, их практического опыта. *Профессиональное правосознание* – понятия, представления, идеи, убеждения, традиции, стереотипы, складывающиеся в среде профессионалов-юристов. Эта разновидность правосознания играет наиболее существенную роль в реализации юридических норм, и от ее демократической и гуманистической адекватности зависит стиль и дух правовой практики. *Научное правосознание* – идеи, концепции, взгляды, выражающие систематизированное, теоретическое освоение права. В современных обществах научному правосознанию принадлежит приоритетная роль в указании путей развития права, законодательства, политико-конституционных отношений.

Выявление элементов правосознания в структуре языковой личности правоохранителя нам представляется возможным на основании реконструирования концептов, представляющих специфические правовые категории и понятия: *права и обязанности, закон и законность, суд, правосудие, преступление, наказание* и др. С этой целью был применен *метод ассоциативного эксперимента*.

Для массового эксперимента испытуемым (курсантам 3-го курса факультета подготовки следователей Луганского государственного университета внутренних дел имени Э.А. Дидоренко) был роздан материал в виде анкет, содержащих список слов: *закон, законность, суд, правосудие, преступление, преступник, наказание, право, обязанность, конституция, государственный язык*. В ходе эксперимента испытуемые в течение нескольких минут рядом с каждым словом-стимулом анкеты писали слово(фразу)-реакцию, которое первым пришло в голову испытуемого по прочтении слова-стимула. *Результаты* ассоциативного эксперимента отражают универсальные когнитивные структуры, стоящие за языковыми значениями, и индивидуальные особенности испытуемых, содержание их личностных смыслов, т.е. позволяют получать знание о специфике языкового сознания будущих правоохранителей.

Цель эксперимента заключается в выявлении когнитивных структур, связанных с профессионально маркированными языковыми знаками, их места и роли в языковом сознании будущих правоохранителей.

Мы реконструировали модель концепта, репрезентированного лексемой ЗАКОН, выявили актуальные смыслы данного концепта для языкового сознания будущих правоохранителей. Ассоциативное поле ЗАКОН в профессиональном сознании представлено следующими основными компонентами: 1) лексемы, отображающие определяющие признаки правового общества: *правопорядок, справедливость, защита, нормативный акт, законодательство Украины, власть* (58,0%); 2) латинские и украинские речевые стереотипы: *dura lex sed lex; закон, что дышло, куда повернешь, туда и вышло.* Украинские речевые стереотипы выражают иронично-негативное отношение будущих правоохранителей к закону (17,0%); 3) лексемы, акцентирующие форму объекта без учета его содержания

(ироничный эффект): *книги* ʻсшитые в один переплет листы бумаги, заполняемые документальными официальными учетными данными' (8,0%); 4) лексемы, обозначающие тот или иной вид насилия: *давление* ʻпринуждение, насилие над чьей-н. волей, убеждениями', *ограничение* (17,0%). Ядро ассоциативного поля ЗАКОН в профессиональном языковом сознании составляют лексемы, отображающие определяющие признаки правового общества.

Ассоциативное поле ЗАКОННОСТЬ в языковом сознании будущих правоохранителей формируется следующими компонентами: 1) лексемы, отображающие определяющие признаки правового общества: *справедливость, порядок, соблюдение порядка, соблюдение закона, правопорядок*. Некоторые из них содержат номены, обозначающие тот или иной вид насилия: *правовой режим* ʻгосударственный строй (обычно об антинародном антидемократическом строе)' (50,0%); 2) общенаучная лексика: *идеализм* ʻидеализация действительности' (ироничный эффект), *принцип* ʻосновное исходное положение' (17,0%); 3) оценочная лексика: *неопределенность* ʻнеопределенное положение' (8,0%); 4) лексемы, обозначающие тот или иной вид насилия: *требование* ʻправило, условие, обязательное для выполнения' (8,0%); 5) лексемы, обозначающие атрибуты правонарушений и преступлений: *обман* ʻложное представление о чем-н., заблуждение', *деньги* (атрибут взяточничества) (17,0%). Ядро ассоциативного поля ЗАКОННОСТЬ также составляют лексемы, отображающие определяющие признаки правового общества.

Ассоциативное поле СУД представлено следующими элементами: 1) лексемы, отображающие определяющие признаки правового общества: *интересы граждан, независимость, ответственность* ʻнеобходимость, обязанность отдавать кому-н. отчет в своих действиях, поступках' (25,0%); 2) оценочная лексика: *дерзость* (*наглость*), *немощность, Бог на Земле* (с ироничным эффектом) (25,0%); 3) лексемы, обозначающие родовые понятия: *государственный орган, власть, ветвь власти* (34,0%); 4) лексемы, обозначающие атрибуты правонарушений и преступлений: *продажность* (8,0%); 5) лексемы, отображающие суть, атрибуты, процессуальные действия и т.д. судебного процесса: *защита и наказание* (8,0%). Ядром ассоциативного поля СУД являются лексемы, обозначающие родовые понятия.

Ассоциативное поле ПРАВОСУДИЕ состоит из следующих компонентов: 1) общенаучная лексика: *принцип* ʻосновное, исходное положение' (8,0%); 2) оценочная лексика: *нереальность* ʻнесуществующий в действительности, воображаемый'; *казнить, нельзя помиловать* (в значении неопределенности) (17,0%); 3) лексемы, обозначающие атрибуты правонарушений и преступлений: *взяточничество, халатность, вымогательство* (25,0%); 4) лексемы, отображающие определяющие признаки правового общества: *справедливость, правопорядок, объективность и всесторонность* (33,0%); 5) лексемы, отображающие суть, атрибуты, процессуальные действия и т.д. судебного процесса: *трактовка законов, вывод* (17,0%). Ядро ассоциативного поля ПРАВОСУДИЕ составляют лексемы, отображающие определяющие признаки правового общества.

Ассоциативное поле ПРЕСТУПЛЕНИЕ формируется следующими составляющими: 1) лексемы, обозначающие родовые понятия: *незаконное деяние, способ достижения цели, противоправное деяние, посягательство, явление государства, действие или бездействие* (58,0%); 2) лексемы, обозначающие видовые понятия: *правонарушение, ошибка, вред, убийство, халатность* (42,0%). Ядром ассоциативного поля ПРЕСТУПЛЕНИЕ являются лексемы, обозначающие родовые понятия.

Ассоциативное поле ПРЕСТУПНИК представлено следующими элементами: 1) лексемы, обозначающие чувства, эмоции, состояние, связанные с общением с преступником: *опасность, угроза* (*обществу*) (17,0%); 2) оценочная лексика: *личность* (позитивная оценка, героизация); *выродок, сволочь, мерзавец, негодяй, враг общества* (негативная оценка) (50,0%); 3) лексика, отображающая содержание нормативно-правовых актов: *правонарушитель, нарушитель закона* (25,0%); 4) лексика, конкретизирующая личность преступника: *государственные деятели* (8,0%). Ядро ассоциативного поля ПРЕСТУПНИК составляет оценочная лексика негативной коннотации.

Ассоциативное поле НАКАЗАНИЕ в языковом сознании будущих правоохранителей формируется следующими компонентами: 1) лексемы, обозначающие родовые понятия: *способ достижения справедливости* (8,0%); 2) лексемы, отображающие определяющие признаки правового общества: *действие закона, применение закона* (25,0%); 3) лексемы, отображающие суть, атрибуты, процессуальные действия и т.д. судебного процесса: *приговор, решение* (*суда, уполномоченных органов*) (25,0%); 4) лексемы, отображающие атрибуты исполнения наказания: *оружие, лишение прав* (17,0%); 5) оценочная лексика: *заслуга* (укр. *катюзі по заслузі*), *карма, следствие* 'то, что следует, вытекает из чего-н., результат чего-н., вывод' (25,0%). Ядро ассоциативного поля НАКАЗАНИЕ составляют лексемы, отображающие определяющие признаки правового общества, суть, атрибуты, процессуальные действия и т.д. судебного процесса, оценочная лексика.

Ассоциативное поле ПРАВА представлено следующими компонентами: 1) оценочная лексика: *необходимость; права, как вода: сегодня есть – завтра нема; незыблемость* (33,0%); 2) лексемы, обозначающие тот или иной вид насилия: *ограничение* (8,0%); 3) лексемы, акцентирующие выгодность (результат) применения прав: *состоятельность, возможность, богатство, клад, имущество* (42,0%); 4) лексемы со значением действия, необходимого для существования прав: *защита, помощь* (17,0%). Ядром ассоциативного поля ПРАВА являются лексемы, акцентирующие выгодность (результат) применения прав.

Ассоциативное поле ОБЯЗАННОСТИ в языковом сознании будущих правоохранителей имеет следующие составляющие: 1) лексемы, обозначающие тот или иной вид насилия: *зависимость, ноша, мера ограничения, тяжесть, принуждение* (67,0%); 2) лексемы, отображающие определяющие признаки правового общества: *соблюдение, полномочность, сохранность* (25,0%); 3) лексемы, акцентирующие коррелятивную парную лексему: *вспомогательные права* (8,0%). Ядро ассоциативного поля ОБЯЗАННОСТИ составляют лексемы, обозначающие тот или иной вид насилия.

Ассоциативное поле КОНСТИТУЦИЯ формируют следующие компоненты: 1) лексемы, отображающие определяющие признаки правового общества: *независимость, главный закон* (17,0%); 2) лексемы, оттеняющие форму объекта без учета его содержания (ироничный эффект): *книга с листами, бумажка* (17,0%); 3) оценочная лексика: *хлам, книга жалоб и предложений, проституция* (негативная коннотация), *ствол дерева* (метафора с позитивной коннотацией) (33,0%); 4) лексемы, обозначающие родовые понятия: *закон* (25,0%); 5) лексика, отображающая содержание нормативно-правовых актов: *гражданские права и обязанности* (8,0%). Ядром ассоциативного поля КОНСТИТУЦИЯ является оценочная лексика.

Ассоциативное поле ГОСУДАРСТВЕННЫЙ ЯЗЫК в языковом сознании будущих правоохранителей формируется следующими компонентами: 1) лексемы, отображающие определяющие признаки правового общества: *реквизит независимого государства, единство, единый язык единого народа* (25,0%); 2) лексемы, акцентирующие аутентичность и идентичность языка: *родной язык; то, что отделяет нас от других; символ государства* (42,0%); 3) оценочная лексика: *негативность, брутальность, неопределенность, враг государства* (33,0%). Ядро ассоциативного поля ГОСУДАРСТВЕННЫЙ ЯЗЫК составляют лексемы, акцентирующие аутентичность и идентичность языка.

На основе проведенных ассоциативных экспериментов можно утверждать, что процент терминоориентированных языковых единиц в языковом сознании будущего правоохранителя (61,5%) указывает на недостаточную степень формирования профессиональной личности в курсантах 3-го курса. Тем не менее, есть доказательства того, что в сознании будущего правоохранителя имеются профессионально маркированные когнитивные структуры. В ассоциативных полях, реконструированных на основе данных эксперимента, актуализируются связи правовых концептов с определяющими признаками правового общества (24,0%), обобщающими (родовыми) и конкретизирующими видовыми правовыми понятиями (11,0% и 3,8%), правоприменительной деятельностью (13,7%), аутентичностью государственного языка (3,8%), нормативно-правовыми актами (3,0%), общенаучной сферой (2,2%). Однако эмоционально-оценочные компоненты исследуемых концептов для профессионального языкового сознания курсантов также оказались актуальными (38,5%).

Высокий уровень стереотипности ассоциаций курсантов указывает на наличие стабильных компонентов в профессиональном языковом сознании, обусловленных содержанием изучаемых ими дисциплин. Для языкового сознания курсантов преимущественным является формирование предметно-понятийного компонента концепта [Алферова, 2007, с. 19], связанного с профессиональной деятельностью правоохранителя. Таким образом, ассоциативные поля, представляющие фрагменты языкового сознания будущего правоохранителя, формируются в соответствие с актуальностью компонентов концепта, определяемой характером правоохранительной деятельности.

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GERMAN LEGAL TERMINOLOGY IN THE AREA OF HIGHER EDUCATION AND THE USE OF ENGLISH IN THE NATIONAL VARIETIES OF GERMAN SPOKEN IN AUSTRIA, GERMANY AND SWITZERLAND

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Abstract: This paper investigates German legal terminology in the area of higher education in Austria, Germany and Switzerland. Particular emphasis is put on the influence of English in this field arising from internationalization and the creation of the European Higher Education Area. One can assume that due to the Bologna Process – initiated on the European level with the aim of creating more comparable, compatible and coherent higher education systems – there is a wider use of English terminology than before in the field of higher education.
German legal and administrative language employed in the higher education sector in the aforementioned countries has been analysed within the framework of this study with the help of comparable specialized corpora of university legislative texts. In addition, a reference corpus of international legal texts dealing with the same topic has been employed. The analysis will endeavour to establish to what extent English terminology is being used.

Zusammenfassung: Die vorliegende Untersuchung befasst sich mit der deutschen Rechtssprache im Bereich des Hochschulwesens in Österreich, Deutschland und der Schweiz und dem Einfluss des Englischen in diesem Bereich auf Grund der Internationalisierung und der Schaffung eines europäischen Hochschulraumes. Durch den Bologna Prozess, einer Initiative auf europäischer Ebene mit dem Ziel eine vergleichbarere und wettbewerbsfähigere Hochschulausbildung zu schaffen, ist es naheliegend, einen weiter verbreiteten Gebrauch des Englischen in diesem Bereich anzunehmen.
Mit Hilfe von vergleichbaren fachsprachlichen Korpora aus Universitätsgesetzen wurde die deutsche Recht- und Verwaltungssprache im Bereich des Hochschulwesens untersucht. Weiters wurde ein Vergleichskorpus mit internationalen Erklärungen und Kommuniqués zum Bologna Prozess erstellt. Die Untersuchung zielt darauf ab, zu zeigen, inwieweit englische Terminologie im Bereich des Hochschulwesens verwendet wird.

Introduction

The contact between cultures and thereby between languages is a well-known phenomenon and constitutes one of the reasons for language change and development. For over half a century English has been considered as the lingua franca of international communication, with nearly every language being influenced by English terminology, both every day language and specialized language. But is the same true of legal and administrative language in the higher education sector? Since the launch of this

intergovernmental initiative which aims to create a European Higher Education Area and to promote the European system of higher education worldwide, the so-called "Bologna Process", the question regarding how much English terminology is used in German university terminology has come to the fore.

This paper firstly outlines the backbone of the research carried out, i.e. the Bologna Process, before clarifying the basic terms relevant for this study and reviewing the corpus and methods applied. The results of the statistical and linguistic analysis are then discussed and, to conclude, consideration is given to the next steps to be explored.

Background

The Bologna Process is an intergovernmental initiative which aims to create the European Higher Education Area and to promote the European system of higher education worldwide. It was launched in 1999 when 29 Education Ministries signed the Bologna Declaration on the European Space for Higher Education (cf. Reinalda and Rulesza 2006, 21; Neave and Olsen 2007, 135ff). The main objectives of the Bologna Process are: to remove the obstacles to student and university staff mobility across Europe; to enhance the appeal of European higher education worldwide; to establish a common structure of higher education systems across Europe, and for this common structure to be based on two main cycles, undergraduate and graduate (a third cycle, doctoral studies, was not part of the initial Bologna Process system but was incorporated at a later stage). Its decision-making procedure is based on the consent of all the participating countries, currently totalling 46, and is independent from the framework of the European Union. The ten Bologna Action Lines are: the adoption of a system of easily readable and comparable degrees; the adoption of an essentially two-cycle system; the establishment of a system of credits; the promotion of mobility by overcoming obstacles; the promotion of European cooperation in quality assurance; the promotion of the European dimension in higher education; the focus on lifelong learning; the involvement of students; the promotion of the attractiveness of the European Higher Education Area and the adoption of doctoral studies and promoting the synergy between the European Higher Education Area and the European Research Area[23] (cf. also Reinalda and Rulesza 2006, 9).

Since the Bologna Process was initiated at the European level and given the fact that so many countries have chosen to take part, it seems fair to assume that English terminology, especially for newly introduced concepts, will influence national languages of the participating countries in the area of higher education.

Aim of the study

The present study aims to investigate the influence of English terminology on German terminology employed in higher education laws and regulations in Austria, Germany and Switzerland, since all three countries are participants of the Bologna

[23] http://www.ond.vlaanderen.be/hogeronderwijs/bologna/actionlines/index.htm (accessed July 7, 2009).

Process initiative. The study is geared towards finding out how many Anglicisms are used in laws and regulations in the area of higher education in the investigated countries, how they are used in the context of the German texts and if any differences can be identified in the use of Anglicisms in the three countries. One aspect of the research focuses on new concepts created within the Bologna Process. The Anglicisms are analysed in terms of:

- frequency of use
- orthographical integration
- integration into the German context.

Corpus and method

A corpus with relevant texts within the area of higher education was created for this study. For the purposes of this paper a corpus is understood to be "a collection of naturally-occurring language text, chosen to characterize a state or variety of a language" (Sinclair 1991, 171) In this case it is a specialized corpus made up of a collection of specialized texts including not only university laws, but also Bologna Process declarations and communiqués. The three national university law corpora can be considered as so-called "comparable corpora", i.e. corpora that do "not contain translations but consist of text from different languages which are similar or comparable with regard to a number of parameters such as text type, formality, subject-matter, time span, etc." (Aijmer 2008, 177). In the case of these national university law corpora it is not different languages that are involved, but rather different national varieties of a language. All the other parameters are fulfilled and, as such, they can be considered as comparable corpora.

The criteria for selecting the text for the corpora were different for the various sub-corpora. On the one hand there is a so-called "Bologna Process corpus" containing all the declarations and communiqués from the Bologna Process, and on the other hand there are the 3 respective national corpora comprising all of the respective national higher education laws. For the Bologna Process corpus the criteria were the following:

- topic: Bologna Process
- type of text: international declarations and communiqués
- time range: since 1998 (starting with the Sorbonne Declaration)
- language: official German translation of the original English text

For the three national corpora the criteria were the following:

- topic: higher education
- type of text: law texts; national or regional legislation (according to the organization of the university sector in the analysed countries)
- time range: law that is currently in force
- language: standard national varieties of German

The three national corpora differ slightly from one another due to the legislative situation of the higher education system in each of the three countries concerned. The

Austrian corpus only contains one law since in Austria universities are regulated at the national level. In Germany, however, there is one umbrella law and, in addition, laws from each of the 16 federal states. The situation in Switzerland is completely different. There are no general university laws or regulations at the national level as yet in Switzerland and it follows that every university has its "own" university law issued by the respective canton, whilst the two technical universities are regulated by the Swiss Confederation. Since not all Swiss university regulations are in German, some of them were not taken into account by the study. Only the German part of any bilingual laws and regulations was included in the corpus. The Swiss corpus contains seven university laws.

Table 1: Size of the sub-corpora

Corpus	**Size of each sub-corpus (in tokens)**
Bologna Process corpus (BP corpus)	12653
Austrian university law corpus (AT corpus)	35170
German university law corpus (DE corpus)	473245
Swiss university law corpus (CH corpus)	24810

The first step was to find all the Anglicisms in the four sub-corpora and to relate the number of Anglicisms to the size of each sub-corpus. It seems now useful to determine what an Anglicism actually is. There are several definitions for this concept, both in dictionaries as well as in linguistic publications. According to Webster's Third New International Dictionary of the English Language (Gove 1986, 83) an Anglicism is "a characteristic feature of English occurring in another language" or "a trend toward linguistic borrowing from English". The Random House Dictionary of the English Language (Stein 1973, 58) defines the term as "a word, idiom or characteristic feature of the English language occurring in or borrowed by another language". Looking at linguistic publications, more detailed definitions can be found. For Zindler an Anglicism is

> ein Wort aus dem britischen oder amerikanischen Englisch im Deutschen oder eine nicht übliche Wortkomposition, jede Art der Veränderung einer deutschen Wortbedeutung oder Wortverwendung (Lehnbedeutung, Lehnübersetzung, Lehnübertragung, Lehnschöpfung, Frequenzsteigerung, Wiederbelebung) nach britischen oder amerikanischem Vorbild." (Zindler 1959, cited in Carstensen, 1965, 30).

There are several other definitions; e.g. Carstensen (1965, 30) enriches the definition of Zindler with the aspects of pronunciation and syntax and the methodological division between "Briticisms" and "Americanisms". However, Carstensen (1965, 18) himself remarks that it is difficult to draw an exact line between borrowings from British and American English.

Also other authors (cf. Langer 1995, Yang 1990, Chang 2003) have come to similar conclusions. Yang (1990, 7) remarks that "die amerikanische oder britische Herkunft der ins Deutsche entlehnten englischen Lexeme oder Lexemverbindungen [ist]

in vielen Fällen nicht eindeutig und einwandfrei festzustellen." Schmitt (1985, 25) in his study of Anglicisms in language for special purpose uses the definition by Zindler. For the aim of his study, Busse (1993, 15) considers a word as an Anglicism if it is marked as such in the German Dictonary "Duden" (i.e. as engl. or amerikan.). To be considered as an Anglicism and included in the Dictionary of European Anglicisms (Görlach 2005, xviii) the word has to be "recognizably English in form (spelling, pronunciation, morphology) in at least one of the languages tested". Zindler's definition is widely accepted and still referred to, even in newer publications, like in Chang's doctoral thesis (2003, 32), where it is used as a basic definition for the study. It is only enriched by Yang's assumption (1990, 7) that borrowings from all English varieties are to be considered as Anglicisms, not only the words of British and American origin. For the purpose of this study, pronunciation and syntax as stated by Carstensen (1965, 30) are not relevant.

Therefore, borrowings from English with etymological origins other than English origins are also considered as Anglicisms for the purposes of this study provided that the English spelling is used, i.e. "Doctor of Philosophy" or "diploma supplement". When counting the Anglicisms the following principles were adopted: foreign words, loan words, compound words with a foreign word or a loan word and also loan translations, like "Diplomzusatz" for "diploma supplement", were considered as Anglicisms. Furthermore, abbreviations of Anglicisms were also counted, such as "ECTS". Names for institutions, such as "European University Association", "European Association of Institutions in Higher Education" and "Union of Industrial and Employers' Confederations of Europe" and denominations of Ministries were not taken into consideration for the purpose of this research. Geographical denominations in English were excluded, too.

The next phase of the analysis took a detailed look at the Anglicisms found in the Bologna Process corpus with the aim to see if all the Anglicisms that appear in the Bologna Process corpus also appear in the three national sub-corpora. Finally, a selection of Anglicisms were taken and analyzed in terms of the orthographical integration of the Anglicisms and their integration into the German context.

Statistical analysis

Frequency of Anglicisms

This section presents the results regarding the frequency of Anglicisms in the four sub-corpora and the entire corpus.

In the combined corpus (all 4 sub-corpora together) 1112 Anglicisms were identified, constituting 0.21% of the combined corpus content. The highest percentage of Anglicisms, 0.58%, was found in the Austrian university law corpus (205 Anglicisms), followed by the Bologna Process corpus with 0.55% (69 Anglicisms). The lowest percentage was documented in the German university law corpus with only 0.17% (790 Anglicisms). The detailed results of frequency are shown in the table below.

Table 2: Number of Anglicisms in the 4 sub-corpora

Corpus	**Size of the corpus (in**	**Number of**	**Anglicisms as**

	tokens)	**Anglicisms**	**a % of the respective (sub-) corpus**
Bologna Process corpus (BP corpus)	12653	69	0.55
Austrian university law corpus (AT corpus)	35170	205	0.58
German university law corpus (DE corpus)	473245	790	0.17
Swiss university law corpus (CH corpus)	23861	48	0.20
Entire corpus	**532276**	**1112**	**0.21**

Hits of Bologna Process Anglicisms in the three national sub-corpora

The table below features a list of all the Anglicisms found in the Bologna Process corpus.

These specific Anglicisms were then looked up in the other three sub-corpora to see if they are also used at the national level in the three countries. The English terms found in the Bologna Process corpus are referred to as "Bologna Process Anglicisms" for the purpose of this paper.

Table 3: Anglicisms in the Bologna Process corpus (BP corpus)

Anglicisms in BP corpus	**Number**
Bachelor	1
Bachelorabschluss	2
credit	1
cross-border	1
Diploma Supplement	4
Diplomzusatz	3
ECTS*	10
European Credit Transfer System	1
European Higher Education Area	1
follow-up*	28
global setting	1
graduate	2
guidelines	1
Higher Education	1
Joint Declaration	1
learning	1
Master*	3

peer review	2
quality provision	1
range	1
stocktaking	1
undergraduate	2

*Compounds were also included (e.g. follow-up group)

The results in Table 4 below show that the English terms "Bachelor" and "Master" (and their compounds), "Diploma Supplement" and the abbreviation "ECTS" (and ECTS compounds) are the most popular English terms from the Bologna Process corpus that are found in the other three corpora. Bologna Process Anglicisms account for 53% of all Anglicisms found in the German university law corpus, that is to say more than half. Findings from the Austrian corpus are even more significant, with 68% of all the Anglicisms being Bologna Process Anglicisms. The Swiss corpus only features two hits for "Bachelor" and "Master", namely "Bachelortitel" (Bachelor degree) and "Mastertitel" (Master degree). The possible reasons for the low percentage of Bologna Process Anglicisms in the Swiss corpus are discussed below.

Table 4: Comparison of the frequency of Anglicisms found in the 4 sub-corpora

Bologna Process Anglicisms	**BP corpus**	**AT corpus**	**DE corpus**	**CH corpus**
Bachelor*	3	38	168	1
credit	1	0	5	0
cross-border	1	0	0	0
Diploma Supplement	4	1	16	0
Diplomzusatz	3	0	0	0
ECTS*	10	15	10	0
European Credit Transfer System**	1	1	7	0
European Higher Education Area	1	0	0	0
Follow-up group	28	0	0	0
global setting	1	0	0	0
graduate	2	0	1	0
guidelines	1	0	0	0
Higher Education	1	0	0	0
Joint Declaration	1	0	0	0
learning	1	0	0	0
Master*	3	85	208	1
peer review	2	0	1	0
quality provision	1	0	2	0
range	1	0	0	0
stocktaking	1	0	0	0
undergraduate	2	0	0	0

* Compounds were also counted

** Different spelling variations were also counted

Linguistic analysis

This section presents and discusses the results of certain aspects of linguistic analyses that were carried out, namely the orthographic integration of a selection of Anglicisms from the BP corpus and their integration into the German context. For the purposes of this paper the following sample of Anglicisms was used: "Bachelorabschluss", "European Credit Transfer System", "Follow-up group" and "Diploma Supplement".

Orthographical integration

The phonemic and graphemic integration of the chosen Anglicisms into German is analyzed in this section. Orthographical variations for an Anglicism often exist. According to Gabler (1986, 18) this is a consequence of the spelling of the foreign word being adapted to German spelling. One of the best known adaptations to German spelling is the replacement of the English "c" at the beginning of the word with the German "k" like Codierung/Kodierung and Club/Klub, or the replacement of the English "sh" with the German "sch" (cf. Busse 1993, 185). According to a study by Langner (1995, 175) only 28% of Anglicisms in German found in the Duden German dictionary are orthographically integrated. This study did not distinguish between upper case and lower case spelling and the same integration strategies as those used by Béchet-Tsarnos (2005), i.e. upper case, lower case, original, hyphen and adaptation, were adopted but extended to include the category of adaptation with a hyphen. Furthermore, the writing of compounds as one word was counted as an adaptation for the purpose of the present paper.

