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Preface

This volume of Comparative Legilinguistics contains six articles.

First three articles refer to legal language and terminology. The first one, *Выражение Деонтической Модальности 'Обязательство': Русские И Украинские Глагольные Конструкции*, is written by Liana GOLETIANI (Italy). The aim of this paper is to compare the Russian and Ukrainian imperative clauses in international law. The investigation was carried out on parallel texts of the Agreement, Treaty and Memorandum of Understanding drawn up by the Ukraine and the Russian Federation in the post-Soviet era. The next paper written by Evgeniya M. KAKZANOVA (Russia) titled *Вариативность Юридической Терминологии В Немецком Юридическом Документе Лихтенштейна* deals with the legal language variability in the contract of delegation drawn up in German in Liechtenstein. The last paper in this section, *Linguistic Analysis of Necessity Expressions in Finnish and Polish Legal Text in Terms of Deontic Strength*, is written by Joanna Rydzewska-Siemiątkowska (Poland). The aim of the author's article is to highlight the issue of expressing deontic modality in Finnish and Polish in a legal context in terms of deontic strength.

In the second section we have two articles which deal with legal translation. Marta CHROMÁ (Czech Republic) in her paper *Traps of English as a Target Language in Legal Translation* deals with translating legal texts into English. The author stresses that a translator should make a qualified decision with respect to a variety of legal English, or its modification, to be used as the target language. The paper touches upon some relevant aspects of such decision-making and provides examples of both useful options and confusing alternatives. The last article is written by Michele MANNONI (Italy) – *Challenging The Existence Of Legal Translation: A Comprehensive Translation Theory*. This paper focuses on the lack of recognition of comprehensive and text-genre unrelated translation theories, a condition that keeps translators imprisoned in the old and sterile debate on free versus literal translation. This paper underlines the importance of the adoption of a comprehensive theory absolutely independent from the classification of texts to be translated.

The last article, *Fairness as Interpretive Device in Law? (An Analysis of Discursive Practices in the Recent Conflict about Voting Rights in Hong Kong and their Anchorage in Argumentative Practices of*

East Asia), written by Marcus GALDIA (Monaco) and Antonio LIACI (Italy) describes the problem of fairness and voting rights in Hong Kong. The article presents the philosophical point of view.

The editors hope that this volume of our journal will be of interest to its readers.

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ВЫРАЖЕНИЕ ДЕОНТИЧЕСКОЙ МОДАЛЬНОСТИ ‘ОБЯЗАТЕЛЬСТВО’: РУССКИЕ И УКРАИНСКИЕ ГЛАГОЛЬНЫЕ КОНСТРУКЦИИ

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В статье ставится задача сравнить русские и украинские глагольные конструкции, выражающие деонтическую модальность ‘обязательство’ в документах международного права. Материалом исследования послужил корпус параллельных текстов Соглашений, Договоров и Меморандумов, заключенных Украиной и Российской Федерацией в постсоветский период. В контрастивном плане рассмотрены различные модальные и перифрастические конструкции. Результаты исследования показывают, что это деонтическое значение в обоих языках может быть передано с помощью различных типов конструкций, однако украинский язык располагает более вариативным спектром лексико-семантических и морфосинтасических единиц. Дивергентные процессы касаются, прежде всего, использования модальных конструкций с глаголами *мусити* и *мати*, а также синтетической формы будущего времени.

Ключевые слова: русский юридический язык; украинский юридический язык; модальные вспомогательные слова; деонтическая модальность

EXPRESSING DEONTIC MODALITY: OBLIGATION IN RUSSIAN AND UKRAINIAN INTERNATIONAL LAW

Abstract: The aim of this paper is to compare the Russian and Ukrainian clauses conveying deontic modality of obligation in international law. The investigation was carried out on parallel texts of Agreement, Treaty and Memorandum of Understanding drawn up by the Ukraine and the Russian Federation in the post-Soviet era. This systematic comparison deals with both modal auxiliaries and several periphrastic constructions. The study findings show that the two languages have very different constructions for conveying this deontic value, with Ukrainian legal language using a more varied range of lexico-semantic and morphosyntactic units. Divergence occurs in the use of the modal constructions with the verbs *musyty* and *maty* and the synthetic future form, which is not available in Russian.

Key words: Legal Ukrainian; Legal Russian; modal auxiliaries; deontic modality

WYRAŻANIE MODALNOŚCI DEONTYCZNEJ: NAKAZ W PRAWIE MIĘDZYNARODOWYM ROSYJSKIM I UKRAIŃSKIM

Abstrakt: Celem pracy jest porównanie rosyjskich i ukraińskich klauzul przenoszących znaczenie nakazu w prawie międzynarodowym. Badanie zostało przeprowadzone na tekstach paralelnych umowy, porozumienia oraz traktatu podpisanych przez Federację Rosyjską oraz Ukrainę w epoce posowieckiej. Zanalizowano następujące wykładniki modalności deontycznej: czasowniki posiłkowe modalne oraz konstrukcje peryfrastyczne. Badanie ujawniło, że w tych dwóch językach sposoby wyrażania nakazu różnią się. Wachlarz środków w języku ukraińskim jest bogatszy niż w rosyjskim w zakresie środków leksykalno-semantycznych oraz morfosyntaktycznych. Występują różnice w stosowaniu konstrukcji modalnych z czasownikami *musyty* i *maty* a syntetyczna forma czasu przyszłego nie jest stosowana w języku rosyjskim.

Słowa klucze: ukraiński język prawniczy; rosyjski język prawniczy; czasowniki modalne; modalność deontyczna

1. Введение

Несмотря на то, что для законодательных текстов характерно “единообразие способов изложения однотипных формулировок” (Пиголкин 1990: 23), выражение деонтической нормы в некоторых речевых жанрах допускает определенную степень

языковой вариативности. Если терминологическая вариативность уже вошла в круг интересов сравнительной юрислингвистики (см., напр., Сагалова 2010), то вариативность выражения деонтической модальности в восточно-славянских языках пока не стала объектом описания. Данная работа посвящена контрастивному исследованию вариативности русских и украинских модальных и синонимичных им конструкций, которые имеют деонтическое значение ‘обязательство’.

Теоретические работы по деонтической модальности основываются на изоморфизме между формулировкой деонтической нормы в законодательном языке и известной в модальной логике триадой (запрет - обязательство — разрешение) (Wright 1951, Coates 1983, Palmer 1986). С другой стороны, исследователи, занимающиеся исследованием конкретных законодательных текстов, отмечают “высокую корреляцию между классификацией норм в теории права и систематизацией деонтических значений в семантике” (Мечковская 2000: 293). Методология данного исследования также исходит из этих положений. Для выражениий с нормативными операторами ‘запрещено’, ‘обязательно’, ‘разрешено’ в законодательном тексте признаются равнозначными выражения с алетическими операторами ‘невозможно’, ‘необходимо’, ‘возможно’ и другие модальные вспомогательные слова (далее МВС), включая модальные глаголы. Термин МВС используется в этом исследовании в соответствии с определением, предложенным в Ханзен (2008: 104):

> МВС это в определенной степени грамматикализованное выражение модальности, причем модальность понимаем в узком смысле как выражение возможности, необходимости и воли. … модальные вспомогательные слова представляют собой особый тип полуграмматических вспомогательных слов, которые образуют категорию с нечеткой прототипической структурой, отражающей их постепенный переход от словаря к грамматике...

Употребление МВ в качестве маркеров различных деонтических значений в последние годы интенсивно изучается как на синхроническом, так и на диахроническом материале корпусов

законодательных текстов (Coppolella 2014, Garzone 2001 и 2013, Engberg 2001, Heller 2001, Gotti 2001, Nowak-Michalska 2013). Результаты исследований имеют прикладное значение для переводов в международной правовой сфере, где передача деонтических значений, выражаемых конструкциями с МВС, на восточнославянские языки может стать существенной проблемой. Поиск эквивалента затруднен полисемией и синонимией внутри системы МВС в языке оригинала и в языке перевода, а также развитием в вариативности их использования в законодательных текстах. Картина усложняется и в связи с тем, что для обязательств является релевантным разделение на две субкатегории: сильную и слабую, для выражения которых внутри как германских, так и романских языков установились дифференцированные соответствия, а как они соотносятся с системой славянских МВС пока не ясно, как не ясно и то, каковы соотношения деонтических МВС внутри группы славянских языков. Данные, полученные на материале украинских переводов Директив ЕС (в англоязычной версии), показывают, что в этом законодательном жанре для украинского языка характерна лексическая вариативность при выражении обязательств: такие МВС как *повинен*/*має*/*потрібно*/*слід* и др. конкурируют в формулировке однотипных норм, и эта вариативность динамически развивается (Goletiani 2015). Лексическая вариативность, обусловленная полисемией и синонимией МВС, не является, однако, единственным фактором, осложняющим как кодификацию и декодификацию деонтического значения, так и выбор эквивалента при его переводе. Для выражения этого типа нормы актуальна и проблема морфосинтаксической вариативности. Она может быть обусловлена как разным набором морфосинтаксических категорий, так и различиями в функционировании общих для разных языков категорий, причем эти различия наблюдаются даже в типологически близких языках. Если учесть особенности развития и распространения правовых культур в славянских странах, то неудивительно, что – несмотря на всю типологическую близость их языков – формулировки однотипной нормы в них могут существенно различаться, в том числе,

благодаря специфической морфосинтаксической вариативности. В этой категории языковой вариативности в контрастивном плане наиболее интересно использование в юридических текстах форм будущего времени от глаголов несовершенного вида (далее – ГНСВ). В отличие от русского языка, где для ГНСВ возможна только аналитическая форма будущего времени, в украинском эти глаголы могут иметь как аналитическую, так и синтетическую форму[1]. Интерес к ГНСВ обусловлен, в том числе и тем, что пока не ясно, как проявляется конкуренция двух форм будущего этих глаголов в разных жанрах правовой сферы, и можно ли здесь говорить о функциональной дифференциации. Исследования Соколова и Шумарова 1998, Goletiani 2014a и 2014b свидетельствуют в пользу того, что в целом синтетическая форма будущего от этих глаголов на современном этапе развития юридического украинского языка доминирует. Более того, наблюдается ее экспансия, по меньшей мере, в тех международных документах, где – с высокой долей вероятности – можно исключить фактор интерференции русского языка, ранее доминировавшего в сфере международной правовой коммуникации Украины[2]. Работ, сопоставляющих использование временных форм русских и украинских ГНСВ на материале параллельных текстов, пока нет. Как свидетельствуют последние работы в области компаративной юрислингвистики (см., напр., Matulewska 2010, Nowak-Michalska 2013, Copolella 2014), именно этот тип материала является надежным источником контрастивного анализа, направленного на установление эквивалентности, так как в параллельных текстах речь идет об идентичной коммуникативной ситуации, и, значит, можно исходить из тождественности прагматического значения

[1]Для удобства в этой работе будет использоваться этот традиционный термин, несмотря на то, что в Даниленко 2010 были высказаны убедительные аргументы в пользу того, чтобы видеть в синтетической форме скорее результат вторичного аналитизма.

[2]Здесь нет места для обсуждения вопросов истории языковой политики. Отмечу только, что в советский период юридическая сфера также подвергалась руссификации. Официальная идеология ‘слияния братских языков’ предписывала использование тех средств украинского языка, что имеют ‘параллели’ в русском (см. об этом Шевельов 1998).

симметрично употребленных единиц. В нашем случае – из тождественности вариативных глагольных конструкций двух языков со значением деонтического обязательства. Исследование выполнено на материале параллельных текстов двух типов: 1) международные Договоры, Меморандумы, Соглашения, заключенные между Украиной и Российской Федерацией в период с 1992 по 2012 (подкорпус параллельных русско-украинских текстов) и 2) международные документы, подписанные Украиной или Россией с третьими государствами (смешанный подкорпус). Материал обоих подкорпусов составил совокупный корпус.

2. Одна обязанность – множество возможностей (ее изложения): метод ‘инвентаризации’ вариантов

На материале русских и украинских юридических текстов советского периода уже отмечалось, что в формулировке норм законодатель использует конструкции с МВС долженствования/необходимости наряду с конструкциями, в которых смысловой глагол употреблен в форме настоящего или будущего времени (Соколова и Шумарова 1998: 96 и сл.). Речь идет о недейктическом употреблении, категория времени ‘уступает’ здесь место категории модальности, а именно – нормативной необходимости. Это отражается в многокомпонентной семантике и прагматике текстов международных документов: законодательно (деонтичность) закрепляются добровольно (интенциональность) принимаемые сторонами обязательства (перформативность), которые должны быть выполнены (императивность) в будущем, причем в выполнении законодатель уверен уже в момент совершения акта. Предлагаемый ниже анализ направлен на выявление возможных вариантов, поэтому прагмалингвистическая проблематика не является приоритетной. Проявления лексической вариативности, не относящейся

к деонтической модальности обязательства, также не будут рассматриваться. Там, где это возможно, будут приводиться примеры из русско-украинских параллельных текстов, а примеры из смешанного корпуса будут приводиться там, где необходимо выявить наиболее полный набор возможных в двух языках МВС и морфосинтаксических категорий. Для более наглядного представления вариативности воспользуюсь методом *convenience sample*: разные варианты конструкций будут рассматриваться на примерах формулировки одной и той же нормы. Речь идет о норме, которая регулирует разрешение споров между двумя сторонами, заключающими договор. Эта норма является конвенциональной для данных жанров документации. Прескриптивный акт, регулирующий действия сторон, встречается в каждом тексте не более одного раза, что позволит в дальнейшем сравнивать квантитативные данные в диахронической перспективе.

3. Модальные конструкции

Спектр русских и украинских МВС со значением долженствования, используемых в юридическом языке, не однороден по составу. С синтаксической точки зрения они подразделяются на личные (напр., русск. *должен* и укр. *повинен*) и безличные (напр., русск. *необходимо*, *следует* и укр. *потрібно*, *слід*, *треба*) (ср. Ханзен 2006: 77). В личных конструкциях субъект модальности должен быть назван, в безличных - может быть назван (в дательном падеже), но может быть и опущен, ср.: 1) *Каждая сторона должна придерживаться установленных сроков*, 2) *Каждой стороне необходимо придерживаться установленных сроков* и 3) *Необходимо придерживаться установленных сроков* (ср. Besters-Dilger, Drobnjakovi and Hansen 2009: 172). Если субъект модальности обязательно должен быть назван, то в тех безличных конструкциях, где смысловой глагол управляет дательным падежом, может возникнуть неудачная

с точки зрения изложения норма, ср.: 1) *Каждая сторона должна сообщить другой стороне..,* 2) *Каждой стороне необходимо сообщить другой стороне...* Поэтому на выбор МВС влияет не только его семантика, но и синтаксические признаки, а также установившиеся традиции в изложении определенных норм. Для выражения нормы, регулирующей разрешение споров, безличные конструкции не характерны. Согласно данных совокупного корпуса в обоих языках рассматриваемая норма формулируется только с помощью личных модальных конструкций. Вторая корреляция касается залога: в обоих языках пассивные конструкции значительно преобладают над активными. Факультативным, но частотным элементом является ослабление обязательства включением МВС возможности (см. пр. 1, 2, 3). Ниже приводится пример типичной модальной конструкции из подкорпуса параллельных текстов, отражающий названные особенности изложения данной нормы на двух языках:

> (1) Спори між Договірними Сторонами щодо тлумачення або застосування цієї Угоди *повинні*, якщо це можливо, *вирішуватися* шляхом взаємних консультацій і переговорів. (Угода між Урядом України та Урядом Республіки Казахстан про заохочення та взаємний захист інвестицій, 17.09.1994)

> (2) Споры между Договаривающимися Сторонами относительно толкования или применения этого Соглашения *должны*, если это возможно, *решаться* путем взаимных консультаций и переговоров. (Соглашение между Правительством Украины и Правительством Республики Казахстан о поощрении и взаимной защите инвестиций, 17.09.1994)

Конструкции с *повинен*/*повинні* (пр. 2) в украинском языке встречаются чаще в параллельном подкорпусе русско-украинских документов, видимо - для сохранения симметричности изложения[3]. Именно здесь проявляется существенное, с точки зрения вариативности, различие между инвентарем личных модальных конструкций в двух языках: если в русском возможно

[3]Обеспечение синтаксического параллелизма – одно из важных требований перевода международных правововых актов (Левитан 2010: 82).

только МВС *должен*/*должны*, то украинский язык для выражения долженствования располагает также модальным глаголом *мусити* и модальным инфинитивом *мати* + инфинитив смыслового глагола[4]. Как показывают следующие примеры (3, 4, 5), конструкции с модальным инфинитивом чрезвычайно продуктивны в изложении данной нормы в международных документах из смешанного подкорпуса:

(3) Спори між Договірними Сторонами відносно тлумачення та застосування цієї Угоди *мають по можливості вирішуватися* по дипломатичних каналах. (Угода між Урядом України і Урядом Монголії, 1992)

(4) Будь-які спори між Сторонами, що випливають із цього Меморандуму, *мають вирішуватися* шляхом переговорів. (Меморандум про взаєморозуміння між Міністерством транспорту України та Міністерством транспорту Чеської Республік про визнання дипломів (сертифікатів) моряків відповідно до вимог Правила I/10 Міжнародної конвенції про підготовку і дипломування моряків та несення вахти 1978 року, з поправками, 25.04.2003)

(5) Будь-які складнощі, що можуть виникнути у зв'язку із застосуванням цієї Угоди, *мають вирішуватися* дипломатичними каналами. (Угода між Україною та Турецькою Республікою про правову допомогу та співробітництво в цивільних справах, 23.11.2000)

Что касается модального глагола *мусити*, то его использование в разных нормативных жанрах крайне нестабильно (ср. Голетиани 2015: 276). Целесообразно рассмотреть его на примерах изложения различных норм в документах смешанного подкорпуса. Этот глагол встречается здесь как в активных (пр. 6), так и в пассивных конструкциях (пр.7):

(6) Для призначення глави консульської установи акредитуюча держава *мусить* одержати попередню згоду держави перебування. Якщо держава перебування не згодна на це, вона не зобов'язана пояснювати мотиви свого рішення. (Консульська Конвенція між Україною і Литовською

[4]Как показывают данные в Mazzitelli 2012, деонтическое значение слабого обязательства модальный инфинитив выражает и в белорусских юридических текстах.

Республікою, 28.03.1995)

(7) В усіх випадках відмова *мусить* бути повідомлена державі перебування виразно і у письмовій формі, окрім передбаченого у п.3 цієї статті. (Консульська конвенція між Україною та Великою Соціалістичною Народною Лівійською Арабською Джамагирією, 14.10.2003)

Многочисленные примеры из смешанного корпуса показывают, что *мусити* в настоящее время используется для передачи как сильного, так и слабого деонтического обязательства, находя, таким образом, применение в качестве эквивалента разных английских МВС даже в границах одного текста. Эта широта значений долженствования хорошо видна из примеров (8) – (13) взятых из украинского варианта текста Краковской хартии 2000 (Міжнародна хартія з охорони та реставрації архітектурно-містобудівної спадщини - Краківська хартія 2000, ориг.: Principles for conservation and restoration of built heritage - Kraków Chapter 2000):

(8) Реставраційний проект *мусить* гарантувати коректну реставрацію всіх творів монументального, декоративного та образотворчого мистецтва з респектом до традиційного народного ремесла, що є інтегральною складовою частиною архітектурної спадщини.

(9) The restoration project *must* guarantee a correct approach to the conservation of the full setting, decoration or sculpture, with respect to traditional building crafts and their necessary integration as a substantial part of the built heritage.

(10) Ці дії мусять інтегруватись з систематичними дослідженнями, контролем, постійним моніторингом і тестуванням.

(11) These actions have to be organised with systematic research, inspection, control, monitoring and testing. Possible decay has to be foreseen and reported on, and appropriate preventive measures have to be taken.

(12) Вибране втручання *мусить* респектувати первісну функцію і забезпечувати відповідність з існуючими матеріалами, структурами і архітектурними цінностями.

(13) The chosen intervention *should* respect the original function and ensure compatibility with existing materials, structures and architectural values.

Вместе с тем, представляется, что именно этот глагол обладает необходимым прагмалингвистическим потенциалом[5] для того, чтобы наиболее точно передавать деонтические значения английского МВС *must* и немецкого *müssen*. Дальнейшее развитие украинского юридического языка сможет дать более определенный ответ о ‘деонтической’ судьбе этого модального глагола. Сопоставление с употреблением МВС в современных юридических текстах на других славянских языках также вызывает большой интерес (ср. Hansen 2000).

4. Перифрастические конструкции

К модальным конструкциям очень близки перифрастические конструкции, диапазон которых в обоих языках чрезвычайно широк. Деонтическая сила обязательства зависит от семантики тех лексических единиц, которые употребляются вместо рассмотренных выше МВС, так называемых квази-МВС. Это могут быть глаголы с семантикой обязательства и намерения в разных формах. Наиболее сильно перформативный акт выражен в конструкциях с продуктивным для исследуемых жанров глаголом *обязываться*/*зобов’язуватися*. Это употребление в формулировке рассматриваемой нормы показано в пр. (14) и (15), взятых из смешанного подкорпуса:

(14) Обидві Договірні Сторони за цією угодою *зобов'язуються* вирішувати спірні питання, що можуть виникнути у зв'язку із застосуванням цієї Угоди, шляхом мирних консультацій переговорів. (Угода про економічне, торговельне і технічне співробітництво між Урядом України та Урядом Держави Катар, 13.01.2002)

[5]Дискуссию об употреблении этого глагола см., напр., в Антоненко-Давидович 1991: 125-126.

(15) Будучи убеждены ... стороны *обязуются* разрешать возможные споры исключительно мирными средствами. (Договор о дружбе и сотрудничестве между Российской Федерацией и Итальянской Республикой, 14.10.1994)

Несмотря на то, что в материалах параллельного подкорпуса не встретились случаи симметричного использования этого глагола в изложении рассматриваемой нормы, многочисленные примеры формулировок других норм говорят о его высокой продуктивности для данных жанров. Вот примеры из параллельных текстов Соглашения (пр. 16 и 17) и Меморандума (пр. 18 и 19):

(16) Сторони *зобов'язуються* не передавати третім сторонам дані АІС, отримані в рамках цієї Угоди від іншої Сторони. (Угода між Кабінетом Міністрів України та Урядом Російської Федерації про заходи щодо забезпечення безпеки мореплавства в Азовському морі та Керченській протоці, 20.03.2012)

(17) Стороны *обязуются* не передавать третьим сторонам данные АИС, полученные в рамках настоящего Соглашения от другой Стороны. (Соглашение между Правительством Российской Федерации и Кабинетом Министров Украины о мерах по обеспечению безопасности мореплавания в Азовском море и Керченском проливе, 20.03.2012)

(18) Держави *зобов'язуються* не підтримувати на території інших держав-учасниць сепаратистські рухи, а також сепаратистські режими, якщо такі виникнуть; не встановлювати з ними політичних, економічних і інших зв'язків; не допускати використання ними територій і комунікацій держав-учасниць Співдружності; не надавати їм економічної, фінансової, військової та іншої допомоги. (Меморандум про підтримку миру та стабільності в Співдружності Незалежних Держав, 10.02.1995)

(19) Государства *обязуются* не поддерживать на территории других государств-участников сепаратистские движения, а также сепаратистские режимы, если таковые возникнут; не устанавливать с ними политических, экономических и других связей; не допускать использование ими территорий и коммуникаций государств - участников Содружества; не оказывать им экономической, финансовой, военной и другой помощи. (Меморандум о поддержке мира и стабильности в Содружестве Независимых Государств, 10.02.1995)

В изложении рассматриваемой нормы в обоих языках наблюдается большая лексико-грамматическая вариативность в ряду перифрастических конструкций, имеющих семантику намеренности, цели, стремления и под. Вот несколько примеров симметричного употребления таких конструкций, взятых из параллельного подкорпуса:

(20) Сторони *докладають зусиль* до того, щоб врегулювання всіх спірних проблем здійснювалося виключно мирними засобами, і співробітничають у відверненні та врегулюванні конфліктів і ситуацій, які зачіпають їхні інтереси. (Договір про дружбу, співробітництво і партнерство між Україною і Російською Федерацією, 31.05.1997)

(21) Стороны *прилагают усилия* к тому, чтобы урегулирование всех спорных проблем осуществлялось исключительно мирными средствами, и сотрудничают в предотвращении и урегулировании конфликтов и ситуаций, затрагивающих их интересы. (Договор о дружбе, сотрудничестве и партнерстве между Российской Федерацией и Украиной, 31.05.1997)

Будучи синонимичны модальным конструкциям и конструкциям с *обязываться*/*зобов'язуватися*, эти формулировки обладают, тем не менее, меньшей перформативной силой. Смысловой глагол в этих конструкциях, как правило, имеет несовершенный вид (пр. 22/23 и 25/26), в то время как совершенный вид, выражающий достижение результата, теснее связан с сильным обязательством, но все-таки возможен там, где сила обязательства уже ослаблена семантикой вспомогательного глагола (пр. 24 и 25):

(22) Сторони створюють спільну Робочу групу, яка *має на меті* розглядати виконання цієї Угоди та її умов, *вирішувати* спірні питання, розробляти і вносити на розгляд Уряду України і Уряду Російської Федерації пропозиції по розвитку взаємовигідного співробітництва і реалізації основних напрямків співробітництва, передбачених статтею 2 цієї Угоди. (Угода між Урядом України і Урядом Російської Федерації про співробітництво у сфері інформатизації, 28.05.1997)

(23) Стороны учреждают совместную Рабочую группу, которая *имеет целью* рассматривать выполнение настоящего Соглашения и его условий, *решать* спорные вопросы, разрабатывать и вносить на рассмотрение Правительства Российской Федерации и Правительства Украины

предложения по развитию взаимовыгодного сотрудничества и реализации основных направлений сотрудничества, предусмотренных статьей 2 настоящего Соглашения. (Соглашение между Правительством Российской Федерации и Правительством Украины о сотрудничестве в области информатизации, 28.05.1997)

В контрастивном плане большей грамматической вариативностью отличаются те украинские перифрастические конструкции, в которых смысловой глагол употреблен в форме будущего времени – синтетической или аналитической. К этому типу грамматической вариативности мы еще вернемся ниже, а здесь ее уместно показать на примере двух форм будущего от глагола *прагнути* в (24) и (26) из следующих двух пар параллельных примеров:

(24) Компетентні органи Договірних Держав *прагнутимуть вирішувати* за взаємною згодою будь-які труднощі або сумніви, що виникають при тлумаченні або застосуванні цієї Угоди. (Угода між Урядом України та Урядом Російської Федерації про уникнення подвійного оподаткування доходів і майна та попередження ухилень від сплати податків, 8.02.1995)

(25) Компетентные органы Договаривающихся Государств *будут стремиться решить* по взаимному согласию любые трудности или сомнения, возникающие при толковании или применении настоящего Соглашения. (Соглашение между Правительством Российской Федерации и Правительством Украины об избежании двойного налогообложения доходов и имущества и предотвращении уклонений от уплаты налогов, от 08.02.1995)

(26) Всі розбіжності, які виникають при реалізації цієї Угоди, Сторони *будуть прагнути вирішувати* шляхом консультацій і переговорів, в тому числі по дипломатичних каналах. (Угода між Кабінетом Міністрів України, Урядом Російської Федерації, Урядом Словацької Республіки, Урядом Чеської Республіки про співробітництво в галузі транспортування ядерних матеріалів між Російською Федерацією і Чеською Республікою через територію України і територію Словацької Республіки, 14.3.1998)

(27) Все разногласия, возникающие при реализации настоящего Соглашения, Стороны *будут стремиться* решать путем консультаций и переговоров, в том числе по дипломатическим каналам. (Соглашение между правительствами Чешской Республики, Российской Федерации,

Словацкой Республики и Украины о сотрудничестве в области перевозки ядерных материалов между Российской Федерацией и Чешской Республикой через территорию Словакии и Украины, 14.03.1998 г.)

