EFFECTIVE COMMUNICATION WITHIN LEGAL TRANSLATION

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Abstract

The legal translation generates many difficulties due to the differences between and within legal systems, which are further complicated by their evolution in history and by their cultural specificity. Therefore the legal translator must be versatile not only in the legal terminology, but also in the legal systems and the cultures involved in translation and he has to function as an intercultural expert able to translate the meaning from one culture into another so as to make it comprehensible and functional. This paper makes reference to different legal systems, gives some examples of difficulties that arise in the terminological transfer from one legal system into another and offers some solutions that could be useful to both legal translators and legal professionals.

Keywords: legal translation, legal systems, legal English, comparative law, translation problems

"If your words are not correct,
your business will not be successful"- Confucius

When translating a legal text the translator cannot rely only on dictionaries or glossaries with specialized terminology as he may easily feel at a loss for words when concept gaps surface due to the differences between the source legal language and the target one, the source legal system and the target one, and ultimately between the cultures these legal systems come from. If we consider Vermeer's definition of culture – "the entire setting of norms and conventions an individual as a member of his society must know in order to be 'like everybody' or to be able to be different from everybody" (Vermeer, p.28) - we can state that legal systems are closely connected to the cultures they come from and thus the translation field, even a specialized one as that of legal translation, is an act where different legal systems and cultures engage in an intercultural dialogue.

Therefore the legal translator must be versatile not only in the legal terminology, but also in the legal systems and the cultures involved in translation and he has to function as an intercultural expert able to translate the meaning from one culture into another so as to make it comprehensible, functional and especially in the case of legal translations, performative.

The performative character is what makes legal language different from the general language, namely its role is not only informative but also regulative because of the legal effects it produces: e.g. the judge gives the sentence which creates rights and obligations, the Parliament passes laws that regulate people's lives, contracts once concluded generate rights and obligations, etc. This performative character has generated certain common language requirements for drafting legal documents which can be found across legal languages, regardless the specificity of their legal systems. Thus we can identify

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performative markers in contracts or statutes, such as modals that express obligation ('shall') and permission ('may'), or performative verbs such as 'grant', 'confer', 'declare', 'pronounce', 'undertake' (Cao, p. 21) and these can easily be transferred from one language to another.

However, in contrast with other technical languages that belong to sciences such as medicine, physics, chemistry or engineering the legal language has no universal character as it is system-bound. Each society has its own legal system with its concepts, norms and rules for applying them; hence, the multiple terminological apparatus that individualizes each national legal system and makes it different from the others. When translating from one legal system into another the legal terminology carries with it the particularities of the history, evolution and culture of the corresponding legal system. Therefore, the job of the legal translator becomes even more demanding as it involves system-related differences and the translator discovers that apart from being a language and intercultural expert he needs to posses comparative law knowledge.

Why should the translator be informed about the specifics of different legal systems? This is because, as stated above, the legal language has a performative character and if a single word is wrongfully translated, this can change the intended purpose of the source-document and thus the translator may be held liable for any damages that result from his defective translation. Thus, knowledge of the specificity of the legal systems involved in translation is highly required.

As regards the types of legal systems, according to Christian Hertel (p.128) there is no 'correct' classification into legal families. However, the legal translator may consider Hertel's classification into 7 legal systems as being useful: 1. Common Law legal family; 2. The Romani-Germanic legal family based on the Code Napoleon; 3. the German legal family; 4. The former/existing communist governed states; 5. East-Asian legal orders belonging to the Romano-Germanic legal family; 6. The Nordic legal family (between Common law and Romano-Germanic legal family); and 7. The Islamic legal family. One classical distinction is that made between Common Law (the Anglo-American legal family) and the Civil Law (the Romano-Germanic family with its "codified" legal orders) because these legal systems cover about 80% of the countries of the world.