Bachelorabschluss

The term "bachelor" in the area of higher education is understood to be an undergraduate academic degree in accordance with the system of the Bologna Process system after the successful completion of the first cycle of studies lasting at least three years.[24] Table 5 below details the frequency of the compound "Bachelorabschluss" (bachelor degree) in the 4 sub-corpora. In the corpus 4 upper case examples were found, whilst no lower case examples were identified.

Table 5: The use of "Bachelorabschluss" in the 4 sub-corpora

	BP corpus	**AT corpus**	**DE corpus**	**CH corpus**
Spelling				
Upper case	2	0	23	0
Lower case	0	0	0	0
Orthography				
Original	0	0	0	0
Hyphen	1	0	3	0

[24] Bologna Declaration 1999 http://ec.europa.eu/education/policies/educ/bologna/bologna.pdf (accessed July 22, 2009)

Adaptation	1	0	20	0
Adaptation with a hyphen	0	0	0	0

European Credit Transfer System

The European Credit Transfer System "is a tool which enables students to collect credits for learning achieved through higher education. ECTS is a learner-centred system which aims to increase transparency of learning outcomes and learning processes."[25]

In the overall corpus both the original version "European Credit Transfer System" and the version with a hyphen, "Europäisches Credit-Transfer-System", were found.

The following variations were found for European Credit Transfer System being adapted with a hyphen: "europäisches Kredit-Transfer-System", "europäisches Kredittransfer-System" and "europäisches Kredit-Transfersystem".

Table 6: The use of "European Credit Transfer System" in the 4 sub-corpora

	BP corpus	**AT corpus**	**DE corpus**	**CH corpus**
Spelling				
Upper case	1	1	9	0
Lower case	0	0	0	0
Orthography				
Original	1	1	3	0
Hyphen	0	0	1	0
Adaptation	0	0	0	0
Adaptation with a hyphen	0	0	5	0

Follow-up group

In the context of the Bologna Process, the term "follow-up group" is understood to be a working group for follow-up work initiated at the meeting of European Ministers in charge of Higher Education in Prague on May 19th 2001 composed of representatives of all signatories, new participants and the European Commission and chaired by the EU Presidency at the time.[26] This term was only found in the Bologna Process corpus and featured once in its original form written with a capital "F", once in an adapted form (Follow-up Gruppe) and 26 times in an adapted version with a hyphen (Follow-up-Gruppe).

Table 7: The use of "Follow-up group" in the 4 sub-corpora

[25] http://ec.europa.eu/education/lifelong-learning-policy/doc/ects/key_en.pdf (accessed July 22, 2009)

[26] Prague Communique 2001 http://www.bologna-bergen2005.no/Docs/00-Main_doc/010519PRAGUE_COMMUNIQUE.PDF (accessed July 22, 2009).

	BP corpus	AT corpus	DE corpus	CH corpus
Spelling				
Upper case	28	0	0	0
Lower case	0	0	0	0
Orthography				
Original	1	0	0	0
Hyphen	0	0	0	0
Adaption	1	0	0	0
Adaption with a hyphen	26	0	0	0

Diploma supplement

The term "Diploma Supplement" in the context of higher education is taken to mean "a document attached to a higher education diploma aiming at improving international 'transparency' and at facilitating the academic and professional recognition of qualifications (diplomas, degrees, certificates etc.)."[27] Instances of both upper case and lower case spellings were found. The original version was more often used than the variants with a hyphen and for this term no adapted versions were found.

Table 8: The use of "Diploma Supplement " in the 4 sub-corpora

	BP corpus	AT corpus	DE corpus	CH corpus
Spelling				
Upper case	4	1	14	0
Lower case	0	0	2	0
Orthography				
Original	4	1	12	0
Hyphen	0	0	4	0
Adaption	0	0	0	0
Adaption with a hyphen	0	0	0	0

Integration into the German context

In this section the Anglicisms were analyzed from the perspective of integration into the German context. Particular emphasis was put on how the Anglicisms appear in the national German text (in the flowing text, in brakes etc.), whether or not they were explained in some way and whether or not a German translation was used. Similar analyses were undertaken by Béchet-Tsarnos (2005) for Anglicisms in economic newspapers.

The integration of Anglicisms in university law texts can be illustrated with the example of the term "Diploma Supplement". "Diploma Supplement" is a concept that was born with the Bologna Process and, as such, is really a new term. In the German translation of official Bologna Process documents, the term appears in brackets after the

[27] http://ec.europa.eu/education/lifelong-learning-policy/doc1239_en.htm (accessed July 22, 2009)

German translation in the text. In the Austrian and German corpora this type of integration into the context was not identified at all. The inverse was, however, found, i.e. "Diploma Supplement" as a term in the running text with the German translation in brackets afterwards, but there are no hits in the entire corpus for the German translation suggested in official Bologna Process documents. In national legislation other translation variations were chosen.

Many examples were found of explanations given in German with the Anglicism in brackets afterwards. In the German corpus a great deal of examples for Anglicisms standing alone in the running text without explanation or translation were observed and in such instances the Anglicisms were often used in article headings or the term had been previously explained earlier on in the text.

Table 10: Type of integration for "Diploma Supplement" into the German context in the 4 sub-corpora

Integration type	**BP corpus**	**AT corpus**	**DE corpus**	**CH corpus***
Running text without German explanation or translation	1	0	9	0
Anglicism in brackets with German translation	3	0	0	0
Anglicism in brackets with German explanation	0	0	6	0
German translation in brackets	0	0	1	0
Anglicism in brackets and between quotation marks with German explanation	0	1	0	0

* Since there are no hits for this term in the Swiss corpus, a value of "0" has been entered in this column, but for the sake of completeness the Swiss corpus is also shown in the table.

Discussion of the results

During the course of the statistical analysis of the entire university law corpus in the context of the Bologna Process, Anglicisms were found to constitute 0.20% of the entire corpus. A close look at the single sub-corpora showed the highest percentage of Anglicisms to be in the Austrian university law corpus (58%), followed by the Bologna Process corpus with 55%. The lowest percentage of Anglicisms was found in the German university law corpus, i.e. only 0.17%. A detailed analysis of Bologna Process Anglicisms shows that 68% of all the Anglicisms in the Austrian university law corpus and 53% of all the Anglicisms in the German university law corpus are Bologna Process Anglicisms. This illustrates that English terminology is being used in university legislation in Germany and Austria as a result of the Bologna Process, since terms like Bachelor, Master and Diploma Supplement have only recently been introduced into the national university system. The results in the Swiss corpus paint a completely different

picture; there are only two hits for Bologna Process Anglicisms, the compounds "Bachelortitel" and "Mastertitel".

One reason for the low percentage of Bologna Process Anglicisms in the Swiss corpus could be the period from which the texts date. Since one of the selection criteria for the corpora was that the law should be currently in effect, the corpus contains also law texts that were created prior to the launch of the Bologna Process. It is thus evident that in those texts no Bologna Process Anglicisms were found. According to the linguistic analysis of the small selection of Anglicisms, it is fair to say that some terms are better adapted to the German spelling than others. For example, for "European Credit Transfer System" different versions of adaptation to the German spelling were found. In the German university law corpus a higher frequency of adapted versions was documented than of the original version, whilst in the Austrian university law corpus only the original version was found. For "Diploma Supplement", however, the original version was used very often in three sub-corpora. Only 4 times versions with a hyphen were found.

All types of integration were found with regards to "Diploma Supplement", i.e. the Anglicism in the running text and without translation or explanation, as well as the Anglicism with the translation in brackets. An analysis would need to be carried out on a larger sample to ascertain whether one type of integration into the German context is preferred.

Conclusions and future work

Many studies have been carried out concerning the use of Anglicisms in the German language in Germany, Austria and Switzerland (see also Busse 1993; Béchet-Tsarnos 1995; Muhr 2004; Muhr 2009; Rash 2009). It seems likely to compare the results of these studies with the results of the present study. To compare different results, the describing approaches, the counting systems and the classification systems on the basis of the studies should be the same or at least similar. Under point 4 we have already seen, that there are different types of definitions for an Anglicism. That is, the different studies do not use them same definition type and that leads to different describing approaches because for example it makes a difference if a loan translations is counted as an Anglicism or not. Another problem is the inconsistency in the counting system, that means what is counted or not, if abbreviations, proper names or product names are counted. Differences also result from weather types or tokens in the corpus are counted, if only headwords or every inflected form are counted or if words like "diploma supplement" are counted as one word or two words, because each of the components could be appear also alone. However, due to the problem of the different definitions of Anglicisms and various counting systems applied, it is difficult to relate the results of the present study with the results of former studies. (cf. Muhr 2009, 124ff). The discussion of the results points out that more than half of the Anglicisms used in the Austrian and German university law corpora, 68% in the Austrian corpus and 53% in the German corpus, are directly linked to the Bologna Process initiative and the creation of the European Higher Education Area. English terms like "Bachelor", "Master" and "European Credit Transfer System" have been introduced into Austrian, German and Swiss university legislation as a result of the Bologna Process initiative. Further research

is underway using additional text corpora including texts on a university level, such as university statutes, to verify whether results at the national/regional law level differ from the results at a university level.

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LOST IN TRANSLATION: THE VERBAL CHANGE FROM *PERSONA* TO PERSON[28]

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Abstract: This paper challenges the modern legal concept of "person" by analyzing the translation problems of some Roman law fragments. It shows why the Latin word "*persona*" cannot be the etymon of the vernacular "person," and argues that the modern use of "person" stems from the nineteenth-century German juridical literature, especially that of F. C. von Savigny. This paper shows that "*persona*" forms a phrase with verbs like *gerere*, *tenere* and *sustinere* (bear, carry, hold, etc.) and has no meaning by itself. Such phrases require a noun complement in genitive form, as their synonym "represent," which is transitive, needs a direct object. On the other hand, the modern literature attributes a sense to "person," taking it as equivalent to "human individual" and using it word with the verb "be." This use is a modern invention and cannot be re-translated into Latin without semantic confusion.

Compte-rendu: Cet article met en cause le concept juridique moderne de « personne » en analysant les problèmes de traduction de quelques fragments de droit romain. L'article explique pourquoi le mot latin « *persona* » ne peut pas être l'étymon du mot vernaculaire « personne », et que l'emploi moderne de « personne » remonte à la littérature juridique allemande de XIX^{e} siècle, en particulier des écrits de F. C. von Savigny. Cet article constate que « *persona* » fait partie des expressions idiomatiques construites avec des verbes tels que *gerere*, *tenere* et *sustinere* (porter, tenir, supporter, etc.) et n'a pas de signification en lui-même. Ce genre d'expression a besoin d'un substantif en génitif comme complément, tout comme leur synonyme « représenter », qui est transitif, nécessite un complément d'objet direct. De l'autre côté, la littérature moderne attribue un sens au « personne », le traitant comme équivalent de l' « individu humain » et l'employant avec le verbe « être ». Cet emploi est une invention moderne et ne peu se retraduire en latin sans perplexité sémantique.

In April 2005, Joseph Cardinal Ratzinger was elected by the conclave as successor to John Paul II. Ratzinger was said to be the late pope's major advisor on doctrinal issues, and thus portrayed as a conservative theologian, even caricatured as "God's Rottweiler" for his supposedly traditionalism regarding issues such as the ordination of women, homosexuality and contraception. After the conclave, Theodore Cardinal McCarrick from the United States defended the new pope in a press conference. Benedict XVI, he said, "has this perceived persona which in many cases is not true."

[28] I am grateful to the sponsorship of the Marie Curie Actions of the European Commission in the framework of the Early-Stage Research Training program (sixth framework program) and my host institute, *Istituto italiano di scienze umane*.

While the English word "persona" enunciated in this anecdote remains clearly different from the word "person", the Latin word "*persona*" seems ambiguous, especially for legal scholars. Contemporary legal literature acknowledges that the Latin *persona* is the etymon of the modern legal concept "person." Some believed that the concept already existed in the classical Roman law, and that there was a long scholarly debate in the nineteenth-century Europe over the concept of person and the so-called legal personality of corporations in particular (Runciman, Ryan, and Maitland 2003; Saleilles 2003; Michoud 1998; Flume 1983; Duve 2003; Bär 2003; Pennitz 2003). Major participants of this debate were German civil law scholars, and the debate concerned the interpretation of certain fragments contained in the *Corpus iuris civilis*, that is, the compilation of Roman legal texts. These debates were said to have lost their practical signification, as the German and the Swiss civil codes came into effect respectively in 1900 and 1912. Both codes laid down their own principles for the corporations and foundations, and substituted systematized statutes to the scholarly interpretation of dispersed Roman legal texts. These two codes influenced the legislation of many other countries, took the old debate away from the lawyers' hands and left the unanswered questions to the academics. Little progress has been made since then. Only two books that were published in the 1930's addressed specifically the issue of person in the classical Roman law.

The term "person" in the legal language seemed disambiguated after the Second World War. In 1945, the Charter of the United Nations invoked in its preamble "the dignity and worth of the human person." The Universal Declaration of Human Rights quoted this phrase three years later. They inspired many other later instruments of international law (Schachter 1983, 848-49). In addition to the international aspect, the German Basic Law (*Grundgesetz*) promulgated in 1949, which later produced a worldwide influence, also articulated the idea of "dignity of Man" (*Würde des Menschen*) with its very first article.[29] Along with the more famous word "dignity," the term "human person" was anchored in the post-war terminology of human rights. There seemed to be a consensus on the signification of "human person." It is often taken as synonymous with "Man" or "human being" (art. 1, Universal Declaration of Human Rights).[30] As Menke (2009, para. 3) observed, the scholarly tradition of human rights highlights the "normative character" of the predicate "Man," which is the only condition to enjoy the "dignity." It goes without saying that the consensus on the signification of "human person" was part of the reaction to all the racist and eugenic atrocities that had not been

[29] Sometimes rephrased as "human dignity" (*Menschenwürde*) in the enormous literature of constitutional law and law of human rights. It is interesting to note the way in which the preamble and the art. 1 of the Charter of the Fundamental Rights of the European Union were translated. While we read "human dignity" in the second paragraph of the English version, the term became "*Würde des Menschen*" in the German one, and, additionally, "*dignité humaine*" in the French one. Whereas the "*Würde des Menschen*" complies with the official expression in German law because the first sentence of the art. 1 reproduced the first sentence of the art. 1, sec. 1 of the German Basic Law, the "*dignité humaine*" could have been replaced by "*dignité de l'Homme*" or "*dignité de la personne humaine*" as the art. 16 of the French Civil Code, since "Human rights" in English may not be translated literally with "*droits humains*," but "*droits de l'Homme*" in French (European Union 2000).

[30] Ohlin (2005) discusses many other examples.

fully disclosed until the end of the war. Undoubtedly, the intention of the peoples of the United Nations was to condemn, among other crimes, all the cruel, inhuman and degrading treatments. Even though the words like dignity, cruel, inhuman and degrading are not well defined, there can be no misunderstanding that the only thing that matters is being human.

Nevertheless, the lawyers' consensus is linguistically intriguing. Why is the "human person" deemed equal to "human being," as "person" is apparently different from "being"? If "person" alone is enough to denote a "human being," is the term "human person" not a useless repetition? Moreover, if the modern word "person" stemmed from the Latin word "*persona*," literally a mask used in a theatrical play, how did this mask become mixed up with the person that wears it? It was the difference between the two words that allowed Cardinal McCarrick to make his comment about Benedict XVI's character. The cardinal did not think the public persona, be it English or Latin, depicted correctly the person he knew. McCarrick's comment could not make sense without this semantic and ontological difference.

For those who believe that the modern "person" stems from the *persona* of Roman law, the Institutes and the Digest of Justinian provides solid proves. "First," said the Emperor, "let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established." (*Inst*. 1, 2, 12; Moyle 1913) This statement may have paraphrased that of Hermogenian included in the Digest: "since all law is established for man's sake, we should speak first of the status of persons …" (*D*. 1, 5, 2; Watson 1998).[31] Yet no reference has noticed that these two quotations employ the plural form of *persona* which is rare in the whole *Corpus iuris civilis*. That is to say, this form seems unproductive. On the other hand, D. Deroussin (2001, 80) challenged this anthropocentric view in a brilliant article. He argued that the "person" as a legal term did not appear until the nineteenth century, that the *persona* of Roman law was an abstract category instituted by the law *ex nihilo*. His remark echoed the Romanist Y. Thomas's opinion that challenged what he called in the title of the co-authored book: "the right not to be born" (Cayla and Thomas 2002). Thomas delivered this opinion in the midst of controversies around the decision in which the French highest jurisdiction, the Court of cassation, upheld a baby's claim for damages against the doctor who had diagnosed trisomy disorder of the infant itself without advising the mother to abort.[32]

This paper agrees to the general orientation of Deroussin's article and disagrees to its diagnostic. Indeed, the nineteenth century deserves more attention than it receives in the legal historical scholarship. However, this paper argues that it is useless to focus on *persona*, which, instead of denoting anything incongruent with the modern legal concept, refers to nothing at all. However, it is not the logical-semiotic approach of Wróblewski (1982/83) that is taken here. This paper maintains that nineteenth-century literature isolated *persona* from an idiomatic expression in which *persona* was the object

[31] Corcoran (2000, 87-90) indicates that Hermogenian's activities were dated between 293 and 302 AD.

[32] The decision is known as "the Perruche case" (Court of Cassation 2000). Spurred by this decision, the French Parliament later passed two acts against it, respectively the law no. 2002-303 of March 4, 2002 (a.k.a. *loi Kouchner*), and the law no. 2002-1577 of December 30, 2002 (a.k.a. *loi About*).

complement of a set of transitive verbs, and denatured the word by employing it with the verb "be." This verbal change has impeded most authors from disentangling the civil law reasoning from the human right discourse, and thus misled most of the studies addressing the protection of the human person in the age of life sciences.

Translation as a core question of legal history

Although the legal historical literature admits that no Roman jurist has ever written "someone was a person," it is widely believed that the "concept" existed in the ancient world. In 1840, the renowned German scholar, F. C. von Savigny (1779-1861), wrote in his influential treatise on modern Roman law that the idea of person, or, in the German fashion of natural right philosophy, "subject of law" or "subject of rights" (*Rechtssubjekt*) concurred necessarily the notion of Man, and every individual, and only a human individual is capable in law, that is to say, able to own, to acquire or dispose of properties, and so on (1840, 2). In addition to the individual that he called "natural person," there were also "juristic persons," such as associations and foundations. He conceded that there was no common denomination for all the various kinds of juristic persons in the Roman law. "When they want to address this character of such subjects [of law] in general," said Savigny, "they only say that they take the place of persons," that "they are feigned persons" (1840, 241).

It is Savigny that coined the words and formulas that the modern textbooks of civil law still repeat today, though he also continued the legacy of some predecessors (Flume 1983, 1). Yet neither was he the first author to associate the word "person" to "man," nor did he invent alone the concept divided into the subcategories of natural persons and of juristic ones. The association of person and man had a much longer history which I will explain after the second point: The binary framework of natural and legal persons can be traced back easily to the eighteenth century. In fact, it appeared originally in the works of D. Nettelbladt (1719-1791), disciple of the famous natural right philosopher, Christian Wolff (1679-1754).[33] As to the overlapping "person" and "man," there are at least two reasons for it, one remoter and the other closer chronologically to Savigny. On the one hand, there seemed to be a lasting uncertainty regarding the meaning of *persona* mentioned in the *corpus iuris civilis*. For centuries, Justinian and Hermogenian's quotes that I mentioned above have been read in accordance with the Christian teachings. The gospel story on the different understanding of Jesus and Pharisees with respect to Sabbath gave rise to the following maxim: "Law is made for man, not man for law" (Mark 2:23-27). Though Hermogenian's biography still remains unclear, Justinian prefaced the Institutes with the following phrase, "in the name of our Lord, Jesus Christ." Thus, it has appeared plausible since the rediscovery of the manuscripts that both Roman law fragments also paraphrased Christ's words. On the other hand, the natural right philosopher Wolff's influential and representative language of philosophy could have

[33] Nettelbladt (1767, 31, §45) addresses the dichotomy of "physical persons" and "moral persons." Savigny (1840, 240) rejected explicitly these terms by using "moral" in the sense of morality and ethics and by replacing "physical" (of Greek origin, *physis*) with "natural" (of Latin origin, *natura*), while the term "moral" also denotes "intangible." On the transition from Nettelbladt to Savigny, see Lipp (1982/83).

accustomed his readership to the definitional style "X is Y" or "P is called Q." This amateur jurist wrote in 1740 that "a *moral man* is a subject of obligations and rights" (Wolff 1972, 43, §70). He modified substantially this definition ten years later in a summarized version of his natural right philosophy. "Man is," Wolff said, "a moral person to the extent that it is deemed the subject of certain obligations and rights" (1969, 50, §96).

However influential Savigny's conception of "person" has been, the correctness issue of the translation from Latin to vernacular languages is worth highlighting. The pro-gospel interpretation I invoked above already exemplifies that all the Roman law fragments in question were not properly translated. Reading the quotes in question in its contexts shows that it is oversimplifying and misleading to single out the part that all law exists for man's sake. Because, first of all, the sentences referred, not to "persons" as such, but to the laws and rights related to different persons. Both quotes of Justinian and Hermogenian textually follow the principle that Gaius of the second century laid down: "All our law concerns [either] persons or things or actions." (*Inst*. 1, 2, 12; *D*. 1, 5, 1; Watson 1998) Moreover, the title that comes up right after Justinian's quote is "of the law of persons." In other words, it was not "persons" but "law" on which the Institutes and the Digest focus. In fact, the whole Book I of the Institutes consists of the juridical consequences differing in accordance with a *persona* and does not find it necessary to define *persona* in spite of its presumed importance. Hence, it seems safer to translate the preposition *causa* with its ordinary sense "because of" instead of the teleological "for."

The jurists' reading of "person" played a leading role in the nineteenth century. It was rather the legal historiography rather than the lexicography that brought the new meaning of person to the major dictionaries. A telling example is Jacob Grimm (1785-1863), Savigny's disciple in Marburg and a close friend, best known for the fairy tales published along with his brother Wilhelm (1786-1859). He devoted himself to the medieval history of law under his master's inspiration, and applied his legal historical methods and knowledge in the monumental dictionary *Das Deutsche Wörterbuch* (DWB) that the brothers co-edited. The entry "Person" of this dictionary begins with a citation of Jacob's etymological study. He explained *persona* by breaking it down into the intensifying prefix implying and the verb *sonare*, to sound, arguing that a *persona* was used to make the voice louder ("Person" 1854-1960, column 1561; Grimm 1965, 370). The DWB did not forget to mention that a person is "in the legal science, a man capable of certain rights" like a moral or juridical person ("Person" 1854-1960, column 1564). By comparison, such a definition did not exist in the entry "*personne*" of *Académie française*'s dictionary, at least up to the sixth edition of 1835. Curiously, Littré's dictionary (1872-77) said that a *personne* is someone who "has some rights" by quoting a great theologian, J.-B. Bossuet (1627-1704), whereas Diderot and d'Alembert's Encyclopedia, certainly one of the most significant French publications in the eighteenth century, ignored the influential Bossuet and only mentioned briefly in the entry "*personne* (*théologie*)" that scholars called a "person" a "dignity," that is, rank, office or position, such as father, husband, judge, magistrate, and the like ("Personne" 2008). The Encyclopedia's wording was similar to that of its contemporary publication, du Cange's glossary of medieval and late Latin. The author, Charles du Fresne (1610-1688), also known as *sieur du Cange*, posed *dignitas* as the first definition of *persona*. (Fresne 1883-

1887). Neither did the *Lexicon totius latinitatis* published in 1771 include any particular legal usage of *persona*. Its editors cited as an occurrence the fragment "all our law …" that we discussed above without highlighting any particularity (*Persona* 1965). By the way, it was then still falsely attributed to Paul, since its true origin, Institutes of Gaius, was lost until a copy of it was discovered in Verona, Italy, by B. G. Niebuhr (1776-1831) in 1816.

Misread phrases and detached *persona*

Another problem caused by the jurists' writings is whether or not the Roman text literally said "take the place of persons." Certainly, the word *persona* exists in the Roman legal sources, and the legal scholars found occurrences to support their claims. Yet the existence of a word does not necessarily give birth to a concept, and it is implausible to extract words regardless of their grammatical role in the whole sentence. When words form idioms and phrases, they no longer function alone, but as a unit in a sentence. This is the key to disentangle the complicated scholarly discussions on the juridical term "person."

Among the Roman law materials utilized to conceptualize "person," a great amount concerns so-called *hereditas iacens*, literally a heredity which is lying down. This concept refers to an intermediate situation of a heritage awaiting the entry of an heir.[34] In some scenarios of the Roman law of inheritance, as soon as one dies, his heritage, the rights, properties, estates, debts and actions altogether, falls automatically upon the categories of heirs called *heres suus* or *heres suus et necessarius*. In default of an heir of either category, he who is willing to overtake all the rights and obligations has to enter into the heritage voluntarily, and this act is called *aditio*. Such a heritage thus "lies down" (*iacet*) chronologically between the death and the *aditio*, and arouses mountains of questions for the lack of property owner. For instance, are the properties of an *hereditas iacens* legally ownerless and can they be taken away by anyone, since the ex-owner has died and the new one has not shown up yet? To whom belong the fruit and animals harvested and bred during this interval? Who is entitled to the payment done by a decedent's debtor? One of the solutions to the legal questions relating to the *hereditas iacens* is the so-called "personification," which means for the modern scholarship that the *hereditas* is deemed to represent a person.[35] The occurrences quoted by Savigny deal exactly with this question.

The translation problem here is whether or not Romans said that an *hereditas* "took the place of a person" or "represented a person." It is useful to specify in advance that the following discussions are still to be placed on the linguistic level instead of the doctrinal one. It is not the legal concept "person," but the word from which the concept allegedly derived that is at stake. Certainly there would be no room to contest the proposition that

[34] For a short explanation in English, see Buckland (1963, 306-310) and Duff (1938, 162-167). Some of Duff's points seem to have echoed in Lübtow (1968). For Italian and Spanish literature, see Robbe (1975) and Castro Sáenz (1998).

[35] Recent literature shows a wider variety of wording. Instead of "personification," some authors use "personation" or "impersonation." "Personality" also tends to leave its place for "personhood."

"an *hereditas* represents a person" if "person" were to be defined in the fashion that each scholar would prefer. This is not the case here. *Persona* was more than an etymon in the literature. It was deemed equivalent to the modern word "person."