Наконец, среди процессов, способствующих увеличению вариантов в обоих языках, следует отметить номинализацию смыслового глагола в перифрастических конструкциях. См. пр. (28) и (29) из параллельного подкорпуса и пр. (30) из смешанного корпуса:

(28) Спори щодо тлумачення та застосування положень цієї Угоди *підлягають вирішенню* шляхом переговорів на рівні спеціальних представників Сторін. (Угода між Урядом України і Урядом Російської Федераціїпро співробітництво в сфері дослідження і використання космічного простору в мирних цілях, 27.08.1996)

(29) Споры относительно толкования и применения положений настоящего Соглашения *подлежат разрешению* путем переговоров на уровне специальных представителей Сторон. (Соглашение между Правительством Российской Федерации и Правительством Украины о сотрудничестве в области исследования и использования космического пространства в мирных целях, 27.08.1996)

(30) Сторони в дусі співробітництва *прагнутимуть до* швидкого та справедливого *вирішення* будь-яких спорів між ними, що стосуються тлумачення та застосування цієї Угоди. (Угода між Урядом України та Урядом Арабської Республіки Єгипет про сприяння та взаємний захист інвестицій, 22.12.1992)

5. Конструкции с индикативными формами смыслового глагола

Конструкции со смысловым глаголом в индикативных формах представлены в корпусе шире, чем модальные. Это можно объяснить тем, что речь идет о ‘слабой’ деонтической силе многих обязательств, устанавливаемых в данных жанрах. Форма настоящего времени встречается чаще, чем форма будущего.

> Функционирование форм будущего времени в официально-деловом стиле русского и украинского языков характеризуется низкой употребительностью изучаемых форм, связанной как со спецификой значения самой формы, так и с императивным характером выражения временных отношений в данном стиле. Следствием такого положения является употребление для передачи значения будущего [...] форм настоящего. (Соколова и Шумарова 1988: 103)

В формулировке рассматриваемой нормы конструкции с формой настоящего времени смыслового глагола также более продуктивны. Показательно, что МВС возможности в них уже не включаются. Это также свидетельствует в пользу того, что деонтическая сила обязательства, выраженная конструкцией с индикативной формой, менее сильная, чем та, что выражена модальной конструкцией, именно поэтому ослабляющее МВС уже не является необходимым.

> (31) Сторони та їхні компетентні органи *вирішують* спірні питання, які можуть виникнути у зв'язку з тлумаченням або застосуванням положень цієї Угоди, шляхом консультацій та переговорів. (Угода про співробітництво держав - учасниць Співдружності Незалежних Держав у боротьбі з торгівлею людьми, органами й тканинами людини, 25.11.2005)

> (32) Стороны и их компетентные органы *решают* спорные вопросы, которые могут возникнуть в связи с толкованием или применением положений настоящего Соглашения, путем консультаций и переговоров. (Соглашение о сотрудничестве государств-участников Содружества Независимых Государств в борьбе с преступностью, 25.11.2005)

Еще одна корреляция в использовании перифрастических конструкций проявляется в категории залога. В отличие от модальных конструкций здесь наблюдается преобладание пассивных конструкций. Для категории залога симметричность выбора особенно характерна для параллельного подкорпуса: активной конструкции в русском всегда соответствует активная конструкция в украинском, пассивной в русском – пассивная в украинском:

> (33) Розбіжності між Сторонами щодо тлумачення і застосування цієї

Угоди, які не можуть бути усунуті шляхом консультацій між компетентними органами Сторін, *вирішуються* по дипломатичних каналах або шляхом переговорів між Сторонами. (Угода між Кабінетом Міністрів України і Урядом Російської Федерації про взаємодію з питань попередження надзвичайних ситуацій, пожеж і ліквідації їх наслідків у населених пунктах, в яких розташовано об'єкти Чорноморського флоту Російської Федерації на території України, 12.07.2012)

(34) Расхождения между Сторонами относительно толкования и применения настоящего Соглашения, которые не могут быть устранены путем консультаций между компетентными органами Сторон, *решаются* по дипломатическим каналам или путем переговоров между Сторонами. (Соглашение между Правительством Российской Федерации и Кабинетом Министров Украины о взаимодействии по вопросам предупреждения чрезвычайных ситуаций, пожаров и ликвидации их последствий в населенных пунктах, в которых дислоцируются объекты Черноморского флота Российской Федерации на территории Украины, 12.07.2012)

Наконец, в рассматриваемой норме в русских текстах наряду с бесприставочным глаголом используется образованный от него приставочный глагол *разрешить(ся)/разрешать(ся)*:

(35) Споры, возникающие при выполнении положений настоящего Меморандума, *разрешаются* в ходе двусторонних консультаций. (Меморандум о взаимопонимании между Государственной таможенной службой Украины и Федеральной таможенной службой (Российская Федерация) по осуществлению совместного таможенного контроля в пунктах пропуска через украинско-российскую государственную границу, 27.10.2010)

Возвращаясь к уже затронутой проблеме вариативности форм будущего времени в украинском, нужно сразу же подчеркнуть динамический характер ее развития. Если в 1992 году соотношение синтетического будущего к аналитическому было 1:4, то за двадцать лет ситуация ‘перевернулась’ (Goletiani 2014a). Как уже упоминалось, частотность использования зависит не только от диахронического параметра, но и от того, на каком языке составлен параллельный текст. Синтетическая форма по данным украинского-русского параллельного подкорпуса за 2012 год встретилась в четыре раза больше, чем аналитическая (там

же), а в исследовании на материале украинско-английского параллельного корпуса эта диспропорция еще больше (Goletiani 2014b). В данном параллельном подкорпусе эта динамика также прослеживается, асимметричность между русской и украинской версией документов в документах последних лет представлена шире, ср. пр. (36) и (38):

(36) Сторони *будуть вирішувати* всі спірні питання, які можуть виникати у зв'язку із тлумаченням і застосуванням цієї Угоди, шляхом переговорів. (Угода між Урядом України та Урядом Російської Федерації про проведення погодженої структурної політики в економіці 28.05.1997)

(37) Стороны *будут решать* все спорные вопросы, возникающие в связи с толкованием и применением настоящего Соглашения, путем переговоров. (Соглашение между Правительством Российской Федерации и Правительством Украины о проведении согласованной структурной политики в экономике 28.05.1997)

(38) Усі спірні питання між Сторонами, що виникають при тлумаченні та застосуванні положень цієї Угоди, *вирішуватимуться* шляхом переговорів між Сторонами. (Угода між Кабінетом Міністрів України та Урядом Російської Федерації про співробітництво в галузі карантину рослин, 07.06.2011)

(39) Все спорные вопросы между Сторонами, связанные с толкованием и применением положений настоящего Соглашения, *будут решаться* путем переговоров между Сторонами. (Соглашение между Кабинетом Министров Украины и Правительством Российской Федерации о сотрудничестве в области карантина растений, 07.06.2011)

До сих пор были показаны процессы асимметричного изложения одной и той же нормы, вызванные различиями лексических или грамматических единиц двух языков. Однако в параллельном подкорпусе встречаются и случаи асимметрии, не обусловленные лакунами в языковой системе. Именно в силу того, что времена понимаются здесь не в дейктическом (дескриптивное употребление), а в деонтическом (прескриптивное употребление) значении, настоящему времени в русском может соответствовать будущее (как правило, синтетическое) в украинском:

(40) У разі виникнення суперечностей з приводу тлумачення або застосування положень цієї угоди Сторони *будуть вирішувати* консультацій та переговорів. (Угода між Кабінетом Міністрів України і Урядом Російської Федерації про співробітництво в галузі атестації наукових та науково-педагогічних кадрів вищої кваліфікації, 21.06.2002)

(41) В случае возникновения разногласий по вопросам толкования или применения настоящего Соглашения Стороны *решают* их путем консультаций и переговоров. (Соглашение между Правительством Российской Федерации и Кабинетом Министров Украины о сотрудничестве в области аттестации научных и научно-педагогических кадров высшей квалификации, 21.06.2002)

Обратная тенденция, то есть использование настоящего времени в украинской конструкции и будущего – в русской, представлена единичными случаями:

(42) Спори щодо тлумачення та застосування цієї Угоди вирішуються шляхом переговорів та консультацій між Сторонами. (Угода між Кабінетом Міністрів України та Урядом Монголії про співробітництво у галузі попередження надзвичайних ситуацій та ліквідації їх наслідків, 29.06.2011)

(43) Споры относительно толкования и применения настоящего Соглашения будут разрешаться путем переговоров и консультаций между Сторонами. (Угода між Кабінетом Міністрів України та Урядом Монголії про співробітництво у галузі попередження надзвичайних ситуацій та ліквідації їх наслідків, 29.06.2011)

В таблице приведен сводный перечень глагольных конструкций, выявленных в формулировке рассмотренной нормы.

Таблица конструкций с глаголом *решать(ся)/вирішувати(ся)* и их примеров в норме ‘Урегулирование споров’

Тип конструкции	Примеры из укр. языка	Примеры из русского языка

Модальные: МВС + инф.	*- повинні + вирішувати(ся)* *- мають + вирішувати(ся)*	*- должны + решать(ся)*
Перифрастические: квази-МВС + инф.	*- зобов'язуються вирішувати* *- зобов'язані вирішувати* *- прагнутимуть вирішувати* *- будуть прагнути вирішувати*	*- обязуются решать* *- обязаны решать* *- стремятся решить*
Номинализации: квази-МВС + отглагольное существительное	*- прагнутимуть до вирішення* *- підлягяють вирішенню*	*- стремятся к решению* *- подлежат решению*
Индикативные: наст. время аналитическое буд. синтетическое буд.	*- вирішують(ся)* *- будуть + вирішувати(ся)* *- вирішуватимуть*	*- (раз)решают(ся)* *-будут + (раз)решать(ся)* не существует

6. Предварительные выводы и перспективы дальнейших исследований

Деонтическая модальность обязательства в международных документах Соглашение, Меморандум и Договор на украинском и русском языках может выражаться с помощью разнообразных глагольных конструкций. В корпусе данного исследования представлены модальные конструкции, перифрастические конструкции и конструкции с индикативными формами настоящего и будущего времени от глагола, выражающего предписываемое нормой действие. Контрастивный анализ выявил бóльшую вариативность украинского языка, что обусловлено более широким рядом модальных слов со значением долженствования/необходимости, а также быстро растущим использованием синтетической формы будущего. На выбор той или иной языковой единицы при составлении параллельных нормативных текстов кроме семантики, синтаксических признаков и юридической традиции влияет большое количество переменных. В связи с этим целесообразны дальнейшие корпусные исследования, дифференцированные по жанру, типу нормы, комбинации языков и диахроническому фактору. Они смогут пролить свет на характер развития вариативности разных лексических и морфосинтаксических единиц и на их количественное соотношение в рамках одного текста, жанра или языка.

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ВАРИАТИВНОСТЬ ЮРИДИЧЕСКОЙ ТЕРМИНОЛОГИИ В НЕМЕЦКОМ ЮРИДИЧЕСКОМ ДОКУМЕНТЕ ЛИХТЕНШТЕЙНА

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В данной статье рассматривается вариативность юридической терминологии в договоре поручения, составленном на немецком языке в Лихтенштейне. Автор статьи не раз сталкивался с расхождениями в терминологии в немецкоязычных документах Германии и других немецкоязычных стран. Поскольку право в Германии и Лихтенштейне развивалось относительно обособленно, то изменения, происходившие в них, вели к вариативности как отдельных терминов, так и терминосистем. Правовая система Германии сформировалась под влиянием римского права среди германских племен и развивалась вплоть до сегодняшнего дня. Правовая система Лихтенштейна сложилась под влиянием австрийского и швейцарского права. Несмотря на то, что различия между языковыми стандартами Лихтенштейна и Германии малы, зачастую значительные расхождения со стандартными формами в названных странах могут трактоваться как варианты.

Ключевые слова: юридическая терминология; вариативность; Лихтенштейн; договор поручения; немецкий язык

VARIABILITY IN GERMAN LEGAL TERMINOLOGY IN LEGAL DOCUMENTS FROM LIECHTENSTEIN

Abstract: The article deals with the legal language variability in the contract of delegation drawn up in German in Liechtenstein. Time and again the author of the article came across discrepancies in terminology in German-language documents of Germany and other German-speaking countries. As the law in Germany and Liechtenstein developed relatively separately, the changes happening therein resulted in variability of both separate terms, and term systems. The legal system of Germany has been created under the influence of the Roman law among the German tribes and has been developing up till now. The legal system of Liechtenstein was formed under the influence of the Austrian and Swiss law. While the distinctions between Liechtenstein and Germany language standards are minor, the significant divergences from standard forms in the abovementioned countries can be treated as variants.

Key words: legal language; variability; Liechtenstein; contract of delegation; German

ZRÓŻNICOWANIE NIEMIECKIEJ TERMINOLOGII PRAWNICZEJ W DOKUMENTACH PRAWNYCH LIECHTENSTEINU

Abstrakt: Artykuł dotyczy zmienności terminologii prawniczej dokumentów sporządzonych w języku niemieckim w Liechtensteinie. Wielokrotnie autorka tekstu spotykała się ze zróżnicowaną terminologią stosowaną w państwach niemieckojęzycznych. Ponieważ prawo Niemiec oraz Lichtensteinu rozwijało się w sposób odmienny doszło do zróżnicowania terminologii prawniczej. System prawny Niemiec wykształcił się pod przemożnym wpływem prawa rzymskiego. Z kolei system prawny Lichtensteinu pozostaje pod wyraźnym wpływem prawa szwajcarskiego i austriackiego. Wprawdzie różnice pomiędzy językiem potocznym w obu krajach są nieznaczne, jednakże odchylenia od standardu na płaszczyźnie języka prawa można traktować jako warianty.

Słowa klucze: język prawny i prawniczy; zmienność; Liechtenstein; umowa o podwykonawstwo; język niemiecki

Введение

Современное юридическое образование характеризуется интернационализацией, фундаментализацией и специализацией. Студенты юридических вузов и факультетов многих стран в обязательном порядке изучают иностранные языки или

юридическую терминологию ведущих стран мира [Левитан 2011: 9-10].

Формой правовой информации выступает язык как определенная знаковая система. Юрист оперирует в своей деятельности языковыми феноменами (явлениями), которые не просто представляют собой знаки (письменные и звуковые), но имеют смысл и значение. Знаки составляют массив правовой и сопутствующей информации. Без языка нет и не может быть правового регулирования [Черданцев 2012: 5, 13].

Глобальное общество нуждается в глобальном праве как средстве его организации и управления им, создания и защиты глобального правопорядка [Левитан 2011: 11].

Цель исследования

Целью настоящей статьи явилось рассмотрение юридической терминологии в юридическом документе (договоре поручения) Лихтенштейна и сопоставительный анализ терминов в немецкоязычном документе Лихтенштейна и немецкоязычном документе Германии. На разницу в употреблении лексики в зависимости от национальной языковой картины мира следует обратить внимание не только ученым – лингвистам-терминоведам, юристам, но и переводчикам. Таким образом, теоретическая цель написания статьи имеет явную практическую подоплеку.

Материал и методы исследования

Описательно-аналитический метод, которым мы воспользовались в нашем исследовании, предусматривал анализ исследуемого материала с последующим обобщением полученных результатов.

Несмотря на то, что немецкий язык Лихтенштейна не является, как будет показано ниже, официальным диалектом немецкого языка, мы применяем метод описательной диалектологии с использованием синхронной методики исследования.

Исторический экскурс в диалектологию

Развитию диалектологии способствовали воззрения младограмматиков, с которых и начались диалектные исследования в разных странах. В 1876 году немецкий ученый Г. Венкер решил уточнить границы немецких диалектов. Он разослал учителям своего округа составленную им анкету – 40 предложений, состоящих из 339 слов. Предлагалось перевести все слова на местный диалект. Ответы дали очень интересный материал, и Г. Венкер расширил область наблюдений. За 10 лет ученый получил 40 000 ответов со всей Германии. В основном это были ответы по фонетике, на основе которых в 1926-1932 годах был издан «Немецкий атлас». Кроме того, немецкие диалекты активно изучались полевой методикой: сбором материала путем работы с информантами-говороносителями [Комарова 2012: 590].

Рассматривать диалекты можно двояко – описательно и исторически. Чтобы говорить об историческом аспекте диалекта, мы должны быть уверены, что такой диалект существует. Но поскольку немецкий диалект Лихтенштейна официально не признан, мы можем лишь установить характер лексических и частично грамматических особенностей, на которые мы обратили внимание при изучении юридического документа (договора поручения), то есть, воспользоваться исключительно синхронной методикой.

Самый большой объем юридических текстов составляют, в частности, тексты договоров. Юридическая терминология текста договора поручения Лихтенштейна является предметом рассмотрения в настоящей статье. Также мы рассмотрим

отношения равнозначности и пересечения понятий по сравнению с юридической терминологией в тексте договора поручения Германии.

Понятия юридического дискурса и правовой картины мира

Юридический дискурс представляет собой сложную когнитивную структуру, в основе которой лежит отражаемое в языке соответствие между нашим представлением о юридическим мире и репрезентацией этого представления в языке. Прежде всего под юридическом дискурсом понимается коммуникативная деятельность, результатом которой является юридический текст.

Среди нескольких функций юридического дискурса, выделенных И.В. Палашевской, для нашей статьи интерес представляет *интерпретационная* функция, состоящая в интерпретации смыслов коммуникативных действий участников дискурса и соответствующих правовых текстов [Палашевская 2010: 536].

Язык права характеризуется определенными признаками. Основным отличительным признаком языка права является, в частности, такой показатель как наличие правовой терминологии.

Термины и понятия в языке права, языке юридической науки и языке юридической практики могут совпадать или не совпадать по своему объему и содержанию. Известен тезис, согласно которому право и общество должны говорить на одном языке [Черданцев 2012: 38].

Термины, используемые в правовой сфере, имеют двойной статус, так как неизбежно являются и словами языка обыденного, а не только юридического. Отсюда возможно неоднозначное использование терминов [Черданцев 2012: 46].

Юридический текст регулирует отношения людей в человеческом обществе в рамках одной страны. Каковы бы ни

были юридические тексты по содержанию, они достаточно однородны по своим типологическим признакам. Комплекс средств, который для них характерен, обеспечивает полноценную передачу когнитивно-предписывающей информации реципиенту. Когнитивная информация содержится в первую очередь в юридических терминах. Они обладают всеми признаками терминов: однозначность (абсолютная и относительная), отсутствие эмоциональной окраски, системность, точность, краткость, независимость от контекста. Часть из них известна не только юристам, но и всякому носителю языка, так как область их применения выходит за рамки юридического текста [Левитан 2011: 23, 24].

В Европе всё больше в качестве языка-посредника в хозяйственно-правовой и научной сфере используется немецкий язык, поскольку Германия является многолетним лидером европейской экономики с детально проработанной правовой системой [Левитан 2011: 12]. Отличительными чертами правовой системы ФРГ выступают тщательная разработка законодательства, стремление сочетать высокую степень детализации правовых предписаний и системные начала, развитый понятийный аппарат, развернутая система правил поведения и обязательных предписаний, которые содержатся в письменных источниках. Право ФРГ является именно германским правом, а не вариантом континентального европейского права [Левитан 2011: 32].

По мнению В.Э. Вайсфлога, юридический язык – это технический язык, но не универсальный технический язык, а язык, который зависит от национальной системы [Weisflog 1987: 179].

Своеобразие любого национального языка права определяется его органической связью с соответствующей правовой системой конкретного государства. Большая часть права, которым занимается подавляющее большинство юристов, относится к соответствующему национальному праву. Исключение составляют международное право, международное частное право и европейское право. Несмотря на некоторое сходство правовых систем, прежде всего стран континентальной Европы, каждое государство имеет свой собственный правопорядок, свои специфические правовые нормы, свои

традиционные формы и процедуры судопроизводства и собственный язык права с соответствующей понятийно-терминологической системой [Левитан 2011: 27].

Язык как культурный код нации является инструментом проникновения и интерпретации правовой культуры, ментальности того или иного народа. Знания и представления о мире, типичные для представителей национальных языков, образуют национальную языковую картину мира. Под картиной мира понимается целостный, глобальный образ мира, который есть результат всей духовной активности человека, всех его контактов с миром [Левитан 2011: 31]. Правовая картина мира отражает политико-правовую культуру общества и трактуется как мировосприятие в категориях и формах национального языка.

Мы обратили внимание на то, что в зависимости от страны происхождения юридического документа (Германии, Австрии, Швейцарии, Лихтенштейна) в юридическом подъязыке употребляются разные термины для обозначения одного и того же понятия (см. примеры ниже). Феномен наличия в юридическом подъязыке разных терминов для обозначения одного и того же понятия в зависимости от страны происхождения юридического документа мы называем вариативностью.

Понятие вариативности

Вариативность является способом существования и функционирования языковых единиц, так как сама природа языка создает предпосылки для возникновения варьирования [Ивлева 1981: 121].

Вопрос вариативности способов обозначения научных понятий разными авторами рассматривается по-разному – как проблема субституции терминов [Жавкина 2004], как проблема полисемии и омонимии [Иконникова 2013], как проблема синонимии [Какзанова 2011].

Вариативность немецкоязычной юридической терминологии не только заслуживает внимания ученых-терминоведов, но и представляет интерес для переводчиков, поскольку зачастую приводит к неожиданным трудностям при выполнении юридического перевода. Необходимо учитывать особенности юридической терминологии в зависимости от национального варианта немецкого языка. Так, русскоязычные юридические термины могут иметь различные переводческие эквиваленты и в национальных вариантах немецкого языка права Австрии, Германии, Швейцарии, Лихтенштейна, Люксембурга. Например, терминам «обязательство», «обязательственное право» в правовой системе ФРГ соответствуют немецкоязычные эквиваленты Schuld, Schuldrecht, а в швейцарском варианте немецкого языка соответственно Obligation, Obligationsrecht, понятие «наследство» в ФРГ передается словами Erbe, Erbschaft, в австрийском варианте – Verlassenschaft [Левитан 2011: 39]. Настоящая статья посвящена исследованию языка права Лихтенштейна и его сравнению с языком права Германии.

Предположительно изменение правовых представлений носителей языка, законодателей и правоприменителей обусловливает несоответствия в системах права и терминосистемах [Иконникова 2013: 64]. Поскольку право в Германии и Лихтенштейне развивалось относительно обособленно, то изменения, происходившие в них, вели к вариативности как отдельных терминов, так и терминосистем.

Как самостоятельное государство княжество Лихтенштейн существует с 1866 года. После Первой мировой войны Лихтенштейн расторг союзнический договор с Австрией и переориентировался на Швейцарию. Очевидно, именно эти территориальные симпатии обусловили тот факт, что правовая система Лихтенштейна сложилась под влиянием австрийского и швейцарского права. Гражданский, Уголовный и Уголовно-процессуальный кодексы следуют австрийским образцам, в то время как торговое право основано на швейцарских законах. Уголовный кодекс Австрии 1852 года применялся в Лихтенштейне до 1980-х годов. В законодательстве Лихтенштейна отмечается, что языком, на котором составляются законодательные акты и корпоративная документация, является немецкий. Но несмотря на то, что юридические тексты

в Германии, Австрии, Швейцарии и Лихтенштейне написаны на немецком языке, терминология для обозначения одних и тех же понятий используется разная.

Юридическая терминология отражает процесс исторического развития права. Правовая система Германии сформировалась под влиянием римского права среди германских племен и развивалась вплоть до сегодняшнего дня. В V веке германские племена уже имели юридическую систему и своды законов.

В современном немецком языкознании редко признается относительная самостоятельность немецкого диалекта Лихтенштейна, как вариант он выделяется лишь номинально, в то время как официальными вариантами немецкого языка признаются диалекты на территории Германии, австрийский и швейцарский диалекты, в котором некоторые исследователи насчитывают до пятидесяти швейцарско-немецких поддиалектов [Поздерова 2012: 1785]. Немецкий язык Лихтенштейна относится к верхненемецким диалектам, на основе которых и сформировался литературный немецкий язык.

Описание договора поручения в немецкоязычном документе Лихтенштейна

Договор поручения представляет собой юридический документ, который фиксирует юридические факты, а именно факты волеизъявления субъектов права. Этот документ относится к административно-правовой сфере и регулирует отношения между субъектами права: частными лицами и юридическими лицами.

К специфике варьирования терминов немецкого языка относится варьирование отдельных частей многосложных терминов (композитное варьирование) и синтаксическое варьирование [Жавкина 2004: 178].

Рассматриваемый документ, составленный на немецком языке в Лихтенштейне, называется *Mandatsvertrag*. В Германии

договор поручения традиционно называется *Auftragsvertrag*. При этом обе части словосочетания переводятся дословно: Auftrag – поручение, Vertrag – договор. Договор поручения – это договор, согласно которому одна его сторона (поручитель) поручает другой стороне (уполномоченному лицу) совершить от имени и за счёт доверителя определённые юридические действия. В рассматриваемом договоре поручения уполномоченное лицо берет на себя обязательство выполнять функцию члена административного совета. Существительное Mandat тоже имеет значение «поручение», поэтому термин Mandatsvertrag вполне можно рассматривать как композитный вариант традиционного существительного Auftragsvertrag. В юридических словарях, как русско-немецком, так и немецко-русском, вариант *Mandatsvertrag* зафиксирован наряду с *Arbeitsvertrag*, при этом существительное *Arbeitsvertrag* стоит на первом месте, а *Mandatsvertrag* – на пятом-седьмом местах среди синонимичных вариантов.

Традиционно в юридическом тексте преобладает тавтологическая когезия, т.е. повторение в каждой следующей фразе одного и того же существительного [Левитан 2011: 24]. Поскольку предметом рассматриваемого договора является поручение, то само это существительное должно неоднократно встречаться в тексте договора. Обычно в немецком договоре поручения употребляется лексема Auftrag. В договоре поручения Лихтенштейна употребляется существительное Mandat. Логика в употреблении данной лексемы, безусловно, есть: если договор называется Mandatsvertrag, то предметом договора является Mandat, а не Auftrag. Правда, стороны договора имеют традиционные обозначения: *Auftraggeber* (поручитель) и *Beauftragter* (уполномоченное лицо). Лексема Auftrag является корневой в обоих существительных.