The Common Law family is a unitary one with legal orders that have many similarities to each other. This includes England and Wales, the USA, Australia, New Zeeland, Canada, former colonies of England in Africa and Asia such as Nigeria, Kenya, Singapore, Malaysia, Hong Kong. While Common Law is characterized by an astonishing homogeneity in important matters, given the fact that it covers almost a quarter of the countries of the world, the Romano-Germanic legal family, which represents nearly two thirds of all legal orders (Hertel, p.130) displays considerable differences as regards content. The Romano-Germanic family is generally divided between the legal family of the Code Napoleon and the German legal family. Civil Law countries include France, Germany, Italy, Switzerland, Austria, Latin American countries, Turkey, some Arabic states, North African countries, Japan, South Korea (Kocbek, p. 57). The Romanian legal

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system is part of the Romano-Germanic legal family as it is based on the Napoleonic Code. Then we have the mixed types of legal families such as Israel, South Africa, Quebec, Louisiana, Scotland, the Philippines and Greece. The EU law is also considered a mixed type (Cao, p.25), hence the diversity involved in the translation of its regulations into the languages of its Member States and the problems generated by this diversity.

Given this great diversity of legal families, every single legal translation involves prior documentation with regard to the specificity of the legal issues addressed by the legal text and the identification of both differences and similarities between the legal systems of both the source and target legal text. In this process of mediating effective communication between legal systems, the legal translator is faced with many problems and we will make reference to some of them as follows.

The difficulties that may arise in legal translation mainly depend on the relation between the legal systems involved. According to de Groot (p.279), we can have different situations that are generated by the legal systems and the languages required for translation: 1. The legal systems are closely related (Spain and France, Romania and France) and in this situation the translation is relatively easy; 2. The legal systems are closely related but the languages are not (Netherlands and France) and this will involve major difficulties; 3. The language systems are different and the languages are related (German and Dutch). Here the threat of 'false friends' may generate real problems; 4. The most difficult situation and the one the Romanian legal translator is faced with as well is that when the legal systems and the languages are not related (Romanian and English). As a Romanian translator I experienced an even more difficult situation when during international conferences I was asked to translate into English for an audience coming from different language backgrounds. In this case English was chosen as a 'lingua franca' for the translation of texts that had no connection with the English legal system. The translation follows the 'lingua franca' particularities on the syntactical, pragmatic and stylistic levels but when it comes to terminology there is a high risk of introducing concepts that are not to be found in either of the legal systems involved in translation.

Probably the safest way to avoid this risk would be to give up using English as a 'lingua franca' and to have parallel texts in all languages required. However this is a lengthy and expensive process that is not adopted in conferences, yet when it comes to contracts that may generate real issues, these parallel texts are employed in order to prevent any dispute that may arise due to defective communication. I may also add another discouraging argument for using English as a 'lingua franca' by quoting Paul Smith (p.2): "Historically, English was not an ideal choice to be an international legal language. For example, modern legal "English" is mainly a mixture of Old French, plus some Latin, Greek, German, Dutch, Old Norse and a variety of other languages. Many of these have contributed "legal English" terms which have no recognizable connection with modern law in the UK or the USA (or anywhere else where English is the language of law) but which survive to confuse even native English speakers."

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One thing that can be done in order to avoid the risk of getting a confusing translation with concepts that depart those used in the source text is to thoroughly study the meaning of each concerned concept in the source language. Then it is advisable to retort to specialists in the legal field whose advice could prove essential in getting a clear and detailed explanation of the respective concept. After comparing the legal systems involved, a term with the same meaning should be identified in the target language and this must be checked against several contexts in the target legal system in order to validate the correct choice. However, if system gaps surface, meaning that there is no equivalent for the concept from the source language in the target language, then one solution is to use the source language term in its original or transcribed version using a paraphrase or creating a neologism with an explanatory footnote (de Groot, p.25). Another solution would be the use of calques and/or borrowed meanings (Mattila, 119).

Over the years both as an English teacher for law students and as a translator in international conferences or as a translator of legal documents I have encountered many problems, and in most situations the translation required a lot of prior documentation. As it follows I will give only some examples of legal translation issues that I had to cope with. One of them is represented by the category of 'false friends' such as 'caution'- which may easily be confused with the Romanian 'cautiune' (bail), yet it means sending the file back to the police in order to get more evidence on the committed crime; another false friend is 'tribunal'. As the meaning in the English system is that of judicial body that is not part of the court system and its role is to mediate conflicts in their incipient phase, the translation in Romanian cannot be 'tribunal' as in the Romanian system this refers to a court of law that has county jurisdiction. However in the European Convention of Human Rights, Article 6 on the Right to a fair trial, the general term that is used is not 'court' but 'tribunal': "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial *tribunal* established by law." Moreover, while in French we have 'cour de justice', in Italian we have 'tribunale' and in Spanish and Portuguese 'tribunal.' The answer to these quite confusing variants is that all depends on the source and target legal systems involved in translation and the identification of the appropriate term relies on the accurate identification of the peculiarities of each legal system. Another example of a 'false friend' is the English classification for damages: general and special. These cannot be translated in Romanian by 'daune generale/ speciale' as there are no such terms related to damages in the Romanian legal system. Yet if we follow the definition of the English terms, we can easily identify that they actually refer to the Romanian damages called 'daune morale/ materiale.'