The phrase "to take the place of a person" or "to represent a person" stems from the Latin phrase "*hereditas personae vicem sustinet*" and the like.[36] The literature seems unanimous on this point. Even those who have contested the soundness of the legal personality theories found a corresponding word for *persona*. P. W. Duff, ex-Regius Professor of Civil Law in Cambridge, maintained that *persona* is not a person, yet still translated the above-mentioned "*personae vicem sustinet*" by "is treated as, functions as a person," even though, said Duff, "*heredis* and *defuncti* are no doubt dependent on, not apposition to, *personae*" (1938, 1-22, 162). Thus he put the quote of the Institutes in English as follows: "The Estate takes the place of a person, the person, that is to say, not of the heir, but of the decedent" (1938, 166). In other words, Duff found it syntactically acceptable to read "*personae vicem sustinet*" alone and assumed that *persona* should have a meaning whether or not it was a person, a subject of rights and obligations, or a human being. Duff was not alone. Countless scholars, including learned Savigny, read it in the same way and shared the same assumption. Despite all the disagreements among them, they all granted a sense to "*persona*" and recognized its grammatical independence. This is where the translation problem lies.

In order to detect this problem, it takes no particular knowledge or competence but simply a shared experience among foreign language learners. When one builds up one's vocabulary, attention is not only paid to the sense of the words, but also to the way in which these words ought to be used. A random arrangement of words might become a good poem, but can hardly result in any meaningful phrase and sentence. Even if such an arrangement is both logical and grammatical, it can still sound incomprehensible, perplexing, incongruent, or at least unusual. To use one word correctly, it is necessary to learn at the same time other words that goes with it. Take the word "perfume" for instance. Conventionally we say that someone "wears" perfume, instead of "uses" perfume. In this example, "to use perfume" makes sense since it is grammatical, but it is not a conventional use and thus not recommendable to those who learn English as a second language.

The same experience is also relevant to the discussions on *persona*. Would the Roman understand the nineteenth-century doctrinal elaborations in Latin? The answer is no. As a matter of fact, the nineteenth-century theories become totally incomprehensible when they are translated into Latin. This is simply because when *persona* goes with the Latin verb "be," *essere* in its infinitive form, *persona* conveys the meanings we already know, that is, a mask, or figuratively a role or a character. Propositions like "*persona est*" or "*aliquis persona est*" turn out to mean "there is a mask (a role, or a character)" and "someone is a mask". Such propositions not only have little to do with the legal scholarship, but are also close to nonsense. Instead of "be," *persona* goes much more often with verbs like *gerere*, *tenere*, *sustinere*, *suscipere*, etc. which render "wear," "bear," "carry," "hold" and so on. Since all these verbs are transitive in Latin, they all require a direct object, and thus *persona* has to decline into the accusative form,

[36] *Inst*. 2, 14, 2.

personam. Indeed, a verb of this kind followed by its direct object constructs a grammatical sentence, yet "*personam sustinet*" or "*personam gerit*" mean nothing but "someone or something carries a mask" or "plays a role."

Here comes the vital question: How are we going to obtain a concept of "person" from the combination of *persona* and a proper transitive verb when the meaning that such a combination conveys remains far from what we call a person in our time?

The occurrences that legal scholars have at hands may suggest two different readings, but the scholarly tradition prefers constantly what I call the positive one. This reading consists in taking "*persona*" as a word and thus attributing a sense to it. The alternative is a negative reading of *persona*. This reading takes "*personam sustinere*" as a phrase, even an idiomatic expression and thus eliminate the question on *persona*'s denotation. Instead of *persona*, it is its complement in genitive form that deserves our attention. Because this reading equalizes "*personam sustinere*" to the transitive verb "represent," which needs a direct object, and this object determines what on earth the subject of the sentence represents.

If we focus on the *hereditas iacens* regardless of the chronological order of the fragments and all the authenticity problems, the diversity of wording lays before the eyes. There was not just one single way to name this juridical scenario. The fragments can be sorted into three different kinds. The *hereditas* is said to take the place either of the decedent or of a future heir, or is taken as its own master. In other words, the idea of "taking place" or "representing" repeats itself, yet all of them do not invoke *persona*. In respect to the *Lex Aquilia*, a Roman law which concerned the compensation of damage caused on properties, it is said that "the *hereditas* is deemed the master (*dominum ... habebitur*), for which reason the *heres* will be able to undertake (the lawsuit against the one who has killed a slave of the *hereditas*) after his entry" (Ulpian, *D*. 9, 2, 13, 2; Duff 1938, 163). Philological critiques corrected this sentence later with no semantic alteration: "*domini autem loco hereditas habebitur*," the *hereditas* is deemed "in place of the master" (Lübtow 1968, 598) In another context, the *hereditas* "holds the master's position" (Ulpian, *D*. 43, 24, 13, 5; Duff 1938, 163). Still another occurrence runs: "the *hereditas* plays the role, not of the heirs, but of the decedent, as it is confirmed by many civil law arguments" (Ulpian, *D*. 41, 1, 34). As to the future heir, Pomponius of the second century said that the process to conclude a contract of *stipulatio* would not be terminated even if the requested party had not replied before he died, because the process could go on with the heir, who "in the meantime would be represented by the *hereditas*" (Pomponius, *D*. 46, 2, 24). Other ways of wording like "*vice*," "by virtue of," should convey the same idea. An early one occurred in a fragment attributed to Iavolenus of the first century: "*hereditas personae defuncti vice fungitur*" (*D*. 41, 3, 22). This form passed since then from little known Florentinus to the Justinian's Institute of the sixth century: "*hereditas personae defuncti vicem sustinet*" (*Inst*. 2, 14, 2; 3, 17, pr.; Florentinus, *D*. 46, 1, 22; *D*. 30, 116, 3). Note that the word *vicis* in genitive form denotes position, place, room, etc. The sentence literally renders: "the *hereditas* holds the position of the decedent's *persona*." Indeed, this occurrence could imply that "*persona*" acquired a particular meaning in the sixth century. Yet it may also be deemed an awkward wordplay to combine in one phrase the two classical expressions, namely "*vice fungi*" and "*personam sustinere*." Both expressions convey the same meaning when completed by a

noun in the genitive form, and can be translated simply by "to represent" in modern English. As a transitive verb, "to represent" requires a noun as its direct object. To sum up, the Roman jurists focused on the noun complement of "*vice fungi*" and "*personam sustinere*" rather than the words "*vicis*" and "*persona*." There is no ground to single out "*persona*" from the expression in which it is embedded.

From this point of view – and so I conclude – no theory of juristic *persona*, at least not when the reasoning is done in Latin, can be deduced from the Roman legal texts without committing neologism. It is in the detachment of "person" from an idiomatic expression that the problem lies. Due to this linguistic manipulation, the verbs that used to go with "person" have been forgotten and replaced, and the Roman fragments in question were overloaded with significations. While in modern English "persona" and "person" remain two distinct words, "*personne*" and "*Person*" seem to occupy both seats respectively in French and German, and the Latin expression "*personam gerere* (*tenere, sustinere, etc*.)" has lost its sense in translation for good.

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MULTILINGUALISM IN EU LAW: HOW PROMULGATION AUTHENTICATES EQUALITY

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Estratto: Il diritto europeo è in vigore nei 27 stati membri dell'Unione ed è disponibile in 23 lingue, tutte facenti ugualmente fede. Ciò è possibile grazie al DGT (Directorate General Translation) che vanta uno dei maggiori servizi di traduzione del mondo, ma da un punto di vista legale, la traduzione rimane un puro mezzo, istituzionalmente 'inesistente'. La problematica ha ricevuto negli ultimi due decenni, considerevole attenzione da parte di ricercatori, linguisti e traduttori (Correia 2003, Kjær 1999, Koskinen 2000, Šarčević 2001, Tosi 2001, Wagner 2000), i quali hanno puntato il dito sul paradosso della traduzione e sull'assenza di una politica linguistica e di una cultura legale europea a livello unitario.

Basandomi esclusivamente su testi legali e sulla pragmatica delle norme giuridiche (Olivecrona 1994:[1962], von Wright 1963), intendo dimostrare che l'autenticità linguistica delle traduzioni del diritto europeo è meno contraddittoria di quanto sembra. Il principio di autenticità è valido solo quando i testi vengono autenticati e pubblicati sulla Gazzetta Ufficiale dell'UE, ma prima di quel momento, nulla impedisce di considerarli traduzioni o versioni linguistiche.

Abstract: EU law currently applies to 27 countries and is available in 23 languages which all carry equal status. In practice, this is achieved though translation and by the work of the DGT (Directorate General Translation), which hosts the largest translation service in the world. But from a legal point of view, translation is institutionally 'non-existent' and EU languages are all equal and authentic. The issue has been given attention in the last two decades mostly from scholars, linguists and translators (Correia 2003, Kjær 1999, Koskinen 2000, Šarčević 2001, Tosi 2001, Wagner 2000), thus raising awareness on the paradox of translation and the lack of a proper EU language policy and legal culture.

Focusing exclusively on legal texts and on the pragmatics of norms (Olivecrona 1994:[1962], von Wright 1963), I will argue that the equal authenticity of the EU language versions and the multilingual practice of the Union are less contradictory than they seem. The principle of equal authenticity applies only when texts are authenticated and published in the EU Official Journal. Before that, nothing prevents to regard them as translations or language versions.

EU multilingualism: *de jure* and *de facto*

EU multilingualism is directly linked to the political nature of the Union. Although established with the intent of common economic policies (ECSC 1951, EURATOM 1957 and EEC 1957), the current Union has evolved in less than half a

century into an association of States[37] equally and legally sovereign. The goal is to promote 'an ever closer union among the people of Europe, where decisions are taken as openly as possible and as closely as possible to the citizen'[38]. Multilingualism is therefore an unquestionable asset and distinguishes the EU from all other international organizations. Unlike International law that requires an intention from the parties to be valid, member countries have transferred part of their sovereignty and political competencies to the Union and, where a dispute arises, EU law takes precedence over national law. This supremacy and the 'direct' application of Community law demand that all relevant documents be available in all the official languages as a guarantee of equality before the law. Similar rights have also been claimed for some of the Union's minority languages. In 2005 Spain signed an agreement with the European institutions whereby Catalan, Basque and Galician are eligible to benefit from official usage, provided the member state bears the costs for the additional language service. In this context, multilingualism is vital to the maintenance of democracy and represents the intention of different countries that have gathered to pursue common objectives. Thus, main treaties must be available in all the official languages of the Union and they all mention the safeguard of national identities. The only exception is the ECSC Treaty that was drafted exclusively in French after Robert Schuman (French foreign minister) initiative. But the two Treaties of Rome (1957) setting up the EEC and Euratom were from the very beginning drawn up in German, French, Italian and Dutch[39]. They envisage a progressive European integration (art.3) and prohibit any form of national discrimination (art.7). However, they do not make any clear prescription as to language matters and a declaration of language equality does not equate with promoting a multilingual policy. Article 217 of the EC Treaty, or article 290 in the consolidated version, contains only a brief provision saying that: 'the rules governing the language of the institutions of the Community shall (...) be determined by the Council, acting unanimously'. This has adopted Regulation n.1/58 determining the languages to be used in the EEC and Article 1 states that: 'the official languages and the working languages of the institutions of the Community shall be Dutch, French, German and Italian', namely the languages of the member states which negotiated the Rome Treaty in 1957. This article has never changed and each time a new member country joins the Union, its language is added to the list. So, the European Union works at the present in 23 languages (Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian,

[37] EU currently consists of 27 member states (Austria, Belgium, Bulgaria, Czech Republic Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom) and uses 23 languages (Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish).

[38] Article 1, Treaty of European Union, 1997.

39 Tabory refers that 'these Treaties were drafted primarily in French, with some provisions initially formulated in German only, and other still both in French and in German only' (1980:114-15). She also states that at the time of signature, only rough drafts existed for Italian and Dutch and they were signed in blank. It was not until the end of June1957 that the four original language versions could be considered definitive.

Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish), which all enjoy official status and equality before the law.

In practice, 'language equality' is ensured by translation that finds no mention in any of the EU legislation. For each new enlargement, EU legislation in force (*acquis communautaire*) is translated into the new official languages and these new language versions are considered as legally valid and 'authentic' as the four initial versions[40]. The principle is that, once EU legislative texts are officially published, they all become equally valid and authoritative. On that basis, 'drafting' equates to 'translating' and there is no parallel rendering of the EU law. The issue has raised lots of concern from both linguists and jurists and highlights a situation where language equality is more a *de jure* principle than a *de facto* practice. To this point, most jurists maintain that only one text can be 'authentic', that is the original one and the supposed 'equality' between language versions turns out to be more a fiction than a reality. The same drafting process of amending, correcting and rewriting a single document countless times (sometimes in different languages too) has strengthened the hypothesis of the absence of a real original version. Several linguists and translators are inclined to support the idea of the fictitious language versions, thus also wondering about the principle of language equality. Nystedt warns that although EU texts are considered 'language versions' and not 'translations', they are in reality nothing else than translations, often carried out in difficult working conditions (1999:200). Correia has stressed this ambiguity further and remarks that 'in practice Community law is inconceivable without translation, whereas in strictly legal terms Community law is inconceivable with it' (2003:40). Moving from this point, after a brief overview of the main translation practices across different EU institutions, I will focus on the peculiarities of the EU law and on how equal authenticity makes multilingualism happen. The final aim is to show that translation and language equality are less contradictory then they seem and to envisage the opportunity of thinking EU language needs in a broader perspective while enhancing at the same time the status of translation.

Translation practice in different EU institutions

Different EU institutions have different needs and Article 6[41] of Council Regulation no.1 allows them to choose their own rules of procedure in relation to the language to be used. Though all the official languages are in principle equal and authentic, not all the EU documents are drafted and translated in 23 languages and multilingualism varies according to the specific addresses and needs of the Union. For practical reasons, full multilingualism is only used to make the EU law available and for dealings with the public; for internal communication and for in-house drafting, the Union

[40] The final Provision of the EC Treaty mentions the concept of 'equally authentic texts' (Article 314 of the Treaty establishing the EC Community): 'This Treaty, drawn up in a single original in the Dutch, French, German and Italian languages, *all four texts being equally authentic*, shall be deposited in the (...). Pursuant to the Accession Treaties, the Danish, English, Finnish, Greek, Irish, Portuguese, Spanish and Swedish versions of this Treaty shall also be *authentic*'.

[41] "The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in the specific cases"(Article 6 of Council Regulation no. 1 of EC Treaty).

tends to rely on English and French, often referred to as 'procedural languages', and to a lesser extend on German. According to recent EU figures[42], English is now the vehicular language of the Union and unlike 15 years ago, when French still enjoyed a paramount role as language of diplomacy, over 70 per cent of the Commission's documents are currently drafted in English, less than 15 per cent in French. The opaque allusion to 'working and official languages' stated in article 1 of *The Community's Language Charter* (Council Regulation 1/58) highlights the practical side of multilingualism as well as the contradictions of the EU language policy. Most of the drafting takes place in English and French and equal status for all the other languages is ensured only at a later stage by authenticated translations. As a consequence, multilingualism has different applications and language policy varies according to different institutions and to the specific needs of the Union.

The EU Parliament

Parliament is without any doubt the institution where language access and equality are best represented. The fact that it passes laws and represents all the citizens of the Union requires a scrupulous implementation of multilingualism. Range of documents includes agendas, draft reports, amendments, resolutions, decisions of parliament's governing bodies and by the European Ombudsman, and information for the citizens and the member states. As a general rule, its internal rules of procedure specify that no language version or text have priority over another, not even the original one if the President so decides[43]. Language equality is valid even for amendments that have to be translated into all official languages before a vote can be taken (art.124, par.6)[44]. However, Parliament has adopted a more pragmatic approach and a system of 'relay' languages ensures that a text is first translated into the most used languages (English, French or German) and from there into the other minor languages[45]. Full multilingualism is used only during plenary sessions; where MEPs are entitled to take part and use their own language during all debates. Translation and interpretation are arranged according to the needs of the participants present, and only the principal parts of motions and resolutions are translated. In this way, languages are equal in terms of access and availability: a bit less as far as their status is concerned.

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[42] "Efficiency, transparency and openness: Translation in the European Union", 4-7.08.2008, 18th World Congress of the International Federation of Translators, 'Translation and Cultural Diversity'. Shanghai (http://ec.europa.eu/dgs/translation/publications/presentations/index_en.htm).

[43] According to Rule 117 (Languages) in *European Parliament Rules of Procedure, Chapter XVI, General rules for the conduct of sittings*, (14th Edition published in the Official Journal L 202, 02.8.1999) "All documents of Parliament shall be drawn up in the official languages. Speeches delivered in one of the official languages shall be simultaneously interpreted into the other official languages (...). Where (...) there are discrepancies between different language versions (...), he (the President) shall decide which version is to be regarded as having been adopted. However, the original version cannot be taken as the official text as a general rule, since a situation may arise in which all the other languages differ from the original text".

[44] It is possible to deviate in part from this rule, but not if at least twelve members object.

[45] Italian, Polish and Spanish are somehow considered other major language and can also become relay language.

The EU Council

The Council, whose instruments do not require availability in all languages, has taken an even more flexible approach[46] and applies 'strict' language equality only to the documents, which need to be discussed, e.g. Commission proposals, amendments and reports. If no formal decision is taken and in all meetings below ministerial level, interpretation service is provided in a limited number of languages.

The EU Court of Justice

The Court of Justice arbitrates on Community law and pursues a particular, but no less rigorous application of multilingualism. While Article 7 of Council Regulation l/58 grants special powers to the Court in determining its own language regime, the Court internal Procedure recognizes all the official languages (including Irish)[47]. This means that each authentic text is considered independent for the purpose of interpretation by the courts and despite being translations, judgements and other documents are deemed to be authentic only if they are the language of the case. On the other hand, as none of them prevails and they all have the same meaning, whenever linguistic divergence or ambiguity arises, the European Court of Justice consults all the texts of a given instrument on a routine basis. Interpreting the intended meaning of the single instrument is given priority over any linguistic discrepancies and this is why revisers and translators of the European Court of Justice need to be lawyers. As far as the internal working language is concerned, French has kept a dominant role. Judges use it for internal communication and proceedings, and since no interpretation is provided for reasons of secrecy, it is also the language of judicial deliberations, which are subsequently translated into the other official languages.

The EU Commission

If the Parliament is the most respectful institution of multilingualism, the European Commission turns out to be the most flexible, so it is often at the centre of numerous controversies. It hosts the Directorate General of Translation (DGT) that is the largest translation service in the world with offices both in Brussels and in Luxembourg. The DGT is meant to ensure internal and external communication in all the 23 languages of the Union, but its approach to multilingualism reflects its distinct functions as well as the considerable amount of documents it has to deal with. It is not a chance that it has the

[46] "The Council shall deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages" as in Council of European Union Rules of Procedure, Article 14, *Deliberations and decisions on the basis of documents and drafts drawn up in the languages provided for by the language rues in force*, published in the Official Journal L 230/13, 28.8.2002.

[47] According to Article 31, *Chapter 6, Languages* of Court's Rules of Procedure in Official Journal L 176, 04.7.1991 (http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf): "The texts of documents drawn up in the language of the case or in any other language authorized by the Court pursuant to Article 29 of these rules shall be authentic". Article 29 ensures the member countries the right of using the languages of their choice in a case before the Court: "any supporting documents expressed in another language must be accompanied by a translation into the language of the case".

least specific Rules of Procedure of the Union in terms of language uses and this approach reflects the distinct functions as well as the considerable amount of documents it has to deal with. They span from legislative proposals, reports, Green and White papers to conference proceedings, incoming documents, internal notes, public information, databases and website. Text typology is also extremely varied. It ranges from legal texts marked by stereotyped formulation and a strong community language, to administrative instruments, where style and language are less strict, and national features have therefore a stronger impact on lexis. In addition, there are thousands of informative texts and technical reports, written in a conversational style, technical terminology and calques. Choice of topics is even wider: national and international politics, environment, agriculture, employment, taxation, education and culture, information society etc. Having a wide discretion at all levels, the Commission is the institution that does most of the drafting and translation work and for practical reasons, this takes place in English and French, usually referred to as 'procedural languages', some other times in German. These are in fact, the languages in which official documents have to be provided before they can be adopted at a meeting of the Commission. The only documents produced in all 23 official languages are pieces of legislation and policy documents of major public importance and they account for about a third of the Commission work.

Other consultative bodies

English is the main 'working language' of other minor institutions of the Union. The European Central Bank drafts mostly in English, but official documents are required to be in all the ten official languages of the fifteen countries of the Euro zone. General Council and Governing Council meetings and debates are interpreted only in four languages (English, French, German and Italian). The other consultative bodies involving economic, social and regional matters (Economic and Social Committee and Committee of the Regions), and the European Investment Bank, which finances economic development, are subject to the general principle of all 'working languages' being equally used, unless otherwise stated[48]. On the other hand, the Court of Auditors works with a reduced language *régime:* French, English and German.

EU translation: in search of the source text

The contribution of the DGT to the noble cause of multilingualism is enormous and translation is vital to the correct functioning of the Union. However, translation work escapes to any form of conventional patterns and presents features unique to the EU context and its legal system. The supranational nature of the EU ensures and imposes language equality from a legal conceptual perspective, but the Union's multifaceted field of activity, e.g. different politics, institutions, texts, addressees and goals requires a different practice. The extent of these factors is often overlooked when it comes to multilingual production and if translation makes certain languages less equal than others, the whole system also escapes from the basic translation logic of source and target text/

[48] Documents submitted to the Executive Council Board are drafted in German, English and French.

source and target language production. Dollerup highlights that 'the combination of administration, logistics and languages are many and simply cannot fit in with the kind of thinking in Translation Studies which is based on one sender-> one message -> one translator -> one audience' (2001:285). Despite French and English being the 'official working language of the Union, their use is not linear and homogeneous because they both might be used within the drafting of the same document. This takes place at the Commission which has the 'right of initiative' and is in charge of drafting all the legislative proposals in the three procedural languages before they go for discussion in the three main institutions and reach the stage of adoption. The tortuous co-decision procedure involves, in the case of legislative documents, different services and generates countless language versions, drafts and translations. As noticed by Robinson (2005: 4-10), a translator at the EU, the first drafts are generally written by technical experts and the use of English or French depends on the language in use in their department and also on the language used in similar provisions of precedent legislation. These texts (i.e. a regulation, a directive etc) are subsequently revised by legal experts and then go through an approval process (with accompanying translations) in three main institutions (the Commission, the Parliament and the Council). Here, despite the increasing practice of using English, translations are discussed and amended in the national languages of EU members and may return back and forth to the Commission several times, always accompanied by the attached translated drafts and emendations. Finally, only once the text is approved, it is also translated into all the official languages of the Union. As a result, translators deal with an unstable text, whose source and original become more and more blurred. As put it by Dollerup (2004:197) 'the source text is a fluid and changeable mass of text, composed of recycled translation, new linguistic material from both the core or tool languages as well as national languages incorporated in the core languages'. This view is shared by other translation scholars (Schäffner/Adab 1997:325) who regard these texts as hybrid and as being the product of intercultural communication resulting from languages and cultures in contact. Trosborg borrows the definition of 'hybrids' to highlight the 'neutral' status of EU documents and maintains that the EU translation process is neither source nor target-oriented, but it fulfils the sociocultural communicative requirements while aiming at a sort of standardization (1997:146-157). However, the usefulness of the idea of hybridism does not convince Koskinen who finds Trosborg's assumptions too simplistic. The Finnish scholar remarks that, after describing hybrid texts, the same Trosborg claims that it is reasonable to expect that a translation into Danish or any of the EU languages can be read as original prose like any other text' (2000:87-88), so that her 'hybrids' remain an open question in terms of linguistic quality. Text quality is in fact another thorny point of the EU multilingual production, because most of these authenticated texts generate translations of other translations and the new attested versions may serve as 'original' source texts for the next EU enlargements and accessions. Susan Šarčević shows the subsequent implications for the quality of EU translation in the immediate future and wonders 'whether it is admissible for translators of the *acquis* to rely on one authentic text as the source text or whether they are obliged to consult and compare more than one or even all of the authentic texts of the single instrument' (2001:34-49). For example, given the increasing popularity of English, translators tend to choose the English versions as original source texts, even though, these

are in most cases a translation of the first four originals[49]. However, assessing the quality of EU texts exclusively on the basis of translation procedures and strict linguistic strategies may result a biased operation that envisages only half of the EU multilingual context. More attention should be probably shifted to the different translation needs of the EU and to the particular role of translation in that context. As already mentioned, the same translation process takes place, at least for certain kind of texts, under very particular conditions. In addition, European legislation is often the result of political compromise and negotiations. The fact that the text can be amended until the very last minute is clear proof of this because stylistic vagueness or circumlocutions may be sought on purpose just to avoid nationally specific terminology.

EU law and the principle of equal authenticity

The same EU legislation represents a pretty unique case within international law. Although operating alongside the laws of the member states, it has direct effects on its citizens and governments and it often overrides domestic law without parties having to declare their intent. This is the principal reason why texts need to be available in all the 23 languages of the Union. The main law consists of primary legislation (the Treaties or the so called *acquis communautaire*), secondary legislation derived from the Treaties and the case law of the Court of Justice. Now, while the Treaties correspond more or less to the international law in force, the EU secondary legislation (*regulations, directives, decisions, recommendations* and *opinions*) present features that are borderline with domestic law. *Regulations* are entirely binding and directly applicable in all the member states. *Directives* are addressed to the member states. They are 'binding as to the result to be achieved' (Article 249 of the EC Treaty) but the choice of the form and method to achieve this result is left to the national authorities. *Decisions* are also directly binding, but only on those to whom they are addressed. Finally, *recommendations* and *opinions* are not binding. As a consequence and despite the EU's efforts to produce a kind of legal unification, EU law cannot be defined an established legal system on its own. The variety of its politics and the different legal systems of the member countries (Common Law, Civil Law tradition, the new political system in ex Eastern Europe) often require a supranational legal adaptation, rather than a cultural and linguistic one. The result is a melting system of rules and concepts, whose development is currently *in fieri.* For these reasons, some scholars have been wondering about the real international nature of the EU law (Janis 2003, Kjær 1999, Slaughter *et al*. 1998) and, from the point of view of translation, one might also wonder which source legal functions and meanings should be taken in consideration: a supranational uniformity or a cultural adaptation. On the other hand, where the EU law shares commonalities with other international organisations is exactly in the translation process and in the principle of 'equal authenticity'. This means that the final clause of an international instrument encloses a provision specifying 'the text is equally authoritative in each language, unless the treaty provides or the parties

[49] The United Kingdom joined the EC in 1972 and all the English legislation prior to that date fall into the category of translation.

agree that, in case of divergence, a particular text shall prevail' (Art.33).[50] A similar principle is stated in article 314 of the Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community. But for different reasons, there is no hint to the agreement of the member countries and the matter of divergence and legal interpretation is tackled in the Court's Rules of Procedure[51]. It is also interesting to note that stress is not on 'languages' or 'language versions' but on the word 'texts'. Talking about 'language versions' implies the existence of an original source text that may undermine the legal authority of all the other texts. Multiple authenticities, on the other hand, are necessary for the existence of democracy in Europe and reflect the desire that there should be no dominant language or culture in the Union. This is why all EU texts focus on the word 'authentic' in the sense of 'legally valid' rather than 'original'. The semantic nuance is more evident when looking at the rendering of *equally authentic* in some other language versions. The French final provisions of the EC Treaty translate it *as faisant également foi* and the same occurs in Italian: *tutti facenti ugualmente fede* both meaning 'legally valid and authoritative'. The German *wobei jeder Wortlaut gleichermassen verbindlich ist* goes even further in this direction, as the proper meaning of *verbindlich* is 'authoritative' or 'binding'. So, although it is translation that makes multilingualism possible, stress is more on the legal 'authenticity' than on the drafting of several 'language versions'. Acknowledging an official value to translation would mean, from a legal point of view that some language versions have priority over others, thus threatening the EU principle of equal rights. Legal interpretation is expressed more or less in the same terms; in fact reference is always on the texts 'authenticated' rather than 'translated' or 'drawn up'. In this way, it is hardly possible to talk about translation from a legal and from an official point of view. Indeed, translation exists; it is supported by an advanced system of computational translation aids[52] and the DGT, despite the use of procedural languages, ensures multilingual communication in order to enhance EU's openness, legitimacy and democracy.