По справедливому утверждению М.П. Брандес, каждый вид официально-делового документа имеет свою, довольно строгую архитектоническую форму, которая вырабатывалась в течение длительного существования официально-делового стиля и которая должна соблюдаться всеми пользующимися данной формой общения [Брандес 1983: 162]. Стиль юридического документа строго выдержан. Он не допускает фразеологизмов, неологизмов, просторечных слов и выражений. Отмечается, что официально-деловой стиль юридических

документов замкнут, мало проницаем для других стилей. Терминология в договоре употребляется исключительно юридическая. Текст договора близок к общелитературному нормированному языку. Договор формулируется четко, ясно, однозначно, он исключает всякую двусмысленность и разночтение, имеет как любой юридический документ клишированную форму. Когнитивная информация, содержащаяся в договоре, оформляется раз и навсегда установленным образом, согласно строгим конвенциям. Источник и реципиент текстов – административные органы, которым документы нужны для подтверждения прав и полномочий соответствующих лиц. Стандартные обороты, клише, структурно-композиционные особенности являются результатом внутриязыкового отбора, использования тех структурно-стилистических возможностей языка, которые наилучшим образом отвечают задачам, стоящим перед договором поручения.

Языковые средства, оформляющие юридические тексты, относятся к канцелярской разновидности письменной литературной нормы. Характерная черта этого стиля – обилие канцелярских клише [Левитан 2011: 25]. При обозначении сторон договора используется канцеляризм «далее называемый» (*nachfolgend genannt, im Folgenden genannt*). В документе Лихтенштейна использован вариант *im Nachstehenden* (Auftraggeber/Beauftragter) *genannt*. В юридических документах Германии причастие *nachstehend* используется довольно редко, в основном для указания на то, что некоторая упомянутая здесь информация более подробно будет освещена ниже.

«Уполномоченное лицо берет на себя обязательства согласно инструкциям поручителя или третьих лиц» (в оригинале *Der Beauftragte übernimmt Verpflichtungen laut Instruktionen des Auftraggebers oder Drittpersonen*). Мы обратили внимание на слова Instruktionen и Drittpersonen. В немецких юридических документах Германии традиционно употребляется немецкое существительное Anweisungen (инструкции). Заимствованная лексема Instruktionen является лексикографически зафиксированной и занимает в синонимичном ряду четвертое-пятое место. В документе явно используется немецкое, а не английское слово, потому что иначе оно бы имело другую орфографию – Instruction. Ни в одном юридическом документе

Германии не встречается существительное Drittpersonen. Для обозначения третьих лиц используется либо словосочетание dritte Personen, либо субстантивированное порядковое числительное Dritte. В электронном словаре немецкого языка лексема Drittpersonen фиксируется с пометой «употребляется преимущественно в Швейцарии». Как видим, швейцарский вариант употребления проник и в юридический документ Лихтенштейна.

Составитель рассматриваемого договора поручения говорит о сохранении ограничений согласно закону, праву и морали. Для обозначения ограничений употребляется существительное Schranken. В единственном числе лексема die Schranke фиксируется в юридическом словаре со значениями «преграда, препятствие», «граница, предел». Электронный словарь дает гораздо больше значений из самых разных областей знания. Значение «ограничение» характерно только для употребления существительного во множественном числе с пометой «финансовое дело». Понять идею составителя договора поручения можно было исключительно по аналогии: в немецком языке значение «ограничение» передается лексемами Beschränkung или Einschränkung. Как видим, корень во всех трех словах один и тот же. Это позволило нам предположить, что под существительным Schranken понимаются «ограничения». Слово «мораль» соответствует в немецком документе выражению gute Sitte. Это выражение действительно фиксируется в юридических словарях, правда, во множественном числе – gute Sitten и обозначает «добрые нравы», «общепринятые моральные нормы». Как юридический термин в единственном числе не употребляется.

«По распоряжению заказчика назначается уполномоченное лицо» (в оригинале *Auf Weisung des Auftraggebers wird der Beauftragte bestellt*). Для передачи выражения «по распоряжению» в германских правовых документах используется словосочетание auf Anordnung. В правовом документе Лихтенштейна применено словосочетание auf Weisung. Следует подчеркнуть, что это словосочетание зафиксировано в электронных словарях, но занимает девятое-десятое места среди остальных вариантов.

Согласно рассматриваемому договору поручения «уполномоченное лицо не несет никакой ответственности и однозначно заранее отказывается от неё» (в оригинале *Der Beauftragte trägt keine Verantwortung und zum Voraus verzichtet darauf eindeutig*). В немецком языке есть несколько слов и выражений для передачи наречия «заранее», но наиболее употребительным является словосочетание im Voraus. В документе Лихтенштейна употребили словосочетание zum Voraus, которое в немецкоязычном документе воспринимается как ошибка. Может быть, в данном случае и допустимо говорить о швейцарском варианте общеупотребительного немецкого выражения, но пока ещё оно не является лексикографически зафиксированным.

Явную ошибку с точки зрения нормы представляет собой и глагол anerkennen, употребленный в настоящем времени третьего лица единственного числа. По всем законам немецкого языка отделяемая приставка в этом случае должна быть отделена. Но в предложении Der Auftraggeber anerkennt hiermit seine persönliche Verpflichtung zur Bezahlung des Honorars отделяемая приставка *an-* не отделяется. Об этой особенности говорят и швейцарские исследователи Кристе Дюршайдт и Инге Хефти, отмечая отсутствие глагольной рамки в предложениях с глаголами типа *anerkennen, anerbieten* вследствие того, что приставка *an* – вопреки норме не отделяется [Dürscheid u.a. 2006: 139].

В этом же предложении мы обратили внимание на существительное Honorar. Вообще, гонорар – это денежное вознаграждение в области литературы, науки или искусства. В рассматриваемом договоре поручения речь идет о выплатах за членство в административном совете. Эта функция не связана ни с литературой, ни с искусством, ни с наукой. Конечно, следовало бы употребить слово «вознаграждение», во всех германских документах традиционно Entschädigung.

Соответствует норме, но не соответствует традиции существительное Ziffer в значении «пункт»: im Sinne der Ziffer 1 dieses Vertrages («в свете пункта 1 этого договора»). В германском документе употребляется существительное Punkt или даже чаще его сокращенная форма P.

Выводы

Юридическая терминология в составленном на немецком языке юридическом документе Лихтенштейна не часто бывает предметом лингвистического исследования. В перспективе предполагается продолжить работу над изучением немецких юридических документов Лихтенштейна и их сопоставлением с немецкоязычными документами, составленными в Германии. На наши выводы можно экстраполировать выводы У. Аммона, который отмечает, что различия между языковыми стандартами Швейцарии и Германии настолько малы, что практически никто не подвергает сомнению их принадлежность к единому немецкому языку [Ammon 2004: 29]. Мы позволим себе сделать аналогичный вывод применительно к языковым стандартам Лихтенштейна и Германии, хотя подчеркнем, что существуют и такие формы немецкого языка, которые часто имеют значительные расхождения со стандартными формами в названных странах и могут трактоваться как варианты.

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LINGUISTIC ANALYSIS OF NECESSITY EXPRESSIONS IN FINNISH AND POLISH LEGAL TEXT IN TERMS OF DEONTIC STRENGTH

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Abstract: The aim of this article is to highlight an issue of expressing deontic modality in Finnish and Polish in a legal context in terms of deontic strength. The particular interest is put on the Finnish necessive expression *on –t(t)ava* and its Polish equivalents. The choice of this expression is motivated by the fact that it is the most frequent deontic expression that occurred in the analysed material. It is argued that although the meaning of the Finnish and English modal expressions are almost parallel, the corresponding Polish expressions show some discrepancy. This paper aims at giving insight into the differences of the phenomenon on the basis of the Treaty on Functioning of the European Union.

Key words: deontic modality; deontic strength; Finnish legal language; Polish legal language

ANALIZA LINGWISTYCZNA SIŁY KONIECZNOŚCI W KONTEKŚCIE PRAWNYM W JĘZYKU FIŃSKIM I POLSKIM

Abstrakt: Artykuł ma na celu przedstawienie różnic w wyrażaniu stopnia konieczności w kontekście prawnym w języku fińskim i polskim. Przykłady zaczerpnięte zostały z Traktatu o funkcjonowaniu Unii Europejskiej i omówione w odniesieniu do języka angielskiego. Środki przenoszenia modalności deontycznej odznaczające się największą frekwencją w analizowanym Traktacie to wyrażenie nesesywne *on –t(t)ava* oraz jego polskie odpowiedniki. Zauważono, iż użycie

polskich ekwiwalentów tego wyrażenia jest najbardziej zróżnicowane w kategoriach siły deontycznej wśród trzech języków.

Słowa kluczowe: modalność deontyczna; siła deontyczna; fiński język prawny; polski język prawny

Introduction

This year marks the 20th anniversary of Finnish being one of the official languages of the European Union. The Finnish legal genre used in the European Union has been investigated in the Institute for the Languages of Finland (Kotimaisten kielten tutkimuskeskus) in particular with focus on the influence of the EU legislation on the Finnish legal language (e.g. Piehl 2002: 101-112, 2006: 183-194, Piehl and Vihonen 2010). However, no major impact on Finnish syntactic structure has been stated.

A similar subject regarding Polish language was analysed in a thorough, recently published work by Biel (2014a). The book offers insight into the correlations between Polish language used in domestic legal acts and Polish that occurs in translations of the European Union acts. Polish has been an official language in the European Union for over 10 years and the Polish version of EU law shows clear differences, for example 'a strong overrepresentation of obligation modals and a strong underrepresentation of deontic phraseological patterns' (Biel 2014a: 18).

As one of the most common features of the legal languages is the occurrence of modal expressions, it is interesting to verify how this feature is manifested in Polish and Finnish, when it comes to their comparison in the context of the eurojargon. For the time being, it is not possible to investigate the direct impact of both languages on each other basing on existing legal acts, as there is lack of official, parallel Polish-Finnish legal translations. For this reason the material on the basis of which this analysis has been conducted is the Treaty on Functioning of the European Union where the reference language is English as the major language of the European Union nowadays.

This analysis focuses on a comparison of a Finnish necessity expression *on –t(t)ava* and Polish modal verbs *musieć* and *powinien* in terms of their deontic strength. The particular interest is put on these indicators of deontic modality, as they show some discrepancies.

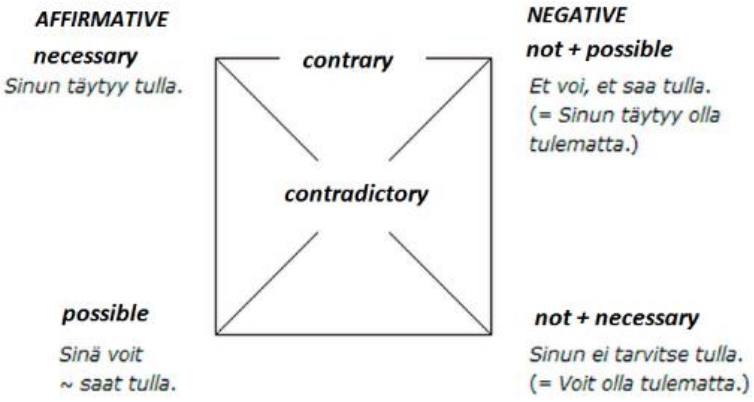
First, the means of conveying deontic modality in Finnish and Polish language are described. Secondly, the background of the research on the deontic strength is presented. Furthermore, analysis that consists of frequency statistics and meanings of the deontic expressions that occur in the text of the analysed Treaty is conducted. At the end of the article an analysis of the sample sentences is shown highlighting the differences in the necessity expressions.

Deontic modality from the Finnish and Polish perspective

Deontic modality in Finnish linguistics is defined as a phenomenon that is based on an obligation or a permission resulting from any social norms or one's own will that refers to 'acts of an intentional agent' (VISK, *deonttinen modaalisuus*). As far as the legal context is concerned, these norms imposed on somebody can be called in von Wright's terms 'heteronomous norms' (Wright 1963: 76). Furthermore, Finnish deontic modality can be expressed with obligation verbs, necessity constructions and imperative mood. However, there is no unanimity regarding the number of Finnish modal verbs in general – it ranges from 14 modal verbs, as in some newer studies (Kangasniemi 1992) to 45 in a study from the 80's (Flint 1980), while the contemporary descriptive Great Finnish Grammar ('Iso suomen kielioppi', ISK) has taken a middle stand by combining both approaches and modal verbs from both studies (VISK § 1563). This discrepancy in number of modal verbs is a result of, what Kangasniemi notices (1992: 291), the great difficulty to establish some formal criteria in Finnish according to which modal verbs could be defined and easily separated, like it is done in other languages, e.g. English.

The basic system of Finnish modality from the point of view of logic is presented in the Figure 1 below:

Figure 1. The square of opposition in Finnish (VISK: § 1613, Graphic 16).



Polish approach to deontic modality as far as the definition is concerned, is rather similar to the Finnish one. It is a very well-studied subject in general Polish (Jędrzejko 1987, 1988). The occurrence and features of exponents of deontic modality in particular in the legal discourse have been a popular research subject recently, as well (Matulewska 2009, 2010, Biel 2014). Polish indicators of deontic modality include modal verbs, semi-modals and phrasemes that substitute them (Biel 2014a: 161). They seem to be more thoroughly defined and described in Polish legal linguistics than correspondingly in Finnish.

Deontic strength

In literature on the subject an issue of deontic strength is sometimes raised (Palmer 1986: 100, Jędrzejko 1987, Kangasniemi 1992, Auwera and Plungian 1998: 82, Verstraete 2005, Larjavaara 2007). The discussion concerns the way the ‘weak’ or ‘strong’ obligation is imposed on somebody. However, scalarity of deontic expressions cannot be conducted in the same way as scalarity of epistemic

expressions that form a perfect scale (Larjavaara 2007: 402-417, Kangasniemi 1992: 8; 391-392). 'It would be logical "purblindness"' to do so (Kangasniemi 1992: 391) because they do not form a full continuum from possibility to necessity. Expressions of obligation thus do not apply to scalar quantity implicatures (Verstraete 2005) and they are quite different from their epistemic counterparts because of some factors like having both a modal source and a modal agent, the specific interaction with tense and especially carrying 'specific presuppositions about the modal agent's willingness to carry out the action described in the clause' (Verstraete 2005: 1416).

With regard to Finnish, Pekkarinen states that it is difficult to separate weak and strong necessity in Finnish as no separate lexical means have been developed for these both types, which are conveyed by the same verb (2011: 185).

In Polish some attempts were made to organise deontic modals on a scale but without taking into consideration the assumptions presented above (Jędrzejko 1987). The interpretation of the differences in weaker and stronger obligation represented by their indicators, *powinien* and *musi*, is sometimes based on the assessment of consequences that would follow not performing an action imposed by some norms. The crucial point here is that performing an action of weak obligation would imply the positive consequences, whereas not performing an action of strong obligation would imply negative consequences (Jędrzejko 1987: 41).

It is still possible to compare deontic modals towards each other and assign them some degrees of strength on a scale, like it is in the study of English modals *must, should, can* by Wärnsby (2006: 33). There, *must* that expresses obligation is on the left side of the scale and conveys speaker's greatest authority over to addressee that decreases towards the right-sided *could*. In the aforementioned study also Swedish modal verbs were placed on a deontic scale according to the categories of obligation, recommendation, permission and volition (Wärnsby 2006: 35).

All in all, however, it is significant in interpreting the modals to take their contextualization into consideration (Wärnsby 2006: 113-116; Pekkarinen 2011: 128).

Analysis of the notions on Finnish and Polish deontic expressions

In this analysis modal verbs, semi-modals and phrasemes were searched for. Only expressions that are modal in all three language combinations at the same time were included into the analysis. The aim of such a method was to assure a smooth extraction and comparison of modal means and highlight crucial issues on modality between these two languages as they have not been studied in comparison so far. For this reason the following exclusion criteria were used. Performative verbs that are not modals as well as non-performative verbs in declarative mood, passive voice and other equivalents were excluded from the analysis. As a result, the expressions meeting the inclusion criteria were extracted from the trilingual display of EUR-Lex, with English language being a reference language.

The expressions that were found in Finnish include: *voida, saada, saattaa, ei saa, ei voi, ei tarvitse, tulee, tulisi, on –(t)tava, olisi –(t)tava, on määrä, on välttämätön, on velvollinen, on kielletty, on sallittua, on oikeutettu/ jklla on oikeus.*

Their Polish equivalents are: *jest upoważniony, jest uprawniony, jest zakazany, jest zobowiązany, ma być, ma prawo, może, musi, należy, nie jest zobowiązany, nie ma obowiązku, nie może, nie powinien, powinien.*

In general, permissibility is a category best represented among modal verbs and the most frequent verb is *voi* (3 pers. sg, 'can/ may',) with 388 results. It is also the most frequent modal in Oulu Corpus – covering all areas of standard Finnish language, analysed by Kangasniemi in 1992: 291. It is followed by necessity expression *on –(t)tava* (*to be*, 3 pers. sg + passive present participle, 'have to/ must') with 77 occurrences, from which 20 is a morphologically similar *olisi –(t)tava* (*to be* in conditional + present passive participle, 'should/ ought to'). On the third place there is an expression of prohibition, a verb *ei saa* (*no* + *saada*, 3 pers. sg negative, 'may not') with 32 results. In Polish the categories are similarly represented: there are 392 occurrences of *móc* ('can, may'), of obligation modals *powinien* ('ought to') is paradoxically most frequent (the enacting parts of the

Treaty should be formulated in a more categorical manner). All results and equivalent combinations are presented in the Table 1 below:

Table 1. The occurrences of modal verbs and expressions in Finnish and Polish.

	jest upoważniony	**jest uprawniony**	**jest wymagany**	**jest zakazany**	**jest zobowiązany**	**ma być**	**ma prawo**	**może**	**musieć**	**należy**	**nie jest zobowiązany**	**nie ma obowiązku**	**nie może**	**nie powinien**	**jest niezbędny**	**powinien**
ei ole velvollinen											X	X				
ei saa													X	X		
ei tarvitse													X			
ei tulisi														X		
ei voi													X			
on kielletty				X												
on oikeutettu	X															
olisi –(t)tava									X	X						X
on määrä						X										
on oikeus	X	X					X	X								
on –(t)tava			X		X	X			X	X						X
on velvollinen											X					
saa	X	X						X	X				X			
saattaa								X								
tulee									X							X
välttämätön			X												X	
voi	X	X					X	X					X			

Interestingly, the Finnish obligation verb *pitää* that is regarded ‘the most common modal verb for obligation’ (Kangasniemi 1992: 99) does not occur in the analysed legal text at all. This observation is confirmed in Kanner, who states that *pitää* constitutes only 1,4 % of all necessity constructions in EU-acts (2011: 55). The same is with Polish necessity verb *trzeba* ‘(one) should, it is necessary to’, which is very common in spoken language (Biel 2014a: 11) but occurs rarely in

the legal material – it is not included in the list of 2000 most frequent words in legal language (Malinowski 2006: 267-286).

The category of necessity is represented almost only by the expression *on –(t)tava* and its conditional form, *olisi –(t)tava*. However, the Table 2 shows that in spite of this their meanings are a bit different in terms of deontic strength. The Finnish *on –(t)tava* expresses obligation and its equivalents in Polish are *musieć* ('must', 22 results) and *należy* ('must', 11 results) but it also has 14 equivalents meaning 'ought to' (*powinien*). The similar expression *olisi –(t)tava* that differs only with the verb *to be* being in conditional clause which makes it less categorical, which is also reflected in the material, amounts up to 17 occurrences in the sense of *powinien* ('ought to') and only 3 with regards to strong obligation. Although these two Finnish expressions have different morphological exponents and they should therefore have different meanings, it is interesting to see that *on –(t)tava* covers both 'weaker' and the 'stronger' necessity despite the fact that *olisi –(t)tava* already conveys the weaker meaning. The comparison in numbers of these two Finnish expressions with Polish ones is in the Table 2 as follows:

Table 2. Comparison of *on –(t)tava* and *olisi –(t)tava* with their Polish equivalents.

	jest wymagany	**jest zobowiązany**	**ma być**	**musi**	**należy**	**powinien**
olisi –(t)tava	-	-	-	1	2	17
on –(t)tava	5	4	1	22	11	14

On –(t)tava

The Finnish *on –(t)tava* is a very frequent obligation construction in the standard language ('välttämättömyysrakenne', Pekkarinen 2011) that comprises the verb *to be* always in the third person singular ('on') and a present participle of the complement verb (Kangasniemi 1992: 356). The typical ending for present participle is a nominative *–tava* which is added to a verb stem, either weak or strong, depending on the

conjugation group. It can have a double or a single 't' also depending on the group. The expression usually takes a genitive subject. It rarely occurs in an epistemic sense and cannot convey dynamic impossibility (Kangasniemi 1992: 359–360). Its dictionary definition includes reference to 'constructions that express obligation [more in a participant-external sense, *pakollisuus*, in terms of Auwera and Plungian 1998] necessity, etc.' and the dictionary example is *Työ on tehtävä* which means 'The job/ task is to be/must be done'. This notion concerns general language and is very laconic. Pekkarinen notices moreover, that 'passive present participle is not modal *per se'* but it gains an interpretation of obligation 'whether the situation is pleasant or undesirable' for the subject of the participle (2011: 5). Furthermore, to relate it to the legal context, Kanner states that 'for some reason for example the necessity expression *[on –(t)tava]* seems to suit the register that the legal drafters approach nowadays'[author's own translation] (2011: 36). This is true and its high frequency is reflected in the studies (Kanner 2011: 34).

Musieć and należy

The three Polish modals that are most frequent *musieć* ('must') and *należy* ('should, must*'*) are regarded as indicators of strong necessity, while *powinien* ('should') as being weaker. *Należy* is an impersonal and indeclinable form that imposes obligation and in principle it is mostly used in non-normative parts of the acts. Moreover, it is considered to express a stronger obligation than *powinien* (Biel 2014a: 164).

Musieć in Polish language is considered to be polysemous. It has about 5 distinctive meanings depending on its relation to other factors. These meanings are logical, dynamic, axiological, psychological and thetic. The last one deals with being obliged to do something by norms and is used in legal interpretation (Zieliński 1972: 40; Ziembiński 1997: 127-134). This interpretation of modal utterances applies only when, for instance, the modal operator *must* is followed by a statement that rules someone's behaviour (Malinowski

2009: 235). Hence, *must* as a modal operator together with other similar deontic means form so called 'apodictic utterances' (Malinowski 2009: 229) which are directly related to imposing obligation and prohibition.

Powinien

Powinien ('should') is also regarded polysemous. The polysemy of *powinien* is disclosed in its five different meanings: prognostic, axiological, advisory, descriptive and normative (Zieliński 2008: 17). In fact, it is no wonder because it is placed on the 148 position in the list of 2000 most frequent words in Polish legal language which is quite frequent given the fact that as far as the contemporary general Polish language is concerned, it is then on a 138 position (Malinowski 2006: 276). However, in spoken language it is often used as referring to moral rules more than to participant-external necessity making it weaker in meaning (Jędrzejko 1987: 32, Wierzbicka 1972). On the one hand, its deontic strength is weaker than that of *musieć* (Biel 2014a: 164), but on the other hand in everyday language the meanings of *musieć* and *powinien* are neutralized (Jędrzejko 1987: 43).

Official style guidelines of the European Union

In addition to the above discussion, some more notions have to be added regarding the institutionalization of these expressions by the official guidelines of the European Union. There are instructions regarding all official languages of EU as to how to use certain phrases in legal drafting. They apply to the normative parts of the binding EU acts. Treaties are binding, so the guidelines that refer to using modals included in the English Style Guide (updated in 2015) and its corresponding versions in Polish (Vademecum tłumacza, updated 15)

and Finnish (Suomen kielen käyttöohjeita*)* updated in 2013 have to be taken into consideration while translating. Below in Table 3 are the guidelines that apply to English modals, summarized by Biel (2014b: 341):

Table 3. Summary of EU guidelines for English modals (Biel (2014b: 341).

Imperative terms		
Positive command	*shall*	*This form shall be used for all consignments.*
Negative command	*shall not* *may not*	*The provisions of the Charter shall not extend in any way the competences of the Union …* *This additive may not be used in foods.* (prohibition)
Positive permission	*may*	*This additive may be used … :*
Negative permission	*need not*	*This test need not be performed in the following cases:*
Declarative terms	Present tense + optional *hereby*	*Regulation … is (hereby) repealed.* *For the purpose of this Regulation, 'abnormal loads' means…*

The guidelines for Polish are scarce and limited to recommendation on the usage of *shall* imposing an obligation or prohibition which is to be formulated with a verb in Present Simple. It is also possible to use Future tense, if the obligation to do a single action clearly determines a fixed date of performing it. However, sometimes it is needed to use *musieć* ('must') or *nie móc* ('shall not') when there is a risk of misunderstanding of the Present Simple form with an ordinary declarative function of the utterance instead of a directive sense. Besides, *should* is to be translated as *należy* in the preamble part.

The guidelines for Finnish are much more comprehensive than in Polish. As regards the equivalents of *shall,* a division is added into the institutions of the European Union (a verb in indicative mood should be used) and agents other than European Union, like member states (the necessity construction *on –(t)tava* is to be used). The

example of the latter is as follows (Suomen kielen käyttöohjeita 2013: 60):

> Member States **shall** amend or withdraw existing authorisations for plant protection
> products containing rape seed oil as active substance by 30 September 2014 at the latest.
>
> Jäsenvaltioiden **on muutettava tai peruutettava** rapsiöljyä tehoaineena sisältävien
> kasvinsuojeluaineiden voimassa olevat luvat viimeistään 30 päivänä syyskuuta 2014.

Besides, in the case of *shall*, some exceptions from the aforementioned rule are possible and they are context-related. For example, when they have a meaning of a future tense, they can get a verb in a Present tense (there is no morphologically marked future tense in Finnish).

Moreover, *should* is to be translated in a conditional clause in a form of *olisi –(t)tava* and its usage is restricted to the parts of the legal acts that do not impose obligation, e.g. a preamble or motivation. Its task is mainly to underline the aim of the act. Otherwise, it should not be used in the articles. Furthermore, the equivalent of the negated *should* is to be translated as *ei tulisi.* Joint Practical Guide for Finnish recommends in addition to avoid using the verb *tulla* when relating to necessity. One more notion concerns the expected results of a regulation or a measure. In this case some other non-modal constructions should be used. It seems then, that the less binding the act, the weaker modality the expressions occurring in a particular act convey.

Translation patterns in Finnish, English and Polish

Before further analysis of different translation patterns is presented on the basis of examples, the two analysed Finnish expressions together with their English equivalents (Table 4), as well as the corresponding

Finnish-English equivalents of all modal expressions are shown (Table 5).

Table 4. Finnish-English equivalents of *on –(t)tava* and *olisi –(t)tava*.

	have to	**is to be**	**must**	**need to**	**shall**	**shall be required**	**should**
olisi –(t)tava	-	-	1	-	-	-	19
on –(t)tava	4	2	29	2	14	4	2

The data presented in the Table 4 shows that English modal expressions and its Finnish equivalents are quite coherent as far as their modal meanings and deontic strength are concerned. The expression *olisi –(t)tava* has a clearly established meaning and matches almost always the modal *should*, indicating thus weaker degree of obligation. *On –(t)tava* expresses necessity and its most frequent English equivalents *must* and *shall* also noticeably impose obligation. The Table 5 sums up all necessive equivalents in Finnish and English.

Among Finnish and English equivalents of *on –(t)tava* there is no such a big discrepancy as in the corresponding Polish-Finnish comparison which is shown in the Table 2. There, one fourth of all occurrences of *on –(t)tava* is used conveying weaker modality alongside the examples indicating 'stronger' modality. These examples are analysed in their context in the next section.