Confusion may also arise when there are no exact equivalents in the target legal system. One example would be the English division of 'defamation' into 'libel' and 'slander'. Even though in Romanian the legal terminology uses only one term and that is the translation for defamation, namely 'calomnie', legal texts also give examples of defamation and thus, we can identify translations for 'libel' and slander by using

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paraphrasing: libel (defamation in a written form) would be 'calomnia prin presa' (defamation in the media) and slander (defamation in an oral form) would be 'calomnia exprimata oral (defamation expressed orally).

Another situation that may lead to a wrongful translation is that of identifying an equivalent for the legal profession licensed by the state to advise clients and represent them in the court, called in Romanian 'avocat', in Italian 'avocato', in French 'avocat', in Portuguese 'advogado' and in Spanish 'abogado', but with no direct equivalent in the Anglo-Saxon system as it can be translated as lawyer, counsel, advocate, attorney, solicitor, barrister, counselor. In the USA the most common terms are lawyer and attorney, attorney-at-law or counselor. In the UK, Canada, Australia and some more common-law countries, the lawyers are either barristers (they have the right of audience in superior courts) or solicitors (they advise clients, draft the documentation for the barristers and have the right to appear in inferior courts). In this situation the translator is again legal system – related and he has to consider the competencies of the concerned legal profession when choosing the appropriate equivalent.

A further element that we need to have in mind when translating a legal text is that each legal word has a history attached to it and this has influenced its meaning in a way or another. Thus there are some old legal words that have survived in modern legal English, yet new meanings have been attached to them. Let's take the case of 'bailiff.' Originally this referred to the marshal of the court but now it refers to someone who serves documents for the court (UK) or someone who keeps order in the court (USA). In the UK bailiff also refers to someone who can enforce court orders. By the Tribunals, Courts and Enforcement Act 2007, the term bailiff has been replaced by 'enforcement officers' thus getting closer to the Romanian term of 'executor judecatoresc.' However, in the UK system the term 'bailiff' has been preserved for some jurisdictions, thus we have County Court bailiff (enforces county court orders), certificated bailiff (enforces debts on behalf of organizations), non-certified bailiff, water bailiff (constables that for illegal phishing prevention), jury bailiff (court ushurers who monitor juries), but High Court enforcement officer (who executes High Court writs). In the USA, these court officers are sheriff's deputies, marshals or constables, thus terminology differs among the several states. When confronted with so many variants, the translator needs to identify the associated meaning in the source language and to identify the corresponding term in the target language, one that covers the same competence, or at least one that is closer in meaning to which footnote is added with the explanations on the differences that arise. Thus bailiff could be translated in Romanian both as 'executor judecatoresc', which means an enforcement officer that enforces court orders, but also as 'aprod' when referring to the officer that keeps order in court.

Conclusions

Considering the above-mentioned issued that may arise in translating legal text mainly due to dissimilarities between legal systems but also to language differences, one

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can realize the highly demanding job of the translator that can become even more burdensome considering the legal consequences that a legal translation can generate. Apart from being thoroughly knowledgeable of the languages he uses in translation, the legal translator has to consider the particularities of the language of law and of the legal system this stems from. The translation difficulties are generated by the differences between and within legal systems, which are further complicated by their evolution in history and by their cultural specificity and which, if not properly deciphered, can hinder the process of effective communication. In this era of globalization, communication has become a vital element, and the actors involved in this process are highly aware of the increasing need of an efficient exchange of information. Thus not only future translators, but also future specialists in the field of law need to acquire knowledge of comparative law, of specialized language and of translation skills in order to properly function within the increasingly demanding world of work.

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