Authenticated texts: is translation a contradictory notion?

EU official language versions rely on subsequent translations that mean 'authenticated texts', generally referred to as parallel texts. From a legal point of view, once these texts have been adopted or authenticated they are not translations anymore; they represent the law regardless of the source language and carry legally binding effects. Moreover, as legislative texts do not envisage any particular target readership, language equivalence is sought at a high level: in words, in meanings and in effects. Unlike informative legal texts, whose communication function allows translators a slightly wider

[50] http://untreaty.un.org/ilctexts/instruments/english/conventions/1_2_1986.pdf, and Final Clauses of Multilateral Treaties Handbook 2003 (http://intreaty.un.org/English/Final/Clause/english.pdf). Accessed on 16.07.09.

[51] Article 31, Chapter 6, *Languages of Court's Rules of Procedure* in Official Journal L 176, 04.7.1991 (http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf).Accessed on 15.07.09.

[52] The DGT has at present three main types of translation aid: terminology tools and data banks (*IATE, CCVista Data Base, Eur-lex*), Systran Machine Translation and translation memory technology or TWB.

margin of freedom, authentic translations have traditionally fallen within the translation of directive texts, where formal correspondence, namely fidelity to the source text, is the rule. But fidelity to the source text does not necessary imply fidelity to the same meaning and effects.

According to article 220 of the EC Treaty, the Court of Justice and the Court of First Instance arbitrate on the uniform interpretation and application of the EU law. The internal Procedure recognizes all the official languages (including Irish) and from a legal point of view, each authentic text is considered independent for the purpose of interpretation by the courts. In case of ambiguity, the European Court of Justice consults all the original versions of the same instrument, looking for the intended meaning of the law and not for the common meaning resulting from the comparison. On that basis, all language texts are equally authentic and the functions of the source text cannot vary according to the translator's interpretation or the cultural factors of the target language. 'Since the communicative function of institutional texts is standardized, all the parallel texts of a single instrument have always the same communicative function' (Šarčević 1997:21). The legal status of the authenticated official text implies at 'first glance' that the process of translation has not occurred, even though nobody can deny that these texts are translations, and of a very particular type. The matter has generated in recent years lots of debates, for the most part through the isolated initiatives of linguists and translators who have claimed the paradoxes of translation, the illusions of language equality and consequently, the impossibility of defining the translator's role (Correia 2003:40, Koskinen 2000:83, Tosi 2002:179, 2007:105,117). However, if we look carefully behind the principle of equal authenticity, it does not apply to the genesis of the text and this is also congruent to any legal interpretation of the norms. The performative nature of norms implies a legal authority uttering intentional acts, and aiming at producing effects on a third party. Their validity is subject however to some felicitous conditions, whose failure to fulfil them, would make the act invalid. In the case of legislative acts, one of these conditions is the *promulgation* of the legal proposition by a certain authority in particular circumstances. And the felicitous utterance of the promulgation 'is an essential link in (or part of) the process through which this norm originates or comes into existence (being)' (von Wright 1963:94,125). The general aim is in fact 'to establish' a new legal event, whose validity is dependent on the uttering of constitutive statements under special circumstances and by a particular authority or institution (Olivecrona 1994 [1962]: 169-170). Institutionalised authority is therefore necessary to the existence of norms because, as found by Searle, 'every institutional fact is underlain by a (system of) rule(s) of the form X counts as Y in context C and without the institution, the result would only be a piece of paper with various grey and green markings' (1969: 51-52). A similar focus on authority is also found in Benveniste (1994 [1962]: 187-195), for whom 'executive utterances' only exist if they have been 'authenticated' as *acts*. So, the performance of these acts is identified with the utterance of the act itself, which also determines the uniqueness of the 'executive' statement. In our case, it is only when the 23 EU texts are authenticated and published on the Official Journal that they become equally valid and authentic. No legislation enters into force before then. Although drafting takes place in one or two working languages, it is only the fact that there are 23 language versions, which confers them legal authority. This means

that before being adopted, there is no legal constraint in defining these texts translations or language versions. For the same reason, word-for-word translation recommended for legal translation should not be considered a 'scapegoat' (Koskinen 2000:85) when dealing with non-normative EU texts. And although a Green or a White paper becomes official only when is published, it undergoes no formal authentication, thus making the status of translation, at least in principle, much less paradoxical than it seems. In this scenario, translators as well would enjoy the opportunity to gain a better identity for their role, thus following different approaches on the basis of the EU communication needs. After all, multilingual access to the EU is ensured by translation and if noble political reasons are an unquestionable asset, it is also true that today's Europe has completely different needs from those of the six founder members - and the increasing number of enlargements has been the most tangible demonstration. This also provides a good reason for the use of English as a working language. It is unthinkable to draft documents in 23 different languages and compared to a decade ago most of the current Commission's drafting takes place in English, whose usage will continue to grow. One may raise the issue of power relations -that has been left out from this analysis- by arguing that EU members would not enjoy any more the same language rights. But, in reality, using 23 different languages or adopting a neutral and artificial language like Esperanto is not an alternative either, because only few people would master it and the role of English has a global 'lingua franca' is undeniable. It is worth noticing that the English in use at EU is often drafted by non-native speakers and has been regarded as very different from the standard of British English and from its other varieties (Seymour 2002:22-32; Wagner 2000:11). Translators on their turn are often faced with the task of deciphering what the author has meant before carrying out the translation of the text itself. The use of some core languages should not be regarded as synonymous with language hegemony and political domination. It would probably increase uniformity in the original drafts, thus improving consequently also the quality of the target texts. However, this operation cannot be restricted to the general translation strategies and approaches either, because the EU law and its political organisation have developed text features and problems that are not to be encountered in any other translation setting. The unusual text generation and the supranational nature of the EU and its political and socio-cultural identity *in fieri* are not to be neglected and should probably be the starting point of any discussion about EU multilingualism. In this scenario, the legal principle of multilingualism could allow rethinking the role of translation in a much broader perspective that suits the specific needs of the EU.

Concluding remarks

In this paper I have looked at EU translation issues both from a legal and a practical point of view in an attempt to reconcile the *de jure* principle of multilingualism with the *de facto* practice of its realisation. Moving from a legal standpoint I argued that the existence of translation is less paradoxical than it seems. The principle of 'equal authenticity' applies only when the texts are authenticated and published in the EU Official Journal. Before that, nothing prevents regarding them as translations or language versions. The fact that translation is not mentioned or restricted could be almost exploited

as a legal pretext, because in the end what is not prohibited or restricted, is implicitly permitted. The matter envisages the possibility of thinking translation in a broader perspective and in a way that better suits the EU context and its upcoming linguistic needs.

The supranational nature of EU law, on the borderline with features of several domestic systems, and the lack of an established Euro-culture are strictly related to the concept of multilingualism and they might demand a more attentive reflection on multicultural legal and political integration. Before considering linguistic issues, the question of multilingualism should be probably addressed in different terms, i.e. on whether the EU wants to be 'united in diversity' by promoting an own culture or by being a reference point offering multilingual access and services. In both cases, it will only be possible with a collaborative approach and a constant dialogue among different parties, institutions, legal experts, linguist and translators.

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CAUGHT IN THE WEB OF THE LAW LE TRADUCTEUR JURIDIQUE FACE À LA MÉTAPHORE

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Résumé: *Thin skull doctrine, living tree, blue-sky law, clean hands, cloud on title…* Les métaphores occupent à l'évidence une place centrale dans le vocabulaire juridique anglais. Comment expliquer le succès de cette figure de style dans le langage de la *common law* ? Les métaphores juridiques permettent de rendre accessibles, au moyen d'images évocatrices et familières, des concepts qui, sans elles, resteraient abstraits. C'est là une de leurs fonctions, parmi d'autres que nous nous efforcerons de cerner dans le cadre de la présente communication.
Après un rapide survol de deux familles de métaphores particulièrement productives en anglais juridique (les métaphores corporelles et les métaphores « naturelles » au sens large), nous nous interrogerons sur la traduction des métaphores. Nous verrons qu'au-delà de la règle générale (adaptation de la métaphore rendue nécessaire par le degré d'abstraction supérieur du français), d'autres techniques de traduction sont également possibles, dont la traduction littérale. Nous nous pencherons également sur le cas particulier des métaphores « filées », qui peuvent parfois justifier le recours à une traduction littérale.

Abstrakt: *Thin skull doctrine, living tree, blue-sky law, clean hands, cloud on title…* Metafory niewątrpliwie odgrywają istotną rolę w prawniczym języku angielskim. W jaki sposób można wyjaśnić popularność metafor w języku prawa w systemie *common law* ? Metafory w języku prawa pozwalają na zrozumienie abstrakcyjnych pojęć dzięki sugestywnym i znanym obrazom. Jest to jedna z funkcji metafor, która zostanie omówiona w niniejszym artykule.
Po dokonaniu krótkiego przeglądu dwóch grup metafor szczególnie bogatych w jednostki leksykalne w angielskim języku prawa (nazywane w języku francuskim *les métaphores corporelles* oraz *les métaphores « naturelles »*), omównione zostaną zagadnienia dotyczące ich przekładu. Autor stoi na stanowisku, że poza najczęściej stosowaną metodą przekładu (konieczności adaptatcji metafor ze względu na wyższy poziom abstrakcyjności języka francuskiego), możliwe są również inne techniki przekładu, włączając w to przekład literalny. Autor dokonuje analizy konkretnych metafor, w stosunku do których można zastosować technikę przekładu literalnego.

Réflexions générales

Son intention ce jour-là n'était sans doute pas de vanter les mérites de la métaphore mais lors de son intervention au journal de 20 h de France 2, le 30 janvier 2008, Daniel Bouton, le PDG de la Société Générale, ne manqua pas d'images pour s'expliquer sur la désormais célèbre affaire Kerviel : « Le conseil d'administration me demande de rester à la barre du bateau dans la tempête dans laquelle nous sommes. Je suis un homme de devoir, je ne vais pas sauter par-dessus bord… » ; « l'incendie pouvait

gagner la maison, on a réussi à l'éteindre dans la chambre » ; « nous ne savions pas que quelqu'un était capable à cent, cent dix kilomètres-heure, de changer de voiture, non seulement il connaissait les radars fixes et les radars mobiles mais il était capable de passer d'une voiture à l'autre ». Cette pluie de métaphores masque sans doute un certain malaise de la part du dirigeant, sommé de rendre des comptes après l'un des plus grands scandales financiers de l'histoire. Certains n'auront d'ailleurs pas manqué de fustiger « l'obscure métaphore » des radars, censée expliquer la défaillance des contrôles, ou plus largement, les « effets pervers » de cette technique de communication, jugée « manipulatrice ». Pour criticables qu'ils soient, les propos de Daniel Bouton n'en témoignent pas moins de l'omniprésence de la métaphore dans le langage en général et dans la communication institutionnelle en particulier.

La métaphore a toujours suscité l'intérêt des linguistes et des philosophes. Elle figure en bonne place dans la *Rhétorique* et la *Poétique* d'Aristote, qui est souvent considéré comme le premier théoricien de la métaphore. D'innombrables ouvrages et articles ont été consacrés à cette « figure de style » qui, avec l'avènement de la théorie cognitive (Lakoff et Johnson, 1980), s'est révélée dans toute sa complexité et a dévoilé de nouvelles facettes. Il est aujourd'hui admis que la métaphore, loin d'être une simple figure de style, s'inscrit au cœur du langage et de notre conception du monde. Pour Lakoff et Johnson, il n'est pas possible d'appréhender le monde sans recours à la métaphore :

« Il semble que la métaphore envahisse bien tout notre système conceptuel. (…) Loin de se contenter de relever le grand nombre de métaphores utilisées dans le langage quotidien, Lakoff et Johnson montrent comment elles dépendent les unes des autres et comment, par conséquent, nous sommes véritablement en présence d'un *système* conceptuel métaphorique qui nous permet d'appréhender la réalité. »[53]

Si la métaphore est à l'évidence l'une des figures les plus connues, il n'est qu'à consulter quelques-unes des définitions qui en sont données pour constater immédiatement que le concept même de « métaphore » est très flou. *Le Robert* la définit ainsi : « Procédé de langage qui consiste à employer un terme concret dans un contexte abstrait par substitution analogique, sans qu'il y ait d'élément introduisant formellement une comparaison ». La métaphore peut aussi se définir comme « un déplacement de sens par similarité entre les signifiés de deux éléments perçus comme ayant au moins un trait sémantique commun » (Chuquet, Paillard : 1987 : 213). Certaines définitions sont plus concises : « Figure de style qui rapproche un comparé et un comparant, sans comparatif (contrairement à une comparaison) »[54]. Pour Paul Ricœur, la métaphore est une « erreur calculée. Elle consiste à assimiler des choses qui ne vont pas ensemble. Mais précisément, par le biais de cette erreur calculée, la métaphore révèle une relation de signification, qui n'avait jusqu'alors pas été perçue, entre des termes qui étaient empêchés de communiquer entre eux par les classifications antérieures » (Ricœur, 2007 : 117). Au regard de ces définitions, il est une évidence que le concept de métaphore n'est pas facile à cerner (le site www.info-métaphore.com propose lui-même plusieurs dizaines

[53] *Toute description n'est-elle que métaphorique ?*, à propos de : *Les métaphores dans la vie quotidienne*, de George Lakoff & Mark Johnson, Thomas Lepeltier, 1998 (http://revue.de.livres.free.fr/cr/lakoff.html).

[54] *Les figures de style*, http://www.edunet.tn/francais/vocabulaire/cours/fig_style.htm.

de définitions de la métaphore). Comment s'en étonner ? Le langage évolue en permanence et certains mots imagés perdent au fil du temps leur charge métaphorique au point de ne plus être perçus comme des métaphores (pensons seulement au virus informatique ou à la souris de l'ordinateur). La métaphore est alors dite « figée » ou « morte », et s'oppose à la métaphore « vive » (Ricœur), qui frappe par son originalité et sa nouveauté. D'autres auteurs parlent de métaphores « expressives », « neuves » ou « usées », selon le cas, rendant toute ébauche de typologie extrêmement délicate.

Comme le laisse entendre la troisième définition citée plus haut, il convient de ne pas confondre métaphore et comparaison : la métaphore est une comparaison implicite, avec fusion entre le comparé et le comparant. Ainsi, *Law is a bottomless pit* (titre d'une satire de John Arbuthnot, 1712) est une métaphore tandis que « Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through » (Jonathan Swift) est une comparaison.

Si la métaphore est le plus souvent étudiée sous l'angle de la langue générale, il ne faut pas sous-estimer son importance dans les langues de spécialité et en particulier dans le langage juridique. Nous étudierons un peu plus loin trois « familles » particulières de métaphores dans le langage du droit, mais il convient de rappeler au préalable que de nombreux termes juridiques de base sont eux-mêmes des métaphores (« in fact, there are hundreds of metaphors, buried and unburied, in the language of the law » ; Alcaraz, Hughes, 2002 : 44). En témoignent des termes comme *burden of proof* ou *smoking gun* ou des expressions comme *to discharge one's duties*. Ces métaphores ne sont plus perçues comme telles mais elles n'en disent pas moins toute l'importance de l'image dans le discours juridique.

Avant d'évoquer des familles particulièrement emblématiques de métaphores dans le langage du droit et d'aborder la question du traitement des métaphores en traduction juridique, il peut sembler utile de s'interroger sur les fonctions de la métaphore dans le discours juridique.

Comme dans la langue générale, la métaphore constitue en droit un outil d'expression que le juriste peut mettre au service de son argumentation, pour mieux emporter l'adhésion de ses lecteurs ou de son auditoire. Cette fonction, évidente, ne doit toutefois pas cacher les autres, plus subtiles, que revêt la métaphore. Dans son article *Trial by Metaphor*, Benjamin L. Berger reconnaît à celle-ci une triple utilité : selon lui, la métaphore est utilisée en droit « to render the complex simple, to appeal to common sense, and to structure thinking about a particular issue » (Berger, 2002).

La première de ces fonctions – rendre concret, au moyen d'une image, ce qui sans celle-ci resterait abstrait – est également évoquée par Patricia Loughlan dans son article *The Metaphors of Intellectual Property*. Selon cet auteur, la métaphore a pour principale fonction de « increase the accessibility of a highly abstract concept by reference to a common and concrete experience which brings out structural or inherent similarities between the two » (Loughlan, 2006 : 225). Pour Loughlan, la métaphore est avant tout un moyen de rendre une notion abstraite plus accessible. Ainsi, une métaphore particulièrement évocatrice (« When these ghosts of the past stand in the path of justice clanking their mediaeval chains, the propre course is for the judge to pass through them undeterred ») permet d'exprimer avec force un principe juridique autrement abstrait (« the just solution to a modern legal problem may not be found by following old

precedent ») (2006 : 213). L'image constitue en quelque sorte une traduction concrète de l'abstraction juridique en question. De même, citant cette autre métaphore, « a judge exercising the equitable jurisdiction may deny relief to a plaintiff on the express basis that the plaintiff does not have "clean hands" », Loughlan constate que « the language chosen expresses in the vivid, concrete terms of daily human life, an abstract principle of legal reasoning about denial of relief to a plaintiff whose own conduct has been improper » (2006 : 213-214).

Les deux autres fonctions de la métaphore (solliciter le bon sens et permettre de structurer la pensée) mises en évidence par Berger et prolongées par Loughlan[55] semblent tout aussi essentielles et expliquent largement le succès de la métaphore dans le domaine du droit. La métaphore filée constitue un outil particulièrement efficace de structuration de la pensée et du raisonnement. Nous ne sommes pas loin ici de la *legal fiction* (sur laquelle se penche longuement Sanford Schane dans son ouvrage *Language and the Law,* 2006), qui n'est finalement rien d'autre qu'un moyen métaphorique d'exposer un concept juridique dans toutes ses nuances et avec toutes ses ramifications. Certaines métaphores telles que celle du *living tree* (expression employée à propos de la constitution au Canada) permettent de développer l'image et de tisser un réseau d'analogies à partir de l'idée de départ. Shane cite aussi la métaphore de l'entreprise comme personne (*a corporation is a person*), qui, par déduction logique, se prête également à de multiples analogies. Les concepts de métaphore filée et de *legal fiction* sont également très proches de celui de *metaphor cluster* évoqué par Loughlan : la « grappe de métaphores » permet en effet elle aussi de multiplier les analogies autour d'un thème donné. Loughlan remarque ainsi que les métaphores agraires sont particulièrement présentes en droit de la propriété intellectuelle (« the bucolic metaphors, the set of images forming an extended metaphor system and evoking a rural past of hard earthy labour and comparing that labour to the work of the modern inventor or author and the product of that labour namely, crops or, more specifically, fruit, with the book or the invention »), pour aboutir à la conclusion suivante : « The agrarian extended metaphor actually forms a kind of short story or parable » (2006 : 220). Ce qui nous renvoie à la *legal fiction*…

Outre les métaphores agraires, deux autres familles de métaphores sont particulièrement productives en anglais juridique : les métaphores corporelles et les métaphores liées aux phénomènes climatiques et naturels. Après avoir cité quelques exemples de ces deux familles, nous évoquerons brièvement les métaphores maritimes, dont sont très friands les juristes des deux grandes traditions (*common law* et droit civiliste).

Les « familles » de métaphores

Les métaphores corporelles sont particulièrement nombreuses dans la langue de la *common law*. Elles doivent sans doute une bonne part de leur succès à la volonté du juriste de conférer une certaine humanité au droit, matière réputée aride.

[55] « A metaphor may do much more than 'phrase the thought'. It may structure the thought. It may even make the thought possible. » *Ibid.*, p. 214.

Parmi les termes imagés appartenant à cette catégorie particulièrement féconde, citons *long-arm statute*, *clean hands*, *Chancellor's foot* ou encore *thin skull doctrine*. Tous ces termes, qui ont en commun de faire référence à une partie du corps, ont un sens juridique précis. Ainsi, le terme *long-arm statute* désigne « a statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect » (Garner, 2004 : 961). D'autres métaphores de cette famille font référence plus particulièrement à l'effort physique : il en va ainsi de *sweat of the brow*, principe de droit de la propriété intellectuelle consacrant la reconnaissance du travail et des efforts fournis par l'auteur.

La personnalisation de la loi et de la justice se reflète également dans de nombreuses expressions imagées qui n'ont pas de sens juridique à proprement parler mais dont la charge métaphorique leur confère une grande force évocatrice : citons *the arm of the law*, *the eye of the law*, *the mouth of the law*, ou encore *the big ear of the law*. Certaines de ces images sont communes aux deux cultures juridiques : pensons au « bras de la justice », à l'adage « l'œil de la loi veille » ou à la célèbre formule de Montesquieu « le juge est la bouche de la loi » (voir également « Les métaphores communes » plus loin).

L'anglais juridique semble également vouer une grande affection aux métaphores liées aux phénomènes climatiques et à la nature. Celles-ci sont particulièrement fréquentes en droit américain, notamment dans la dénomination des types de loi : *sunshine law*, *sunset law*, *blue-sky law*, etc. Citons également, dans cette catégorie, *cloud on title* (« a defect or potential defect in the owner's title to a piece of land arising from some claim or encumbrance », Garner, 272) et le dérivé *clouded title*. La métaphore de l'arbre, sur laquelle nous reviendrons plus loin, est également très fréquente : on la retrouve notamment dans l'expression *fruit of the poisonous tree* ou dans le terme *living tree* (employé à propos de la Constitution au Canada). A ce propos, citons également l'emploi récurrent, en droit français, du mot « branche » pour désigner notamment les différents domaines du droit (le droit civil et le droit commercial sont les branches principales du droit privé) ou les subdivisions d'un moyen dans les pourvois en cassation.

Outre les métaphores corporelles et les métaphores liées aux phénomènes climatiques et à la nature, une autre catégorie de métaphores semble particulièrement prisée des juristes des deux traditions : les métaphores maritimes.

A quelques exceptions près (cf. *safe harbor laws*), les termes de cette catégorie ont rarement un sens juridique précis, mais la récurrence des métaphores maritimes sous la plume des juristes en dit long sur leur succès dans le domaine du droit.

Dans les textes juridiques, la métaphore maritime est souvent filée, notamment lorsqu'elle vient appuyer des critiques : « (…) plus d'une dizaine de causes d'inconstitutionnalité fragilisent ce texte. Celui-ci *fait eau de toute part*, sans aller jusqu'à dire qu'il amène au *naufrage du droit pénal sur les récifs de la Constitution*… » (compte rendu d'une discussion devant le Sénat ; nous soulignons). Cette réflexion sur l'évolution du droit renferme également une métaphore filée, présentée explicitement comme telle : « Le risque pour les avocats est de se laisser bercer par la métaphore rassurante de la 'montée du droit' qui évoque *une montée des eaux* lente, continue et irrésistible, *qui met les navires à flot*. Il n'y aurait plus alors qu'à se laisser porter. Mais, pour filer la métaphore, l'histoire des tribunaux d'exception rappelle qu'il y a aussi *des ressacs et des*

saisons de basses eaux » (nous soulignons)[56]. Cette autre métaphore fait référence à une catastrophe célèbre : « The reforms the Law Council was prepared to suggest were akin to rearranging just two deck chairs on the legal Titanic as the whole system sinks under the weight of burgeoning costs. »[57] Patricia Loughlan constate pour sa part la récurrence des métaphores maritimes et nautiques en droit des marques (2006 : note 4, 212).

D'une manière plus générale, les métaphores aquatiques sont également monnaie courante, en particulier la métaphore du cours d'eau : « The common law is not a stagnant pool, but a moving stream » (Hilen v. Hayes, 673 S.W.2d 713 (Ky.,1984)) ; « The two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters » (*Ashburner's Principles of Equity*).

Après ce rapide survol de trois familles particulièrement productives de métaphores dans le langage du droit, il convient de se poser la question de la traduction de la métaphore. Faut-il conserver systématiquement la métaphore originale dans la traduction ou au contraire la supprimer, ou encore la remplacer par une métaphore équivalente ? Quid des métaphores communes ? Les métaphores filées posent-elles des problèmes particuliers au traducteur ?

La traduction des métaphores

Introduction

Avant de nous intéresser à son traitement en traduction juridique, penchons-nous sur la traduction de la métaphore en langue générale. Parmi les nombreux auteurs qui ont élaboré une méthodologie de traduction des métaphores, citons Peter Newmark, qui leur consacre un chapitre entier dans son ouvrage *A Textbook of Translation*. Pour mieux cerner les problèmes de traduction qu'elles induisent, Newmark dresse une typologie détaillée des métaphores, distinguant successivement les *dead metaphors*, les *cliché metaphors*, les *stock or standard metaphors*, les *adapted metaphors*, les *recent metaphors* et les *original metaphors* (1998 : 104-113). Les *recent metaphors* renvoient en fait aux néologismes créés par glissement métaphorique (le terme *hot tub* est ainsi utilisé depuis quelques années, en droit australien, pour décrire la confrontation des experts des parties avant la tenue du procès). Il est à noter que la typologie de Newmark est souvent reprise, en tout ou partie, dans les études consacrées à la traduction des métaphores[58].

Jean Delisle, qui remarque que la métaphore « est aussi une forme de traduction car elle exprime une réalité abstraite au moyen de termes concrets », distingue pour sa part trois approches possibles : « la traduction littérale, l'emploi d'une autre métaphore de sens proche ou équivalent, ou ne rendre que l'idée sous-jacente aux images du TD » (1993 : 406-419).

La deuxième technique proposée étant assez peu utilisée en traduction juridique (sauf rares exceptions : *sunset law* = loi couperet), nous nous intéresserons essentiellement à deux techniques – la traduction littérale et l'adaptation (traduction du

[56] Le temps du droit : illusion ou progrès ? http://cnb.avocat.fr/PDF/Conventions/Caen.pdf.
[57] http://www.aic.gov.au/publications/proceedings/03/schacht.pdf.
[58] voir notamment Isabelle Collombat, *Traduire la métaphore cognitive : choisir un vecteur de transmission du savoir*, 2006.

sens sous-jacent) – dont nous nous efforcerons de distinguer les avantages et inconvénients respectifs.