Table 5. The occurrences of modal verbs and expressions in Finnish and English.

	be authorised	be entitled	could	have the right	have to	is to be	may	may + neg.	might	must	must not	need to	neg. + shall	shall	shall be authorised	shall be entitled	shall be prohibited	shall be required	shall have a right	shall + neg.	shall + neg. be required	shall + neg. be obliged	should	should not
ei ole velvol-linen																						X		
ei saa								X			X		X							X				
ei tarvitse																					X			
ei tulisi																								X
ei voi								X					X							X				
kielletty																	X							
oikeutettu	X																							
olisi –(t)tava										X													X	
on määrä						X																		
on oikeus	X	X		X			X									X			X					
on –(t)tava					X	X				X		X		X				X					X	
saa							X	X						X		X				X				
saattaa							X		X															
tulee										X				X										
voi			X				X	X	X					X	X	X				X				

All corresponding deontic expressions juxtaposed together in Polish and English are enclosed to the article in the Appendix 1.

Different equivalent patterns of necessity expressions in Finnish and Polish

The previous section presented the general outline of the necessity expressions that are most frequent in the Treaty among the combinations of modal verbs and deontic expressions in three languages. In order to verify, how differently they indicate the deontic strength, different translation schemes of the analysed expressions are further investigated in their context. As far as the searched combinations in Finnish (*on –(t)tava)* and the Polish *(powinien)* are concerned here are some most common translation patterns:

Example 1. *on –(t)tava – powinien – shall*

> Ennen kuin jäsenvaltio nostaa toista jäsenvaltiota vastaan kanteen (…), sen **on saatettava** asia komission käsiteltäväksi.
>
> Zanim Państwo Członkowskie wniesie przeciwko innemu Państwu Członkowskiemu skargę (…), **powinno** wnieść sprawę do Komisji.
>
> Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it **shall** bring the matter before the Commission.

In this example a member state is obliged to perform an action in connection with another action. The Polish inflected form *powinien* is used contrary to the guidelines and theoretically functions as a recommendation, not an obligation.

Example 2. *on –(t)tava – powinien – will have to*

> Jos komissio päättää pitää ehdotuksen voimassa, sen **on esitettävä** perustellussa lausunnossa ne syyt, joiden vuoksi se katsoo ehdotuksen olevan toissijaisuusperiaatteen mukainen.

> Jeżeli Komisja postanowi podtrzymać wniosek, **powinna** przedstawić uzasadnioną opinię określającą przyczyny, dla których uważa, że wniosek ten jest zgodny z zasadą pomocniczości.
>
> If it chooses to maintain the proposal, the Commission **will have**, in a reasoned opinion, **to** justify why it considers that the proposal complies with the principle of subsidiarity.

This one shows once more an unjustified usage of *powinien* as if it was used in an advisory sense. However, it can result from the future tense in the English version which is preceded by a conditional that introduces some uncertainty.

Example 3. *on –(t)tava – powinien – must*

> Neuvoteltaessa uusien jäsenvaltioiden liittymisestä Euroopan unioniin Schengenin säännöstöä ja toimielinten jatkossa sen soveltamisalalla toteuttamia toimia pidetään säännöstönä, joka kaikkien jäsenyyttä hakevien valtioiden **on hyväksyttävä** kokonaisuudessaan.
>
> W negocjacjach dotyczących przystąpienia nowych Państw Członkowskich do Unii Europejskiej dorobek Schengen i inne środki podjęte przez instytucje w zakresie jego zastosowania są uznawane za dorobek, który **powinien** być w pełni przyjęty przez wszystkie państwa kandydujące do przystąpienia.
>
> For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which **must be accepted** in full by all States candidates for admission.

In the English sentence *must* imposes a categorical obligation on member states, although *must* does not express any 'objective necessity' as recommended in regards to instructions (English Style Guide 2015: 41). The Polish expression indicates weaker obligation again, whereas Finnish seems to state what is to be done as if it combined these two modalities (weak *powinien* and strong *must).*

Example 4. *on –(t)tava – powinien – should*

> [the High Contracting Parties]
> VAHVISTAVAT UUDELLEEN vakaumuksensa, että EIP:n **on** edelleen **suunnattava** suurin osa varoistaan taloudellisen, sosiaalisen ja alueellisen yhteenkuuluvuuden edistämiseksi,
>
> POTWIERDZAJĄ swoje przekonanie, że Europejski Bank Inwestycyjny **powinien** nadal przeznaczać większość swoich środków na wspieranie spójności gospodarczej, społecznej i terytorialnej (…)

REAFFIRM their conviction that the European Investment Bank **should** continue to devote the majority of its resources to the promotion of economic, social and territorial cohesion (…)

\- - -

OVAT SITÄ MIELTÄ, että yhteisön toimielinten **on** tätä sopimusta soveltaessaan **otettava huomioon** Italian hallituksen lähivuosina jatkuvat ponnistelut (…)

SĄ ZDANIA, że instytucje Wspólnoty, stosując niniejszy Traktat, **powinny** brać pod uwagę wysiłek, któremu będzie musiała podołać gospodarka Włoch (…)

ARE OF THE OPINION that the institutions of the Community **should**, in applying this Treaty, take account of the sustained effort to be made by the Italian economy (…)

The passages above are clear examples of the usage of weaker modality in a non-normative part of the act, which is the declaration at the end of the document. Although Polish and English use weaker obligation modals, Finnish does not make use of the weaker conditional *olisi –(t)tava.*

Example 5. *on –(t)tava – należy – must*

Neuvosto voi antaa neuvottelijalle ohjeita ja nimetä erityiskomitean, jota **on kuultava** neuvottelujen aikana.

Rada może kierować wytyczne do negocjatora Unii oraz wyznaczyć specjalny komitet, w konsultacji z którym **należy** prowadzić rokowania.

The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations **must be conducted**.

Here the highlighted expressions have a rather descriptive function as they are introduced in a subordinate clause. They also do not have any subject.

Example 6. *olisi –(t)tava – powinien – should*

VAHVISTAVAT UUDELLEEN vakaumuksensa, että rakennerahastoilla **olisi** edelleen **oltava** huomattava merkitys unionin tavoitteiden toteuttamisessa yhteenkuuluvuuden alalla (...)

POTWIERDZAJĄ swoje przekonanie, że fundusze strukturalne **powinny** nadal pełnić istotną rolę w osiąganiu celów Unii w zakresie spójności (...)

> REAFFIRM their conviction that the Structural Funds **should** continue to play a considerable part in the achievement of Union objectives in the field of cohesion (...)

The above examples are coherent with each other in terms of modal strength and comply with the style guidelines. As regards Finnish, there are 17 instances of such a usage in the whole text which accounts for almost all of the occurrences of the weaker *olisi –(t)tava.*

Conclusions

Polish language version shows many discrepancies regarding the quality of modal verbs in comparison to Finnish and English versions. Especially it is the case of *powinien*, considered to indicate weaker modality. It seems that in many contexts its meaning is usually equal with the expressions' conveying strong obligation, like *musieć.* It is sometimes a hybrid like Finnish *on –(t)tava.*

One of the factors that may have an impact on this situation is that Polish is not as much institutionalized and normalized in terms of using the modals (Biel 2014a: 18).

Finnish obligation expression *on –(t)tava* seems to be a hybrid expression that conveys a meaning that can be interpreted in terms of a weaker and stronger necessity, with the distinction that the conditional clause (*olisi –(t)tava*) can be regarded as a similar in meaning to *should* and *powinien*, which is weaker. *Olisi –(t)tava* can be interpreted as even weaker than *on –(t)tava.*

The context plays an ancillary role in interpreting the deontic strength of modal verbs and expressions. This applies in particular to the treaties and acts of the European Union and their macrostructure which influences different writing styles. The less binding the act, the weaker deontic degree the expressions have.

On the whole, in case of interpretation of deontic modals in legal context there is an assumption about the normative character of the legal rules (Zieliński 2008: 175).

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Appendix 1. Polish and English equivalents of the Finnish necessity expression, *on –(t)tava* and *olisi –(t)tava.*

jest upoważniony	**jest uprawniony**	**jest wymagany**	**jest zakazany**	**jest zobowiązany**	**ma być**	**ma prawo**	**może**	**mógłby**	**musi**	**należy**	**nie jest zobowiązany**	**nie ma obowiązku**	**nie może**	**nie powinien**	**powinien**	
X	X															**be authorised**
	X															**be entitled**
								X								**could**
						X										**have the right**
									X						X	**have to**
					X					X						**is to be**
	X					X	X									**may**
							X						X			**may + neg.**
							X									**might**
		X							X	X					X	**must**
													X			**must not**
										X						**need to**
													X			**neg. + shall**
				X			X		X	X					X	**shall**
X																**shall be uthorised**
X	X					X										**shall be entitled**
			X													**shall be prohibited**
				X											X	**shall be required**
						X										**shall have a right**
							X						X	X		**shall + neg.**
													X			**shall + neg. be required**

											X	X				**shall + neg. be obliged**
										X					X	**should**
														X		**should not**

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TRAPS OF ENGLISH AS A TARGET LANGUAGE IN LEGAL TRANSLATION

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Abstract: Translating legal texts into English requires that a translator should make a qualified decision with respect to a variety of legal English, or its modification, to be used as the target language. The analysis should be aimed at choosing the best possible "variety" of legal English at all "linguistic" levels – grammatical (morphology and syntax), semantic and conceptual (relevant terminological choice), textual (relevant text types/genres) and pragmatic (considering potential addressees). The decision relating to "which legal English" should be used may often be motivated by the type of target legal system (e.g. common law, continental law, sharia, etc.) and by an envisaged ultimate recipient of the translated text (whether the recipient has any legal background, previous experience in legal transactions conducted in English, etc.). The paper deals with the relevant aspects of such decision-making and provides examples of both useful options and confusing alternatives.

Key words: legal translation; jurilinguistic analysis; conceptual analysis; legal terminology

Překládání právních textů do angličtiny vyžaduje, aby se překladatel kompetentně rozhodl, jakou varietu právnické angličtiny nebo její modifikaci použije ve svém překladu jako cílový jazyk. Rozhodování by mělo vést k volbě takové variety, která bude optimální ve všech jazykových rovinách (od gramatické, přes sémantickou a pojmovou až po textovou) a bude odrážet relevantní pragmatické aspekty zejména s ohledem na konečného příjemce překladu a jeho právnělingvistické prostředí.

Podstatným faktorem při rozhodování je charakter cílového právního systému (např. rozdíly mezi kontinentálním právem a právem common law) a osoba konečného příjemce, tj. jeho obeznámenost s právem, předchozí zkušenosti s angličtinou v právu apod. Tento text se věnuje podstatným aspektům takového rozhodování překladatele a uvádí příklady dobrých i méně dobrých řešení.

Klíčová slova: právní překlad; právnělingvistická analýza; pojmová analýza; právní terminologie

PUŁAPKI JĘZYKA ANGIELSKIEGO JAKO DOCELOWEGO W PRZEKŁADZIE PRAWNICZYM

Abstrakt: Przekład tekstów prawniczych na język angielski wymaga podejmowania świadomych decyzji translatorskich dotyczących wyboru wariantu języka docelowego i jego ewentualnych modyfikacji. Analiza powinna mieć na celu dokonanie wyboru najlepszego z możliwych wariantów na wszelkich poziomach: gramatycznym (morfologia i składnia), semantycznym oraz konceptualnym (wybór właściwej terminologii), a także pragmatycznym (uwzględnienie potencjalnego odbiorcy tekstu). Wybór wariantu może być uzależniony od docelowego systemu prawnego (prawo kontynentalne, common law, shariat, itd.) i docelowego odbiorcy (jego znajomości prawa, doświadczenia w obrocie prawnym, itd.). Praca dotyczy wybranych aspektów procesu decyzyjnego tłumacza. Autorka ilustruje wywody przykładami przydatnych rozwiązań i niebezpiecznych pułapek.

Słowa klucze: przekład prawniczy; analiza jurilingwistyczna; analiza konceptualna; terminologia prawnicza

1. Introduction

Globalization, apart from various definitions oriented towards economic objectives and outcomes, is a process of massive interaction among people, entities and nations worldwide. In order to make such interaction practicable, swift and efficient a common code is useful and even necessary to enable communicating parties to interact. Despite some historical attempts[1] to develop an artificial language to replace natural languages, which in fact divide people, and to facilitate

[1]Esperanto was developed in 1887 in Poland.

communication between individuals, entities and states with different languages, there has been a gradual but natural process of turning one language – English – into the global language in almost all spheres of human existence including the legal domain.

English is the only natural language that has shown its potential to be a global language. A modest estimate indicates there are more than 1.5 billion users of English worldwide (Crystal, 1997: 61). Naturally, the level of their English proficiency varies[2]. Besides native speakers of English, English has been spoken and written by individuals with different mother tongues, and with varying degrees of competence to use English "properly"; people are usually determined in their use of English by various objective and subjective factors, such as a different purpose for using English, different communication environments and partners (e.g. English native vs. non-native speakers), different degrees of linguistic competence and personal motivation, etc.

The English language has become a means of uniting people in communication and this role has been more or less properly performed; however, the language itself has diversified and transformed into a web of not only geographical varieties of English in "traditional" English-speaking countries and in former British colonies, but also varieties used within specific institutions and subject-areas, such as international organizations (e.g. the United Nations), supranational entities (e.g. the European Union), international commerce or public international law.

[2]English language proficiency has been categorized primarily for the purposes of language teaching. Professor Kachru (1982) introduced a three-circle classification: (a) inner circle, i.e. "traditional" English bases composed of countries and regions where English is a *mother tongue* for an absolute majority of the population; (b) middle (or outer or extended) circle essentially encompassing former British colonies and territories where English is considered a *second language* (ESL); and (c) expanded (and ever-growing) circle where English is used for international communication in the widest sense of this term and is a foreign language (EFL) to most communication partners.

2. Varieties of legal English

Just as there is no uniform general English[3] there is nothing like a universal legal English. As noted by lawyers at the international law office Evershed LLP (2011: 6) about 70 countries use English as an *official* language, i.e., English is used in government, legislation, courts, media and education in these countries. As a result, there are about 70 identifiable geographical varieties of legal English. These would include (a) "traditional" common law countries (cf. Kachru's inner circle); and (b) former British colonies and dependent territories where common law was imposed and original local systems were substantially modified (cf. Kachru's outer circle). Next, there are two larger *groups* of "institutional" varieties of legal English, namely (c) English in international law and international organizations (e.g. the language of conventions, treaties, international judiciary and their case law, etc.); and (d) English of the European Union law (e.g. English of legislation, *acquis communautaire*, EU judiciary and its case law, etc.). One more group deserves mentioning, namely (e) local translational varieties. These are quite often needless "mutations" of varieties of English under (a) – (d). One way a local variety may "form" is through, for example, an inadequate first quasi-official[4] translation of a newly adopted law, such as a translation of a major piece of legislation posted on the official Internet site of a governmental agency. The language of the translation tends to spread rather quickly invading private legal documents[5] such as

[3]All non-native learners of English become very soon aware of at least two geographical varieties – British and American.

[4]In most unilingual countries, i.e. countries having one official language, documents of whatever type (primary and secondary legislation, contracts, legal memoranda, etc.) published wherever in other than the official language are not considered official linguistic versions as soon as any interpretive conflict arises and the issue is brought before a local court.

[5]Private documents under continental law are always filled with quotations of legislative provisions and references to particular legislative clauses, which are slightly rephrased in the document. If there is any published translation of a required legal regulation available to translators they would usually prefer quoting whatever has already been translated rather than translate legal provisions by themselves.

contracts, various deeds, etc. An inadequate translation may be caused, for example, by a varying degree of literal and inaccurate translation of the source legal text (SLT) terminology, which can be partly caused by a jurilinguistic specificity of the source law and presumed "non-existence" of a target law equivalent. In addition, existing translational solutions, whatever relevance and quality these may have, are subsequently (and frequently) employed by translators by tradition[6]. Particularly English terminology within such translational varieties is often perceived by the recipients of a translation as *jurilinguistic realia*, i.e. terms representing concepts typical of, and special for, the particular system of law, whether legally and linguistically justified or substantiated. Two examples may illustrate the point.

Example 1
Needless (and confusing) choice of an English equivalent

An insufficient initial conceptual analysis led a translator to choose the term "**joint-stock company**" for the Czech 'akciová společnost' (spółka akcyjna) in the beginning of the 1990s when a new company law was adopted in Czechoslovakia. Since then this term has established itself as a regular translational equivalent (not only[7]) within the Czech environment for the concept of a business entity designated as a "stock corporation" (US) or "public limited company"

Needless to say, sub-standard legal translations are occasionally also made public (see, for example, Chromá 2014).

[6]It should be noted that most translators of legal texts are non-lawyers by education and their knowledge of source law and target is usually limited, if any. For a translator with insufficient legal background knowledge it is rather difficult to find a relevant target law and language equivalent as most translators would not indulge in comparative jurilinguistic analysis of their topic to identify proper equivalence at least at the level of lexis; in such situation, translators usually resort to bilingual law dictionaries and other sources without checking the quality and reliability of equivalents offered because of a widely spread, but often unjustified, assumption that whatever has been made public is a quality product.

[7]A quick scan of the Internet clearly suggests that the term "joint-stock company" is quite widely spread as an equivalent substituting for a "stock corporation" in many post-communist countries developing their new business law, relating terminology and its potential translational equivalents at more or less the same time.

(UK) or, later, as a "public limited liability company" within EU law. The US term "stock corporation" should have been the primary option for the translator as this term has an unambiguous meaning corresponding to the substance of that entity under Czech law. On the contrary, the English term "joint-stock company" within common law has at least two basic (and widely spread) meanings neither of which reflects the main conceptual elements of the Czech 'akciová společnost': in Great Britain, it is mostly perceived as a terminological archaism denoting an unincorporated entity established to pool the share capital of individual shareholders usually with unlimited liability (see Joint-Stock Companies Act 1856); in the USA, some states, such as Texas or New York, define "joint-stock company" as "a company *usually unincorporated* which has the capital of its members pooled in a common fund; transferable shares represent ownership interest; shareholders are *legally liable for all debts of the company*" [8]. Such entity under US law has some conceptual elements typical of a corporation but others are closer to a partnership (the type of business entity essentially missing in Czech law). What significantly differs if compared with the Czech "akciová společnost" are two conceptual elements indicated in italics in the above definition – often unincorporated entity (i.e. not registered in a register of companies), and personal liability of shareholders for the debts of the entity, which is fully absent in the Czech "akciová společnost" where shareholders are not liable for the debts of their company at all.

Example 2
Justified coining of a new English term

An English translation of a Dutch contract contained the following provision: "An **executory attachment** is made of any substantial part of the Borrower's assets or a **conservatory attachment** is converted into an executory attachment." The Dutch terms would be 'executoriaal beslag' and 'convervatoir beslag' respectively. The former would entail the seizure of assets for the purpose of selling or liquidating them, and so force the debtor to fulfill his or her dues. The latter is a preliminary step, namely to freeze someone's assets to

[8]http://www.thefreedictionary.com/Joint-stock+companies

prevent the debtor from selling or liquidating them by him or herself, which would make it difficult for the creditor to get his or her money. Once conservatory attachment is made, the creditor would nonetheless require a subsequent court decision on the merits, in his or her favor, before converting a ʻconvervatoir beslagʼ to an ʻexecutoriaal beslagʼ and moving ahead with selling of the assets[9]. The translator of this contract from Dutch to English in fact coined English terms designating legal concepts absent in common law and, as a result, missing in its English terminology repertoire; for a reader experienced in the field of judgment enforcement and its English terminology it should not be a problem to interpret those two English translational equivalents more or less correctly. However, it should be noted that if a translator opts for coining a new English term assuming there is none in common law English he or she should provide, in the first occurrence of such term in the translation, a brief explanation or definition of the source law concept which is to be designated by the coined term. The interpretation of such terms may not always be as straight-forward as in this example.

2.1 Which variety

It should be emphasized that whatever variety of legal English one may encounter it always stems from the "original" legal English, i.e. that of common law. German attorney (and British barrister) Volker Triebel, in his explaining why English need not be the best option to choose as the language of a contract, notes: "Legal English and common law grew up together. Many English legal terms and concepts can only be understood against a common law background." (2009: 149). A similar congenital tie exists between legal French and French law (and French and Quebec law), legal Polish and Polish law,

[9]The explanation of the two Dutch concepts was provided by Professor C.J.W. Baaij from the University of Amsterdam Law School in private correspondence with the author of this text.

legal Czech and Czech law, etc. This should be kept in mind by translators of legal texts whatever source and target languages would be at issue: the languages as a means of legal communication would always be deeply rooted in their "original" legal systems and would differ conceptually. As a result, reaching terminological equivalence would require in some cases that translators should resort to substitutive strategies, such as choosing explicative equivalents or even coining new terms.

In practice, most translators of any subject-area texts into English choose either British or American rules of spelling (often supported by their software text-editor). However, spelling is just a marginal aspect of a particular geographical variety of general English; other linguistic phenomena (at the level of lexis, syntax, text, etc.) applied in the translation into English need not belong to the same variety for various (essentially a translator's subjective) reasons. A translator of legal texts should go further in his or her conscious preparation for the translational performance, namely to select such variety of legal English which would facilitate a smooth transfer of legal information from the source text (the source language and the source legal system) into the target text in English that need not necessarily be addressed to a common law lawyer, but should make legal sense to its recipient of any legal background.

There are several factors determining the translator's choice of a variety of legal English for the translation, of which two appear to be crucial: (a) the ultimate recipient of the target legal text (translation), and (b) the purpose of the translation.

The primary ultimate recipient of a translation can, but need not be, directly identifiable. If it is clear that the translated text is to be used by a recipient in a particular (English-speaking) country the translator may choose a relevant variety of legal English at least by selecting proper legal terminology used in the translation[10]. Ascertaining who is to be the primary recipient of a translated legal text may be much easier when private law texts are to be translated,

[10] Visible differences can be found, for example, in procedural terminology reflecting the specificity of proceedings (e.g. US plaintiff vs. UK claimant), and historical and geographical peculiarities of judicial institutions and their designation (e.g. the system of courts and their nomenclature).

such as contracts, where the contracting parties are expressly established[11]. The primary recipient of a translation is also traceable in some public law texts, such as extradition documents (it is always clear which country and which court are requested), judgments to be enforced abroad (e.g. judgment of divorce or judgment determining the maintenance duty), etc. In all other situations where no particular addressee of a translated legal text is indicated the translator should cautiously resort to a more "universal" variety of legal English particularly at the level of lexis with more explicative equivalents, translator's notes describing concepts belonging to the legal reality of the source legal system, etc. The translator should aim at properly informing a potential recipient of the content and sense of the source legal text so that the recipient would not be confused in the interpretation of the translated text and/or application of its content. Example 3 suggests an approach to forming explicative equivalents built upon existing English (common law) terms and supported by the conceptual analysis of the source law terms.

Example 3

Explicative terms as an extension of existing English (common law) terms

Two Czech terms, *předdůchod* and *předčasný důchod*, have an essential conceptual element in common – early retirement; this English term can be then used as the basis of an explicative term. The Czech institutions differ in their sources of funding, which is also the reason why there are two different Czech legal terms employed to

[11]This is the case when the translation is assigned to be completed because the parties are speakers of different languages and the English version of their contract serves, for example, their smoother communication. However, it should be noted that the translated contract can be used in different environments with different recipients, such as a piece of documentary evidence in proceedings before court. In such case – at least in the Czech Republic – the English version of the contract would be translated into Czech because only documents in Czech may be considered by a judge in proceedings: as a result the recipient of the English translation would be a certified (sworn, licensed, court) translator into Czech.

denote the two concepts; as a result the funding element would constitute the complementary[12] (clarifying) part of the term:
předdůchod (no legal equivalent in Polish law) – early retirement *funded from a private pension scheme*
předčasný důchod (świadczenia przedemerytalne) – early retirement *funded from the state social security system*.

2.2 Purpose of translation

The purpose of translation is a more complex category. It usually begins with the question *why is the translation commissioned?*, followed by an analysis of the circumstances under which the translation is to be completed and outcomes (objectives) to be achieved.

Christiane Nord (1991: 72) distinguishes between *instrumental* and *documentary* translation in that they reflect different purposes (within the general theory of translation). The former is a communicative instrument conveying a message directly from the source text author to the target text recipient, having the same or analogous function as the source text. Documentary translations serve as a document of a source culture communication between the author and the source text recipient. To apply this dichotomy to legal texts, instrumental translations would encompass normative and constitutive texts such as contracts, judgments, etc., in the sense that the translated legal text would have the same (or very similar) legal effect as the source legal text. The translation of local legislation into a language not official in the jurisdiction would fall within the category of documentary translation, i.e. the translation of the source legal text can, more or less correctly, transfer legal information contained in the source legal text, but would never be binding on its recipient as the source legal text would be with respect to its primary addressees.

[12]Professor Šarčević designates this type of conceptual elements as *accidental* (2000: 238).

Legal texts within one region having one legal system and using just one natural language are primarily drafted to address individuals and/or entities under the local jurisdiction speaking a single language and their purpose is, generally speaking, to make their addressees to act accordingly, i.e. to apply the substance of the texts in practice. Where bilingual or multilingual translation becomes an issue and legal texts become source texts (ST) essentially two basic situations may be identified and determine the purpose of the translation:

(a) The source legal text is drafted in the source language (SL) within the source legal environment for standard source law recipients, but, subsequently, the need for its translation into the target language (TL) emerges. The translator becomes a secondary – but unintended – receiver and an intermediary between the source text and its potential TL recipient. One should speak of signification[13] rather than communication between the author of the ST and the recipient of the TT (Jackson 1995: 68). Two situations may occur:

(i) the purpose of the target text (TT) differs from that of the source text (ST) – for example, the Czech translation of a contract originally drafted in English, which was commissioned by a judge for the purpose of proceedings before a Czech court would serve only as evidence of the contractual relationship between the parties for the purposes of those court proceedings; or

(ii) the purpose of the TT is close to, or even identical with that of the ST – for example, a judgment issued in one EU Member State should be translated into the language of the Member State where it is to be enforceable under EU law.

[13]Cf. Grice, P. 1991: 359-368. Signification is the process of making sense of the target legal text entirely from the receiver's perspective because there was no intention on the part of the original sender to convey the sense of her message through a different language to a receiver in a different legal environment, i.e. to a member of a remote and different *semiotic group* determined by and using "the same conventions of sense construction" (see Jackson 1995: 5).

(b) The source legal text is drafted for the (intended) recipient who is assumed not to be proficient in the SL (irrespective of whether legally proficient), i.e. translation is presumed from the beginning and the purpose of both the ST and the TT would be essentially identical (for example contracts executed in two languages, EU legislation translated into the languages of EU Member States, an international treaty translated into the language of a Contracting State, and so on).

Naturally, there is a wide range of source legal texts within public and private law oscillating between the two basic groups under (a) and (b) outlined above. A translational approach to dealing with the purpose of a particular translation selected by the translator would depend not only on his or her linguistic competence[14], but what is usually much more important is the translator's awareness or even knowledge of the source legal system and its respective conceptual and terminological repertoire on the one hand; on the other, it would be the translator's competence to select an appropriate variety of legal English and to identify the degree of potential equivalence between its terminological repertoire and the source law concepts in the ST, and his or her ability to deal with cases of non-equivalence[15].

[14]Cf. Cao 2007: 39-48 and her dichotomy between *translation competence* and *translation proficiency* a legal translator should achieve in order to produce as high quality a translation as practicable. In the model of translation competence (2007: 41) she interlinks *translational language competence* (e.g. SL and TL), *translational knowledge structures* (e.g. source law and target law), and *translational strategic competence* which is interdependent with the context of a particular translational situation. Strategic competence in translation can be seen as "the linkage that relates translational language competence to translational knowledge structures and the features of the context in which translation, and hence interlingual and intercultural communication, takes place" (2007: 48). Translation proficiency is then seen as a global skill integrating both the competence and ability to activate this competence in the process of translation (2007: 39).

[15]Cf. Šarčević (2000: 238) distinguishing among near equivalence, partial equivalence and non-equivalence.

3. Translation as interpretation

One of the basic postulates of the theory of legal translation (proved by practice) is that *translators of legal texts are able to transfer into another language only what they understand in the source text*. Lawyers interpret law in order to apply it, translators must interpret a legal text in order to "just" convey the information into another language.

It should be noted in this context that lawyers and translators belong to different semiotic groups. Jackson (1995: 96) explains how a semiotic group may be formed: "Whatever the degree and nature of variation, if the language of a particular profession, or other occupational group, has sufficient peculiarities to form a barrier to comprehension by those not member of the group, then we are in the presence of a group defined by language (a "semiotic group")." In other words it is "a group which makes sense (of law) in ways sufficiently distinct from other such groups as to make its meanings less than transparent to members of other groups without training or initiation." Differences in interpretation of a legal text by these two semiotic groups are caused primarily by the extent of their knowledge of law (substantial and solid in the case of lawyers, and very limited or non-existent in the case of translators). The purpose of interpretation is the second discriminating aspect: application of law by lawyers presupposes their profound understanding of the law and the environment where the law is to be applied, whilst transferring the legal information into another language is built upon a comparative jurilinguistic analysis (i.e. the source language and law, and the target language and law).

The aim of interpretation is essentially to understand, "to ascribe the meaning to, or inscribe the meaning in" the text (Phillips 2003: 90). However simplified the process of translation may be it always proves the common truth that translation is a special kind of interpretation (Eco 2001: 13) and translators are able to transfer into another language (or code) only what they decode in the source text, or how they construe the signification and meaning of the ST message. Or, as Joseph (1995: 33-34) suggests, translators should

interpret the source legal text rather than 'merely' translate, i.e. they should transfer the sense of the ST, not just words, and they should intervene in the text semantically, stylistically, and intellectually, to the extent called for. In other words and more generally, the translator's primary role is to make sense of the source text for the TL recipient: not only should the translator interpret the source legal text correctly but also his or her translation should enable the ultimate recipient to interpret the target text in such a way that its sense is as close as possible to the sense of the source text.

What is crucial here is the clear, unambiguous, formally transparent, consistent and semantically predictable language of a source legal text, which enables the translator to rightfully interpret it and appropriately translate[16]. Similarly, the clear, unambiguous, formally transparent, consistent and semantically predictable language of the translated legal text enables its recipient to rightfully interpret it and act accordingly. Therefore the primary task for the translator of a legal text is to transmit the meaning of the source legal text and its segments into the TL in such a way that the target legal text, as a whole and in all its parts, makes (legal) sense to the ultimate recipient, approximating the sense of the source legal text as perceived by its intended (original) recipient. This is the gist of what can be termed the semiotics of legal translation.

4. Comparative jurilinguistic analysis

Using English as the target language in legal translation would always require an essential analysis of its jurilinguistic potential. Such analysis would be a component part of the process of selection of a suitable variety of legal English for the respective translation. Three segments of such analysis seem substantial, namely purely linguistic elements expressing modality and gender, semantic relations of

[16] Needless to say, it also enables the lawyer to rightfully apply it.

synonymy and polysemy[17], and conceptual differences and their reflection in legal terminology of the source and target languages respectively[18].

4.1 Modality

There is a widespread view that legislative language is reducible to norms expressed in terms of three deontic modalities, that which is required, prohibited and permitted. (Jackson 1999: 17). The correct choice by translators from amongst the relevant modal auxiliaries *shall*, *may*, *may not*, *must, must not* would render possible the correct interpretation of a translated proposition.

The most controversial modal is *shall* which is claimed to be the most misused word in all of legal language (Schiess 2005). Academic lawyers oppose *shall* to such an extent that for example Bryan Garner, editor-in-chief of the Black's Law Dictionary and author of various legal writing books and manuals, called one of his chapters "Delete every SHALL" (2001: 105). The reason for such opposition is quite simple. Banful (2013) clearly explains the unsuitability of this modal for any legal text as follows: "Words are presumed to have a consistent meaning in clause after clause, page after page but *shall* does the opposite and this is why *shall* is among the most heavily litigated words[19] in the English language. *Shall*

[17]We focused on these issues in *Synonymy and Polysemy in Legal Terminology and Their Applications to Bilingual and Bijural Translation.* Research in Language 9/1 (2011), pp. 31-50.

[18]A more extensive jurilinguistic analysis of these aspects for the purposes of translation into English is provided in Chromá 2014a and Chromá 2014b (in Czech).

[19]There is a wide range of judgments in English-speaking countries substantiating the ambiguity of *shall* in various legal texts (e.g. the case decided by the British Court of Appeal *BW Gas AS v JAS Shipping Ltd* [2010] EWCA Civ 68). Some international law offices, such as Allen & Overy, even adopted (in 2010) the principle of excluding *shall* not only in their overall drafting guidelines, recommending to their lawyers to

offends the principle of good drafting. It does not always retain its meaning throughout a document."

The range of meaning of the modal in the legal domain is wide. For example, Garner (1995: 939-941) provides and exemplifies the following functions of *shall*: (a) imposing a duty on the subject of the sentence; (b) imposing a duty on an unnamed person (not on the subject of the sentence); (c) giving permission (in the meaning of *may*); (d) imposing a conditional duty; (e) acting as a future-tense modal; (f) expressing an entitlement not duty; (g) being directory in the meaning of should. The translator should be aware of the risk of using *shall* in the translation into English as interpretation of the modal by a recipient of the translated text need not correspond to the intended meaning of modality in the clause or sentence used in the source text. There are several alternatives for avoiding *shall* in the translation (as well as in original English legal writing). Excellent sources of inspiration in this respect are legislative guidelines published in individual English speaking countries by their legislative bodies[20] to ensure that all laws passed by parliament and all secondary legislation adopted by central executive agencies would be expressed in a clear, unambiguous, formally transparent, consistent and semantically predictable language. For example, the Drafting Guidelines 2011 (p. 14)[21] suggest several alternatives to *shall*, of which three seem extremely relevant to translation into English:

- *must* in the context of obligations (although *is to be* and *it is the duty of* may also be appropriate alternatives in certain contexts);
- the *present tense* in provisions about application, effect, extent or commencement; and

avoid *shall* in their drafting, but also extended this recommendation to their translators into English.

[20]For example, the Office of the Legislative Counsel of the U.S. House of Representatives; the Office of the Parliamentary Counsel, Cabinet Office, London, UK; the Office of Parliamentary Counsel of the Australian Government; etc.

[21]Published by the Office of the Parliamentary Counsel, Cabinet Office, London, UK; retrieved from https://www.gov.uk/government/publications/the-office-of-the-parliamentary-counsel-guidance.

- *is to be* in the context of provisions relating to statutory instruments[22].

Needless to say, an appropriate substitution for *shall* requires that the translator correctly understand and interpret the source text modality. The following example shows how traditional "shall" clauses may be redrafted in order to avoid the modal.

Example 4
Reformulation of contract provisions:[23]

Article I The VESSEL…**shall** be designed, constructed, equipped and completed in accordance with the provisions of this Contract and following the Specifications and Plans of the date hereof, attached hereto and signed by the parties hereto (hereinafter collectively called the "Specifications"), making an integral part hereof…	The BUILDER **will** construct and equip the Vessel in accordance with the provisions of this Contract, the Specifications and Plans …
Article 2 …The Contract Price **shall** be exclusive of the articles to be supplied by the BUYER as provided in Article XVII hereof and described as the BUYER's Supply in the Specifications…	The Contract Price **is** exclusive of the articles to be supplied by the BUYER under Article XVII and described as the BUYER's Supply in the Specifications…
Article VII….Provided that the BUYER **shall** have fulfilled all of its obligations stipulated under	The BUILDER and the BUYER **must** complete the delivery immediately when the Buyer

[22]R. Quirk, S. Greenbaum, G. Leech a J. Svartvik – authors of the authoritative book "A Comprehensive Grammar of the English Language" – classify the phrase *is to be to* as a modal idiom (1985: 137).

[23]The reformulation was part of the "Discussion Paper" written by Philip Carstairs in March 2010 as an Allen & Overy internal document analyzing the function of *shall* in legal drafting and substantiating its overuse (the document was received with courtesy of Allen & Overy's Prague Office).

this Contract, delivery **shall** be effected forthwith by the concurrent delivery by each of the parties hereto to the other of the PROTOCOL OF DELIVERY AND ACCEPTANCE, acknowledging delivery of the Vessel by the BUILDER and acceptance thereof by the BUYER…	**fulfils** all of its obligations under this Contract. Delivery **will be** effected by the Builder and Buyer exchanging the duly executed PROTOCOL OF DELIVERY AND ACCEPTANCE, acknowledging delivery and acceptance of the Vessel by the BUILDER and the BUYER respectively.

Many non-native speakers of English perceive the modal idiom *is to be* much closer to the soft meaning of the modal *ought to* rather than as a phrase imposing an obligation. The following example composed of selected provisions of the British Defamation Act 2013 shows that interpretation of the modal idiom *is to be* unequivocally suggests a duty if used in the English text properly. The context (as always) appears to be crucial in attaining the correct meaning of the modal idiom.

Example 5

> *Section 6*
> "(7) Nothing in this section *is to be* construed— ..."
> (8) The reference in subsection (3)(a) to "the editor of the journal" *is to be* read, in the case of a journal with more than one editor, as a reference to the editor or editors ..."
> *Section 12*
> "(3) If the parties cannot agree on the wording, the wording *is to be* settled by the court."
> *Section 16*
> "(6) In determining whether section 8 applies, no account *is to be* taken of any publication made before ..."

It should be noted that the use of simple present is the most frequent option to substitute for *shall*. Moreover, in some languages including Czech the simple present tense is used regularly in all normative provisions irrespective of the text type (e.g. in contracts, legislation,

testaments, etc.) to express an obligation. Therefore, nothing would be easier for translators but transferring the same tense into English. However, translators essentially follow linguistic patterns in legal texts they are to translate. Since in English "*shall* is the hallmark of traditional legal writing. Whenever lawyers want to express themselves in formal style, *shall* intrudes." (Butt & Castle 2004: 99) many translators of texts into English would try to follow this stereotype and use this hackneyed modal as much as possible.

4.2 Gender neutrality

The requirement that the language of legal texts should preserve gender neutrality, particularly when using pronouns, which is strictly enforced in English legal drafting, need not apply to all languages. Czech is an example of a language stuck with the grammatical gender and the generic masculine in singular should an affiliation with a particular profession or another group be expressed[24].

In this context, a sarcastic complaint expressed by Professor Fillmore decades ago deserves mentioning (1978: 157):

> Since the system of pronouns in English is a closed class of words in which singularity for humans cannot be separated from sex, there is no way of choosing an anaphoric pronoun for an indefinite human antecedent without offending somebody. 'They' offends the grammarians, 'he' offends the feminists, 'he or she' offends the stylists, 'she' is downright hostile, and 'it' just cannot be taken seriously. We could get out of this by speaking Chinese, but that's bound to offend some people, too.

Essentially, there are two options for a translator into English to deal with gender neutrality. An easier way is to use an explicative *gender*

[24]For example, Czech has grammatical gender *she* for a "person" or a "party", which are frequently used nouns in the legal context.

clause[25] in the footnote at the first occurrence of a "problematic" pronoun in the translation[26].

The second option is more complicated. Returning back to the British legislative drafting guidelines[27] (pp. 18-24) the following six rules may help the translator to produce a gender neutral translation[28]:

1. Repeat the noun rather than using a pronoun;
2. Substitute *the* or *that* for the personal pronoun;
3. Use *he or she*;
4. Change to a plural noun followed by *they*;
5. Omit the pronoun;
6. Use a present or past participle.

Neither the drafter nor the translator would avoid a combination of the rules. The following example shows two translated provisions of the Czech Civil Code 2012. The combination of Arabic numerals suggests the combination of the above listed rules 1-6. Words in brackets were used in the original version of the translation and words or phrases in italics are their replacement in order to achieve gender neutrality.

Example 6
Section 1043 (1)

1+1+3

"(1) A person becoming the holder of an ownership right in good faith and in a lawful and genuine manner is regarded as the owner against a person retaining [his] *a* thing *of that owner*, or disturbing [him] *the*

[25]Examples of a gender clause are as follows: (i) "words importing a gender include every other gender" (Section 23 (a) of the [Australian] Acts Interpretation Act 1901, as amended); (ii) "... unless the contrary intention appears – (a) words importing the masculine gender include the feminine; (b) words importing the feminine gender include the masculine" (Section 6 of the [British] Interpretation Act 1978, as amended); (iii) "words importing female persons include male persons and corporations and words importing male persons include female persons and corporations" (Section 33 (1) of the [Canadian] Interpretation Act 1985, as amended).

[26]Alternatively, the gender clause may be put in the footnote in the very beginning of the translation.

[27]https://www.gov.uk/government/publications/the-office-of-the-parliamentary-counsel-guidance.

[28]There are more rules included in the Guidelines for British legislative drafters but not all of them are practicable if translation is at issue since the translator is bound by the source text in the source language, whose typology is usually different.

owner otherwise without having any legal ground for that or [his] *his or her* legal ground is of the same value or weaker."

Section 992 (1)

3+6+1+3+6

"(1) A person believing, upon convincing grounds, that [he] *he or she* holds a right [he has] exercised, is a possessor in good faith. A person is a possessor in bad faith if [he] *the person* knows, or should, due to the circumstances, be aware that [he] *he or she* exercises a right not [belonging to him] *acquired*."

Our own experience quite clearly suggests that if it is necessary to transform the text translated into English to make it gender neutral it would be advisable to do so after the whole translation has been completed. The main reason would be that a relevant degree of consistency should be preserved, which seems more feasible to achieve when the translator may concentrate only on this particular issue rather than being detracted by many issues to be resolved in the process of translation itself (focusing on the content and sense of the source text).

4.3 Conceptual analysis

Although terminology creates no more than 30% of the legal language[29] (and usually its proportion is lower) it is the most visible part of the language of law on which (not only) translators primarily concentrate. Concepts as mental representations (units of knowledge) are essentially context-bound. Terms, strictly speaking, are their spelling or sound forms (lexical units). Every legal term is supported by its definition, containing basic conceptual elements. Every legal system has its own sets of concepts (sometimes expanded in legal

[29]Cf. Chromá, Marta, 2004. *Legal Translation and the Dictionary.* Lexicographica, Series Maior. Tübingen: Max Niemeyer Verlag, p. 16.

institutions); simultaneously, there are sets of legal terms linguistically representing the concepts. Both concepts and terms are unique and historically and culturally anchored in the respective legal tradition. One of the main tasks of the translator is to identify equivalence between source law concepts and target law terminology, if any, and to deal with situations where no equivalence has been traced. In trying to attain equivalence in the translation of legal terms, one cannot dispense with the conceptual analysis of a particular term. Translation need not only require a comparative conceptual analysis of the source term (and the concept behind the term) and its potential equivalent in the target language and/or legal system, but sometimes also comparative research into the wider extra-linguistic and possibly extra-legal contexts.

There are various modes of classifying degrees of equivalence within the theory of translation. Classification by Professor Šarčevič (2000: 238), distinguishing between near equivalence[30], partial equivalence and non-equivalence, is the most appropriate for the purposes of conceptual analysis in legal translation. What matters is the measuring of sameness or closeness or remoteness of two basic types of conceptual elements, i.e. *essential* and *accidental* elements (as Professor Šarčević designates them).

The first step is to identify essential and accidental elements of the respective concept expressed by the source language term at issue; this can be found either in a terminology (interpretation) section of the source text or, alternatively or simultaneously, in relevant legal dictionaries. The second step would be to find a potential equivalent in the target language; identification of essential and accidental conceptual elements would follow. The third step is comparison of essential and accidental elements of the SL term and TL term. Next, the translator can determine whether the terms attain *near* equivalence (a source language concept and its selected target language equivalent share all essential and most accidental elements); or *partial* equivalence (the concepts share most essential and only some

[30]Professor Šarčević intentionally avoids using the attributes "full" or "absolute" in combination with equivalence; House argues that "equivalence is always and necessarily relative", evaluating the phrase *absolute equivalence* as a contradiction in terms (1997: 25).

accidental elements); or they show non-equivalence of their elements (concepts in the source language and target language share a few or none of their essential elements and no accidental characteristics). Finally, the translator should decide whether the chosen term in the target language can be used as such or if it is necessary that some explanatory note should be added (in the form of an explicative equivalent). The following example may roughly illustrate the process of conceptual analysis in comparing essential and accidental elements.

Example 7
The Czech term *daňový únik* should be translated into English. The literal translation is "tax escape" (oszustwo podatkowe).

(A) Definition of the Czech term and its literal translation:

daňové podvody a nezákonné snižování daňové povinnosti, agresivní daňové plánování a snižování daňové povinnosti v důsledku využití mezer v daňových zákonech	tax frauds and illegally reducing one's tax liability, along with aggressive tax planning and minimizing taxes as a result of loopholes in tax legislation

(B) Definitions of potential English equivalents as indicated in the literal translation of the Czech definition:

(a) Black's Law Dictionary:

tax evasion – the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability. Also termed *tax fraud*.

tax avoidance – the act of taking advantage of legally available tax-planning opportunities in order to minimize one's tax liability.

(b) EU:

aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability (e.g. double deduction, double non-taxation).

(c) USA: forms of *escape from taxation*

1. Shifting (process by which tax burden is transferred from one

statutory taxpayer to another without violating the law); 2. Capitalization; 3. Transformation; 4. Avoidance; 5. Exemption; 6. Evasion.

(C) Solution: the Czech term is conceptually much wider than any potential English equivalent. The essential element – illegal activity – is not met in the English terms *tax avoidance* and *escape from taxation*. The English terms *tax evasion* or *tax fraud* meet the essential elements of illegality and reducing one's tax liability but do not include *aggressive tax planning*. In order to attain as much conceptual equivalence as possible an expanded term may be used – *tax evasion including aggressive tax planning* (although the accidental element of legislative loopholes facilitating the reduction is omitted).

5. Conclusion

A legal text is (usually) a conceptual minefield for a non-lawyer and most translators are non-lawyers. Translators are expected to produce a text in the TL the interpretation of which in the TL and within the target law settings would convey information, as precisely as practicable, from the source legal text into the target language, so that the information conveyed *makes sense* to, and does *not mislead*, the recipient.

Just as there is no universal general English there is nothing like uniform legal English. Dozens of varieties of legal English may pose decision making dilemmas on the translator such as which variety to choose and how to deal with it if the target text must be in English but would not be supported by any concrete legal environment stemming from common law. For example, a translation of the Czech Civil Code into English would just serve the purpose of informing persons not speaking Czech but interested for some reason in Czech private law. These persons would include native speakers of different languages coming from different legal systems who have learnt English in order to communicate internationally.

Since legal English is historically rooted in the system of common law and its conceptual and terminological repertoire has been built within its realm the translator should carry out a thorough comparative conceptual analysis (as part of the jurilinguistic analysis of the source legal text) in order to select relevant terminological equivalents in the target language which would make legal sense in the target legal text corresponding to the legal sense in the source text.

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CHALLENGING THE EXISTENCE OF LEGAL TRANSLATION: A COMPREHENSIVE TRANSLATION THEORY

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Abstract: This paper focuses on the lack of recognition of comprehensive and text-genre unrelated translation theories, a condition that keeps translators imprisoned in the old and sterile debate on free Vs. literal translation. By challenging two of the most common opinions, that is, the presumed existence of legal texts and legal-translation theories and that of the presumed utility of the notion of free and literal translation, this paper underlines the importance of the adoption of a comprehensive theory absolutely independent from the classification of the texts to be translated. More specifically, Popovič's semiotics approach to translation gives great space to personal interpretation and anisomorphism, hence discarding once and for all the concept of faithfulness and equivalence in translation. As I attempt to prove in this paper, faithful and objective translations cannot exist, as translation is proved to be a subjective act: it is a creative process for which the interpreter is called to give his own interpretation on the signs created within the text.

Key words: legal texts; legal translation theories; literal translation; faithfulness; semiotics; Popovič

SFIDARE IL ESISTENZA DI TRADUZIONE GIURIDICA : UNA TEORIA DELLA TRADUZIONE GLOBALE

Abstract: Il presente studio si focalizza sulla mancanza di riconoscimento di teorie traduttologiche onnicomprensive e indipendenti dal genere testuale, condizione questa che non permette ai traduttori di uscire dall'inutile dibattito su traduzione libera Vs. traduzione letterale. Confutando i luoghi comuni sull'asserita legittimità di testi giuridici e di teorie della traduzione giuridica da un lato, e sulla presunta utilità delle nozioni di traduzione letterale e traduzione fedele dall'altro, il presente paper sottolinea l'importanza di fondamenti teorici del tutto indipendenti dalla classificazione del testo traducendo. Nello specifico, l'approccio traduttologico semiotico di Popovič lascia ampio margine all'interpretazione personale e all'anisomorfismo, abbandonando dunque definitivamente i concetti di fedeltà ed equivalenza. Come dimostra il presente studio, traduzioni fedeli e oggettive non possono esistere, poiché la traduzione stessa è provata essere un atto soggettivo frutto d'un processo creativo in cui il soggetto interpretante è chiamato a dare la propria interpretazione sui segni contenuti nel testo.

Parole chiave: traduzione giuridica; teoria della traduzione giuridica; traduzione letterale; fedeltà; semiotica; Popovič

KWESTIONUJĄC ISTNIENIE PRZEKŁADU PRAWNICZEGO: KU UNIWERSALNEJ TEORII PRZEKŁADU

Abstrakt: Praca dotyczy nieuwzględniania globalnych i nieskoncentrowanych na gatunku tekstu teorii przekładu, co prowadzi do uwięzienia tłumacza w niekończącej się debacie, jaki rodzaj przekładu stosować tj. przekład wolny czy dosłowny. Autor neguje dwie najczęściej wyrażane opinie dotyczące istnienia tekstów prawniczych i teorii przekładu prawniczego, wskazując konieczność stosowania globalnej teorii przekładu niezależnej od klasyfikacji tekstu do jakiegoś konkretnego gatunku. Autor zwraca uwagę, że podejście semiotyczne Popoviča do przekładu pozwala tłumaczowi na dokonywanie indywidualnych interpretacji tekstu i rozwiązywania problemu anizomorfizmu. W ten sposób raz na zawsze można porzucić dywagacje na temat wierności przekładu i ekwiwalencji. W pracy autor stara się udowodnić, że przekład wierny i obiektywny nie istnieje, ponieważ proces przekładu jest zawsze aktem subiektywnej kreatywności tłumacza-interpretatora.

Słowa klucze: tekst prawny; tekst prawniczy; teorie przekładu prawniczego; tłumaczenie literalne; wierność przekładu; semiotyka; Popovič

1. Introduction

Excluding a few experts of the field, the plethora of professional and amateur translators is rarely in the position to follow a solid translation theory, as translators continue to be imprisoned in the old sterile debate on free vs. literal translation.

Even supposing translators manage to follow one theory, this can seldom be consistently used throughout the text: the vast majority of existing translation theories are in fact too often text-genre related (there are theories for poetry translation, literary translation, legal translation, and so on and so forth), which is a far cry from what practitioners need to perform their daily activity. In fact, the identification of a text genre can be very difficult, as it "is not a polarized dichotomy, but a spectrum that admits blending and overlapping" (Cao 2007: 8), as will be later proven in this paper.

Difficulties in defining the genre of a text may be one of the first reasons prompting translators to abandon a particular legal translation theory as soon as they are asked to translate a text which does not perfectly fit the definition of the genre in question (for instance, what text genre does a price breakdown or a medical report belong to? Would the answer be the same if their translations were to be legally certified?). This paper underlines how current definitions of legal texts are detached from the work legal translators do in their daily activity and thus create an immense and inadequate gap between theory and practice. If text genre is not a precise category to found a translation theory, then legal translation theories and text-genre related theories are also inadequate. In this regard, things have not changed much from what Paul Ricoeur wrote in 1998: "la pratique de la traduction reste une operation risquee toujours en quete de sa theorie." (Zaccaria 2000: 9), regardless the large number of translation theories existing nowadays[1]. Proving that the definition of text genres cannot underpin translation theories, this paper firstly challenges one of the most common opinions, that of the presumed existence of legal texts and, consequently, legal translation theories.

By abandoning a scientific theory, translators are often tempted to translate choosing the word indicated as more suitable in

[1]See for instance Alcaraz Varò and Hughes 2002.

the context by a dictionary or, even more frequently, just following their heart with no scientific foundation whatsoever. On the one side, this lack of scientific precision makes translation being perceived as an unworthy, unprofitable artistic activity, on the other side this makes translators being continuously imprisoned in the never-ending debate on free vs. literal translation. When a translator is not able to make up his mind on the word to choose, he might just decide to play it safe and to "stick to the text and translate it literally", a phrase probably sounding as a captivating mantra, a cliché translator can rely on in times of need ("[…] lawyers and linguists tend to tether themselves to the pole of literalism", as Wolff notes 2011: 228).

The second common opinion this paper challenges is the presumed utility of literal translation, which based on the fact that the very notion of literality has no meaning at all, I want to definitely prove to be useless.

In this analysis, it is posited that a more general and comprehensive translation theory can and should hence be used, whilst the old notions of free and literal translation, as well as the text-genre related approach, should be both abandoned. Popovič's theory on translation will be tested and applied to different excerpts of random texts in different languages (e.g. Mandarin, English, Italian) in order to prove the solidity and efficiency of his theoretical framework in the practical act of translation. Such theory not only underlines the scientific value of translation as a creative act, but it also perfectly recreates the interior and cognitive process the translator follows when translating, leading us to abandon the concept of faithfulness and equivalence in translation – surely challenged many times by scholars, but never truly left aside by practitioners.

2. Against common opinions

2.1 Against the presumed existence of legal texts

Misbeliefs are not only typical of non-specialists, but of specialists alike. They dangerously lead experts and non-experts of the field to false assumptions which may interfere with the most practical aspects of the profession. They may also be a far cry from what practitioners need to know to perform their daily activity. If we take a look at what is currently said on legal translation, we realize that there are major differences between existing translation theories and definitions of legal texts provided for by scholars. This clearly prevents practitioners to make use of a solid and single theory, which may be of help in doing their job, regardless of the text they are to translate.

Scholars have not reached an agreement on how to define a "legal text". If we consider most recent works written to this purpose, a first important question should come to our mind: why would we need a definition of "legal text" at all? Wolff (2011: 233) admits that no one has offered a comprehensive and distinctive definition of what constitutes a legal text so far, a premise which would be arguably useful to those in seek of a legal-translation theory. It should be frustrating for these definition-seekers to find out that the anxiety in defining a field of study does not affect exponents of many other fields. Physicians do not keep wondering what is medicine, except when it comes, for instance, to some ethical issue and distinction between medical care and futile medical care is needed.