Traduction littérale ou adaptation ?

Il est aujourd'hui communément admis que le français présente un degré d'abstraction plus élevé que l'anglais. « D'une façon générale, » constatent Vinay et Darbelnet, « les mots français se situent à un niveau d'abstraction supérieur à celui des mots anglais correspondants » (1977 : 59). Ce que confirme Delisle, qui constate « une différence très nette de 'sensibilité' entre les rédacteurs anglais et français. Les premiers jouent plus librement que les seconds avec les images » (1993 : 411).

Cette préférence du français pour l'abstraction se vérifie avec ces quelques exemples de traduction, qui reprennent certains des termes cités plus haut:

thin skull doctrine	doctrine de la vulnérabilité de la victime
clean hands	conduite irréprochable, droiture (Juriterm)
long-arm statute	loi d'application extra-territoriale
cloud on title	possibilité de contestation d'un titre
poisonous tree doctrine	irrecevabilité des preuves obtenues illégalement

Dans tous ces exemples, la métaphore originale est gommée dans la traduction, au profit d'un terme plus abstrait.

Dans le passage suivant, où il est question de la théorie dite du *cat out of the bag* (« the argument that a prior inadmissible statement can taint a subsequent statement »[59]), la traduction par adaptation s'impose d'emblée comme la meilleure – et la seule – possible :

> « Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. » (United States v. Bayer)

Traduction proposée :

> « Bien sûr, dès lors qu'il s'est compromis en passant aux aveux, l'accusé (…) doit en assumer les conséquences tant psychologiques que pratiques. Il ne peut se rétracter. La divulgation du secret est irréversible (…). » (nous soulignons)

L'image de l'original est perdue mais la traduction est conforme au génie du français. Le cas échéant, lorsqu'il s'agit notamment de souligner la spécificité du concept étranger, le traducteur peut conserver le terme anglais (entre parenthèses ou dans une note de bas de page) tout en en proposant une traduction littérale : « Par application de la

[59] *Texas Juvenile Probation Commission*, http://www.tjpc.state.tx.us/publications/reviews/99/99-3-42.htm.

'théorie du crâne fragile' (*Thin skull rule*), les tribunaux reconnaissent que… ». Cette méthode permet de mieux faire passer la traduction littérale.

Dans tous les cas, il faut éviter la traduction littérale sans référence à l'original et sans autre explication : « Le Tribunal a ainsi appliqué la théorie du crâne fragile qui est à l'effet que l'auteur d'un préjudice doit prendre sa victime dans l'état où elle se trouve au moment où le dommage est causé » (nous soulignons). Même si le passage contient une explication de la théorie en question, l'effet produit est pour le moins incongru.

L'expression *piercing the corporate veil* mérite également réflexion. Elle est souvent traduite littéralement – « percer/lever le voile de la personnalité juridique », « perçer/lever le voile social » – notamment dans le contexte canadien, mais ces expressions peuvent sembler déroutantes en français et on pourra leur préférer des traductions moins imagées comme « faire abstraction de la personnalité morale » par exemple. Il est par ailleurs toujours utile de replacer le travail de traduction dans le cadre d'une réflexion comparatiste plus large et de chercher des analogies entre les concepts. S'agissant de *piercing the corporate veil*, l'explication suivante pourra ainsi s'avérer précieuse : « Cette doctrine est semblable à l'idée de réalisme fiscal. Effectivement, elle autorise l'administration à ignorer la personnalité juridique de la société pour déterminer les liens économiques réels du contribuable »[60].

D'une manière générale, la traduction littérale se justifie lorsqu'il s'agit de présenter un concept dans sa spécificité : « On peut en effet faire référence à cet égard à la théorie américaine du 'sweat of the brow' (théorie de la « sueur du front ») : celui qui a travaillé, même s'il n'a pas fait œuvre originale, doit être récompensé de ses efforts, dont a profité la création artistique »[61].

La prise en compte du contexte historique peut également dicter la traduction qu'il convient d'utiliser. Louis Beaudoin remarque ainsi, à propos du terme *Chancellor's foot*, qui pourra souvent se rendre par « norme arbitraire » ou « pouvoir discrétionnaire absolu », que « le traducteur ne conservera l'image du pied du chancelier que dans un contexte où il doit rendre compte de l'aspect historique de la notion de '*length of the Chancellor's foot*'. »[62]

Pour clore notre réflexion autour de la question « traduction littérale ou adaptation ? », arrêtons-nous sur cet extrait d'un document de la Cour internationale de justice, où l'on retrouve le term *clean hands* déjà cité :

> « He who seeks equity must come to Court – as it is laid down in the governing maxim of equity in the common law – with clean hands. Can it be said, even on the most provisional evaluation of the facts, that it is clear that Nicaragua's hands are so clean that the injunctions (…) should not be directed to it as well? »

[60] Eric Engle, *Transparence fiscale en droit comparé : France/USA*, 2007 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021595).

[61] Benoît Galopin, *Jeux vidéo et droit d'auteur*, 2003 (http://www.glose.org/mem022-htm.htm).

[62] Louis Beaudoin, *Traduire la common law en français: rebelle ou fidèle ?*, dans Actes du colloque *La traduction juridique, Histoire, théorie(s) et pratique*, Université de Genève et ASTTI, 2000.

> « Celui qui cherche à obtenir l'équité doit se présenter devant la Cour – comme le dit la maxime régissant l'équité en *common law* – avec les mains propres. Peut-on dire, même d'après une appréciation très provisoire des faits, que les mains du Nicaragua sont manifestement si propres que les injonctions (…) ne devraient pas lui être aussi adressées ? » (nous soulignons)

Malgré les traductions abstraites citées plus haut, le traducteur a fait le choix ici de la traduction littérale et a conservé l'image originale. Cette traduction, qui n'était sans doute pas la seule possible, n'en est pas moins parfaitement acceptable dans la mesure où l'image des « mains propres » est transposable d'une langue à l'autre, ce qui nous amène à la question des métaphores communes.

Les métaphores communes

De nombreuses métaphores sont communes aux deux cultures juridiques et ne posent pas a priori de problème de traduction. Il en va ainsi des métaphores corporelles dénuées de sens technique (contrairement à celles que nous avons citées plus haut), telles que the *arm of the law* (le bras de la justice), *the eye of the law* (l'œil de la justice), etc. Certaines de ces métaphores se retrouvent dans des adages désormais célèbres : « l'œil de la loi veille » (métaphore qui a fait l'objet d'un ouvrage récent[63]), « le juge est la bouche de la loi » (Montesquieu), etc.

Dans cette citation de Voltaire, la métaphore du bras de la justice est associée à celle du bandeau : « Les inimitiés personnelles n'ont que trop souvent imploré le bras de la justice, et tâché d'épaissir son bandeau ». Rappelons que l'image du bandeau fait référence à l'un des trois attributs de Thémis, déesse grecque de la justice devenue, à travers ses diverses représentations (cf. statues dans les tribunaux, etc.), le symbole de celle-ci. Ce symbole étant commun aux deux cultures juridiques, il est naturel de retrouver les images du bandeau, du glaive et de la balance – les trois attributs de *Lady Justice* – dans les deux langues. Le bandeau de la justice, symbole d'impartialité, est par exemple évoqué dans ce passage : « [In Bush v. Gore, Antonin Scalia] *peeked beneath the blindfold of justice* and decided the case not on neutral principles or precedents designed to govern future cases, but rather on the basis of whom he wanted to see win this election » (nous soulignons). L'image du bandeau est souvent reprise en français, notamment dans les chroniques judiciaires (cf. « Les larmes ont mouillé le bandeau de la justice »). La métaphore du glaive (ou de l'épée) est également présente dans les deux cultures et est souvent associée, en *common law*, à celle du bouclier, comme en témoigne cet adage : « Estoppel is a shield, not a sword ». Le Juridictionnaire, qui consacre une entrée à part entière à la métaphore du bouclier, propose de cette formule la traduction suivante : « La doctrine de l'irrecevabilité fondée sur une promesse ne peut servir que de bouclier, et non d'épée », avant de préciser que « l'image donne souvent lieu à une métaphore développée : ''La défense d'anticipation est bien connue et fait également partie du bouclier protecteur traditionnel levé instinctivement à l'approche des premiers assauts de l'attaquant en matière de brevet' ' ».

L'image du bouclier se retrouve également dans cet extrait d'une décision de la Cour suprême du Canada : « The s. 11(*b*) right is one which can often be transformed

[63] Michael Stolleis, *L'œil de la loi : Histoire d'une métaphore*, Mille et une Nuits, 2006.

from a protective shield to an offensive weapon in the hands of the accused. » : « Le droit que confère l'alinéa 11*b),* conçu comme un bouclier, peut souvent se transformer en arme offensive entre les mains de l'accusé. » (Juge Cory, dans l'affaire *Askov* (1990)).

Les métaphores filées

Avant de nous pencher sur les problèmes spécifiques qu'elle pose au traducteur, il est sans doute utile de rappeler ce qu'est la métaphore filée : « Série structurée de métaphores qui exploitent, en nombre plus ou moins élevé, des éléments d'un même champ sémantique. »[64] Autrement dit, la métaphore filée est une métaphore développée qui, contrairement à la métaphore « ponctuelle », prend appui sur plusieurs éléments au sein de la phrase (on peut alors parler de métaphore filée « limitée ») ou peut se propager à la phrase suivante, voire à plusieurs phrases ou à un paragraphe entier (métaphore filée « étendue »). Selon Bryan A. Garner, ce type de métaphore n'a plus sa place dans les textes juridiques : « Extended metaphors have been out of fashion for more than a century. The most we can tolerate nowadays is the two-part metaphor » (1995 : 559-560). Garner fustige ce qu'il appelle l'*overwrought metaphor* mais nous verrons plus loin que les juristes, ne lui en déplaise, s'y adonnent encore parfois.

Qu'elle soit « limitée » ou « étendue », la métaphore filée pose un problème spécifique au traducteur : celui-ci doit en effet en conserver la cohérence et l'unité, et la question du choix entre traduction littérale et adaptation se pose dès lors avec une acuité nouvelle. Si, dans le cas d'une métaphore ponctuelle, le recours à une traduction abstraite s'avère souvent possible, voire souhaitable pour les raisons évoquées plus haut, une traduction littérale peut être plus indiquée lorsque la métaphore est filée. Prenons l'exemple de *living tree* :

> 1) « The Honourable Leader of the Government says that the Constitution *is a living tree, not a dead end*, and that the court has the responsibility to interpret it. »
> « Le leader du gouvernement dit que la Constitution *est en évolution, et non stagnante,* et que le tribunal a la responsabilité de l'interpréter. » (Sénat canadien ; nous soulignons)

Dans cette phrase, la métaphore n'est pas filée et se prête donc à une traduction adaptée, plus abstraite.

> 2) « If indeed our Constitution is as the court has stated, *a living tree*, then it must be considered that *this tree is rooted* in fundamental and historic values. »
> « Si, comme les tribunaux l'ont indiqué, notre Constitution est *un arbre vivant*, il faut alors tenir compte du fait que *cet arbre est enraciné* dans des valeurs fondamentales et historiques » (Hansard canadien ; nous soulignons)

Dans ce deuxième exemple, le développement de la métaphore justifie le recours à une traduction littérale.

L'image du *golden thread* constitue un autre exemple intéressant. Cette métaphore désormais célèbre trouve son origine dans l'affaire Woolmington v. DPP (1935) :

[64] *Trésor de la Langue Française Informatisé*, http://atilf.atilf.fr/.

« Throughout *the web* of the English Criminal Law *one golden thread* is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ». Bien qu'elle soit « limitée », cette métaphore filée est généralement traduite littéralement (et, à la vérité, il est difficile d'en imaginer une traduction abstraite) : « Dans toute *la toile* du droit criminel anglais se retrouve toujours *un certain fil d'or*, soit le devoir de la poursuite de prouver la culpabilité du prévenu. » (décision de la Cour suprême du Canada ; nous soulignons).

Dans son article *Trial by Metaphor*, Benjamin Berger remarque que les métaphores du *living tree* et du *golden thread*, loin d'être de simples ornements stylistiques, ont permis de réelles avancées du droit. La métaphore du « fil d'or » a ainsi accéléré la reconnaissance de la présomption d'innocence, principe qui était loin d'être acquis en 1935. Quand à la métaphore du *living tree*, utilisée pour souligner la nécessaire évolution de la Constitution, elle illustre parfaitement, selon Berger, la triple fonction de la métaphore dans le domaine du droit : « By using this metaphor of the Constitution as a 'living tree', the court achieved a number of important persuasive effects. First, it reduced a complex and abstract discussion about the rules of statutory interpretation to a simple, common symbol – everyone can conceive of a tree and the natural properties that it possesses. Secondly, the court appealed to common sense – if, indeed, the Constitution is a living tree, it naturally follows that it must grow and change. Finally, the court shaped future thought about the way in which the Canadian Constitution should be interpreted » (Berger, 2002 : 36).

Pour conclure sur la métaphore filée, penchons-nous sur cet extrait d'un texte du Parlement européen, qui fournit un bon exemple de métaphore étendue (il n'a pas été possible de déterminer si la version française est une traduction de l'original anglais ou inversement, mais il est intéressant de constater que la métaphore, qui appartient au domaine maritime (voir « 2. Les ''familles'' de métaphores »), est reprise, dans tous ces éléments, dans les deux versions) :

What economic players find when they seek to engage in cross-border activities is *the great ocean of international private law* containing *the 20 or 30 greater or smaller islands* of European Community law. As soon as users leave *these safe harbours they risk running aground on shallows* consisting of either unresolved conflicts of individual private law regulations or the absence of coordination between European law and international private law. In some places *there is the risk of the ocean drying up altogether* because the law of EU directives (…).	La topographie actuelle que rencontrent les agents économiques lorsqu'ils veulent opérer au-delà des frontières est caractérisée par *l'océan du droit international privé* où *surnagent entre une vingtaine et une trentaine d'îlots* plus ou moins importants de droit communautaire. Dès que les justiciables quittent ces *havres sûrs*, ils sont menacés soit par les *hauts fonds* des conflits irrésolus entre différents systèmes de droit privé, soit par l'absence de coordination entre le droit européen et le droit international privé. Bien souvent, *la pleine mer menace de se transformer en récifs* car le droit des directives (…).

Pour conclure

Dans le domaine juridique, la métaphore est à l'évidence beaucoup plus qu'une simple pirouette stylistique. Si elle est parfois utilisée à des fins purement « décoratives »

(*arm of the law* pour symboliser le pouvoir de la justice par exemple), elle sert aussi souvent à désigner des concepts juridiques spécifiques, revêtant dès lors un sens technique. Les noms de nombreuses doctrines américaines (*cat out of the bag*, *sweat of the brow*…) témoignent du pouvoir évocateur de la métaphore, qui en dit souvent plus qu'un long discours (cf. première fonction relevée par Berger).

Pour autant, certains n'hésitent pas à souligner les dangers d'un recours excessif à la métaphore. Pour Bryan Garner, le principal danger est celui des métaphores dites « heurtées » (*mixed metaphors*), mal assorties : « The greater problem in using metaphors is that one metaphor shoud not crowd another. The purpose of an image is to fix the idea in the reader's or listener's mind; if disparate images appear in abundance, the audience is left confused (…) » (1995 : 558). George Orwell avait fait le même constat dès 1946 : « The sole aim of a metaphor is to call up a visual image. When these images clash -- as in *The Fascist octopus has sung its swan song (...)* -- it can be taken as certain that the writer is not seeing a mental image of the objects he is naming; in other words he is not really thinking »[65]. On doit un des exemples les plus célèbres de *mixed metaphor* à Sir Boyle Roche, qui déclara devant le Parlement irlandais (vers 1790), sans percevoir la force comique de ces propos : « Mr Speaker, I smell a rat; I see him forming in the air and darkening the sky; but I'll nip him in the bud ».

Bien qu'elle soit elle-même exposée au feu des critiques, la métaphore est souvent utilisée pour critiquer les dérives de la machine judiciaire. Prenons l'exemple de *Law is a bottomless pit*, titre d'une satire politique de 1712 de John Arbuthnot (dans laquelle apparaît pour la première fois le personnage de John Bull, symbole de l'Angleterre et de l'Anglais moyen). Cette métaphore du « puits sans fond » met notamment l'accent sur la durée excessive des procédures.

La métaphore est également parfois mise au service des critiques les plus acerbes, de rancœurs personnelles, et devient alors d'autant plus critiquable. Ces propos formulés par le juge Musmanno en 1966, à propos du livre *Tropic of Cancer* d'Henry Miller, surprennent encore aujourd'hui par leur férocité et leur acrimonie : « *Cancer* is not a book. It is a cesspool, an open sewer, a pit of putrefaction, a slimy gathering of all that is rotten in the debris of human depravity. And in the center of all this waste and stench, besmearing himself with its foulest defilement, splashes, leaps, crawls and wallows a bifurcated specimen that responds to the name of Henry Miller. » (opinion dissidente du juge Musmanno dans l'affaire *Commonwealth of Pennsylvania v. Robin*, 1966). Il est regrettable que le juge Musmanno n'ait pas pu s'inspirer des judicieux conseils de Bryan Garner, dispensés un peu plus de 20 ans plus tard : « Writers should use metaphors sparingly, should wait for the aptest moments, elsewhere using a more straightforward style » (1995 : 559)…

Il est à remarquer au passage que Bryan Garner n'est pas le seul à mettre en garde contre les dangers de la métaphore. Dans ses *Remarques sur Sertorius*, Voltaire précisait déjà que « toute métaphore doit être juste et faire une image vraie ». Mise en garde à laquelle font écho ces propos de Jean-François Féraud : « Rien n'embellit tant le discours que le bon usage des métaphores; mais il faut pour cela qu'elles soient justes et naturelles, qu'elles soient sensibles au commun des lecteurs, et que, dans le discours

[65] George Orwell, *Politics and the English Language*, 1946.

relevé, elles soient nobles et décentes »[66]. Cette autre mise en garde, qui s'appuie elle-même sur une métaphore, s'avère particulièrement originale : « De toutes les figures du discours, aucune n'approche de la peinture autant que la métaphore ; son effet particulier est de donner de la clarté et de la force aux descriptions, de rendre les idées intellectuelles en quelque sorte visibles à l'œil, en leur donnant de la couleur, de la substance et des qualités sensibles ; mais pour produire cet effet, il faut une main habile et délicate, car le moindre défaut d'exactitude peut produire de la confusion sur l'objet, au lieu d'y répandre du jour »[67]. Plus prosaïquement, Benjamin Berger constate que « It is important to recognize that, alongside its positive rhetorical uses, the juridical metaphor also has the potential to mislead, distort, obscure, and distract. The process of simplification can remove complexities that ought to be explored » (2002 : 36). Lord Mansfield remarque également que « nothing in law is so apt to mislead as a metaphor » (cité dans Thornburg, 2006 : 4). Plusieurs études semblent confirmer la pertinence de ces mises en garde. Dans *The Misleading Metaphor of the Slap in the Face: An Analysis of Ash v. Tyson*, Miriam Achtenberg s'emploie ainsi à démontrer l'ambiguïté d'une métaphore pourtant ancrée dans la jurisprudence américaine (2006).

Si certains fustigent l'ambiguïté des métaphores ou le risque de simplification inhérent à certaines images, d'autres soulignent l'usure inévitable de la métaphore : « Metaphors fade fast. A hackneyed comparison, faded from overuse, calls up no mental image, but slides unnoticed through the mind » (Weihofen, 1980 : 120).

Refermons le chapitre des critiques en citant ces mots célèbres du juge Benjamin Cardozo : « Metaphors in law are to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it. » (jugement rendu dans l'affaire *Berkey v. 3d Ave Ry Co*, 1926). Cette mise en garde est sans doute à méditer mais il est intéressant de remarquer que son auteur a lui-même recours à une métaphore pour la formuler. Ce constat semble valider la thèse de l'omniprésence de la métaphore dans le langage en général et dans le langage juridique en particulier. Berger lui-même l'utilise, délibérément ou non, dans sa définition de la métaphore : « The metaphor *can bridge the gap* between the abstract and the concrete » (2002 : 15) (nous soulignons). Patricia Loughlan, qui cite également le juge Cardozo, s'appuie sur une deuxième citation pour dresser le constat de l'omniprésence de la métaphore : « Gummow J in the High Court of Australia has similarly fulminated against the use of metaphor in legal discourse as something that 'may obscure the underlying principles that are in issue' and 'is apt to obscure rather than illuminate'. Both of these denunciations [*avec celle de Cardozo*] of the use of metaphor do themselves whether consciously or not employ metaphor to make their point: Cardozo J mobilises striking images of slavery and liberation, and Gummow J uses, in both instances, a metaphor of light and darkness. The point here is not to demonstrate anomaly or hypocrisy on the part of these eminent judges, but rather to emphasize the prevalence, the ubiquity, the 'embeddedness' of metaphor, even in the words of speakers who do not wish (at least apparently) to speak metaphorically and who do not perceive themselves to be speaking metaphorically. » (Loughlan, 2002, 215-216)

[66] Jean-François Féraud, *Dictionaire critique de la langue française*, 1787-1788.
[67] A. Varinot, *Dictionnaire des métaphores françaises*, 1818, préface.

D'une manière plus générale, il est incontestable que la métaphore reste une figure très prisée des juristes. Force de l'image oblige, elle continue d'être perçue comme une arme précieuse susceptible d'emporter plus efficacement l'adhésion du lecteur que de longs développements par trop abstraits. Prenant le contrepied des critiques, Robert L. Tsai remarque ainsi que « the presence of active metaphors indicates a healthy legal culture. […] Constitutional metaphors, like legal symbols and judicial mantras, allow jurists to address many different audiences at once, and to do so at different levels simultaneously. While the finer points of legal argumentation are aimed at specialists […], metaphor has the capacity to convey meaning broadly and instantly by drawing upon general experience » (Tsai, 2004 : 189-190). Le commentaire qui suit, extrait d'un article sur le *forum shoppin*g, illustre la fonction « didactique » de la métaphore, qui peut effectivement permettre d'« expliquer un phénomène complexe ou inconnu [le *forum shopping* dans cet exemple] en utilisant l'image d'un phénomène connu et familier [le poison qui se répand] » (Landheer, 2002) : « C'est le problème classique du 'forum shopping' qui *empoisonne* depuis toujours les relations de droit international privé. Mais *ce poison tend à se répandre* aujourd'hui avec d'autant plus d'efficacité que les systèmes juridiques *se décloisonnent pour laisser place à des espaces de libre-échange* et que les cabinets d'avocats s'internationalisent pour répondre aux nouveaux besoins créés par ces *espaces de liberté* »[68] (nous soulignons). La double métaphore « poison »/« espaces » confère une réelle efficacité à l'exposé. L'association des deux images n'est d'ailleurs guère surprenante dans la mesure où il s'agit de métaphores que l'on pourrait qualifier de « génératives », autrement dit de métaphores qui se prêtent à un approfondissement de la réflexion. La métaphore du *living tree*, citée plus haut, possède également cette qualité, comme le remarque B. Berger, qui oppose la métaphore « générative » à la métaphore « limitative » (*constrictive*) : « The 'living tree' metaphor includes a generative aspect. That is, the metaphor itself invokes and invites future thought about the implications of the image upon the interpretation of that which it embodies. While bounded by the limits of the metaphor, debate can continue as to what precisely it means to say that the Constitution is a 'living tree'. In contrast, the metaphor of the "golden thread" effectively ends the creative-interpretive discussion. » (Berger, 2002, 15).

La métaphore de la pyramide, autre exemple de métaphore générative, est également très fréquente dans le langage juridique : elle est utilisée pour représenter la hiérarchie des sources de droit (cf. pyramide de Kelsen[69]) ; elle peut être utilisée pour établir la hiérarchie des responsabilités dans une organisation (cf. « pyramide des

[68] Marie-Laure Niboyet, *La globalisation du procès civil international (dans l'espace judiciaire européen et mondial)*, www.courdecassation.fr, 2005.

[69] Dans un article récent, Carole Grillet entreprend de décrire l'évolution du droit comptable français et s'appuie pour ce faire sur la métaphore de la pyramide, confirmant ainsi le caractère « génératif » de celle-ci : « Selon Kelsen, les sources de droit s'organisent sous la forme d'une pyramide. Toute règle de droit doit respecter la norme qui lui est supérieure, formant ainsi un ordre hiérarchisé. Et plus les normes sont importantes, moins elles sont nombreuses, la superposition des normes acquiert ainsi une forme pyramidale. Nous allons ainsi retracer l'évolution des sources du droit comptable français à travers la présentation de pyramides ». (*Le droit comptable français : droit souple ou droit dur ? Quelle influence du droit comptable international ?*, Carole Grillet, Congrès AFC Poitiers 2007, http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p133.pdf).

responsabilités ») ou la hiérarchie des juridictions (« La Cour de cassation se situe au sommet de la pyramide judiciaire ») ; utilisée en droit de la consommation (« vente pyramidale »), elle peut même se voir substituer une autre métaphore (« vente à la boule de neige ») et se prête évidemment aux jeux de mots, source intarissable de créativité langagière : « Les pyramides ne sont pas toutes égyptiennes » (titre d'un article sur les pratiques de vente pyramidale).

Bref, la métaphore peut se décliner à l'infini, toutes les combinaisons sont permises. Elle est facteur de créativité, sous la plume des rhéteurs les plus habiles, mais dans le même temps, elle est inscrite au plus profond du langage et de notre conception du monde (cf. Lakoff et Johnson). C'est là tout le paradoxe de la métaphore : nous ne pouvons pas nous exprimer, même sur les sujets les plus simples, sans y avoir recours, et pourtant, elle nous ouvre des horizons infinis.

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МЕТАМОРФОЗЫ ЯЗЫКОВОЙ ЛИЧНОСТИ ГОВОРЯЩЕГО ПРИ ПЕРЕВОДЕ СУДЕБНОГО ДОПРОСА

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Abstract: The article deals with the speaker's lexicon features during court interpretation. The study is based on the transcripts of the authentic interpreter mediated court investigations and analyzed using a corpus analytical approach.

The analysis of the data shows, that interpreters strive to be loyal to the juristic macrocontext and the situation in which conversation takes place. That might lead to the wrong understanding of the identity (personality) of the speaker by the recipient. The overemphasizing of the features of speakers idiolect might lead to major misrepresentation of the information that was in the source message. The interpreter's endeavor of using special juristic terms might also complicate communication process.