Perhaps, there is no need to treat legal translation as a specific area[2], in opposition to Garzone's stance that the language of the law has distinctive qualities that "[…] marks it off from ordinary language and makes it a case apart even in the field of special languages" (Garzone 2000: 1; see also: Tiersma 2000: 2). And why would this be? If we take a look at the following random excerpt from a colloquial speech between teenagers of a British TV series, we get an

[2]As noted by Harvey (2002: 177), this may hide a vein of socio-professionalism haughtiness.

idea of how colloquial speech cannot be said to be easy at all, and how it is similarly "marked off" from any other kind of language:

> Homo! - Yeah, because I rule, basically Shit bender./Ah, Kelly, you're stankin'! What about you, you sweaty fuck! Aargh! Get away, you scummer./Later then! What you think of that, then? Tone?/What? Think of what?/The moves. Me, Jonno and Kel worked it out./It's OK./Hey! Nothing to worry about, dude./Yeah?/ Yeah./It's all right./Everything's cool./- Hi, Maxxie./- Hey./Hi./Who's that?/That's Tony./What's up with you?/ I had a traumatic subdural haematoma with motor and perceptional complications./Are you mental?/ Yes./I'd still give you one./Totally./He's well fit./Yeah, Queenie?/ Yeah./He's buff./Hey come on, Tone./See you later, girls./See you Maxxie!/ Bye!/ I wanna give Maxxie one./You can't. He's homosexual./Bummer.//See? I remembered your favourite./Thanks./You've grown, Tony./And there's another two inches in you, easy./How's your Mum? - I don't remember you./Oh, well./We used to have lovely chats when I was cleaning your mum's place./You were such a clever little lad./I'm stupid now./No./Here you go, mate./Thanks, Mum./Oh, we used to giggle./Well, you never did know what your mum was going to say next./Ketchup, Mum? - Yeah, right./Bloody hilarious jokes she told./Filthy./Oh, a right laugh, your mum.//Mum? I need to pee./I can manage it myself usually./Yeah, sorry./Oh, fucking fucking fucking thing! Oh! Ooh./Oooh! Ooh la la! Yee-ha! Oi, look out./Here comes Batty Boy./You wanna watch it, Dale./He'll slip you a big fat cock! No fucking way, man! Cockety-cock-cock! […].
>
> ("Skins s02e01 Episode Script | SS" 2015)

Does this mean that we need a colloquial-informal speech theory? One may argue that colloquial language is a case apart, since it may include teenagers' slang, phrasal verbs and other forms of figurative language, which contribute to mark this language off from languages of other fields. However, there is no solid proof for such differentiation, as the same goes for medical language, chemistry language, physics language, astronomy language, and so on and so forth: they are all "marked off" from each other, and they have features and intended meanings different from those we find in "ordinary language" [3].

[3]Also, if "legal language" is said to be marked off from ordinary language, then we need to define "ordinary language" as well. It cannot just be defined as "every day language" or "the language you speak at home", as one may speak of many things at home, and the language used with friends is certainly different with that used with one's spouse, or with acquaintances, or with that used lullabying to our baby or, even more, with that used by a 3-year-old child.

Šarčević (1997: 9; quoted by Harvey 2002: 178) defines legal language as the language used by experts of the field, thus unjustifiably ignoring texts between experts and non-experts, and text used in a legal context. These interpretations of the concept of "legal" prevent other kind of texts, including sworn translations in general (e.g. birth certificates, degree certificates, medical reports, price breakdown), texts between lawyers and non-lawyers (e.g. students) and pieces of evidence used in legal proceedings (e.g. suicide notes; Harvey 2002: 178), from being treated with a legal-translation theory, whereas everyone who made an attempt at translating them surely realized they are "as much legal as" a Power of Attorney is.

Classification of texts according to their destination or context of use opened the door to functional theories, whose advocates may assume that legal texts are texts to be used for legal purposes[4], and/or producing legal effects, which is what Koutsivitis and Gémar (both quoted in Harvey 2002: 179) affirm, along with Garzone (2000: 1), who treats texts with no legal validity as non-authentic texts. Again, a textbook relating to corporate law does not produce any legal effects, neither a contract between two parties necessarily does to a third party, but nobody would ever dare to consider them differently from legal texts.

Intuitively, Cao (2007: 8) recognizes the difficulties in defining text genre and states that this "[…] is not a polarized dichotomy, but a spectrum that admits blending and overlapping, a question of quality and intensity, […]". This statement can be easily proved as correct. In my work as a certified translator, I often happen to translate summons/claim forms. Nobody has doubts in saying that a summons is a legal text (if not, then what is?). Italian civil summons ("atti di citazione") are normally divided into eight parts: 1.) an introductory part stating who is the claimant ("attore") and who is/are the lawyer(s) acting on his behalf and on his interest; 2.) a part stating who is the defendant ("convenuto"); 3.) a description of the relevant facts ("in punto di fatto") based on which the claimant is summoning the defendant; 4.) a part in which facts under point 3.) are analysed and considered from a legal perspective ("in punto di diritto") by explaining how these facts constitute an infringement and a violation

[4]This is what I, too, used to believe, and what I affirmed in my paper titled «Anxiety in defining the role of translator: court translators in Italy» I presented at the Translation Talk Conference (23-24 April 2015, London), and which I no longer consider correct.

of the plaintiff's rights; 5.) a section where terms and deadlines for the defendant to file his entry of appearance ("costituzione in giudizio") are indicated; 6.) a part where the plaintiff explains what kind of reliefs are sought; 7.) the economic value of the proceeding; 8.) the Power of Attorney by virtue of which the plaintiff empowered his attorneys at law. In the summons I am referring to, the plaintiff accused the defendant of having sold a counterfeit pair of shoes, whose design was deemed by the plaintiff to be his own property – and thus the alleged imitation would have constituted an infringement of the plaintiff's property right. Of this 20-page summons, part 3.) occupies 10 pages: thus basically 50% of the whole summons is a fact-description telling the prestige of the plaintiff, the design of the shoes in question and that of other similar shoes, point of sales where the shoes were sold, facts and figures on the sale, expert's report on the comparison of the two designs, and so on and so forth. Very rarely do we meet "legal" words in this part – and the same goes for part 3.) of the vast majority of the summons. Nonetheless, the summons in question is "legal" and was used to produce legal effects. Consequently, we must admit that texts are not defined in genre from the number of genre-related words they include, but from the meaning they create by making use of these words. Words are nothing but one of the many devices humankind can use to shape meaning, which is partially created by the author by means of words, and partially reconstructed by the reader's skills and possibility to understand the author's intended meaning according to the purposes for which the text was written. Thus, meaning can be eventually said to be "legal": not texts, nor words. This implies that the reader is at the very core of the meaning, as meaning is not solely within the text, but it has to be created by the reader in his mind: the reader is the interpreter interpreting the meaning within the text and understanding it. And in fact, Harvey (2002: 178) had to admit that "General statements about legal translation are necessarily determined by the writer's definition of a legal document.", clearly introducing the concept of **subjectivity** and giving space to personal interpretation, which is at the core of Popovič's comprehensiv[5] theory supported in this paper. Additionally, words are not the only device creating meaning, other devices also

[5]By comprehensive translation theory I mean a text genre and language unrelated theory, thus a theory that can be used to any text, regardless its function, context of use, and alleged genre categorization.

create it. Font does. Punctuation does. Typographic emphasis does. Context does. And also graphical elements such as tables, seals, fiscal stamps, signatures, they all contribute to construe meaning. Then why do people keep stressing the importance of word-for-word translation?

2.2 The literalists' creed: "I believe in literality, the Father almighty"

An Italian sworn translator needing to certify his own translation can do it by swearing it before a court officer and declaring in an affidavit he had "correctly and faithfully performed his task at the sole aim of revealing the truth"[6]. Similarly, putting it at a more international level, the World Education Services (WES) still requires that translators provide "[…] precise, word-for-word, English translations […][7]."And this is exactly what non-specialists ask for to a translator: a literal, word-for-word, faithful translation objectively revealing the truth of a text.

Even though experts in translation studies can confirm what Steiner (1998: 319) already claimed on the religious concept of fidelity in translation as generating a sterile debate[8], such statements clearly show how most of the people continue to look at translation as a process being accurate and precise only if literally done – as if the concept of "literal translation" meant anything at all. On the contrary, I affirm that the debate between free and literal translation has no implications, as it is totally meaningless, since the concept of "literal" itself is meaningless.

What does "literal" exactly mean, after all? If we are to think of "literal" as intending "letter by letter", thus rescuing its etymology,

[6]Courtesy translation of the Italian version of the affidavit, usually going as follows: "[…] Ammonito il comparente sull'importanza del giuramento, il medesimo ha pronunciato la formula: "giuro di avere bene e fedelmente adempiuto l'incarico affidatomi al solo scopo di far conoscere la verità. […]."

[7]A similar example was used almost 10 years ago by Šarčević (1997: 16), quoted by (Harvey 2002: 181) Unfortunately, it looks like 10 years of research and efforts by scholars of different fields in trying to change this conception didn't alter the common opinion.

[8]Check for instance (Seidman 2010: 73) and (Kasirer 2001: 339).

then the meaning of a word such as "term" would be the meaning resulting from the meaning of its letters, thus t+e+r+m: but "t" has no meaning, and so have "e", "r" and "m". Literal meaning does not exist. But when we read "term", we do intend its meaning. And if we read it in a context, we may understand it as having another meaning. We are used to think of words has having a primary meaning -its literal one- plus other acceptations. But this is only because we are used to it. We are convinced that this is the way words function. Nonetheless, there may be no primary meaning at all (who decides a word primary meaning?), and only acceptations. If we look up the word "term" in a monolingual dictionary, we find a numbered list of equally worthy acceptations. How to establish a word's literal meaning? I cannot think of any other way to establish it but relying on the first explanation listed and generally representing the most common and frequent meaning. If so, then "literal" would not mean "a word's intrinsic meaning", but just "the most frequent meaning according to the vast majority of monolingual dictionaries". Taking it a step forward, we should note that dictionaries are not carved in stone, and that they are all different one from each other: they are in fact written by people, so word choices and consequently the list of acceptations depends on the author(s)' subjective opinion and, again, interpretation.

So, why do people keep stressing the importance of words and word-for-word translation? The straight answer is: because it's easier. Although less profitable, it is obviously easier thinking of a text -being it written or spoken- in terms of countable, tangible words, rather than in terms of abstract, possible, multiple, and often hidden and implied meanings. While smart attorneys usually charge flat rates or hourly rates according to the complexity of the case, and the experience and success they have in the field, translators (with some few remarkable exceptions) charge low rates[9] according to the number of words they translate, thus proving to their clients that their job requires nothing

[9]We should all thank literalists for this great unprofitable choice, which resulted in translators spending their time on social networks or writing blogs (e.g. https://nopeanuts.wordpress.com) to convince their colleague to stop charging incredibly low rates.

but dealing with words and mechanically[10] converting them into another language.

Despite the literalists' creed, literal translation cannot simply exist. Strict literal translation can result only in unintelligible texts, especially when it comes to natural phrases and not to short unnatural sentences. Although this should have been common sense, it can be further proved with some examples. First of all, how to literally translate articles in languages that do not have them? If I say "I don't want *a* book, I want *the* book", how can we translate it into Chinese? Chinese does not have articles: does this mean that the Chinese are incapable of expressing or even understanding the difference between a generic book and a specific one? Let us now consider the following case:

a.) Italian version:

CLAUSOLA PENALE. In caso di esecuzione oltre la Data Termine di Installazione Offshore indicata nel Piano d'Esecuzione per il quale l'Appaltatore è unicamente responsabile, l'Appaltatore è tenuto a corrispondere alla Società una penale pari ad un quarto (0,25%) del prezzo iniziale per ogni giorno di ritardo, fino ad un massimo del 10%.

b.) English very "literal" (and faithful?) translation[11]:

CLAUSE PENAL. In case of execution beyond the Date Term of Installation Offshore indicated in the Plan of Execution of the what the Contractor is exclusively responsible, the Contractor is obligated to reciprocate to the Company a penalty equal to a quarter (0.25%) of the price initial for each day of delay, up to a maximum of 10%.

c.) English less "literal" (and less faithful?) translation[12]:

PENAL CLAUSE. In case of execution beyond the Term Date of Offshore Installation indicated in the Execution Plan for which the Contractor is exclusively responsible, the Contractor is obligated to

[10]Should mechanical translation (MT) be really possible, dictionary-based machine translation would give perfect result; on the contrary, good results are possible when human translation serves as corpora to MT.

[11]According to what I demonstrated in this section of the paper, the literal translation in question was done by choosing the first translation listed in the bilingual dictionary ("Dizionario Di Inglese - Il Vocabolario Di Traduzioni Online - La Repubblica" 2015).

[12]Translation done by maintaining the translation of the words found in the same dictionary as above, but improving -at least partially- the English grammar and syntax.

reciprocate to the Company a penalty equalling to a quarter (0.25%) of the initial price for each day of delay, up to a maximum of 10%.
d.) English "free" (unfaithful?) translation:
LIQUIDATED DAMAGES. In the event of a delay to the Offshore Installation Completion Date as per the Contract Schedule for which Contractor is solely responsible, Contractor shall pay Liquidated Damages to Company at a rate of a quarter of a per cent (0.25%) per day of delay, subject to a maximum of ten per cent (10%) of the Initial Contract Price.

("Example Clause – Liquidated Damages" 2015)

For no good reason, translation under point d.) can be proved to be incorrect or imprecise. Apart from being more natural and grammatically correct, that translation also better represents the legal **meaning** expressed by text under point a.). Among the many differences we can note between the two, the striking difference resides in the name of the clause – "clausola penale" in the Italian version, "penal clause" in the half-way-literal translation, and "liquidated damages" in the "free" translation. "Clausola penale" in the Italian legal context is regulated by paragraphs 1382-1384 of the Italian Civil Code. Whoever has some knowledge in the field would recognize the great difference between a "penalty clause" (of which "penal clause" may lead us to think) and a "liquidated damages clause". They are in fact two completely different concepts, which are treated differently both in Common Law countries and in Civil Law countries. A "penalty clause" is «A provision in a contract that stipulates an excessive pecuniary charge against a defaulting party.» and «Courts do not generally enforce such a clause […].» ("Yourdictionary.com" 2015). This is not what "clausola penale" means, but what a "clausola vessatoria" may eventually imply. Henceforth, being a "clausola penale" generally established by mutual agreement of the parties, and being it equitable, it is better translated by the "liquidated damages clause" phrase.

While literalists may believe that literal translation does exist, I can further prove this statement to be wrong by adding an example relating to a language that does not make use of Latin alphabet: Chinese. If literalists may affirm that "clausola penale" can be literally translated as "penal clause" or "penalty clause", just because the two words are etymologically related and/or because "penalty" is the first choice they come up with when looking up "penale" in a bilingual

dictionary, what can they say about the literal translation of a word such as <*dangshiren* 当事人>? If we are looking at this word graphically, we will obviously not find anything similar in languages using an alphabet. If we consider it from its pronunciation, and provided that we use its *pinyin* transcription, we end up reading it *dang shi ren*, which again does not help us in finding its allegedly existing literal translation. So, what are we to do to find it? If the answer is "checking up a dictionary", then this equals to say that we are asking a person or a group of people (i.e. the dictionary's author(s)) how *they* interpret that word. Such authors are hence other translators who created a glossary (i.e. the dictionary we are checking up) based on the experience they have of that word, or of other translations of the same word done by other translators. There is no literal meaning within a word. Meaning is created in the mind of the interpreter who reads/hears the word. In the example analysed above, "penale" does not mean "penal" or "penalty", and not even "criminal" (as it could be the case with "Codice Penale", being it "Criminal Code"), not because of the letters it contains, but because of its intended meaning in such a context. Studying the context to decide how to translate a word -or a group of words- should not be the exception, but the rule.

From what has been analysed above, we can first conclude that words do not have an intrinsic and literal meaning, but rather than the meaning is always implied.

3. A comprehensive translation theory

Faithfulness goes hand in hand with the concept of equivalence, which for obvious reasons has been at the very core of religious and legal text, and consequently legally-oriented translation studies. As pointed out by Harvey (2002: 180), «The debate over fidelity to the "letter" or the "spirit" in legal translation is a long-standing one, dating back to the days of the Roman empire when it was decreed that formal correspondence between source and target text was essential to preserve the meaning of both Biblical and legal documents (Gémar 1995a: 26-30, Šarčević 1997: 23-48).»

Some scholars, notably those from East-Europe, affirmed that there is no such thing as faithful translation: there are, in fact, only imprecise and non-perfect translations (Lûdskanov 1967; Popovič 1975; Torop 1995), a concept which elegantly tosses aside the problem of faithfulness. To this purpose, Popovič created two new words replacing Catford's "source text" and "target text", thus sweeping away the idea of translation as a voyage and, speaking more properly, the concept of translation as replacement of words of one code with those of another. Popovič's ideas of "prototext" and "metatext" came hence to life, thus revealing that translation is not a journey: it is in fact a communication process involving signs and creating a brand new text (i.e. a secondary text, a meta-text)[13], of which the translator is the sole creative author.

Lûdskanov's great merit consists in having clearly affirmed what Jakobson vaguely implied in his studies, and that is that translation must be studied from the *semiotics* perspective (1967: 26). He defines a sign as an "object indicating another object" (*ibidem*; translation mine). More precisely, Lûdskanov uses Shaff's words to explain this process: "any real object (its real aspect and its characteristics) becomes a sign when it is used in the communication process to convey information relating to facts, thoughts, emotions or will." (quoted in *ibidem*; translation mine). Combining Lûdskanov and Sharff's notions of "sign", and how meaning is shaped, we note that a sign can be created by a word or a sound[14], or by anything we can hear or see (or both hear and see at the same time): the same goes for group of words or sounds to which we attribute meaning.

All the images and possible meanings arising in our mind when we see/hear that sign are what Sausurre and Peirce call the interpretant; what is in fact meant by that sign in that specific context

[13]This was similarly and more recently stated, in other words, by House (2009: 3), who defines translation as "the replacement of an original text with *another* text" (emphasis added.)

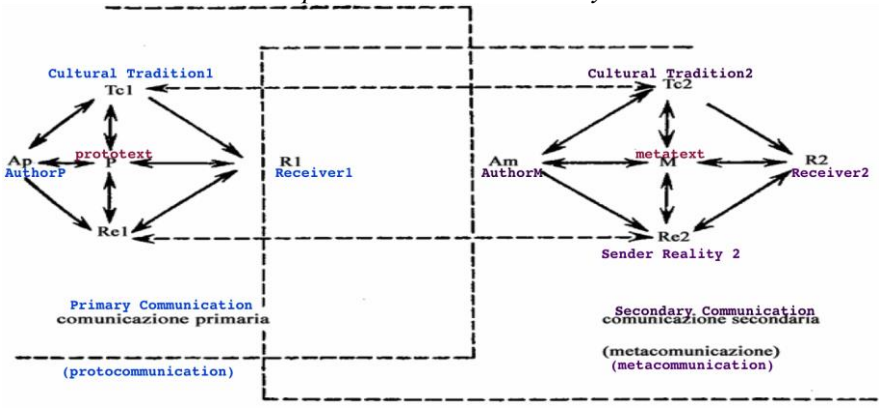
[14]Languages/cultures have sounds, symbols or gestures which similarly to written and oral texts may be translated. For example, Italians make use of sounds which generally are not listed in the IPA symbols used to transcribe Italian phonemes, nor are they reported in dictionaries: they consists in an affricate click sound which may means "no" (if lips are in their neutral position) or it may be a sound use to catch the attention of a cat. Another example of sound not listed in dictionaries is car horn: it does have a meaning -or even multiple meanings- (e.g. "Hi mate!", if you want to say hello to a friend of yours, or "Attention!" if you want to catch another's driver attention to let him brake.)

is the object. All this process is everything but unique and objective: in fact, it varies dramatically under two factors: a.) *subjectivity*; b.) *anisomorphism*. The interpretant varies according to the person (i.e. *the interpreter*) who is actually processing the sign in his mind, because his culture, his own experiences, his own view of the world, are different than those of any other person[15]. This is very much culturally-influenced, which is why one may also look at this phenomena in terms of anisomorphism, being it the property of different languages using different signs to refer to same thing (which was also proved by Sapir and Whorf in their famous hypothesis.) When one reads "tree" or hear the sound /tri:/, the ideas coming to our minds are not the same for all of us. The tree one may be used to see or to play with when s/he was a kid might be completely different than the one other people used to see, because different countries have different trees, or because even within the same country trees vary according to where they grow. So **a tree is not just a tree**. According to the idea a speaker of one language can have of a tree, the translator may in fact be in need of finding a new sign in the other language he is translating into, a sign that is not usually translated with the word "tree".

What happens when it comes to legal words? Is a *hetong* 合同 a contract, or is it an agreement? Or is it a pact? And is *dangshi ren* **当事人**a party, two parties, or the parties to a contract? And what about *zeren* 责任? Is it responsibility or liability? Popovič and Lûdskanov answer to all these questions and the one I discussed in the previous sections by proposing a general translation theory illustrated as follows:

[15]Creativity in legal translation has been discussed, among the others, by Šarčević (2000).

Picture No. 1: Popovič's translation theory



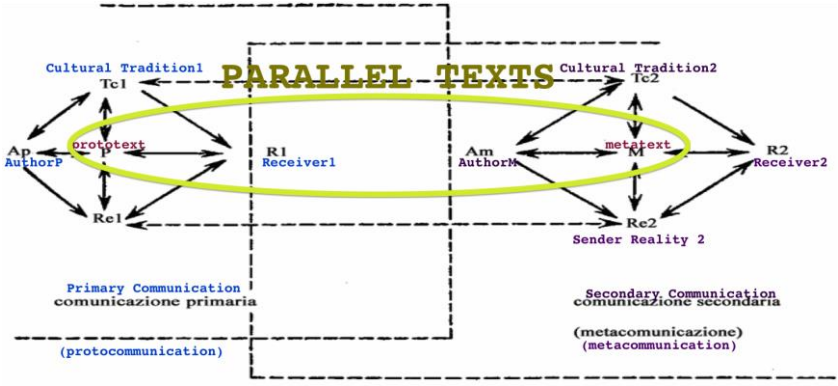
(Popovič 1975: 37)

The prototext (P) is the primary text: P is created in a cultural tradition (Tc1) to which it belongs to by its author (Ap), who had in mind a Receiver (R1), and it is divulgated and shaped by a sender reality (Re1). Besides the possible model reader, R1 can be any other reader who happens to read/listen P. All this creates what Popovič refers to as the primary communication, that is to say, the protocommunication. R1 is just *one* of the possible readers who is going to decode the signs within P and recode them (Lûdskanov 1967: 50-52) by using devices (not necessarily consisting in words) of another code/language. When M is the translation of P, R1 = Am.

So, how to translate P into M? Somewhere else, in the reality (Re2) of another cultural tradition (Tc2), where another language is spoken, the translator is to find a text as similar as possible to P (hence another metatext created by a different Am), to which the translated text (the metatext *sensu stricto*) must be compared to. The most similar text(s) to P one can find in the Re2 are what Osimo (2004: 126) defines as "parallel texts"[16]:

[16]Despite Sin-Wai Chang (2014: 509), among the many others, has recently used the term "comparable texts" as a wider category than "parallel texts", by "parallel text" I intend the Osimo's old acceptation, that is to say "two texts relating to the same field/genre". "Comparable texts" turns out to be an imprecise term, as any text can be said to be comparable -at least to some extent- to another.

Picture No. 2: Parallel texts



(Popovič 1975, 37)

3.1 Practical applications of Popovič's translation theory

Some preliminary conclusions can be drawn. It is now easy to understand that faithful and objective translations cannot exist, as translation is a subjective act: it is a very creative process for which the interpreter is called to give his own personal interpretation on the signs created within the text so to decode and recode them into another language. The M cannot be thought to be the same text as P, since M is *a brand new text* assuming -in the best scenario- just *almost* the same meaning (Eco 2003) Translation is hence a *non-repeatable* process, which is why back translation never brings to light the same P from which its M was created, and the reason why two identical translations do not and will never exist (not even if done by the same author). What Harvey (2002: 180) affirms by using Hammond's words is true: a translator is not a bilingual typist; he is a text producer. Translators *combine artistic creativity with scientific research and the study of at least two cultures* (including in this term not only the so called "human sciences", but also the "technical-scientific sciences").

Ambiguity is not the exception: it is the rule. And translators cannot be asked to maintain it in translation, since -as I underlined

before- the work of a translator necessary implies -willing or not- *interpreting* signs to rescue the intrinsic meaning of a text (thus choosing one meaning among the possible ones intended.) Also, the number of meanings is not language-related, but it varies according to the language on which the act of translation is performed (1967: 28). It is quite impossible to find out if "*hetong* 合同" intends a contract (≈ "contratto")[17], an agreement (≈ "accordo"), or a deed (≈ "atto pubblico") in a Chinese dictionary, whether these acceptations/meanings of the word "*hetong*" must be taken into account if translating from Mandarin Chinese into Italian.

A few practical examples can be further used to prove what I have been affirming so far. It is worth underlining at this point that what follows are not specific examples created *ad hoc* to prove my thesis right. On the contrary, Popovič's translation model can be seen in every translation process (even in wrong translation, where the translator chose the wrong parallel text).

I affirmed in paragraph 2.1 that signs in a text are created not only by means of words, but by any other visual element added to it. A formal document may have many graphical elements; it can, for instance, look like this:

Picture No. 3: Agreement

(http://www.sunderlandcitycouncil.com/friendship/images/agreement2.jpg; retrieved on 15/06/2015)

When translating the last lines of such a page we can choose what we want our M to look like: if we are not stating in our translation that the P was signed by the parties and that there are two emblems, we are

[17] ≈ means "is approximately equal to".

creating an imprecise translation. A "precise, word-for-word, faithful translation" would thus neglect the emblems, and provided that the two signatures above are basically illegible, would ignore them. But if we go look for the meaning of this document and its legal value, we must admit that a written agreement is legally valid if an agreements is reached at least by two parties and hence if they sign the written document. Henceforth, we cannot but recognize the importance of the two signatures and the two emblems relating to the parties: I would hence translate them "*[signed: illegible signature] [emblem]"* (using italics and squared brackets to let my reader understand that this is not something found in brackets in the P, but a device I used to recode into the M what I have found in the P). This shows how meaning is not only provided by words, but by any other sign existing in a text (including, as I said before, signs created via graphic elements).

Another interesting example can be excerpted from Section VII of the Chinese Contract Law (*Hetong Fa* 合同法; hereinafter "HTF")[18], titled *weiyue zeren* 违约责任. To know how to translate *zeren*, what the interpreter does is generally checking up a bilingual dictionary (which equals asking another person how he generally translates the word, as said above), and then picking up one of the translations listed there, assuming that the first is the most literal, whilst the last is the freest and usually most relating to idiomatic expressions. On the contrary, a good interpreter investigates all the elements creating the Primary Communication: the HTF is a P written by one (or more) author(s) experts in laws (probably lawyers), who can be reasonably thought to be the most expert practitioners in such field. Do they choose the phrase *weiyue zeren* according to a Tc1 or did they intentionally use a new phrase? To check this, I would google the phrase and see how many and what kind of hits I obtain: I obtained 755,000 hits, and the phrase is listed in most common websites and digital encyclopaedia. I proved my hypothesis by googling the phrase in Google Books, and obtained 143,000 hits: the phrase was not invented by the Ap to convey something exceptional to their intended recipient (R1), nor is it a rare phrase. From the theoretical perspective, this kind of research means applying Popovič's translation theory by studying the Tc1 and entering the author's mind to interpret the sign

[18]I consulted the bilingual version by (Formichella and Toti 2014), so to compare my translation with theirs (to read a specific study on such a comparison, please refer to (Mannoni 2015))

they intended to create. The best explanation of a sign is its explanation in the same language used to create it[19]: «违约责任也称为违反合同的民事责任，是指合同当事人因不履行合同义务或者履行合同义务不符合约定，而向对方承担的民事责任» ("[*weiyue zeren*], also referred to as "*weifan hetong*", indicates the "*zeren*" a party has toward the other party in case of defective performance of an obligation or breach of contractual terms."; translation mine) (http://baike.baidu.com/view/299861.htm; retrieved on 16/06/2015).

The excerpts make us understand that the kind of *zeren* in question (generally translated as responsibility) relates to the *wei* 违 ("violation") of a *yue* 约 ("contract/agreement"). This *zeren* is called in English "liability for breach of contract", from which we can infer the most accurate translation of *wei* ("breach") and *yue* ("contract") in this case. Parallel texts in this example were P and all the hits having the same intended meaning as P I found on Google for the Chinese on the one side, and -in absence of a Civil Code for most of the English speaking countries- tort laws and similar hits.

Identifying a good parallel text to the P to translate it into Italian is even easier, since Italy is a civil law country and does have a Civil Code containing -among the other things- provisions relating to contracts and agreements. We just need to check art. 789 and art. 1218 to understand Italian makes use of the word "responsabilità" both to refer to liability and responsibility. By looking for other parallel texts in Google Books we can find many studies on the "responsabilità per inadempimento" also called "responsabilità contrattuale", which can then be deemed as correct translations/interpretations of the phrase in P.

Since Popovič's translation theory needs parallel texts to be brought about, when texts whose function is most similar to the P do not contain any useful term or phrase expressing the intended meaning we want to convey, this may be because the very concept we are at does not exist in the M culture. This is often the case when texts have

[19]This is true for at least 2 consequent reasons: (1) we think in a language which Lûdskanov defines "internal language" (hereinafter: L_0), hence when we speak and we use our mother tongue (L_1) we are basically performing a translation from L_0 to L_1 (Lûdskanov 1967, XIII-XV); (2) since as Popovič affirms translation is a kind of communication process, and since every communication implies a residual of meaning which gets lost in the verbalisation process, translating from L_0 to L_1 implies loosing some part of the meaning. Consequently, the same goes for bilingual dictionaries.

to be translated from a P culture with a certain legal system into a M culture with a different one (e.g.: civil law to common law) – but the same goes for many other words typical of the so-called "everyday" language (e.g. tofu is just tofu, and its Sino-Japanese pronunciation was imported as such into European languages because there is nothing one can compare it to in Western M-cultures). If we take for instance a legal document such as the Italian "Atto di Precetto", it does not have a precise word or phrase in Mandarin to translate it with, since the very functioning of the lawsuit process is different in the two countries. What is an "Atto di Precetto"? Let us see first how the phrase is structured so to understand what is the *sign* created by the words. "Atto" is etymologically related to the word "azione" (action) and thus the verb "agire" (to act). Its past participle "atto" ("acted") is used as a name in legal jargon both to refer to formal documents used in a lawsuit (hence "Atto" can be sometimes translated into English as "document", "legal document" or "instrument"), and -from a legal doctrine perspective- to refer to actions having legal value. In Mandarin, each of these acceptations would imply different translations. A document can be a *wenjian* 文件; but documents in lawsuits (such as a Power of Attorney, or a Summons) are generally referred to as *shu* 书 and *zhuang* 状 (e.g.: a POA is *shouquan shu* 授权书, whilst a summons is a *qisu zhuang* 起诉状). "Precetto" -out of the lawsuit process- means a religious precept, a maxim or teaching, and hence *order*, which is the acceptation the word has in "Atto di Precetto". Let us now turn to the function of such document in the Italian culture so to fully understand the semiotic value of the phrase in the P culture. When at the last stage of debt recovery an Italian judge has already ruled that debtor has to repay his debt to creditor and sentenced debtor to promptly perform his obligations[20], but debtor is still unwilling to do so, creditor's lawyer can write a formal document (i.e. the Atto di Precetto) to *order* for the last time the debtor to 'spontaneously' repay the debt within 10 days (art. 480, par. I, Italian Code of Civil Procedure). Failure to perform will result in the attachment of debtor's property. Henceforth, the Atto di Precetto is the final invitation to debtor to perform by virtue of a instrument -being it judicial or extrajudicial- creating an executable right (art. 474, par. I, Italian Code of Civil Procedure). One

[20]As well as under other circumstances provided for by law under art. 474, par. II of the Italian Code of Civil Procedure.

of the best parallel text that can be of help when translating Italian judicial documents -that are regulated by the Italian Code of Civil Procedure- is certainly the Law of Civil Procedure of PRC (*Zhonghua Renmin Gongheguo Minshi Susong Fa* 中华人民共和国民事诉讼法; hereinafter LCP). According to art. 224 LCP, creditor's attorney can request the Court to execute the judgment, and there is no way for the attorney to directly order the debtor to pay the debt bypassing the Court itself. Henceforth, since PRC makes no use of documents similar to the "Atto di Precetto" or "Atto di Precetto su Sentenza" (Order to Perform by virtue of Judgement), one can invent a brand new phrase explicating the meaning/functioning of the P (e.g.: *panjue zhixing shu* 判决执行书: document to execute a judgement)[21].

4. Conclusions

Text-genre related translation theories have long influenced amateur and professional translators, leading them to support false assumptions. This paper made an attempt at dismantling two interrelated common opinions and introducing Popovič's comprehensive theory as a solid alternative for translators throughout the world. Firstly, the paper made an attempt at dismantling the presumed existence of legal texts, showing that the reason why scholars have not reached an agreement on what "legal texts" can be defined as relies on the fact that the definition of legal texts itself is based on the personal definition of "legal" (Harvey 2002: 178), and text-genre is not a polarized dichotomy at all (Cao 2007: 8). Wolff (2011: 233) admits that no one has offered a comprehensive and distinctive definition of what constitutes a legal text so far, and however, the definition is solely useful to create legal-translation theories, which can seldom be applied by practitioners in consideration of the fact that many texts a "legal-translator" translates and certifies (e.g.: descriptive part of a summons, degree certificates, medical reports, …) do not fit current definitions of legal texts.

[21]For a more in-depth analysis of the translation into Mandarin of documents used in the Italian lawsuit, please refer to D'Attoma and Mannoni 2016.

Translators who do not find the relief on a more comprehensive and encompassing theory cannot but fall into the captivating light of the literalists' creed: stuck in the old debate on free Vs. literal translation, when in doubt, they would choose the allegedly most faithful, precise, word-for-word (as the WES put it), literal translation. The second common opinion this paper challenged is the presumed utility of literal translation, which considering the fact that the very notion of literality has no meaning at all, I proved to be useless and with no scientific foundation whatsoever. This was demonstrated by examples showing that "literal" cannot intend the meaning resulting from the meaning of a word's letters, nor can intend etymologically-related words in L_2 (otherwise Mandarin Chinese could not be translated into English, as a word such as *dangshiren* does not have any etymologically-related word in the target language). So "literal" just means "the most common translation and interpretation other people give to a word".

By abandoning the old cliché on free Vs. literal translation and all the text-genre related theories, a more comprehensive theory should be used. In this paper, I introduced and supported Popovič's semiotics translation theory, which gives great space to personal interpretation and anisomorphism, and makes us definitely abandon the concept of faithfulness and equivalence in translation. Faithful and objective translations cannot exist, as translation is proved to be a subjective act: it is a creative process for which the interpreter is called to give his own interpretation on the signs created within the text. The metatext cannot be thought to be the same text as prototext, since the metatext is a brand new text assuming just almost the same meaning (Eco 2003) Translation is hence a non-repeatable process. What Harvey (2002: 180) affirms by quoting Hammond's words is true: a translator is not a bilingual typist; he is a text producer, combining artistic creativity with scientific research.

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FAIRNESS AS INTERPRETIVE DEVICE IN LAW? (AN ANALYSIS OF DISCURSIVE PRACTICES IN THE RECENT CONFLICT ABOUT VOTING RIGHTS IN HONG KONG AND THEIR ANCHORAGE IN ARGUMENTATIVE PRACTICES OF EAST ASIA)

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Abstract: Problems related to a conflict about the content of rights are analysed below from the legal-linguistic perspective in the context of the recent dispute about voting rights in Hong Kong. The central legal-linguistic problem that is also the starting point for the analysis of argumentative samples is the question whether legal and legally relevant, yet not strictly legal arguments in such disputes are actually cross-cultural. Furthermore, the question what role, if any, the culture-specific arguments and legal-linguistic devices play in such conflicts is considered as well. With this aim in mind, legal provisions relevant to the conflict and the argumentation used by the opposing sides are explored to find out the legal-linguistically relevant mechanisms that might facilitate the solution of conflicts about the content of rights.

Fairness as an interpretive device appears as the most appealing cross-cultural mechanism. Meanwhile, its application in conflict solution mechanisms shows the embeddedness of legal mechanisms in broader social structures that also set limits to the application of purely legal discursive devices. As a result, the analysed conflict appears as an amalgam of legal and extra-legal arguments and non-verbal signs that in their application are cross-cultural. Equally, fairness as an interpretive device in law is deemed cross-cultural, yet also limited in the scope of its application to discursive practices in which it emerges.

Key words: fairness, interpretation, legal discourse

LA GIUSTIZIA (FAIRNESS) COME STRUMENTO INTERPRETATIVO?

Abstract: La giustizia (fairness) come strumento interpretativo e come meccanismo di regolamentazione sociale posa le sue radici nel pensiero giuridico e sociale della Cina classica. Possiamo riscontrare tale principio nel pensiero confuciano e, nello specifico, nel concetto di armonia sociale e pietà filiale. Nei successivi scritti legisti tale questione sfocia nella dicotomia argomentativa tra stabilità sociale e le sanzioni relative all'infrazione di uno stato delle cose che viene percepito come armonico e pacifico da tutti gli strati sociali. Entrambe le argomentazioni sono caratteristiche fondamentali del dibattito sulla natura dell'attivismo sociale che abbia una rilevanza legale. L'efficienza di tale dicotomia argomentativa è riscontrabile nei dibattiti sociali sull'applicazione della legge. Alcuni di questi dibattiti sfociano successivamente in conflitti, come la recente disputa sul diritto al voto internazionalmente e costituzionalmente riconosciuto ad Hong Kong. I concetti giuridici utilizzati nel dibattito hanno subìto un'evoluzione semantica, in gran parte dovuta all'influenza di input intellettuali provenienti dall'estero i quali hanno ridefinito il concetto di stato di diritto e costituzionalismo ad Hong Kong e nella Cina continentale. Le argomentazioni giuridicamente rilevanti usate da entrambe le parti nel conflitto forniscono un campo argomentativo che riflette sia le strutture argomentative classiche che la loro evoluzione. Allo stesso modo, meccanismi di persuasione non-verbali sono stati utilizzati sia dal governo che dai dimostranti con una forza straordinaria. Questo potrebbe mettere in discussione il ruolo della comunicazione linguistica in tali conflitti sui diritti fondamentali. Ad ogni modo, rimane inesplorato se strumenti interpretativi omnicomprensivi come la giustizia (fairness) possano essere applicati per razionalizzare il dibattito sociale e mitigare perdite irreparabili per la società che, dopotutto, è costitutiva dello Stato.

Parole chiave: la giustizia, strumento interpretative, discurso giuridico

SPRAWIEDLIWOŚĆ JAKO SPOSÓB INTERPRETACJI? ANALIZA PRAKTYK DYSKURSYWNYCH W NIEDAWNYM SPORZE O PRAWO GŁOSU W HONG KONGU I ICH ZAKORZENIENIE W PRAKTYKACH ARGUMENTACYJNYCH WSCHODNIEJ AZJI

Abstrakt: Problemy związane z konfliktem dotyczącym treści praw analizowane są poniżej z perspektywy prawno-językowej w kontekście niedawnego sporu o prawa

głosu w Hong Kongu. Głównym problemem prawno-językowym, który jest także punktem wyjścia do analizy próbek argumentacyjnych jest pytanie, czy prawne i prawnie istotne, ale nie wyłącznie prawne argumenty w sporach są rzeczywiście międzykulturowe. Ponadto kwestia, jaką rolę, jeśli w ogóle jakąkolwiek, odgrywają argumenty specyficzne kulturowo i narzędzia prawno-lingwistyczne w takich konfliktach jest również brana pod uwagę. Mając to na uwadze, przepisy prawne dotyczące konfliktu i argumentacji używanej przez strony są badane, aby ustalić istotne mechanizmy prawno-językowe, które mogłyby ułatwić rozwiązanie konfliktów dotyczących treści prawa. Sprawiedliwość jako narzędzie interpretacyjne jawi się jako najbardziej atrakcyjny mechanizm międzykulturowy. Tymczasem jego zastosowanie w mechanizmach rozwiązywania konfliktów pokazuje zakorzenienia mechanizmów prawnych w szerszych strukturach społecznych, które również ograniczają stosowanie takich czysto prawnych narzędzi dyskursywnych. W rezultacie, analizowany konflikt pojawia się jako amalgamat argumentów prawnych i pozaprawnych i niewerbalnych znaków, które są międzykulturowe. Sprawiedliwość jako narzędzie interpretacyjne w prawie ma charakter międzykulturowy i ograniczony zakres zastosowania do praktyk dyskursywnych, w których się ujawnia.

Słowa klucze: sprawiedliwość, interpretacja, dyskurs prawny

1. Legal-linguistic implications in conflicts about the content of rights

Law as research subject becomes truly challenging when the application of a legal statute in a particular case, which is dominated by diverging opinions about its content, is at stake. In such a case, the quality of legal argumentation is the decisive factor in the battle about right and wrong between the competing propositions about the possible content of the disputed law. Therefore, legal argumentation is the main legal-linguistic operation that matters particularly when conflicts about the content of rights are approached from the legal-linguistic perspective. Doubtless, legal language is argumentative, yet the consequences of its argumentative nature remain largely obscure. In the comparative legal-linguistic research this aspect of legal language as well as language use that is closely related to it, is not sufficiently explored either. Moreover, when different legal cultures such as the Continental European and the Chinese are compared, the methodological problem of comparability imposes itself as an additional burden upon the researcher (cf. Husa 2015: 62). Until now,

the starting point for this sort of academic scrutiny has been the question whether the language used in the legal argumentation is ubiquitous or whether it displays characteristic features that contradict the thesis about homogeneous globalized legal argumentation that is rendered with the help of essentially equivalent argumentative speech acts (cf. Galdia 2014: 341). This question is particularly important for the development of comparative research into non-European legal argumentation that is undertaken in Europe and by Europeans.

Overall, in the comparative research into legal argumentation one may distinguish arguments of different origin. First of all, arguments typical of the specific legal culture may come up in relevant legal-linguistic speech acts and they may be supported by other traditional arguments of regional origin. Additionally, some legal arguments might be common to some legal cultures; some may appear in mixed forms in different legal cultures. Still others may be innovative in the examined legal culture and may have been implanted in the conscious or unconscious processes of legal transfers. What is more, argumentation is a practical activity. It is apparent that legal arguments are connected with other, for instance political, religious or social arguments. This linguistic regularity will be showed below. In terms of linguistics, arguments manifest themselves in speech acts. Therefore, in the following analysis, legal and social arguments will be illustrated in their immediate linguistic dress before they will be interpreted within the framework that displays their logical classification. The complexity of the argumentative structures that will be analysed below concerns also the use of interpretive devices in the argumentative text samples. They are doubtless multiple, yet for the purposes of this study the main stress will be laid upon interrelated argumentative devices such as *fairness*, *equity*, *justice* and the *rule of law*. These argumentative devices are in fact meta-arguments because they steer the detailed argumentation in legal texts. Jurists value them highly as they regularly assume that reference to such meta-arguments contributes to the solution of legal problems in situations where argumentative *deadlocks*, or *ties* in the Dworkinian sense (cf. Dworkin 1977: 359), emerge in fundamental debates about the content of rights.

2. Conflict in Hong Kong about Voting Rights

In the recent conflict about the voting rights in Hong Kong the range of these rights has been questioned by parts of the Hong Kong society and by circles closely connected to the Mainland Chinese power structures as well as by those who directly represent them in Hong Kong. The conflict emerged around the question whether Hong Kong people would be able to elect the Chief Executive in the upcoming elections in 2017 from a list of candidates agreed upon by a committee of selected 1200 citizens or to vote for candidates who present themselves directly. For the academic research, the conflict in Hong Kong is both revealing and informative. It uncovers complex argumentative structures whose origin and composition should be elucidated. Explicitly legal arguments have a role to play in the discourse about the content of the voting rights.

Legal sources that form the argumentative framework of reference for the conflict are multiple. To begin, the Basic Law of Hong Kong is reflecting the international obligations stated in the Joint Declaration, which has been signed by the British and the Chinese Governments. Meanwhile, like the Joint Declaration, the Basic Law of Hong Kong uses language that facilitates legislative drafting yet complicates the application of legal provisions. Unlike the Joint Declaration, the Basic Law is expressed in Chinese in its official version. It includes numerous provisions relevant in the settings of the conflict about the voting rights. The Basic Law of Hong Kong states in its Art. 15: "The Central People's Government shall appoint the Chief Executive and the principal officials of the executive authorities of the Hong Kong Special Administrative Region in accordance with the provisions of Chapter IV of this Law." The Basic Law includes also a lengthy provision about the modalities of the appointment of the Chief Executive[1]. It is less specific about the Executive Council of

[1]Art. 45 (I) The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. (II) The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in

Hong Kong as this administrative organ is of limited importance only[2]. Art. 45 (I) of the Basic Law is particularly vague in this respect as it provides an alternative for electing the Chief Executive. It frames this alternative as follows: "the Chief Executive…shall be *selected by election* or *through consultations* held locally and *appointed* …by the government." Art. 45 (I) describes a vast election programme that includes fundamental yet also contradictory procedures for the rule in Hong Kong. The alternatives *selection by election* and *appointment after consultations* represent the most distant contrasts in the political theory that focuses on elections. What is more, Art. 45 (II) adds another programmatic commitment to the above provision: "The ultimate aim is the *selection* of the Chief Executive by universal suffrage *upon nomination* by a broadly representative nominating committee *in accordance with democratic principles*." This programmatic provision clearly overburdens constitutional law and the election process. Political science and constitutional law would most probably suggest that the candidate be elected in accordance with democratic principles or selected by a nominating committee and appointed by the government, yet not cumulatively nominated by a committee, afterwards elected in universal suffrage based on democratic principles and finally appointed by the government. The language of the provision, which seems to reflect a political compromise and the tendency to avoid open conflicts, finally blocks any attempt at a coherent application of the provision. This language also preformatted the arguments that were advanced by the opposing sides in the conflict.

Furthermore, the Basic Law includes in its Art. 68 a provision about the election of members of the Legislative Council that is framed in analogy to Art. 45[3]. Thirty-six of sixty members of the

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accordance with democratic procedures. (III) The specific method for selecting the Chief Executive is prescribed in Annex I "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region".

[2]Cf. Art. 54 The Executive Council of the Hong Kong Special Administrative Region shall be an organ for assisting the Chief Executive in policy-making. Art. 55 (I) Members of the Executive Council of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures.

[3]Art. 68 (I) The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election. (II) The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special

Legislative Council are appointed, not elected. Specific procedures for the election are described in annexes to the Basic Law. Requirements for candidates are not determined in the legislative acts. The media reported the words of the Chairman of the Election Committee, Qiao Xiaoyang, saying that the nominee has to "love China" [4]. The regular claims in the conflict are based on references to constitutional provisions. Meanwhile, dealing with arguments such as '*Our constitution promised us that*…' clearly presupposes the existence of a constitutional act in the Hong Kong legislation. Protesters perceive the Basic Law as the constitution of Hong Kong. In turn, Mainland China's authorities claim that China has only one constitution and that the Basic Law of Hong Kong is a political paper without any legal binding force, be it constitutional or another (cf. Chan 2012: 137). Hong Kong itself regards the Basic Law as a '*mini-constitution'* (cf. Chan 2012: 137). Yet, constitutional law does not know any term such as 'mini-constitution'. The described constellation shows interpretive problems in legal orders that are uncoordinated.

The conflict includes also elements of a plebiscite. In June 2014 the members of the Occupy Central-movement organized a referendum where three alternatives for the selection of Hong Kong Chief Executive were proposed. They included direct nomination by citizens or political parties. The legislative acts, instead, speak about a nomination committee that appoints the candidates. Hong Kong authorities deemed this referendum as contrary to the Basic Law and therefore irrelevant in terms of law. The legal qualification given by authorities to the plebiscite was *expression of opinion*. The institutional element of law is visible in this transformation. A vote that is recognized makes part of a referendum and is legally binding, a vote that is deemed to be outside legal mechanisms is a private matter. It is at best the expression of a view of the voter that is not binding in any way.

Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of the members of the Legislative Council by universal suffrage. (III) The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: "Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures".

[4]Mikko Paakkanen, Helsingin Sanomat, June 24, 2014.

3. Arguments and Counter-Arguments in the Hong Kong Treaty

The Joint Declaration signed by the United Kingdom and China in 1984, also called the Hong Kong Treaty, includes provisions that are relevant to the conflict. The textual basis that gave rise to the conflict is rendered in Art. 4 of the Joint Declaration from 1984 that provides in the part here relevant: "The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government.[5] " This legal position is also documented in the popular formula *Hong Kong people rule Hong Kong* (港人治港 – *gangren zhi gang*), as stressed by Michael Yahuda (1996: 77). Meanwhile, it seems that the formula is equally vague as is the treaty provision. The treaty oscillates between *elections* and *consultations* as if they were equivalent means of expression of the general will. Significantly, the Chinese and the English versions of the treaty are as vague as are both linguistic versions of the formula that relates to the rule in Hong Kong. One might suppose that *rule Hong Kong*/*zhi Xiang Gang* indicates in the popular formula the democratic way of exercise of the political power. This is, however, the result of an interpretive approach that is based on the dominant Occidental tradition of the exercise of power. Even in Occidental democracies such as the United Kingdom the monarch *rules*, yet he does not *govern*. The treaty provision is therefore a typical example of an argumentative deadlock in law where at least two rationally founded interpretive alternatives compete in the process of the application of law (cf. Dworkin 1977: 279). The joint declaration is challenging from the legal-linguistic perspective as it drifts towards using general terms and formulations that potentiate interpretive problems. Thus, the document has the legal status of a declaration that may be perceived as

[5]Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong from 19 December 1984.

legally less binding than an agreement. Further, it describes its object as '*the question of Hong Kong'* instead of e.g. *'problems related to the international status of Hong Kong'*. The more general formulation made the British-Chinese agreement easier, yet the use of the linguistic device of avoidance or circumvention of addressing the regulated problem directly has consequences when application of the joint declaration is at stake. After all, prevarication in legislation rarely pays in the long term.

4. Traditional legal (and other) argumentation in China

The above legal materials that form the background of the conflict about the voting rights are embedded in legal-linguistic argumentative patterns and numerous legally relevant social mechanisms and practices that steer the strictly legal argumentation. Many of them are traditional and make part of the legal culture. Constitutive of such arguments is their reference to the idea of *justice*, which is linguistically expressed with the help of different concepts such as *equity* or *fairness* or more recently with the concept of the *rule of law*. For China, the last concept emerged in contradistinction to the *rule of men* (Husa 2015: 162). The process of its emergence is analogous to the shaping of the idea of the *rule of law* in ancient Greece (Galdia 2014: 54). In this sense, the meta-arguments of law appear as common for the East Asian and the European legal traditions. Other arguments, mainly those pertaining to constitutionalism might be of more recent origin. These recent legal arguments and social mechanism witness also to the process of the emergence of cross-cultural legal-linguistic rationality.

The traditional Chinese argumentation may be reconstructed with recourse to the historical discourse that was fixed in the ancient writings. For instance, Chinese historical writings as well as the contemporary reference to historical events in China emerge around and refer to the dynasty timeline. As a matter of fact, China has been ruled by a succession of dynasties that has been regularly interrupted by civil wars or territorial fragmentation. Therefore, in formal terms, the dynasty timeline as a frame of reference makes sense in historical

and cultural research. When properly understood as a chronological system of orientation the traditional dynasty timeline does not blur the retrospective upon historically relevant events that might have been dominated or determined by other than dynastic considerations. Meanwhile, the breaks in the dynasty timeline are particularly interesting for the argumentation research. Regularly, new rulers were aware of the necessity to establish legitimacy for their taking power and establishing a new dynasty or rather for terminating the rule of the previous dynasty. A structural constant in this argumentation that pertains to justification of the change of rule is the mandate of heaven (天命 – *tian ming*). The mandate of heaven is the notional basis for the exercise of power in China (Kalinowski 2011: LXXVII, Perry 2002). It is acquired by divine grace and not by people's choice. Therefore, new rulers claimed that the previous dynasty had displeased the gods and lost the mandate of heaven (Loewe 2004: 421-456). This, so the argument goes, became manifest in the very fact that the gods allowed this loss of power and its transfer to the new ruler. The transfer – the argument continues – would not be possible, would it not please the gods under the mandate of heaven. In terms of law, the mandate of heaven has been withdrawn from the disgraced ruler and attributed to the new ruler and founder of the new dynasty. Reference to and analysis of the argument in the classical Chinese literature, for instance in Ban Biao's *On Kings' Destiny* (王命论 – *Wang Ming Lun*) displays the conscious use of the argumentative structure beyond essentialist or religious contexts that are definitely also present in the classical Chinese discussion about the mandate of heaven. Another salient point in the structure of justifying and legitimizing argumentation is the unlimited power of the Chinese Emperor. Only the mandate of heaven as an argumentative narrative can provide such a type of power. Without the backing of the divine grace, the Emperor would be reduced to a citizen who would have to convince others about the range of his prerogatives and privileges that he claims in state and society. The mandate of heaven clearly does not correspond to the rule of law. It seems to be the most classical argument that protects the exercise of power in China.

A corresponding argumentative structure pertaining to order and social stability can be traced back to Confucian writings. Today, public perception of the Confucian teaching is largely limited to the concept of *obedience to authorities* that also clearly favours these

authorities, yet not the social doctrine later named Confucianism in the Occident. In the modern Chinese society its detailed knowledge should not be overestimated (cf. Cao 2004: 3), yet it survives in parallel and simplified narratives that underlie the daily action of people. The Confucian social doctrine is based on the dialectic of giving and taking, in casu, of the obedience that is recompensed by care. As a doctrine or theory it is also 'Aristotelian' in that it establishes a model that may or may not be evaluated with sociological parameters, as it in principle remains theoretical or more exactly doctrinal. For Confucius, a citizen has to obey the state as the state has to take care about him. That the state may not act according to his doctrine does not appeal to him as a theoretical argument. The wrong action is for Confucius purely practical. This fundamental prerequisite to understanding the Confucian thinking is frequently neglected nowadays and the doctrine is reduced to slogans that propagate law-and-order ideology.