Аннотация: Принято считать, что судебный перевод должен быть точным и передавать все нюансы исходного сообщения, включая стиль и регистр речи говорящего, акцентное выделение, громкость и экспрессивность высказывания, паузы, а также экстралингвистические элементы сообщения (см. Driesen 1992; González, Vásquez & Mikkelson 1991: 16, 272; Hale 2004: 8–9; Mikkelson 2000: 50, 61; Moeketsin1999: 100). В выступлении коснусь вопроса передачи особенностей лексикона говорящего при переводе судебного допроса. Передача лексических особенностей речи может быть важна по двум причинам. Во-первых, формулировка вопроса, выбор используемых при этом слов и терминов может быть сознательным и тщательно продуманным стратегическим ходом адвоката или прокурора (см. Colin & Morris 1996: 21; Kiesiläinen & Niemi-Kiesiläinen 2000: 190.) Определенный выбор слов может даже применяться для манипуляции памятью свидетеля или служить средством для введения его в заблуждение (Haapasalo 2000: 58). Допрашиваемый, отвечая на заданный ему вопрос, может сознательно подбирать те или иные слова или выражения, наиболее оптимально отвечающие его ви́дению происходящего. Во-вторых, особенности речи допрашиваемого, в том числе и лексики, создает у слушающих, и в первую очередь у членов суда, определенное объективное или субъективное представление о личности говорящего и о правдивости его показаний. Такие представления могут иметь значение при оценке доказательств и вынесении решения по делу. В качестве материала исследования используются аутентичные переводы судебных допросов, выполненных в языковой паре финский-русский. Аудиозаписи переводов транскрибированы, аннотированы и сохранены в корпусе устного перевода CIC (Corpus of Court Interpreting at the University of Tampere), созданного на кафедре перевода русского языка Института современных языков и переводоведения Тамперского университета (Финляндия). В докладе будут рассмотрены две категории лексических единиц – разговорные слова и выражения и специальные юридические термины. Результаты корпусного исследования дают основания полагать, что переводчики систематически изменяют регистр речи, используемый говорящим. При переводе разговорная, подчас несколько сниженная лексика нормализируется, а термины, в свою очередь, нередко

заменяются неспециальными выражениями или опускаются. Полагаю, что переводчик неосознанно стремится передавать сообщения общедоступным, литературным языком и потому сглаживает использование нестандартной лексики.

Введение

Настоящая статья посвящена передаче особенностей языковой личности говорящего при переводе допроса подсудимого или свидетеля в суде. Для оценки достоверности показаний важно, чтобы суд получил сообщение на языке перевода именно таким, каким говорящий это сообщение сформулировал в исходном языке. Поэтому принято считать, что судебный перевод должен быть точным и передавать все нюансы исходного сообщения, включая стиль и регистр речи говорящего, акцентное выделение, громкость и экспрессивность высказывания, паузы, а также экстралингвистические элементы сообщения (см. Driesen 1992; González, Vásquez & Mikkelson 1991: 16, 272; Hale 2004: 8–9; Mikkelson 2000: 50, 61; Moeketsin1999: 100).

Нередко вопрос соответствия исходного сообщения и его перевода рассматривается на уровне сравнения и сопоставления лексических единиц (напр. Barik 2002; Lee 1999; V. Dam 2002). В таких исследованиях изучение устного перевода сводится к сопоставлению оригинала и перевода и поиску ошибок, добавлений и опущений. В основе такого анализа лежат принципы лингвистической эквивалентности (Gile 1992: 188) и не учитываются коммуникативные и прагматические аспекты. В свете современного переводоведения такой подход представляется несколько наивным (Setton & Motta 2007: 204). Автор настоящей статьи также считает утопичным и нецелесообразным стремление к межъязыковому соответствию на уровне лексических единиц. Однако при переводе судебного допроса мы вынуждены уделять внимание переводу отдельных слов и передаче **лексических особенностей речи** по нескольким причинам:

1) Формулировка вопроса, выбор используемых при этом слов и терминов может быть сознательным и тщательно продуманным стратегическим ходом адвоката или прокурора (см. Colin & Morris 1996: 21; Kiesiläinen & Niemi-Kiesiläinen 2000: 190.)

2) Специалисты в области психологии судебного допроса полагают, что определенный выбор слов может применяться для манипуляции памятью свидетеля или служить средством для введения его в заблуждение (Haapasalo 2000: 58).

3) Допрашиваемый, отвечая на заданный ему вопрос, может сознательно подбирать те или иные слова или выражения, наиболее оптимально отвечающие его ви́дению происходящего.

4) Особенность речи допрашиваемого, в том числе и лексики, создает у слушающих, и в первую очередь у членов суда, определенное объективное или субъективное представление о личности говорящего и о правдивости его показаний (Colin & Morris 1996: 21). Такие представления могут иметь значение при оценке доказательств и вынесении решения по делу.

Материалы и ход исследования

В качестве материала исследования используются аутентичные переводы судебных допросов, выполненных в языковой паре финский-русский. В настоящее время коллекция содержит около 20 часов аудиозаписей с участием 6 разных переводчиков. Часть аудиозаписей переводов транскрибирована, аннотирована и добавлена в корпус устного перевода CIC (Corpus of Court Interpreting at the University of Tampere)[70], созданный на кафедре перевода русского языка Института современных языков и переводоведения Тамперского университета (Финляндия). База данных содержит транскрипты 8 допросов, в которых работало 4 разных переводчика, общая продолжительность транскрибированных записей примерно 4 часа 20 минут. Объем корпуса 38.574 словоупотребления. Для поиска и обработки данных разработано специальное веб-приложение (Tampere University Corpus Tools, TACT) [71].

В исследовании, представляемом в данной статье, использован метод корпусного анализа. На первом этапе в базе данных (в корпусе) был произведен поиск и отбор интересующих нас лексических единиц. Из частотных списков лексических единиц были выбраны ненормативные слова и выражения и специальные юридические термины и выражения или их фрагменты. Первоначальная выборка производилась отдельно из частотного списка финского и русского языков. На втором этапе все найденные кандидаты проверялись по словарям и в ближайшем контексте на предмет того, относятся ли они к искомым группам слов. При проверке ненормативных выражений использовались следующие словари: ”Словарь-тезарус современной русской идиоматики” (2008), ”Толковый словарь русского языка” (1997), ”Словарь молодежного слэнга”, ”Словарь молодежного сленга Словоново” и словарь современного финского языка ”Nykysuomen sanakirjaa” (1990). При отборе юридических слов и выражений использовались Сравнительный корпус текстов законов Финляндии и Российской Федерации FiRuLex (Comparable Russian-Finnish Corpus of Legal Texts)[72] и ”Юридическая энциклопедия” (2002).

К категории "ненормативные слова и выражения" были отнесены следующие кандидаты:

- слова и выражения, отмеченные в словарях как просторечные, устаревшие, диалектные, грубые, жаргонные, например, *мужик*, *kännykkä* ‘мобильник, мобила, труба’, *довести кого-либо*;
- различные грубые выражения, например, *убирайся отсюда*;

[70] Электронная база размещена и администрируется на сервере Института современных языков и переводоведения Университета Тампере https://mustikka.uta.fi/spoken/. Допуск на сервер ограничен.

[71] Архитектура корпуса описана Михайлов & Исолахти 2008.

[72] Корпус текстов размещен и администрируется на сервере Института современных языков и переводоведения университета Тампере https://mustikka.uta.fi/corpora).

- выражения молодежного слэнга, слова, вероятно, заимствованные, которых нет в словарях русского языка, например, *бадега*[73]*, полицист;*
- слова специальных регистров, использованные в нетипичном для них, разговорном несколько сниженном регистре, например, *из-за всей этой эскапады*;
- уменьшительные формы, например, *мои девчонки.*

На следующем этапе исследования было проверено, в речи кого из участников встречаются найденные слова или выражения и изучен их перевод. Результаты были занесены в сводную таблицу для подсчета.

Сравнение лексикона юристов и подсудимых

Лексикон, используемый говорящим, отражает его социальную и профессиональную принадлежность, иерархическое положение и его личные персональные качества. Мы можем говорить о т.н. языковой личности говорящего. Данная проблематика исследовалась в области художественного перевода, однако в сфере судебного перевода передача особенностей языковой личности говорящего изучалась абсолютно недостаточно.

Как можно было предположить, лексикон, используемый юристами, отличается от лексикона подсудимых. Речь юристов содержит гораздо больше терминов, чем речь подсудимых, и соответственно юристы используют многим меньше ненормативных, сниженных выражений. На схеме 1 представлено использование говорящими в своей речи ненормативной лексики и слов и выражений, являющихся юридическими терминами. Данные отражают относительные частотности (фреквенции) использования исследуемых единиц на 1 тыс. слов. На схеме темным цветом отмечены показатели использования ненормативной лексики, а светлым - специальной юридической терминологии. Говорящие обозначены следующим образом: неспециалисты - To = свидетель, V, V1, V2, V3, V4 и V5 = подсудимые; юристы - S, S1, S2 и S3 = государственные обвинители, EaO, EV3, EV4, EV5 и EX = защитники (адвокаты). Схема 1 наглядно показывает, что юристы используют в сравнении с неспециалистами юридической сферы (подсудимыми и свидетелем) значительно больше терминов и выражений, относящихся к профессиональному юридическому лексикону, и соответственно практически не используют в своей речи ненормативную лексику.

[73] Согласно ”Словарю молодежного слэнга Словоново” слово *бадега* используется для определения питейного заведения с сомнительной репутацией. Синонимами являются *трактир, корчма, тошниловка, винарка, наливайка, бар.* Слово заимствовано из испанского *bodega* – винный погреб, склад.

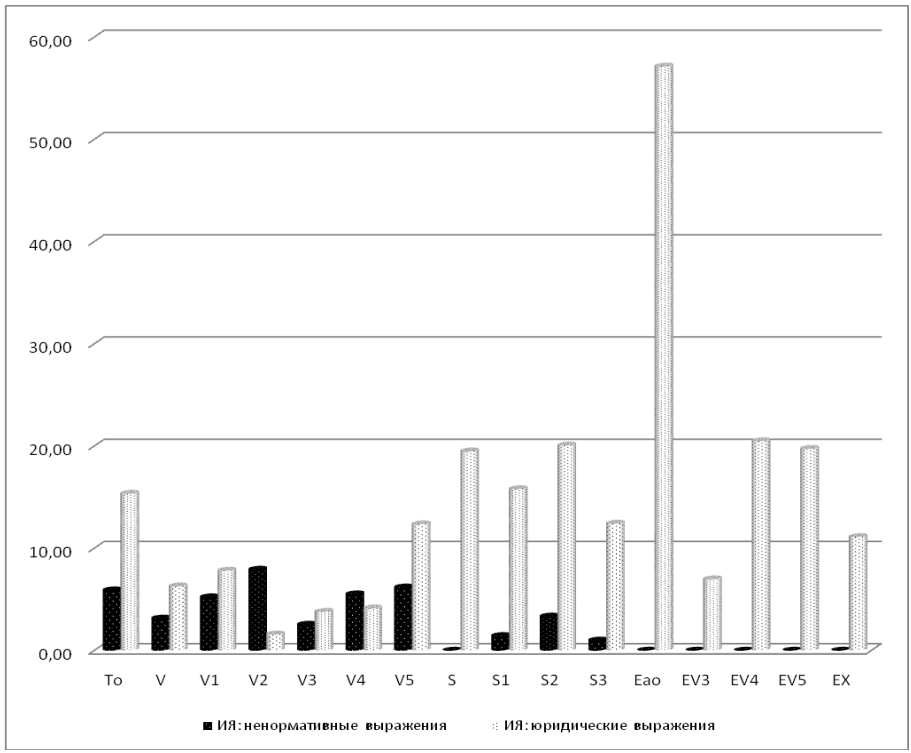

Схема 1. *Использование говорящими ненормативной и юридической лексики*

Межъязыковые метаморфозы

Каким же языком ”говорит” переводчик? Усвоил ли он особенности юридической речи? Отображает ли перевод все особенности языка допрашиваемого? Исследование показывает, что переводчики стремятся использовать нормативную лексику и говорить на литературном языке. Более того, переводчики стараются **адаптировать перевод к ситуационному контексту,** т.е. в данном случае к контексту юридического языка, для которого характерно использование специальной терминологии. Анализ показал следующие особенности:

1) Обычные **выражения нормативного языка** в переводе могут заменяться **терминами и юридическими выражениями.** Например, *paperit* ’бумаги’ превращались в *документы, tarina* ’история’ – в *показания, pojan pankkiasiat* ’банковские дела сына’ – в *финансовые вопросы сына.* В материалах исследования найдены лишь единичные случаи, когда нормативная речь при переводе была заменена более сниженными выражениями.

2) Используемые говорящим **ненормативные** выражения изменяются при переводе следующим образом

а) Ненормативные выражения могут при переводе **заменяться терминами** или нейтральной лексикой. В таблице 1 представлено несколько примеров такого изменения регистра. В левом столбце представлены отдельные отрывки из речи допрашиваемых, а в правом столбце - их перевод. В полукавычках (’ ’) приведены поясняющие переводы выражений, сделанные автором статьи.

Таблица 1: *Примеры замены ненормативных выражений терминами и/или нормативной речью*

Исходный язык (в дальнейшем ИЯ)	Язык перевода (в дальнейшем ЯП)
она просто **мошенница**	hän (0.5) **petoksella** (0.3) sitä (0.2) tilannetta aiheuttanut ‘она создала эту ситуацию путем мошенничества’
из-за (1.0) (ее ~0.8) всей этой **эскапады**	koko tämän **asian takia** ‘из-за всего этого дела’
mikäli olisin kiinnostunut tästä **hommasta** ‘если бы меня интересовало это дельце’	если бы меня заинтересовало это хобби

б) Переводчик также **опускает или обходит** ненормативные или сниженные выражения.

По результатам исследования можно говорить, что лишь в редких случаях ненормативные выражения переводятся оборотами соответствующего регистра. В таблице 2 приведены абсолютные фреквенции таких сниженных выражений, использованных в речи говорящих, и их перевод. Темным цветом на схеме отмечены ненормативные выражения в исходных сообщениях, а светлым - их соответствия в переводе. Например, подсудимый 2 (V2) использовал в своей речи 10 сниженных выражений, из которых лишь 2 были переданы при переводе выражениями соответствующего регистра.

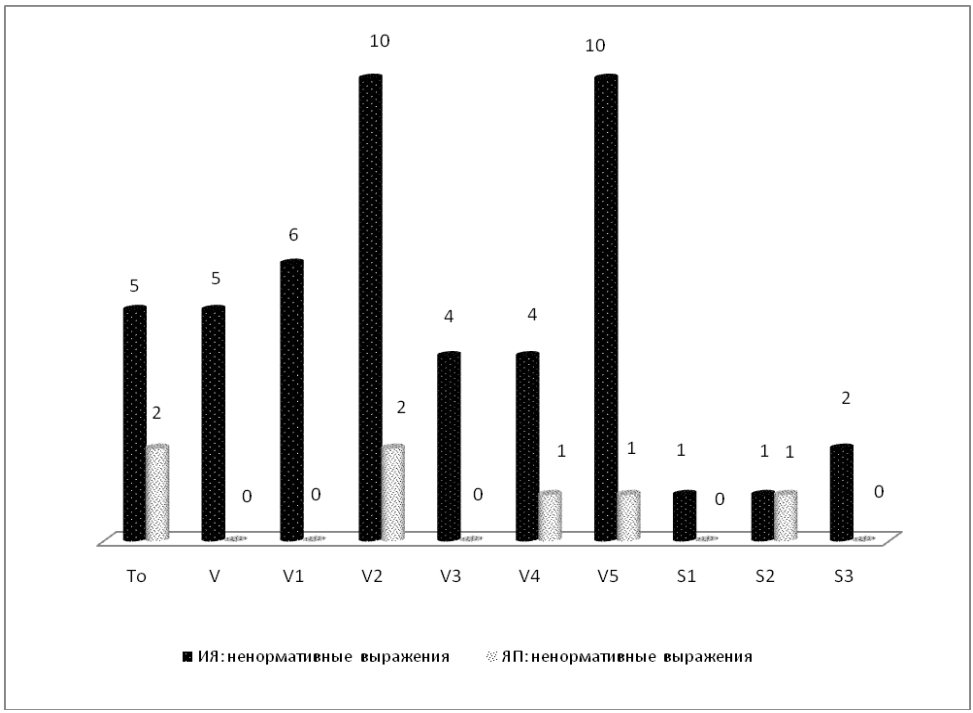

Схема 2: *Ненормативно-разговорные выражения и их перевод (абсолютная частотность)*

Слэнговое выражение может быть незнакомо переводчику, и он вынужден выяснять значение такого выражения, как в примере 1. Подсудимый рассказывает, что он владеет питейным заведением с сомнительной репутацией *бадегой*[74] (см. реплика 1). Слово незнакомо переводчику, и он выясняет его значение (см. реплика 2). Подсудимому сложно объяснить значение данного слова, на что указывают различные маркеры хезитации - паузы, заполненные паузы, неоконченные слова (см. реплика 3). В результате подсудимый объясняет, что *бадега* – это специфическийй винный и деликатесный магазин. Используемое подсудимым выражение *специфический магазин* указывает именно на то, что речь не идет о деликатесном магазине в обыденном, традиционном понимании такого

[74] bodega (исп.) — погреб, кабак; также виноделие, сбор винограда; в приморских гаванях — склад товаров; на кораблях — пространство под фордеком
Определение слова ”Бадега” по электронному словарю молодежного слэнга Словоново (http://slovonovo.ru/)
Общее определение питейного заведения с сомнительной репутацией.
Да вчера зависали с парнями в местной бадеге.
Одесский слэнг: бадега - заведение, именуемое в России трактиром, на Украине - корчмой, а также *тошниловкой, винаркой, наливайкой, баром*.

предприятия. Таким образом, в переводе не передается особенность выражения *бадега*, и слушатель получает искаженное представление о заведении, которым владеет подсудимый (см. реплика 4). В переводе заведение с сомнительной репутацией получает более пристойное и аккуратное наименование - *винный и деликатесный магазин*.

Пример 1:

1 Подсудимый 1: (1.4) Вот (2.2) скажем (0.4) также у меня в Р12 (0.9) (ее ~0.3) есть (0.4) **бадега**
2 Переводчик 1: что это **бадега**
3 Подсудимый 1: бадега это как (ее ~0.4) (мм ~0.5) (0.8) вин- (0.2) какой-то (0.5) специфический винный (.) и деликатесный магазин
4 Переводчик 1: Samoin minulla on (.) (ee ~0.5) (0.7) (ee ~0.4) P12:ssa sellainen viini- ja herkkumyymälä
'также у меня есть в Р12 такой винный и деликатесный магазин'

Изменение регистра речи при переводе может привести к значительным **изменениям в передаваемой информации**, как это произошло в примере 2. Подсудимый рассказывает, что его каким-то образом принуждали к даче показаний, что ему было тяжело на допросе. Подсудимый использует при этом выражение *следователь мучил меня* (см. реплика 1). Глагол *мучить* имеет несколько соответствий в финском языке[75], в том числе *kiduttaa* 'пытать'. В исходном сообщении на русском языке выражение представляется несколько разговорным, во всяком случае, оно не имеет оттенка официального заявления о пытках, примененных к подсудимому на допросе. Переводчик же при переводе стремится быть лояльным ситуационному контексту и из всех возможных вариантов перевода слова *мучить* выбирает именно *kiduttaa* 'пытать', вероятно, как наиболее соответствующее официальному языку судебного допроса (см. реплика 2). Таким образом, адресаты в языке перевода получают информацию о том, что подсудимый подвергался пыткам на предварительном следствии (см. реплика 2), что вызывает незамедлительную реакцию, а именно дополнительный вопрос обвинителя с просьбой разъяснить, что подсудимый подразумевает под таким заявлением (см. реплика 3). Из-за первоначально неверно сделанного выбора переводчик сталкивается с проблемой перевода данного вопроса, который направлен на установление разницы между понятиями *пытка* (*kidutus*) и *оказание давления* (*painostus*) (см. реплика 4). Защитник, вероятно, осведомлен о ходе предварительного следствия и методах ведения допроса и потому поясняет, что его подзащитный не имел в виду пытки, как физическое или психическое насилие в целях вынудить показания (см. реплика 5). Переводчик опять в затруднительном

[75] Глаголу *мучить* могут в финском языке соответствовать следующие глаголы *ahdistaa* 'угнетать, жать, давить, докучать', häiritä 'беспокоить, волновать, тревожить, прерывать', kalvaa 'разъедать, подтачивать', kiusata 'изводить, дразнить, раздражать, досаждать', painaa 'давить, тяготить, гнести', raadella 'рвать, терзать, разрывать', rääkätä 'жестоко обращаться, истязать, пытать, терзать', tuskastuttaa 'изводить, раздражать, выводить из терпения', vaivata 'беспокоить, тревожить, терзать' ja kiduttaa 'пытать, изводить' (МОТ).

положении, когда пытается передать значение сказанного подсудимому (см. реплика 6).

Пример 2:

1 Подсудимый 5: (1.0) я уже сказал (.) что (0.4) мне (0.2) мне (0.2) следователь сказал (0.5) три раза признайся (0.7) и больше тебя **мучить** не буду (.) а я не хочу чтобы меня **мучили**

2 Переводчик 3: (0.5) ja kuten olen sanonut (.) tutkija sanoi (0.6) minulle (0.2) että minun pitää myöntää (0.2) kolme (0.6) kertaa (0.4) sen jälkeen hän ei enää kiduta minua (0.4) ja minä en halua että minua kidutetaan

'и как я уже сказал следователь сказал мне что мне нужно признаться три раза и после этого он не будет больше **пытать** меня а я не хочу чтобы меня больше **пытали**'

3 Обвинитель 3: (1.4) kiduttaminen on kielletty kuulustelukeino (.) mitä te tarkoitatte täällä [/ kiduttamisella] kaikennäköinen painostaminen on kiellettyä (.) mitä te tarkoitatte [nyt]

'**пытки** – это запрещенный метод ведения допросов что вы понимаете под **пытками** любое оказание давления запрещено что вы имеете в виду сейчас'

4 Переводчик 3: [так как] (.) а что вы (0.4) хотите сказать **мучить** [и] (0.9) [давление /] (0.6) оказывание давления (.) запрещено на (ее ~0.5) допросах (.) что вы имеете ввиду

5 Защитник 5: (0.7) kun hän käyttää tämmöistä sanaa kidutus niin ei tietenkään tarkoita tällaista (.) mitä (1.1) [jossain muualla on käytettävissä &&& ei tarkoita tätä [ja]]

'когда он использует такое слово **пытки** он не подразумевает такого что где-то в других странах используют не подразумевает этого и**'**

6 Переводчик 3: [мучение это не оз- означает (ее ~0.6) [/ физических]] мучений

3) При переводе изменяются также термины.

а) Термины могут заменяться **нетерминологическими** выражениями. В примере 3 обвинитель использует юридический термин *takavarikoida* 'изъять, конфисковать' (см. реплика 1). При переводе термин заменен нетерминологическим выражением нормативного русского языка *найдены в квартире* (см. переводчик реплика 2). Замена термина нетерминологическим выражением также несколько исказила информацию. Из перевода неясно, что наркотические вещества были не только обнаружены в квартире, но и изъяты (временно конфискованы).

Пример 3:

1 Обвинитель 2: mistä ovat peräisin (0.3) ne huumausaineet mitä teidän asunnoltanne (0.7) **takavarikoitiin**

'каково происхождение этих наркотических веществ которые были **изъяты/конфискованы** в вашей квартире'

2 Переводчик: откуда (.) у вас взялись эти наркотические средства которые были **найдены** (0.2) в вашей квартире

б) Переводчик может прибегать к методу **описательного перевода,** т.е. **объяснять** значение понятия, скрывающегося за термином. Например, при

переводе названия муниципального органа *kaupunginhallituksen talousosasto* ‘экономический отдел городского правления’ переводчик прибегает к приему такого описательного перевода *муниципальный отдел, владеющий жильем.*

в) При переводе могут быть использованы **иные термины**, например, может применяться прием **генерализации** (переход от видового понятия к родовому) или наоборот. *valtakirja* ‘доверенность’ заменен термином *документ, esitutkinta* ‘предварительное следствие’ – *допрос*.

г) Термин или целый фрагмент высказывания, содержащий термин, могут быть **опущены** при переводе.

Интересно отметить, что хотя переводчики используют профессиональную юридическую терминологию, они не пользуются профессиональным языком юристов в полном объеме. Термины и идиоматические выражения, используемые переводчиками, отличаются от языка юристов. Нагляднее всего эти видно в процессуальной терминологии. Например, юристы всегда используют термин *avustaja* ‚представитель*’* – переводчики *asianajaja* ‚адвокат*’* и при обсуждении вопросов, касающихся предварительного следствия, юристы используют выражение: *esitutkinnassa kerroitte ‚на предварительном следствии Вы показали’, esitutkinnassa teiltä kysyttiin ‚на предварительном следствии Вам был задан вопрос’.* Переводчики используют выражение *tutkinnassa, tutkija kysyi ‚при исследовании следователь спросил’,* и данное выражение никогда в речи юристов не встречается.

Как было представлено выше, при устном переводе происходят различные метаморфозы отдельных слов и выражений. Для воссоздания картины передачи особенностей языковой личности говорящего в коммуникативной ситуации в целом, а не в пределах отдельных реплик, был произведен сравнительный анализ по каждому говорящему. В анализе были сопоставлены относительные фреквенции ненормативных слов по всем репликам каждого говорящего с относительными фреквенциями тех же единиц в переводе их речи. Аналогичный сравнительный анализ был выполнен в отношении терминов. На схеме 3 темным обозначены относительные фреквенции ненормативных выражений по каждому говорящему, а светлым – в переводе речи этих же говорящих. Из схемы 3 можно заметить, что стиль коммуникации, происходящей на ИЯ, изменяется в ЯП таким образом, что насыщенность речи в переводе ненормативными единицами, как правило, уменьшается.

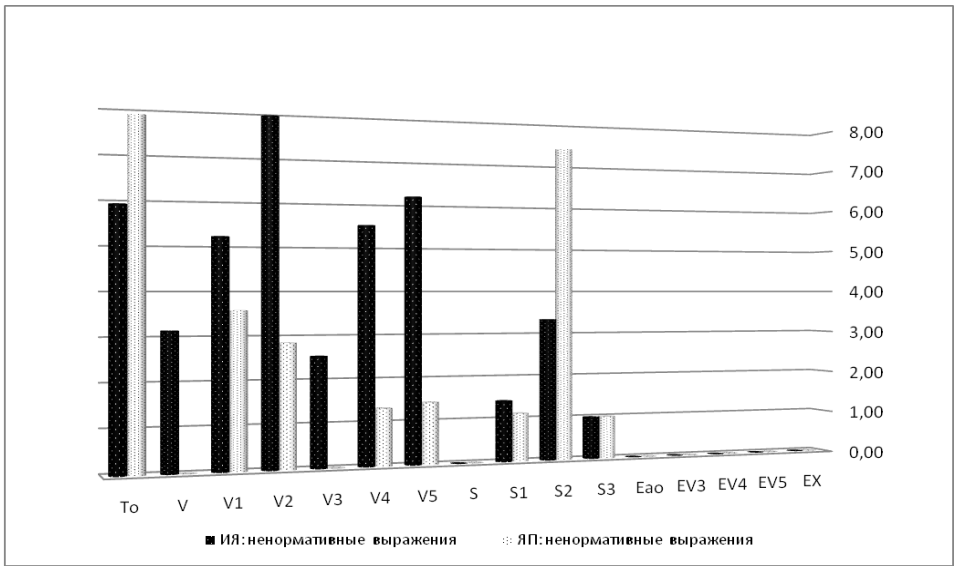

Схема 3: *Сравнение относительных фреквенций ненормативных выражений в речи говорящих и в переводе их речи*

На схеме 4 темным обозначены относительные фреквенции юридических терминов по каждому говорящему, а светлым – в переводе речи этих же говорящих. На схеме 4 явно просматривается, что в переводе насыщенность терминами чаще всего остается на прежнем уровне или возрастает в сравнении с исходным сообщением.

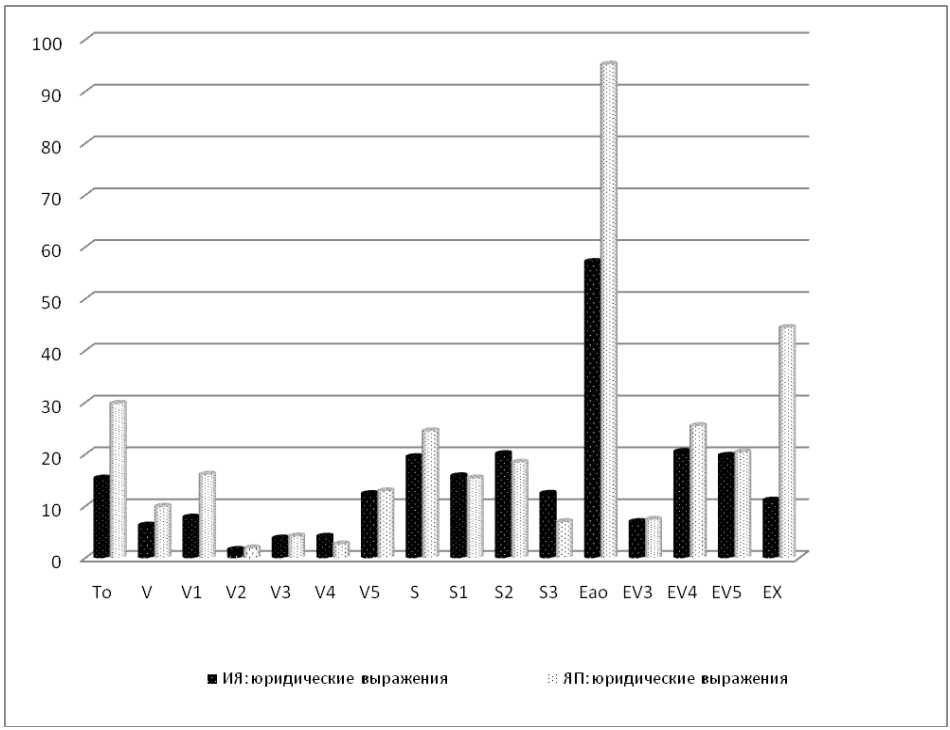

Схема 4: *Сравнение относительных фреквенций юридических терминов в речи говорящих и в переводе их речи*

Итак, особенности языковой личности говорящего, идиолекта, изменяются таким образом, что речь подсудимых в языке перевода становится более грамотной, литературной. В качестве наглядного подтверждения сказанного сравним содержание терминов и ненормативной лексики в речи одного из подсудимых и в переводе его речи. На схеме 5 изображено соотношение относительных фреквенций использования подсудимым V1 терминов и ненормативных выражений. Темным цветом обозначена относительная частота единиц ненормативной лексики в речи говорящего, а светлым цветом - юридической терминологии. На схеме 6 изображено соответственно соотношение частотностей в переводе речи данного подсудимого, т.е. в той речи, которую слышит адресат перевода, в данном случае члены суда, прокурор, защитники.

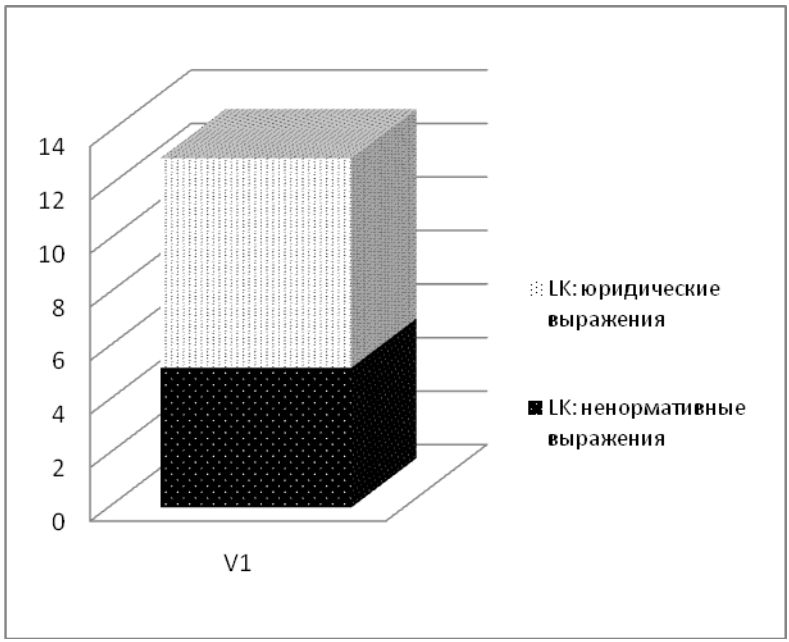

Схема 5: *Соотношение относительных фреквенций терминов и ненормативных выражений, использованных подсудимым V1*

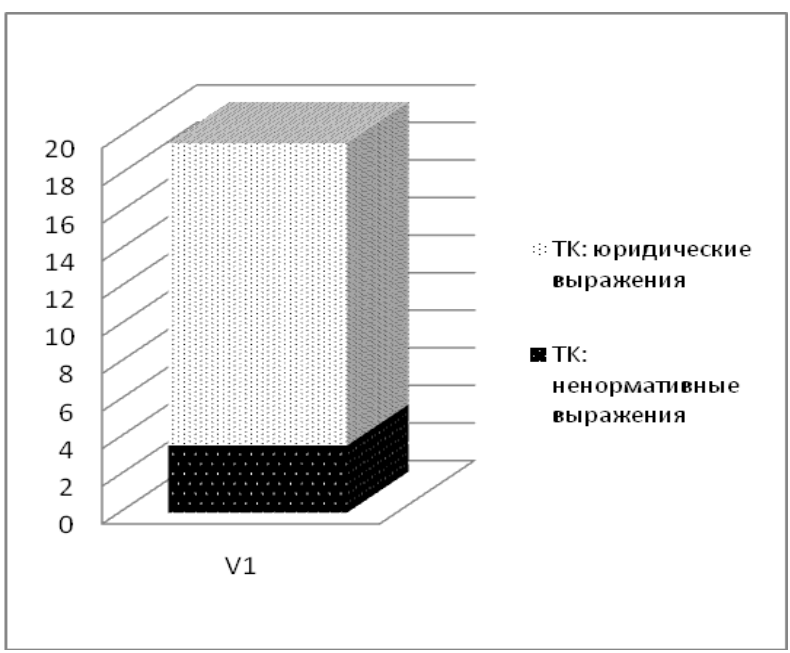

Схема 6: *Соотношение относительных фреквенций терминов и ненормативных выражений, в переводе подсудимого V1*

Сравнив схемы 5 и 6, можно убедиться, что перевод не отражает особенностей языкового профиля говорящего. В переводе речь говорящего становится более культурной, в ней значительно увеличивается содержание юридических терминов, а количество ненормативных элементов снижается.

Выводы

В коммуникативной ситуации, происходящей в зале суда переводчик стремится быть **лояльным юридическому макроконтексту,** ситуации, в которой происходит коммуникация. Переводчик не упрощает речь юристов для подсудимых, не уменьшает насыщенность речи юристов терминами. Наоборот, переводчик сглаживает ненормативные, нестандартные, сленговые выражения, заменяя их литературными выражениями. Более того, переводчик дополнительно насыщает перевод юридическими терминами, замещающими как ненормативно-разговорные выражения, так и обычные выражения нормативной речи.

Роль переводчика нельзя сводить к роли посредника, транзистора речи, автоматически перекодирующего сообщение из одного языка в другой. Исследование показывает, что перевод может изменять картину языковой личности говорящего, а это может привести к тому, что у слушающего сложится недостоверное представление о говорящем и/или изменится в лучшую или в худшую сторону впечатление о достоверности показаний допрашиваемого. Переводчик может неосознанно (реже осознанно) упростить или усложнить коммуникацию, например, используя большое количество специальных юридических терминов. Перевод может также изменить, а в некотрых случаях существенно исказить информацию, содержащуюся в сообщении.

Подводя итог сказанному, автор настоящей статьи хочет обратить внимание переводчиков-практиков, преподавателей и студентов переводоведческих специальностей на необходимость внимательного отношения к передаче особенностей лексикона говорящего, стиля и манеры его речи. Стремление переводчика быть лояльным юридическому контексту, придерживаться делового стиля, в любой ситуации говорить правильным литературным языком не всегда соответствует требованию точного, передающего все ньюансы исходного сообщения, перевода.

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Условные обозначения в транскрипции

(.) пауза короче, чем 0,2 секунды;
(0.9) пауза 0,2 секунды или длиннее, и ее длина;
(ее ~0.9) заполненная пауза и ее длина (сек.);
[ ] наложение реплик (начало и окончание одновременной речи);
sa- недоговоренное слово;
&&& неразборчивое слово или фраза.

Условные обозначения сведений, изымаемых из текста

P12 название населенного пункта

KANN MAN RECHTSTEXTE KULTURELL EINBETTEN?

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Abstract: In many aspects, legal translation seems to be an adequate domain for applying the principles of the functionalist approaches to translation, especially the skopos-theory by J. H. Vermeer. Nevertheless, an indiscriminate application of the principle of cultural embeddedness could prove questionable, if not misleading, as it may cause disturbance in the legal communication occurring through the translation act. In some legal transactions, such as e.g. international contracts, involving contracting parties belonging to different nations, only one legal system is adopted as the communication framework (i.e. the governing or applicable law). In such cases, the functionalist principle of cultural embeddedness needs to be applied selectively, i.e. only with respect to some linguistic features of the text, while in a broader sense, as far as the cultural and/or legal foundations of the text are concerned, the source and the target text will have the same reference frame.

Abstract: Pravna besedila se glede na svojo naravo zdijo posebej primerna za uporabo funkcionalističnih prevodoslovnih pristopov, posebej teorije skoposa. Vendar pa se dosledna uporaba načela kulturne vpetosti jezika lahko izkaže kot neprimerna ali celo zavajajoča, ker lahko povzroči motnje v pravnem sporazumevanju, ki poteka preko prevajalskega dejanja. Pri nekaterih pravnih poslih kot npr. pri pogodbah, v katerih so udeležene stranke iz različnih držav, se kot komunikacijski okvir določi en sam pravni sistem (t.i. merodajno ali veljavno pravo). V takšnih primerih je mogoče načelo kulturne vpetosti uporabiti samo glede na lingvistične vidikih besedila, v širšem obsegu, t.j. kar zadeva kulturno oz. pravno podlago besedila, pa imata izhodiščno in ciljno besedilo isti referenčni okvir.

Zusammenfassung: Unter vielen Aspekten scheint sich die Rechtsübersetzung besonders gut zur Anwendung der Prinzipien der funktionalistischen Translationsansätze, besonders der Skopos-Theorie von J.H. Vermeer, zu eignen. Jedenfalls könnte sich eine konsequente Durchsetzung des Prinzips der kulturellen Einbettung als unangebracht, sogar als irreführend erweisen, da sie zu Störungen in der durch die Translationshandlung stattfindenden Rechtskommunikation führen kann. In einigen Rechtsgeschäften, wie z.B. in Verträgen, an denen Vertragsparteien aus verschiedenen Staaten beteiligt sind, wird nur ein Rechtssystem als Kommunikationsrahmen definiert (das sog. maßgebende bzw. anwendbare Recht). In solchen Fällen kann man das Prinzip der kulturellen Einbettung nur mit Bezug auf die linguistischen Aspekte des Textes anwenden, in weiterem Ausmaß, d.h. was die Kultur- bzw. Rechtsgrundlage des Textes betrifft, haben aber der Ausgangs- und der Zieltext den selben Referenzrahmen.

Einleitung

In der interkulturellen Kommunikation stellen Sprachkenntnisse eine der grundsätzlichen Kompetenzen dar, die die Verständigung zwischen Teilnehmern ermöglichen. Diese Kommunikation verläuft entweder in der Sprache einer der teilnehmenden Parteien oder in einer dritten, neutralen Sprache, die als *Lingua franca* dient. Sprachkenntnisse als Mittel der interkulturellen Kommunikation umfassen also immer auch einen Anteil expliziter oder impliziter Translation.

Die funktionalistischen Ansätze in der Translatologie und vor allem die Skopos-Theorie von J.H. Vermeer legen besonderen Wert auf die Rolle eines eindeutig definierten Zwecks (Skopos) der Translation und betonen die Wichtigkeit eines präzisen Übersetzungsauftrags, die Rolle des Translators als interkulturellen Experten und das Prinzip der kulturellen Einbettung des Ausgangs- und des Zieltextes. Im Rahmen dieser Ansätze wird die Translation als ein interkultureller Transfer gesehen, bei welchem die interkulturellen Unterschiede unbedingt zu berücksichtigen sind. Während in einer multikulturellen Umgebung die Kommunikationssituationen von vielen unterschiedlichen Aspekten der daran beteiligten Kulturen beeinflusst werden, verlangen in der Rechtskommunikation die Rechtssysteme der Ausgangs- und der Zielkultur besondere Aufmerksamkeit. In der Regel wird das Rechtssystem einer der beteiligten Parteien oder, seltener, ein supranationales oder internationales Rechtssystem als Kommunikationsrahmen gewählt.

Das funktionalistische Prinzip der kulturellen Einbettung

Die Translation als kommunikative Handlung verfolgt einen bestimmten Zweck, der von Vermeer mit dem altgriechischen Terminus Skopos bezeichnet wird. Dieses Ziel definiert die zu verwendenden Übersetzungsmethoden und Strategien für die Produktion einer funktionell adäquaten Translation. Außerdem findet die Translation in konkreten, definierbaren Situationen statt, die zeitlich und örtlich begrenzt sind und Mitglieder verschiedener Kulturen einbeziehen und in bestimmte Kulturumfelder eingebettet sind. Die Sprache ist also ein wesentliches Kommunikationsmittel, jedoch muss sie im Kontext der entsprechenden Kultur gebraucht werden. In ihrem Werk *Translation Studies* schildert Bassnett die Verbundenheit und gegenseitige Abhängigkeit der Sprache und Kultur mit der folgenden Metapher:

> *"No language can exist unless it is steeped in the context of culture; and no culture can exist which does not have at its center, the structure of natural language.*
>
> *Language, then, is the heart within the body of culture, and it is the interaction between the two that results in the continuation of life-energy. In the same way that the surgeon, operating on the heart, cannot neglect the body that surrounds it, so the translator treats the text in isolation from the culture at his peril."* (Bassnett 1991, 14)

Es besteht kein Zweifel, dass Sprache und Kultur tief miteinander verbunden sind, da gerade die einer Sprache zugrunde liegende Kultur die Codes für die Interpretation der mit Hilfe dieser Sprache vermittelten Mitteilungen durch ihre spezifischen Normen und Konventionen definiert. Im Falle der Rechtssprache deckt sich

"der Körper der Kultur" mit allen Aspekten der die jeweilige Kultur regulierenden und definierenden Rechtsordnung.

Die Beteiligten an der interkulturellen Kommunikation benötigen also nicht nur gute Sprachkenntnisse, sondern müssen auch andere, für die jeweilige Kommunikationssituation relevante Aspekte der betreffenden Kulturen gründlich kennen. Einige von diesen Aspekten sind der folgenden Definition von Kultur von J. H. Vermeer zu entnehmen "*the entire setting of norms and conventions an individual as a member of his society must know in order to be "like everybody" – or to be able to be different from everybody.*" (Vermeer 1987, 28).

Ferner weist Reiß darauf hin, dass die Normen einen stärkeren präskriptiven Charakter haben (sie bezeichnen, was die Mitglieder einer Kultur tun müssen bzw. nicht tun dürfen) und sind dementsprechend obligatorisch, während Konventionen Verhaltensregeln sind, die sich allmählich durch allgemeinen Konsens herausgebildet haben und die empfohlenen bzw. erwarteten Verhaltensformen in einer Gesellschaft darstellen (vgl. Reiß und Vermeer 1984, 178). Wenn man das vermeersche Konzept der Kultur als eine Sammlung allgemein akzeptierter Normen und Konventionen, die von den Mitgliedern einer Gesellschaft zu befolgen sind, mit folgender Äußerung von Jenkins vergleicht "*law has the basic function in society of guiding human behaviour and regulating human relations*" (Jenkins 1980, 103), stellt man fest, dass die Normen, die nach Vermeer das Verhalten von Mitgliedern einer Gesellschaft regeln, eigentlich in der Rechtsordnung einer Gesellschaft enthalten sind.

Die Beziehung zwischen Sprache und Recht

Da sich in der Rechtskommunikation die beteiligten Rechtssysteme durch ihre Bestimmungen und Vorschriften direkt auf konkrete Rechtsgeschäfte auswirken, haben die interagierenden Parteien zu vereinbaren, welches Rechtssystem als Kommunikationsrahmen bestimmt wird. Innerhalb dieses Rahmens müssen dann Rechtskonzepte und –begriffe zwischen Sprachen, Kulturen und Rechtssystemen übersetzt (d.h. kulturell übertragen) werden.

Ein gutes Beispiel solcher Kommunikation bieten internationale Verträge, die als Rechtsgeschäfte *per definitionem* von der Rechtsordnung des Staates geprägt sind, dessen Recht für den Vertrag als maßgebend bestimmt wird. Ein wesentliches Vertragselement ist also die Bestimmung über das anzuwendende Recht bzw. die Gerichtsstandklausel, die bestimmt, welches Gericht im Falle von sich zwischen den Parteien ergebenden Streitigkeiten zuständig ist. In internationalen Verträgen wird als maßgebendes Recht am häufigsten das Recht des Staates einer der Vertragsparteien bestimmt (es sei denn, die Parteien entscheiden sich für ein internationales Schiedsgericht/Arbitrage oder für ein supranationales oder internationales Recht). Wenn der Vertrag schon beim Abschluss in zwei Sprachen verfasst wurde, wird entweder eine Fassung als verbindlicher bzw. authentischer Text definiert, oder es gelten beide Fassungen parallel als gleichwertig. Im letzteren Fall ist das als maßgebend bestimmte Recht Kulturbasis beider sprachlichen Versionen. Wenn dem Ausgangs- und Zieltext verwandte Rechtssysteme zugrunde liegen, lässt sich das Prinzip der Translation als kulturellen Transfers relativ gut implementieren. Problematisch sind aber die Fälle, in

denen eine *Lingua franca* verwendet wird, der als Kulturbasis eine Rechtsordnung zugrunde liegt, die den Rechtssystemen des Ausgangs- und des Zieltextes fremd ist und sich von ihnen sogar wesentlich unterscheidet.

In diesem Zusammenhang weist Gerard-René de Groot, Professor für vergleichendes und privates Rechts an der Universität Maastricht, darauf hin, dass beim Übersetzen von Rechtstexten die Systemgebundenheit der Rechtssprache unbedingt zu berücksichtigen ist: "*The language of the law is very much a system-bound language, i.e. a language related to a specific legal system. Translators of legal terminology are obliged therefore to practice comparative law.*" (de Groot 1998, 21 ff.). Die Rechtssysteme unterscheiden sich gründlich voneinander und es gibt noch keine standardisierte internationale Rechtsterminologie. Jeder Staat (manchmal sogar Regionen in einem Staat) hat seine eigene unabhängige Rechtsterminologie entwickelt, wobei eine multilinguale internationale Rechtsterminologie (wie die des EU-Rechts) nur allmählich im Rahmen supranationaler Rechtssysteme geschaffen wird, wenn sie der Harmonisierung unterzogen werden.

Sandrini weist darauf hin, dass die Übersetzbarkeit der Rechtstexte in direktem Verhältnis zur Verwandtschaft der an der Translation beteiligten Rechtsordnungen steht (vgl. Sandrini 1999, 17). Rechtssysteme existieren unabhängig von den Rechtssprachen, die sie verwenden, und entstehen durch die Mitwirkung gesellschaftlicher und politischer Umstände. Es besteht keine direkte Übereinstimmung zwischen Rechtssystem und Rechtssprache. Ein Rechtssystem kann mehrere Rechtssprachen benutzen (Kanada, die Schweiz, zweisprachige Regionen in Slowenien, Österreich, Italien, Belgien) und in einem Sprachgebiet können verschiedene Rechtsordnungen Anwendung finden, was der Fall bei dem Vereinigten Königreich und den USA ist.

Wenn man Rechtssysteme nach ihren Quellen, ihrem geschichtlichem, sozialen und politischen Hintergrund, dem Grad der Kodifizierung und den spezifischen Rechtsinstituten analysiert, stellt man die Existenz von Rechtskreisen bzw. Rechtsfamilien von verwandten Rechtsordnungen fest, die auf einer gemeinsamen Rechtskultur aufbauen und einen gemeinsamen Rechtsstil aufweisen. So erweisen sich die Rechtsordnungen, die dem sog. kontinentaleuropäischen Recht (Rechtskreis des *Civil law)* angehören, das den deutschen, nordischen und romanischen Rechtskreis umfasst, als relativ verwandt. Sie haben gemeinsame Grundlagen in der römischen Rechtstradition und sind durch Kodifizierung gekennzeichnet – die wichtigsten Regeln und Vorschriften sind in schriftlichen Rechtsquellen erfasst. Bei diesen Rechtssystemen ist also eine beträchtliche Verbundenheit der jeweils verwendeten Rechtskonzepte zu erwarten. Andererseits sind Rechtssysteme anderer Länder und Kulturen, die anderen Traditionen entstammen, schwierig zu vergleichen, wie z.B. das fernöstliche, islamische, das Hindu-Recht und letztendlich der angloamerikanische Rechtskreis, der auf *Common law, equity* und *statute law* basiert. Innerhalb des angloamerikanischen Rechtskreises ist *Common law* das geltende Rechtssystem in England, Wales und mit einigen Unterschieden in den USA, während Schottland und Irland wesentlich anders geartete, stark am kontinentalen Recht angelehnte Rechtssysteme haben, ähnlich der Rechtsordnung des US-Bundesstaates Louisiana, die ihre Grundlage im französischen Recht hat.

Alle diese Unterschiede wirken sich wesentlich auf die Übersetzbarkeit der Rechtstermini aus, da mit einer vollen Äquivalenz von systembedingten Rechtskonzepten

kaum zu rechnen ist. Gemäß de Groot sollte man in der ersten Phase des Übersetzens von Rechtskonzepten die Bedeutung des zu übersetzenden ausgangsprachlichen Rechtserminus analysieren. Nachdem man die beteiligten Rechtssysteme verglichen hat, sucht man nach einem gleichwertigen Terminus im zielsprachlichen Rechtssystem. Findet man kein akzeptables Äquivalent wegen Nichtverwandtschaft der Rechtssysteme, dann wird eine der folgenden subsidiären Lösungen gewählt: Man verwendet den ausgangssprachlichen Terminus in seiner originalen oder transkribierten Version, man setzt eine Paraphrase ein oder man bildet einen Neologismus, d. h. man verwendet in der Zielsprache einen Terminus, der in der zielsprachlichen Terminologie noch nicht existiert und ergänzt ihn nach Bedarf durch eine Fußnote (vgl. de Groot 1998, 25).

Der Äquivalenzgrad der Termini hängt von der Verwandtschaft der Rechtsordnungen und nicht der Verwandtschaft der Sprachen ab. Die Verwandtschaft der Sprachen kann manchmal sogar irreführend wirken und das Entstehen von sog. *faux amis* verursachen, wie z.B. das deutsche Wort Direktor (das eine operative Funktion in einer Handelsgesellschaft bezeichnet) gegenüber dem englischen Terminus *director* (Mitglied des Direktorenrates - *Board of Directors*, eine Funktion, die entweder einem Vorstandsmitglied oder einem Aufsichtsratsmitglied entspricht). Wenn man sich für die zu verwendende translatorische Lösung entscheidet, muss man den Kontext, den Zweck (*Skopos*) and die Texttypologie in Betracht ziehen. Eine ganze Palette von *Skopoi* ist möglich: von einer Information über den Ausgangstext für einen Adressaten, der der Zielsprache nicht mächtig ist, bis zu einer Übersetzung, die den Status eines authentischen Textes neben dem Ausgangstext haben wird. Nord klassifiziert Übersetzungen in zwei Grundtypen: die dokumentarische Übersetzung, d.h. ein Dokument in der Zielsprache über gewisse Aspekte einer kommunikativen Interaktion, in welcher ein Ausgangskulturabsender mit einem Ausgangskulturpublikum mittels des Ausgangstextes unter Ausgangskulturbedingungen kommuniziert, und die instrumentelle Übersetzung, deren Ziel es ist, in der Zielsprache ein Instrument für eine neue kommunikative Interaktion zwischen einem Ausgangskulturabsender und einem Zielkulturpublikum unter Verwendung (gewisser Aspekte) des Ausgangstextes als Modell zu produzieren (Nord 1997, 47). Für die Translation in einer Rechtsumgebung muss aber die Kategorisierung weiter ausgearbeitet werden. Cao klassifiziert dementsprechend Rechtsübersetzung in drei Kategorien: Übersetzung für normative Zwecke, Übersetzung für informative Zwecke und Übersetzung für generelle juristische oder gerichtliche Zwecke (2007, 10–12). Die Rechtsübersetzung für normative Zwecke entspricht eigentlich Nords Kategorie der instrumentellen Übersetzung, da sie die Produktion von Übersetzungen von nationalen Gesetzen und internationalen Rechtsinstrumenten in zweisprachigen und mehrsprachigen Rechtsordnungen umfasst, wo der Ausgangs- und der Zieltext gleiche Rechtswirkung haben. Diese Art von Texten wird oft in einer Sprache entworfen und dann in eine oder mehrere andere Sprache(n) übersetzt, jedoch wird die Übersetzung als authentisches Rechtsinstrument betrachtet und ist genauso verbindlich wie der Ausgangstext. Šarčević behauptet, dass man in solchen Fällen nicht von einem Ausgangs- und einem Zieltext sprechen kann, sondern von Paralleltexten im Sinne von authentischen, mehrsprachigen Texten desselben Rechtsinstruments (1999, 104 ff.). Beispiele solcher Übersetzungen sind Rechtstexte die innerhalb zwei- oder mehrsprachigen Rechtsordnungen übersetzt werden (wie die

Schweiz, zweisprachige Regionen in Italien, Slowenien, Österreich usw.), sowie auch mehrsprachige Rechtsinstrumente der Vereinigten Nationen oder der EU und privatrechtliche Instrumente, wie z. B. Verträge, die in zwei oder mehreren gleichwertigen sprachlichen Versionen entstehen. Gemäß Cao kann Nords Kategorie der dokumentarischen Übersetzung in zwei Subkategorien unterteilt werden. Die erste ist die Rechstübersetzung für informative Zwecke, die deskriptive und konstative Funktionen hat und unterschiedliche Kategorien von Rechtstexten umfasst (Gesetze, Gerichtsentscheidungen, juristische akademische Texte, usw.), die mit dem Ziel verfasst werden, eine Information (in der Form eines Dokumentes) über den Ausgangstext Adressaten in der Zielkultur zu erteilen, wo aber die Übersetzungen einen bloß informativen Wert und keine Rechtskraft haben. Beispiele solcher Übersetzungen findet man in einsprachigen Rechtsordnungen, wenn Texte aus anderen Rechtssystemen übersetzt werden, um als Informationsquelle über fremde Rechtsordnungen zu dienen. Die zweite Subkategorie ist die Übersetzung für generelle oder gerichtliche Zwecke, wo in der Ausgangssprache verfasste Originaltexte übersetzt werden, um vor Gericht, bzw. in Prozessverfahren als Teil der dokumentarischen Beweise benutzt zu werden. Diese Übersetzungen haben sowohl eine informative als auch eine deskriptive Funktion und können neben Rechtsdokumenten (Verteidigungsschriften, Klagebegründungen, Verträgen, usw.) auch gewöhnliche Texte, wie z. B. geschäftliche oder persönliche Korrespondenz, Zeugenaussagen, Berichte von Sachverständigen usw. umfassen, die oft nicht von Juristen und auch nicht in der Rechtssprache verfasst werden, aber wegen spezieller Bedürfnisse der Rechtsübersetzung in die Sphäre der Rechtskommunikation eintreten. Diese Übersetzungen sind für den Gebrauch seitens der Parteien in Gerichtsverfahren gemeint, die der Sprache des Gerichtes nicht mächtig sind.