Moreover, preservation of *social stability* (维稳 – *weiwen*) is the major argument in governmental argumentation. The frequently used phrase about 'constructing a harmonious society' and 'a new social management system' are the main rhetorical features in the Chinese public discourse. Language that oscillates between 'instability' and measures to counter 'social instability' abounds in Mainland China (Liebman 2014: 97). Meanwhile, already the classical Chinese social doctrine, for which *Xiao Jing* (孝经 – *Treaty on Filial Piety*) dating from 480 BC is fundamental, includes thoughts about remonstances to authorities in cases when they commit errors which distort the harmony between the ruled and the rulers. Therefore, doctrinally anchored forms of social criticism such as remonstrances and representations mentioned in *Xiao Jing* prove that criticism has not been perceived generally as a social action that would destroy social stability, at least within theoretical approaches to the formation of the Chinese society and its state. Therefore, social stability that the doctrine is expected to engender does not produce a deadly quiet society, as is frequently suggested in the argumentation relating to Confucianism.

Also the argument based on filial piety is not missing in contemporary argumentation. The argument as such is one of the most persistent remnants of Confucianism in the Chinese society. It is based on the somehow surprising idea that obedience to government, which at Confucius times equalled the person of the ruler, is based on the

initial relation between parents and their children as a source of moral inspiration for further socially relevant action such as government or obedience to it (cf. Maspero 1950). It is worth mentioning in this context that the Greek concept of *democracy* developed under different theoretical prerequisites.

Arguments of Occidental origin, especially those referring to constitutionalism, were incorporated into the Chinese culture under the slogan *Chinese learning for the essentials and Western learning for the practicalities* (中学为体，西学为用 – *zhong xue wei ti, xi xue wei yong*), (cf. Yahuda 1996: 35). The hybridity of legal argumentation is therefore a well reflected process in the Chinese culture (Husa 2015: 47). The *rule of law* as an Occidental concept that relates to democracy and not to law-and-order ideologies may be perceived as a relatively new argumentative structure in the Chinese law. Yet, as in the Occidental legal cultures the rule of law takes in East Asia frequently the shape of a bureaucratic principle that impedes rather than expands the framework of the legal argumentation. The following paragraphs will show the connection between the traditional arguments and the recent argumentative patterns, mechanisms and strategies.

5. Emergence of legal (and other) argumentation about the voting rights

In this paragraph, the argumentation typical of the conflict, which was brought up by both Mainland China and Hong Kong sources will be analysed. In order to narrow down the scope of the argumentation brought by both sides and to homogenize the collected data, the arguments raised by two influential actors in the controversy will be taken into consideration: Associate Professor of Law at University of Hong Kong Benny Tai (Dai Yaoting 戴耀廷) and the Deputy Director of the Research Centre for Basic Law of Hong Kong and Macau at Shenzhen University Prof. Zhang Dinghuai (张定淮). The first, in most of the cases, raised his arguments in the columns of the *Hong Kong Economic Journal* (信報財經新聞), a paper close to the

democratic cause, while the latter was present in several newspapers, official and scientific publications of the PRC. This paragraph will first examine the arguments concerning the relation between PRC and Hong Kong and subsequently the point of view related to the role of the Basic Law. Furthermore, the divergent points of view on the legitimacy of the universal suffrage as a means for the selection of the Chief Executive will also be taken into account. Before the first proposal in January 2013 by Benny Tai of the movement "Occupy Central" was advanced, the method of selecting the Chief Executive in Hong Kong has been, as mentioned above, a matter of controversy in the public opinion in PRC and Hong Kong. In these years, both supporters of the electing system by means of the Elective Committee and by means of universal suffrage have raised a considerable number of arguments, which led to passionate debates about the topic.

The topic pertaining to the relation between People's Republic of China and Hong Kong, has been debated in detail by Prof. Zhang, while there are few or no comments on the matter from Prof. Tai in his columns. Prof. Zhang defines the Special Administrative Region of Hong Kong as "an indivisible part of PRC" and the relations between the two parts "as central-peripheral", where the first confers the autonomy upon the other. This assessment is particularly evident in the below quote, where Prof. Zhang is firmly appealing to the contents of the "White Paper" published in June 2014[6]. The report of the Central Government discusses the political and economic development of Hong Kong since the return to the Mainland with a particular focus on the definition of '*one country, two systems*' (一国两制 – *yi guo liang zhi*). In his comment to the report Prof. Zhang stressed the importance of the role of the Central Government as regards the autonomy of the region:

> "白皮书就是要告诉香港社会，香港特别行政区的高度自治权不是固有的，其唯一来源是中央授权。高度自治权的限度在于中央授予多少权力，香港就享有多少权力，不存在'剩余权力。[7]"

> "The White Paper has been released to inform the society of Hong Kong that the right to a high degree of autonomy of the Hong Kong Special Administrative Region is not intrinsic, and that the only source of that right is the empowerment given by the Central Government. The limits to this high

[6]"一国两制"在香港特别行政区的实践.中华人民共和国国务院新闻办公室.2014.
[7]张定淮 in 罗旭.中央与香港的政治关系必须正视.光明日报.2014.4.

> degree of autonomy are based on the amount of power delegated by the central government; there is no such thing as the 'residuum of power'."

It is important to notice in this quote the use of the adjective "intrinsic" (*guyou de* 固有的), here referring to the supposed perception of the Hong Kong society about the autonomy that the former British colony enjoyed after its return to the Mainland. The adjective *guyou* – 固有 is defined in the dictionary *Xiandai Hanyu Cidian* as "existing since the origin" (*benlai you de* – 本来有的), "not coming from the external" (*bu shi wai lai de* – 不是外来的)[8], and is specifically used by Prof. Zhang to stress the fact that the autonomy that Hong Kong enjoys is granted and guaranteed by the Central Government. According to Prof. Zhang, the formal authority to grant autonomy to Hong Kong and its relation with the Central Government is regulated by the Basic Law (基本法 – *jiben fa*), which explicitly provides at the same time for a degree of freedom for the population, as stated in the following textual sample:

> "基本法不仅确定了香港特区所享有的高度自治权，也明确了香港居民的各种自由权利。[9]"

> "The Basic Law has not only determined the high degree of autonomy of the Hong Kong Special Administrative Region, but also clarified any kind of freedom and rights of the inhabitants of Hong Kong."

The Basic Law plays an essential role in the argumentation of Prof. Zhang as well as in the comments of the Central Government on the matter of the relation with the peripheral government. In this view, should the Basic Law not be sufficiently clear, the "White Paper" published in 2014 leaves no doubts about the nature of the above-mentioned relation. Since the nature of this relation is regulated by the Basic Law, and as it represents a key argument in the issue of the voting rights, it is our interest to contrast the opinion of Prof. Zhang about the status of the Basic Law with the position of Prof. Tai. In his column in the *Hong Kong Economic Journal* of June 2013, some indirect reference to the Basic Law and its application can be found. In the first instance, Prof. Tai uses arguments advanced by Martin Luther

[8]中国社会科学院语言研究所词典编辑室. 现代汉语词典（第六版）纪念版. 北京：商务印书馆. 2012. 470 页.
[9]张定淮. 面向 2017 年的香港政治发展.东方早报.2014.9.

King in order to define the difference between a "righteous law" (公义法律 – *gongyi falü*) and an "unrighteous law" (不公义法律 – *bu gongyi falü*):

> "歧視人的法律就是不公義的法律，歧視人的法律扭曲了人性，讓一些人享有一些虛假的優越地位，讓另一些人虛假地處於卑下的地位。[10]"

> "The law that discriminates people is an unrighteous law; the law that discriminates people distorts the human nature, and is allowing a group of people to falsely enjoy superior positions, while it places other people in an unjustified inferior position."

After having defined the meaning of *unrighteous law*, he proceeds to describe a third type of law, which one may call *falsely righteous law*:

> "有一些法律表面看來是公義的，但因它是用來保護那些不公義的法律，那麼他們就變成不公義了。[11]"

> "There are some laws that on their surface seem to be righteous, but because they are used to protect other unrighteous laws, they become unrighteous themselves."

In this last comment, Prof. Tai, thought indirectly, is indeed referring to the Basic Law and the regulation relating to the election system. Furthermore, he uses the previous argument to support the need of mechanisms of civil disobedience to oppose both unrighteous laws and "falsely righteous laws". Since using official channels to object implies to question the privileges of those who "falsely enjoy superior positions", he assumes that this would be a fruitless approach[12] (**緣木求魚** – *yuan mu qiu yu* [13]).

The formalistic approach to the constitutional issue is supported above with reference to political reality. In this context, the argument of the balance of powers is very efficient, yet it is not necessarily a legal argument. It is grounded in the semantics of a right

[10]戴耀廷. 梁振英與馬丁路德金的超時空對話.信報財經新聞.2013.6.

[11] *Ibid.*

[12]耀廷. 公民抗命是否合理？.信報財經新聞.2013.6.

[13]The expression in brackets is a quote from the Chinese philosopher Mengzi (孟子 372-289 BC) in his *King Hui of Liang* (梁惠王上 - *Liang Hui Wang Shang*), literally means "climb upon the tree to catch fish". Its meaning of an unsuccessful approach to reach the aim is based on this image.

that might be or not be *intrinsic*. Meanwhile, the determination of what is in fact *intrinsic* to a right is undertaken with reference to the traditional argument of the hierarchy of legal sources. At this point, the argumentative sample fits perfectly the requirements of Occidental legal positivism. It goes without saying that counterarguments against this formalistic proceeding have to come from outside the argumentative system that is based on positivism. In such a situation in law, they will be, as a rule, incommensurable and they will come from philosophical conceptions that relate to the idea of *justice* rather than to formalistic legal doctrines. The contrasted argumentation displayed in above textual samples represents a classical type of a discursive situation related to differences about the content of rights.

6. Role of explicitly legal arguments in the conflict

Most explicitly legal arguments in the conflict are connected to the doctrine of constitutionalism. Its essence is the rule *of* law (法治 – *fazhi*) that is regularly confused in Chinese writings with the rule *by* law also called *fazhi*, yet written slightly differently **法制**. The rule of law as a political and legal argument seems to be of Occidental origin. It is only loosely incorporated in the reality of the contemporary Chinese state. M. Yahuda (1996: 5) writes: "Communist ideology has lost such appeal as it once had and, in the absence of the culture of legality, it has not been replaced by the rule of law." Programmatically, the rule *of* law and the rule *by* law appear in Chinese discourses in a way of contrast to *anarchic chaos* (乱 – *luan*). This contrasting procedure reflects Chinese social values and fundamental ideas about formation and operation of state and society. Meanwhile, as long as there is no independent judiciary in China the establishing of the rule of law in the country, at least in terms of Occidental approaches to the issue, remains illusory (cf. Yahuda 1996: 9, Peerenboom 2002). Meanwhile, attempts to instrumentalize it lingustically as a slogan oscillate between reformist tendencies to loosen administrative controls (放 – *fang*) and to tighten them (瘦 – *shou*), cf. Yahuda (1996: 33).

Constitutionalism with its main formula of the *rule of law* (法治 – *fazhi*) is omnipresent in the social discourse in China. In the political discourse, the rule of law as a legal term appears embedded in broader argumentative structures and is broadened by non-legal vocabulary[14]. From the collected data, it appears very clearly that another fundamental point in Prof. Tai's argumentation is the need to maintain a certain separation of powers, especially between legislative and judiciary power. This would serve as a measure to restrict the power of the executive, which can be reached by two means: democratic elections and independence of the judiciary body. Therefore, Prof. Tai assumes that the democratic system would most effectively ensure that the rule of law (法治 – *fazhi*) will not be used as a mere instrument to pursue the aims of the governance and that the function of the law would not be limited to the maintenance of the social order. As stated in Prof. Tai's article published in the *Hong Kong Economic Journal* in August 2013:

> "[...]法治不只是要求公民守法，也不是只以法律為主要管治工具為目的；法律的功能不只是要維持社會秩序，法治更須要求法律限制政府權力和保障基本人權，最終追求的不單是管治，而是能夠達到限權和達義的善治目的。[15]"

> "The rule of law is not just requiring the citizens to abide by the law, and does not ground on the use of law as an instrument to serve the governance. The function of the law is not just to maintain social order, as the rule of law should require the law to restrict the power of the executive and guarantee the basic human rights. All in all, what is pursued is not just to govern, but to strive for the aim of a good government with limitation of power and general acceptance of the law[16]."

[14]The Chinese Vice-Prime Minister Ma Kai was quoted in *China Daily (European Weekly)* 24-30 April 2015 saying: "China is comprehensibly pushing forward the rule of law, and this will offer a legal environment featuring equality, justice and transparency for talent at home and abroad."

[15]戴耀廷. 民主選舉包含以法限權.信報財經新聞.2013.8.

[16]The term 達義 （*dayi* 达义 in simplified Chinese script）is translated here as "general acceptance" on the basis of the definition given in the *Han Shi Wai Zhuan* 韩诗外传, a commentary on virtue, education and other topics, dating from 150 BC. In this text also the definition of *dayi* as "common understanding of principles" is provided. Therefore it can be used in this context to indicate the general acceptance of the law.

About the separation of powers and the independence of the judiciary body, Prof. Tai says in the same article:

> “若要這種司法限權能夠發揮限制政府權力的作用，司法人員必須獨立於行政部門及其他政治力量而裁決案件，包括涉及政府部門、官員、權貴的案件，並享有足夠的憲法權力監察政府的權力。[17]”

> “If necessary, this kind of limited judiciary power will bring into play the limits to the power of the government. The judiciary should be independent from the organs of governance and, aloof from the power of the government, deliberate on the cases, even those which involve governmental departments, civil servants and influential persons, and at the same time enjoy constitutional rights to supervise the power of the executive.”

Finally, on the legitimacy of the democratic system to elect the Chief Executive, we read in the same article that since the aim of the rule of law is, among others, to guarantee the basic human rights and the right to democratic elections is one of them, it is for Prof. Tai both a legitimate request and a necessary measure for the citizens to supervise the power of the executive. On the other hand, the arguments brought by Prof. Zhang are in complete opposition to the above. According to Prof. Zhang, the current elective system by means of the Elective Committee will ensure that the government will represent the will of the majority in Hong Kong society, mostly because of its pluralist nature. Furthermore, the professor assumes also that the current election system would prevent the election of a Chief Executive opposed to the Central Government. Therefore it would also prevent the risk of a constitutional crisis. The current system will also avoid the appearance of populist phenomena in the society of Hong Kong. We read in an article published in the newspaper *People’s Daily* that quotes Prof. Zhang:

> “张定淮强调，由提名委员会机构整体提名方式要体现集体意志[...]由于提名委员会的组成具有多元性，而产生的特首候选人必须为香港社会普遍接受，因此，坚持基本法规定的提名委员会制度，就是避免’政党提名’可能出现的严重的社会政治对抗风险，防范候选人不为中央接受而引发的宪制危机风险，以及避免使香港社会走向民粹主义。[18]”

[17] *Ibid.*

[18] 孙立极. 中央对于香港政改具有毋庸置疑的主导权.人民日报.2014.4.

> "Zhang Dinghuai stresses that by means of the elective committee the whole elective body should represent the collective volition. […] Thanks to the pluralistic nature of the elective committee, and because of the fact that the selected candidate will have to serve the Hong Kong society as a whole, to support the elective system regulated by the Basic Law is to prevent the risk that the 'nomination by political parties' could bring about a conflict between society and politics, and to prevent the possibility that the candidate will not abide by the guidelines of the Central Government, and consequently will cause a constitutional crisis. Furthermore it will also prevent the society of Hong Kong to turn towards populism."

We can observe from the quotations of the two protagonists that, from the point of view of Prof. Tai the selection of the candidate to the chair of Chief Executive by means of a democratic election is not only legitimate but also necessary. On the other hand, from the point of view of Prof. Zhang, the democratic elections could lead to an unfair representation of the people's volition, as well as to populism and conflict between society and government. Unsurprisingly, also the argument based on the *rule of law* is largely one-sided. It is contrasted with *political expediency*. *Political expediency* is frequently used as an argument in legal texts. Therefore its presence in the above argument appears as an expression of textual regularity in the argumentation that concerns the content of rights. Due to the argumentative contrast and due to the avoidance to commit their argumentation to the same framework of reference the protagonists again did not reach any agreement. Instead, they have proven that the argumentative deadlock cannot be overcome with arguments coming from restricted formal argumentative arsenals. Below we will ask whether this argumentative deadlock could be overcome with meta-arguments that would steer legal argumentation towards agreement. Meanwhile, before this issue will be addressed, some mechanisms that accompany the legal argumentation will be examined in order to better understand the role of explicitly legal arguments in the conflict.

7. Mechanisms accompanying legal argumentation

Legal argumentation takes place within linguistic forms that are adapted to the legal culture. For instance, the argument of *lack of contention* is based on the wording of protest that appears as supporting the government, and not as seeking confrontation with it. It apparently facilitates making concessions. Paradoxical pro-active strategies were present for instance in PRC in the Mao era where bottom-up rebellion against paternalistic state authority had been encouraged (Ching 2014: 125). This state of affairs may be linked to the traditional political and legalistic arguments that contrast and also bind together rights and obligations in the Confucian tradition, as stressed by E. Perry (2002, 2008). Lack of contention and obedience is stressed in *xinfang* petition procedure (信访) that avoids antagonistic argumentation. Positive images of protest are not absent from Chinese culture where protest was "not necessarily a subversive force against the state, but an integral element in the political imagination for both rulers and the ruled," as stated by Ching (2014: 126). Righteousness is the main structuring notion in these approaches to protest. Meanwhile, a cynical conception of law rather than the rule of law is strengthened by mechanisms that stress bargaining in legal settings.

Popular argumentation is often sceptical of legalistic solutions. Typically, this attitude is expressed in sayings such as *shang you zhengce, xia you duice* (上有政策，下有对策 – *above is politics, below is alternative*). The attitude mirrored in the phrase is favouring circumventing legislation that comes from above by using tricks of whatever sort. Next to it, neologisms such as *mainlandising the city* or *Occupy Central* were established and largely used, also abroad. Furthermore, *cyber protests* as a modern technological form of communication make part of the argumentation around the issue of the voting rights, yet they are largely based upon traditional argumentation.

A new element in the structure of protest is the bargaining element as such as it excludes the previously dominating form of a reaction from above, namely from the government, to what occurs at the grassroot level (cf. Ching 2014: 125). This is a totally new element in argumentation in the history of the Chinese statehood as negotiability is not a constant in Chinese social confrontation with

state structures. Ching assumes that this "commodification or monetization of state power and citizen rights" will have important implications as far as the durability of authoritarianism as a form of rule is concerned (Ching 2014: 125). Meanwhile, new forms of dealing with social protests emerged in China, especially in the aftermath of the Olympic Games of 2008 (Ching 2014). The main tendency in this approach is to use bargaining mechanisms and 'buy stability' from protesters, as is said frequently by governmental officials. In economically motivated protests the government bargains with protesters and finally makes some economic concessions, establishing a 'market nexus' between state and protest. Ching (2014: 124) also showed how such bargaining mechanisms may become instrumental in overcoming social protests. She however also stressed that the bargaining mechanisms might concern 'major types of social protest', which means by far not all. It is obvious that non-economical, human rights related protests may also be influenced by bargaining mechanisms, especially in parts concerning the leaders of such protests. The question whether such mechanisms might be efficient within the structure of the Hong Kong political movement remains open (cf. Khalat 2015).

By some foreign observers the Hong Kong protest movement has been termed *revolutionary* (cf. Khalat 2015). The term attributes to the conflict another discursive dimension, yet is not in use in the internal discourse among the opponents. However, argumentative activism in the debate was not limited to Hong Kong and Mainland China people. Foreign representations such as the Canadian, Italian, and Indian chambers of commerce in a joint statement distanced themselves from the students' movement. Some international financial and accounting firms operating in Hong Kong criticised the movement for threatening the position of Hong Kong as a reliable global financial centre.

The above textual features of argumentation are of Chinese as well as of Occidental origin. The element of economical bargaining in the disputes about the content of rights seems to be typical of post-modern societies, yet it is poorly researched due to problems with accessibility to sources.

8. Non-verbal elements of argumentation – persuasion through imagery

Equally, non-verbal mechanisms of persuasion have been used by the government and the demonstrators with overwhelming strength. This fact might put in question the role of language-based communication in this sort of conflicts about fundamental rights. Doubtless, linguistic argumentation does not take place in a vacuum. The focus on language use in this article may to some extent conceal other visible forms of protest and argumentation that might be even more efficient than is the linguistic exchange of legal and other arguments. This non-linguistic action is based on or accompanied by a swath of corporeal signs that mark the social discourse visibly. Language is a tool of explicit communication under such circumstances.

Street protests and blocking road traffic were the most visible forms of recent protests in Hong Kong that lasted some eighty days. They took the form of long term sit-ins, although also a series of shorter but regular protests or disruptive sit-ins have been envisaged by the protesters. 'Awareness campaigns' have been launched by the protesters. 'Yellow ties' as well as 'little umbrellas hanging on strings' were worn by protesters and their supporters. Use of umbrellas precipitated the coinage of *Umbrella movement* for the unrest. T-shirts with slogans such as *I insist to demand nomination*, in Chinese and in English, were worn by protesters.

In Hong Kong, also *tear gas attacks* took place. The legal basis for this sort of acts in stated in laws. The use of force is regulated by local law because Chinese national legislation principally does not apply in Hong Kong[19]. Meanwhile, the Basic Law includes in its Art. 18 an exceptional rule that is interesting in the context of protests[20]. After all, repression is another, classical strategy to react to

[19]Art. 8 The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinaces, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

[20]Art. 18 (I) The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in the Art. 8 of this Law, and the laws enacted by the legislature of the Region….(IV) In the event that the Standing Committee of the National People's Congress decides to declare

social protests (Ching 2014: 129). There, *force shall be used judiciously* as is regularly repeated in the Chinese media.

9. Fairness as overarching legal-linguistic argument

Fairness as interpretive device and as regulatory social mechanism can be traced down to classical Chinese social and legal thinking. In the Confucian thinking it is present at least in the concepts of celestial harmony and in filial piety. In later Legalists' writings the argumentation shifts towards the argumentative dichotomy of social stability and sanction for breach of a situation perceived as peaceful in society at large. Both argumentative patterns are characteristic of the discourse about legally relevant social action in contemporary China.

Fairness as linguistic device and as social mechanism emerged in traditional Chinese legal studies, mostly in the pre-imperial Confucian teachings. Later legalist and formalist approaches shifted the balance towards a more orthodox understanding of ethical and legal issues. This tendency stressed stability and necessity of sanctioning breaches of societal harmony rather than fundamental, subject matter oriented discourse about right and wrong. In the Occidental intellectual tradition J. Bentham's utilitarianism and legalism come argumentatively close to this structure. J. Bentham was relatively early translated into Chinese and his works have had a big influence upon the formation of the modern conception of the Chinese state[21]. The same concerns the works by J. S. Mill, especially his treaty *On Liberty* and famous translations by Yan Fu of works by Adam Smith, T. H. Huxley and others dating from the beginning of the past century. These works are generally perceived as catalysts in the subsequent social processes where the contemporary Chinese state and society were developed. Reception of Occidental legal thought

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a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.

[21]J. Bentham (2000) Daode yu lifa yuanli daolun, Beijing - Shangwu Yinshuguan.

was of course stronger in Hong Kong due to a century-long exposure to the British rule. The cultural contact may be a part of the explanation why East Asian legal argumentation follows in general terms the patterns of the Occidental legal reasoning. Legal concepts used in the discourse underwent a semantic evolution, largely also due to foreign intellectual input that reshaped the notions of the *rule of law* (法治 – *fazhi*) and constitutionalism both in Hong Kong and in Mainland China. Some of them reach the potential of conflicts, such as the recent dispute about the scope of internationally and constitutionally guaranteed *voting rights* in Hong Kong. Legally relevant arguments that were used by both sides in the conflict provide an argumentative field that reflects both the classical argumentative patterns as well as their discursive evolution. The efficiency of the argumentative dichotomy is visible in social discourses about the application of law. However, it remains unexplored whether overarching interpretive devices such as fairness could be applied in order to rationalize the social discourse and mitigate irreparable losses for society that, after all, is constitutive of statehood.

In the light of the above, conflicts about the content of rights appear as a legal-linguistically relevant type of legal argumentation that is connected to broader social mechanisms in which power is exercised in society. Legal texts, like those analysed above, and that give rise to such conflicts, often also provide argumentative alternatives that are either complementary or evidently contradictory. In such situations, purely linguistic mechanisms cannot contribute to the solution of such conflicts in any significant manner. It is also questionable whether semantically broad notions such as *equity* or *fairness* might contribute to an efficient way of solving deadlocks in legal argumentation. Meanwhile, it also goes without saying that fairness or equity as default mechanisms might be used discursively in situations of deadlocked interpretive attempts. This situation has been analysed above as a default mechanism that is applied when other means of interpretation cannot advance the process of conflict solution with regular legal-linguistic means. Yet, finally such interpretive devices that refer to overly broad philosophical concepts may also justify arguments that are contradictory, like the two positions typical of protagonists in the conflict, which were analysed in the foregoing paragraphs. It seems therefore that conflicts of the sort discussed above are finally solved in mechanisms of application of power that

are apt at overcoming the circularity of legal and extra-legal arguments. These mechanisms are primarily legal and therefore their efficiency in settling conflicts might be questioned. Equally, it might be questioned whether law is the best mechanism to establish social stability, as claimed in some of the analysed arguments. At least, the rule of law that is an argument constantly stressed in the analysed material, does not lead to better results. Its only advantage is to separate legal from extra-legal arguments, yet this result may ignite or entice rather than solve conflicts that emerge around fundamental rights. The Chinese legal culture as well as the European legal tradition include argumentative topics that strengthen the idea that social dialogue is more advisable in situations as those analysed above. Controversial issues that relate to conflicts about the content of rights might be efficiently solved in legal mechanisms, yet the substance of such conflicts remains as a part of public non-legal discourses and proves that the social conflict is actually not solved, notwithstanding its limited juridical dimension. This situation also illustrates the legal-linguistic dimension and its limits.

10. Conclusions

The particular case concerning the conflict about the voting rights in Hong Kong that provides material samples for the analysis of a more general legal-linguistic issue that is the ubiquitous character of legal argumentation can be perceived as a typical example of a conflict about the content of rights. Arguments used in it are either legal, such as those referring to international instruments, constitutional acts or other strictly legal sources or extra-legal, such as those pertaining to equity of fairness. Arguments used in the conflict by both sides are well rooted in the textuality of Chinese law and its philosophy. These arguments also correspond with main traditional European argumentative topics developed by jurists to cope with situations where argumentative deadlock can be solved only by power structures. The argumentative deadlock that emerged in the conflict is also typical of controversial situations relating to the application of law. More recent legal and extra-legal arguments that include the use

of modern technologies and the traditional non-verbal sign inventories functionalised in social protests strengthen the assumption that argumentation used in conflicts of the kind analysed here is ubiquitous. It appears furthermore that it is embedded in broader social mechanism of conflict emergence, conflict management and conflict solution than those generally perceived as legal.

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