Erfahrene Übersetzer können in der Regel feststellen, welche Art von Übersetzung in einer gegebenen Rechtsumgebung und in einer bestimmten Kommunikationssituation erforderlich ist, d. h. sie sind in der Lage, den Skopos selbst zu identifizieren. Natürlich kann aber auch der Übersetzungsauftrag diese Informationen enthalten. Gemäß der Skopos-Theorie kann der Übersetzungsauftrag erheblich zur Qualität und Funktionalität der Übersetzung beitragen, und zwar dadurch, dass darin dem Übersetzer explizite oder implizite Auskunft über die intendierte Funktionen des Zieltextes, dessen Adressat(en), die voraussichtliche Zeit, den Ort und das Motiv für die Produktion und die Rezeption des Textes gegeben wird (Nord 1997, 137). Für eine Rechtsübersetzung ist jedoch auch eine Information über die als Kommunikationsrahmen zu berücksichtigende Rechtsordnung notwendig.

Englisch als Lingua Franca der Rechtskommunikation

Ungeachtet ihrer Herkunft wählen Teilnehmer in der internationalen Rechtskommunikation heute oft Englisch als Sprache ihrer Kommunikation. Der weit verbreitete Gebrauch des Englischen als *Lingua franca* ist mit Sicherheit dessen Aufstieg als Weltsprache zuzuschreiben (Crystal 1997, 8-10). Diesbezüglich deutet Van Essen (2002, 13) darauf hin, dass Englisch als *Lingua franca* am häufigsten verwendet wird, nicht um mit Muttersprachlern zu verkehren, sondern als Eintrittsbedingung für eine internationale Gesellschaft von Experten (Wissenschaftler, Juristen, Geschäftsleute), um

unter Anwendung des Sprachregisters dieser Gemeinschaft über Themen von gemeinsamem Interesse zu kommunizieren. Eine solche Kommunikation findet oft zwischen Nichtmuttersprachlern vom Englischen statt, deren kultureller Hintergrund weder englisch noch amerikanisch ist. Die traditionellen, die britische bzw. amerikanische Kultur betreffenden Kulturkenntnisse erweisen sich in solchen Fällen als völlig nutzlos, andererseits sind aber spezifische Aspekte der beteiligten Kulturen äußerst relevant, deswegen ist spezialisiertes Wissen über solche Aspekte (wie z. B. über Rechtsordnungen in der Rechtskommunikation) eine wichtige Voraussetzung für eine effektive Verständigung. Van Essen (2002, 14) deutet in diesem Zusammenhang auf die bisherigen Versuche hin um gemeinsame linguistische Standards (Aussprache, Grammatik, Wortschatz) für die *Lingua franca* festzusetzen, wie z. B. das Projekt des Englischen als *Lingua franca* für Europa bzw. ELFE (vgl. dazu Labrie und Quell 1997, Jenkins und Seidlhofer 2001), das in der EU von einigen Sprachexperten gefördert wird mit dem Ziel, den Gebrauch des Englischen in der EU zu standardisieren.

Die obigen Standards für den Gebrauch des Englischen als *Lingua franca* berücksichtigen hauptsächlich dessen linguistische Dimensionen. Als problematisch erweisen sich aber kommunikative Interaktionen im Englischen, die Kulturelemente der spezifischen soziokulturellen Umgebungen der Interagierenden einbeziehen, welche der angloamerikanischen Kultur fremd sind und trotzdem im Englischen vermittelt werden müssen. Während es sicher nicht leicht ist, linguistische Standards fürs Englische als *Lingua franca* zu entwickeln, scheint es fast unmöglich, eine gemeinsame Kulturbasis zu entwickeln, auf die man sich in solchen Interaktionen berufen könnte. Das gilt besonders für Kulturaspekte, die so präzise definiert werden müssen wie eine Rechtsordnung und die wegen ihrer äußerst empfindlichen Natur einen extrem genauen und eindeutigen Sprachgebrauch verlangen. Zur Zeit ist Englisch die allgemein akzeptierte *Lingua franca* der internationalen Rechtskommunikation, die aber eine sehr vorsichtige Anwendung des Prinzips der kulturellen Einbettung verlangt. Wenn man Englisch in Kommunikationssituationen, wo Teilnehmer aus kontinentalen Rechtsystemen interagieren, unter konsequenter Bindung an das angloamerikanische Rechtssystem verwendet, bringt das die potentielle Gefahr mit sich, dass man Rechtskonzepte hereinbringt, die den Kulturen der kommunizierenden Parteien fremd sind, was die Rechtssicherheit der Interaktion beeinträchtigen kann. Leider enthalten sehr wenige Wörterbücher der Rechtssprache genügend Informationen und Hinweise in diesem Sinne, die den Anwender von diesen potentiellen Problemen bzw. Fallen in Kenntnis setzten würden.

Die Dichotomie zwischen Kontinentalem Recht und *Common Law*

In der vergleichenden Rechtswissenschaft wurde die Dichotomie zwischen *Civil law* bzw. kontinentalem Recht und C*ommon law,* welches nicht auf geschriebenen, kodifizierten Rechtsquellen basiert, gründlich bearbeitet. Die wichtigsten Quellen des angloamerikanischen Rechtssystems sind *Common law, equity* und *statute law*. *Common law* wird oft als *judge-made law* d. h. Richterrecht bezeichnet, da es nicht auf schriftlichen Quellen basiert, sondern auf Präzedenzfällen, d. h. Richterentscheidungen, die in früheren Rechtssachen getroffen wurden. Andererseits ist *equity* ein Terminus, der

sich auf ein System von Regeln bezieht, das zusätzlich zu *Common law* angewendet wird und keine direkte Entsprechung in den kontinentalen Rechtsordnungen hat. Eine wichtige Komponente des angloamerikanischen Rechtssystems ist letztendlich *statute law,* was eigentlich das geschriebene Recht wie z. B. *Acts of Parliament* bezeichnet, d. h. diejenigen Rechtsquellen, die auch in der angloamerikanischen Rechtsordnung in geschriebener Form vorhanden sind.

Cao (2007, 23) behauptet, dass jede Rechtssprache die Geschichte, Evolution und Kultur des entsprechenden Rechtssystems reflektiert. Genauer gesagt, sind im Stil der einzelnen Rechtssprachen die entsprechende Rechtskultur und –logik reflektiert. De Cruz (1999, 91) konstatiert u. a., dass der Stil deutscher Rechtstexte die systematische und logische Entwicklung des deutschen Rechts wiedergibt, welches auf höchst abstraktem, systemorientiertem, deduktivem Denken basiert und nicht für Laien, sondern für Experten gemeint ist, die seine Präzision und Gedankenschärfe zu schätzen wissen (vgl. Zweigert and Kötz 1992, 150).

Die Unterschiede und Abweichungen zwischen *Common law* und kontinentalem Recht resultieren oft aus der Nichtäquivalenz der Termini und Konzepte, die in diesen zwei größten Rechtskreisen verwendet werden und hauptsächlich drei terminologische Felder betreffen (vgl. Cao 2007, 60 ff.), und zwar die Termini, die man zur Bezeichnung verschiedener Rechtsberufe verwendet, die Terminologie, die die verschiedenen Gerichtsstrukturen bezeichnet und die Begriffe, die sich auf spezielle Rechtsgebiete und -institutionen beziehen.

Im Bereich der Rechtsberufe hat der vom Staat bevollmächtigte Experte, der Kunden in Rechtssachen berät und sie vor Gericht vertritt, der auf Deutsch Rechtsanwalt genannt wird, im Slowenischen *odvetnik* heißt und eine fundamentale Rolle in jeder kontinentalen Rechtsordnung hat, keine direkte Entsprechung in angloamerikanischem Recht, so dass man diesen Begriff mit *lawyer, counsel, advocate, attorney, solicitor, barrister* oder *counsellor* übersetzen kann. In den USA bezeichnet man einen Rechtsanwalt am häufigsten als *lawyer* und *attorney*, oder formeller *attorney-at-law,* wobei sie alle Rechtssachen vor Gericht führen dürfen. Im Vereinigten Königsreich, Kanada und Australien und in einigen anderen *Common law*–Rechtssystemen werden die Rechtsanwälte entweder *barristers* (die zum Auftritt vor einem höheren Gericht bzw. zur Prozessführung bevollmächtigt sind) oder *solicitors* (die in der Regel die Kunden beraten und nur vor einem niedrigeren Gericht auftreten dürfen) genannt, während in schottischem Recht der Terminus *advocate* verwendet wird.

Ein weiteres Feld, in welchem terminologische Probleme wegen Unterschiede zwischen Rechtsordnungen entstehen, ist die sich auf Gerichtsbeamten und Richter beziehende Terminologie. In England und Australien werden die Begriffe *judge* and *justice*, as well as *magistrate* (für *magistrate courts*) verwendet. In Deutschland und Slowenien unterscheidet man zwischen professionellen Richtern, die eine juristische Ausbildung haben (slowenisch *sodnik)* und Schöffen (slowenisch *porotnik*), die als ehrenamtliche Richter berufen werden und eigentlich juristische Laien sind, die den professionellen Richtern beistehen und keine Entsprechung in der angloamerikanischen Rechtsordnung haben.

Eine wichtige Quelle von Übersetzungsproblemen sind auch die Termini, die die Struktur und Hierarchie der Gerichte beschreiben. Im englischen *Common law* werden

zwei Wörter in diesem Zusammenhang benutzt: der generelle Begriff *court* und das Wort *tribunal* für Organe bzw. Foren, die Verwaltungs- bzw. halbgerichtliche Funktionen wahrnehmen, während im Deutschen und Slowenischen nur ein Terminus (Gericht bzw. slowenisch *sodišče*) verwendet wird. In England umfasst die Gerichtshierarchie die folgenden Ebenen - *the House of Lords* als höchstes Berufungsgericht, *the Supreme Court of Judicature, the Court of Appeal, the High Court of Justice, the Crown Court, the County Courts* und *the Magistrates Courts.* Diese Struktur lässt sich kaum mit der deutschen vergleichen, die vier hierarchische Ebenen umfasst, und zwar das *Amtsgericht,* das *Landesgericht,* das *Oberlandesgericht* und als höchstes Berufungsgericht den *Bundesgerichtshof.* Das slowenische Gerichtssystem ist dem deutschen ähnlich (die entsprechenden Gerichte sind *okrajno, okrožno, višje* und *vrhovno sodišče*), aber so wie die Mehrheit der kontinentalen Gerichtssysteme weist es kaum Ähnlichkeit mit der Gerichtsstruktur des *Common law* auf.

Der letzte Bereich, wo die systembedingten Unterschiede stark ausgeprägt sind, sind die Terminologiefelder, die spezielle Rechtsbereiche und Institutionen bezeichnen. Innerhalb des kontinentalen Rechtskreises findet man dieselben Hauptdomänen des Rechts in allen Ländern: das Verfassungsrecht, das Verwaltungsrecht, öffentliches internationales Recht, Strafrecht, Prozessrecht, Zivilrecht, Handelsrecht und Arbeitsrecht. Wenn man aber diese Rechtsdomänen mit denjenigen des *Common law* vergleicht, stellt man viele konzeptuelle und strukturelle Unterschiede fest. Es gibt Rechtsinstitute im kontinentalen Recht, die dem *Common law* vollkommen fremd sind, wie z. B. *causa* (Ursache). Andererseits haben viele Konzepte des *Common law* wie z. B. *consideration* oder *estoppel* im Vertragsrecht oder der Begriff *privity* in verschiedenen Rechtskontexten keine Entsprechung in kontinentalen Rechtssystemen. Ein extrem wichtiges Konzept im kontinentalen Recht, besonders im deutschen und romanischen Rechtskreis, welches jedoch kein Äquivalent im *Common law* hat, ist das Obligationenrecht, das sich im Laufe von Jahrhunderten auf der Grundlage von Elementen des römischen Rechts entwickelt hat. In ähnlicher Weise hat die englische Rechtsstruktur *equity* kein entsprechendes Pendant im kontinentalen Recht, und die meisten dazu gehörenden Konzepte und Vorschriften stellen ein Unikum dar.

Gesellschaftsrecht ist eine weitere Domäne, wo die Unterschiede zwischen den zwei Systemen sehr deutlich sind. Das angloamerikanische Gesellschaftsrecht unterscheidet nicht zwischen den Kategorien von *Kapitalgesellschaften* (slowenisch *kapitalske družbe*) und *Personengesellschaften* (slowenisch *osebne družbe*), sondern nur zwischen *incorporated companies*, die den Status einer juristischen Person haben und *unincorporated companies,* die keine Rechtspersönlichkeit besitzen.

Die Termini *public limited company* und *limited liability company* kann man mit relativer Sicherheit als Entsprechungen für die Gesellschaftsformen Aktiengesellschaft *(*slowenisch *delniška družba* und Gesellschaft mit beschränkter Haftung (slowenisch *družba z omejeno odgovornostjo*) betrachten, es gibt aber keine vollkommen äquivalente Bezeichnungen in der englischen Rechtsterminologie für Gesellschaftsformen wie Offene Handelsgesellschaft (slowenisch *družba z neomejeno odgovornostjo)* oder Kommanditgesellschaft *(*slowenisch *komanditna družba*).

Andere Beispiele der Nichtäquivalenz beziehen sich auf die unterschiedlichen Verwaltungssysteme in den Aktiengesellschaften – das angelsächsische einstufige (*one-*

tier) und das kontinentaleuropäische zweistufige (*two-tier)* System. Das einstufige System hat nur ein Verwaltungsorgan, den Direktorenrat (*the board of directors)*, während im zweistufigen System zwei Verwaltungsorgane bestehen – der Vorstand (*management board,* slowenisch *uprava)* und der Aufsichtsrat (*supervisory board*, slowenisch *nadzorni svet*).

Die rechtssystembedingten Übersetzungsprobleme muss man auch innerhalb der EU konfrontieren, wo Englisch die meistverwendete *Lingua franca* ist (vgl. Kjaer 1999, 72). Wenn Englisch verwendet wird, um Aspekte und Konzepte des EU-Rechts oder der nationalen kontinentaleuropäischen Rechtssysteme zu beschreiben, werden oft Termini benutzt, die durch die ihnen im angloamerikanischen Rechtssystem zugeschriebene Bedeutung gefärbt sind. Wenn man z. B. das kontinentale Konzept *bona fides* ins Englische übersetzt, wird am häufigsten der Ausdruck *good faith* benutzt, welcher jedoch dem kontinentalen Begriff nicht ganz gleichwertig ist. Das englische Konzept bezieht die Idee der Fahrlässigkeit nicht ein, während die kontinentale Interpretation von *bona fides* oft grobe Fahrlässigkeit mit *bad faith (*Bösgläubigkeit) gleichstellt.

Schlussbemerkungen

Trotz der Probleme, die der Einbettung der englischen Sprache in der angloamerikanischen Kultur entstammen, wird Englisch sicher die meistverwendete *Lingua franca* in der internationalen Kommunikation bleiben. Dank der Sprachpolitik der EU, die die Rolle der Sprachen aller Mitgliedstaaten fördert, werden aber andere Sprachen sicher auch vorankommen. Durch die Kontakte des Vereinigten Königsreichs mit anderen Mitgliedstaaten der EU und die Beteiligung an zahlreichen europäischen Institutionen sind auch viele euroenglische Termini, d. h. englische Übersetzungen von kontinentalen Rechtskonzepten auch in den Wortschatz englischer Muttersprachler eingegangen. Langfristig kann man erwarten, dass English als *Lingua franca* innerhalb der EU zur Entstehung einer gemeinsamen Kulturbasis beitragen wird, d. h. zur Schaffung von Elementen einer gemeinsamen, von allen Benutzern dieser Sprache geteilten europäischen Kultur. Im Bereich der Rechtskommunikation, wo English als Fachsprache benutzt wird, sollten sich die kommunizierenden Parteien bei der Übertragung von Rechtskonzepten der Komplexität dieser translatorischen Aufgaben bewusst sein und das Prinzip der kulturellen Einbettung der Sprache selektiv und unter der Berücksichtigung potentieller Abweichungen zwischen der Sprache und der ihr zugrunde liegenden Rechtsordnung anwenden. In diesem Kontext sollte sicher die Möglichkeit der Verwendung von Sprachen (z. B. des Deutschen) in Betracht gezogen werden, die eine Kulturverwandtschaft im Sinne von Einbettung in vergleichbaren Rechtsordnungen aufweisen. Die Leitlinien bei der Wahrnehmung dieser komplexen translatorischen Aufgaben sollten jedenfalls „die Wahrung der Rechtssicherheit des Zieltextes sowie die Transparenz des translatorischen Handelns“ (Sandrini 1999, 39) sein.

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THE LONG-FELT NEED OF A LEGAL TRANSLATION TEXTBOOK: REVIEW OF *PRZEKŁAD PRAWNY I SĄDOWY* BY ANNA JOPEK-BOSIACKA

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***Przekład prawny i sądowy*.**
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Neglected for years by researchers, legal translation has recently observed a revival within Translation Studies all over the world. It is closely connected with the intensive development of research on specialised (LSP) translation and the growth of translator-training institutions, fuelled by the increased demand on the translation market related to globalisation and the European Union. In the last decade three notable books, i.e. Šarčević (1997), Alcaraz and Hughes (2002) and Cao (2007), were published; however, none of them is well-suited for training Polish legal translators. Šarčević is theoretically oriented and focuses mainly on translation of legislation in multilingual countries (e.g. Canada) while practically-oriented Alcaraz & Hughes and Cao do not use Slavonic languages as their point of reference. Likewise, the Polish publication by Kierzkowska (2002) is not intended to be a textbook.

Przekład. Mity i Rzeczywistość [Translation/Interpreting. Myths and Reality], a new series by the PWN publishing house, fills the market niche with its accessible books on audiovisual translation, community interpreting, conference interpreting, and, last but not least, legal translation. In particular, Jopek-Bosiacka's *Przekład prawny i sądowy* [Legal and Court Translation], published in Polish and dedicated specifically to Polish and English translation, meets the long-felt need. It is the first book, both comprehensive and succinct in its treatment of the subject, which surveys various branches of legal translation and is a convenient compilation and synthesis of knowledge scattered in various Polish and English sources. It is worth noting that the author is both a linguist and a lawyer and manages to integrate both perspectives in her writing.

The book may be divided into two parts. The first discusses properties of English and Polish legal language within the discourse analysis methodology, while the second follows the genre-based approach to translation (cf. Alcaraz & Hughes 2002: 101) and surveys major legal genres. These include: contracts, company law documents, national

legislation, European Union legislation and court translation. Given English>Polish translation practice, the selection of the genres seems to be well founded.

The internal organisational structure of chapters is not always clear, which is especially noticeable in the first two chapters. Chapter 1 selectively depicts sometimes isolated theoretical concepts. It starts with a brief history of research into Polish legal discourse but also contains, more importantly, a short history of foreign influences on Polish legal language and borrowings. The author also discusses classifications of legal language, comprehensibility, syntactic schemata of legal norms, modality, and basic properties of legal terms. What is lacking is a more systematic discussion of the syntactic and semantic features of Polish legal discourse as in Chapter 2, which surveys the properties of the English legal genre in full detail.

Chapter 3, which focuses on translation of commercial contracts, has high practical relevance to students. It contains a thorough contrastive analysis of major types of contractual clauses, such as recitals, definitions, representations, obligations, boiler-plate clauses, arbitration, force majeure, applicable law, etc. The discussion is amply illustrated with examples and translation tips.

Chapter 4 on translation of documents related to company law focuses on articles of association and shareholder resolutions. Its major merit is an insightful contrastive analysis of basic company law terms, such as *spółka, firm, partnership, company, corporation, Board of Directors* and *articles of association*, which reveals the complexity and incongruity of legal terms between systems. The chapter is however asymmetrical in its treatment of Polish and English terms. It provides English equivalents of Polish terms, derived mainly from three translations of the Polish Code of Commercial Partnerships and Companies (*Kodeks spółek handlowych*). Yet it fails to do so *vice versa*: there are no Polish equivalents of incongruous and problematic English terms, such as *memorandum of association* or *Board of Directors*. The author also presents a detailed structure of Polish partnerships and companies (p. 116) with their English equivalents but similar charts of US and UK entities are missing, not to mention their Polish equivalents. It is a pity because, as a future textbook, the book could have contributed to establishing equivalents of some problematic terms, including company types. However, these minor flaws do not diminish the overall value of the otherwise excellent chapter.

Discussing the Polish *spółka partnerska*, Jopek-Bosiacka assesses its established equivalent, *professional partnership*, as 'very well chosen'. She notes further that this concept may require additional explanation for the UK audience in contrast to US audiences, which are familiar with *professional corporations* and *limited-liability partnerships* (2006: 116). This is an inaccuracy: a very similar entity, a limited liability partnership, has been introduced in the UK under the Limited Liability Partnership Act 2000. This type of business structure is elected mainly by professionals (Lowry and Dignam 2006: 5). For this reason, the best functional equivalent of *spółka partnerska* would be *limited liability partnership* as it is comprehensible both in the UK and in the US (cf. Krześniak 2003).

Throughout the book the author generally advocates the functional approach to translation (e.g. pp. 112, 134, 136), emphasising the need to strike a delicate balance between fidelity to the source text and compliance with target-language conventions of the genre. This approach is in line with both Šarčević's and Alcaraz and Hughes'

recommendations. As Jopek-Bosiacka rightly argues, 'in respect of terminology, despite frequent substantial incongruity between the Anglo-Saxon system and the Polish system, translators should use corresponding target legal concepts wherever possible (…), otherwise they may be accused of unprofessionalism' (2006: 134, translation—Ł.B.). She further adds that the target text should appear natural to a lawyer (2006: 136).

Some inconsistencies in her approach may be noted though. Referring rather cryptically to § 10 of the Legislative Technique Rules [i.e. two distinct concepts should not be named with the same term in Polish legislation], Jopek-Bosiacka praises distinct equivalents for *zgromadzenie wspólników* and *walne zgromadzenie* in the three translations of the Code (2006: 117). No comment is made about the *general meeting* being an equivalent of *zgromadzenie wspólników* in Beck's translation and, simultaneously, of *walne zgromadzenie* in Zakamycze's and Tepis's translation. Yet, in contrast to *Rada Nadzorcza* (Supervisory Board) and *Zarząd* (Management Board), *zgromadzenie wspólników* and *walne zgromadzenie* are synonymous concepts operating within different frames (sp. z o.o. and S.A.). The natural equivalent for a UK lawyer would be *general meeting* in both cases since, unlike Polish, English does not have a separate terminology for private and public companies. Similarly, Polish makes a distinction between *udziały* and *akcje*, both of which are translated into UK English as *shares*. The same applies to *wspólnik* and *akcjonariusz*, both of which become *shareholders* (or *members*) in UK English. This semantic problem could have been explored in more detail.

Chapter 5 on translation of legislation discusses the internal structure of legislative acts in different legal systems by comparing the macrostructure of Canadian and Swiss acts (after Šarčević), and of EU and Polish acts. Yet from a Polish perspective references to the UK or US legal system would be more useful. In the next part the author is selective in her choice of issues, focusing on translation of titles of legislative acts, systematisation, definitions and English names of Polish administrative units (English administrative units are not examined though).

Chapter 6 on translation of EU legislation is a convenient compilation of materials for translators prepared by UKIE and OPOCE and available on the DGT website.

Given the dearth of practical training materials on court translation, except for the technically-oriented *Kodeks tłumacza przysięgłego* [Sworn Translator Code] edited by Kierzkowska, Chapter 7 on court translation seems to be rather disappointing in its one-sidedness. It contains an informative typology of the Polish civil procedure and briefly mentions the criminal procedure. Unfortunately, the UK and US procedures are discussed perfunctorily and little attention is paid to terminological differences between the two common law systems, a good illustration being no mention of the US equivalent of *claim—complaint*. Next the author presents the Polish court structure with useful English equivalents. However, there is no comparison to the UK or US structures with their Polish equivalents, which could be very interesting, but only references to rather dated and inaccessible publications.

On balance, the major advantage of the book is that, as already noted, it integrates a number of sources in one publication. It also contains an extensive bibliography embracing 367 entries, which is an excellent record of resources on legal translation available in English and Polish. The book may be a good introductory textbook to

practical courses on legal, certified or EU translation, as well as to more theoretically oriented courses on legal translation at the BA or MA level. It may also be used by experienced translators as a refresher or a 'gap-filler'.

Przekład prawny i sądowy is not a typical textbook; however, it could easily be turned into one in further editions. First of all, exercises at the end of each chapter, preferably with a key, would definitely add to its value. These could be terminological quizzes, and stylistic or translation exercises for self-study. Secondly, self-assessment questions and a glossary with major definitions would be an asset. Thirdly, the book will have even more practical relevance if it is extended by additional parallel texts as in the company law chapter; this need is especially felt in the contract chapter. Nevertheless, it should be emphasised that the book is lavishly illustrated with a plethora of examples and frequent references to problems encountered by translators in practice, as well as in-depth contrastive analyses of terms.

As already emphasised, the book is both wide ranging and succinct, but there is a price to pay. Some issues are discussed perfunctorily only (e.g. court translation/interpreting) or are omitted altogether (other types of sworn translation). This is however unavoidable to a certain extent.

To sum up, the book offers a neat synthetic survey of various legal genres with reference to Polish and English and consolidates knowledge on legal translation scattered in numerous resources. Undoubtedly, it will prove useful to many students.

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