LEGAL TRANSLATION: GENERAL CONSIDERATIONS AND CHALLENGES

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Abstract: Generally speaking, translating legal texts is complex both linguistically and culturally. This paper aims to discuss issues related to the translation and interpretation of the legal texts written in English and the difficulties arising from the confrontation of two legal systems. The analysis starts from discussing the main features of the legal language and draws a parallel between the civil law and the common law. Further, our concern is to detect some of the issues on the translation of certain concepts and to provide solutions. Examples are selected mainly from The Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union (2005), the section which stipulates the conditions and arrangements concerning the accession of the new Member States.

Keywords: law, legal English, translation, lexical analysis, cultural mediation

The linguistic diversity of legal English

Legal language is considered a language for specific purposes. The syntactic, stylistic and lexical features that distinguish it from general language represent the first challenge to the translator.

From a lexical point of view, legal language is extremely prolix, redundant and almost impenetrable to the layman. Legal texts are characterised by a considerable amount of obsolete words and expressions that have almost disappeared in modern language. A clear example is given by the recurring presence of unusual adverbs (like *whereof, thereof, whereas, wherefore, thenceforth, forthwith, hereto, hereon, herein,* etc.) and the preservation of the *-eth* ending for the third person singular of the present tense *(witnesseth* vs. witnesses, *doth* vs. does, *hath* vs. has, etc). The use of obsolete words and the reluctance to any type of change is a direct consequence of a purely conservative approach: the introduction of new words or the replacement of old ones could easily

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generate ambiguity and confusion, undermining the absolute need for clarity and precision.

In terms of style, legal English is extremely wordy. This is also due to the high concentration of synonyms and binomials (a sequence of two words used to refer to the same meaning) that can be found in a text (e.g.: *new and novel, care and attention).* The repetition of terms that are semantically similar is partially due to historical motivations dating back to the Norman Conquest in 1066, when both English and French were spoken. In his "Legal language: History" (1994), Goodrich emphasizes that, on the one, the sources of law in terms of the precedent were spoken English and, on the other hand, the language of medieval judicial instruction was Latin. Moreover, after 1066, court proceedings were held in French. Paradoxically, all three languages were therefore used within the same legal action: the claimant and the defendant stated their case in English, the legal records or the pleas were presented in Latin and, finally, the court decision was issued in French. Experts in the field argue that the use of twinned terms was dictated by the practical need to make the law intelligible and clear to the entire population: one term was generally derived from Anglo-Saxon, while its synonym was borrowed from Latin and/or French. A few examples clearly show this double linguistic origin: *false and untrue, terms and conditions, hire and employ, renounce and abjure, swear and affirm, injuries and wrongs, to have and to hold.*

Syntactically speaking, sentences in legal documents are generally much longer than in ordinary language. On average, sentences in legal documents are made of about 50 words, which is a substantial length if we consider that, in general terms, English syntax is more succinct when compared to Romanian. This feature is heavily criticized by one expert in the legal language, David Melinkoff, who ironically advises the law-making bodies to either say less or to put a period in the middle when drafting the legal texts (cf. 1963: 25).

The following sentence selected from *The Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union* is composed of 92, words and clearly highlights the frequent recurrence to long relative or dependent clauses (like the one reported in italics) and the redundant repetition of the noun 'acquis' and of the pronoun 'it' used for its anaphoric reference (reported in bold):

Those provisions of the Schengen **acquis***as integrated into the framework of the European Union and the acts building upon* ***it*** *or otherwise related to* ***it*** *not referred to in*

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paragraph 1, while binding on Bulgaria and Romania from the date of accession, shall only apply in each of those States pursuant to a European decision of the Council to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the **acquis** concerned have been met in that State. (Art. 3, al. 3, L157/30)

Verbosity in legal texts is also due to the insertion, for the sake of precision, of the most information available for every single aspect of the text. Every mention to things or persons is in fact followed by references and detailed information to help the reader clarify their identity:

Bulgaria and Romania accede to the conventions and protocols listed in Annex I. Those conventions and protocols shall enter into force in relation to Bulgaria and Romania on the date determined by the Council in the decisions referred to in paragraph 4. (Art.4, al.2, L157/30)

It can be concluded that "legalese" is far from being a communicative type of language. It is in fact designed to work as an instrumental code for the exchange of shared information between experts of the same field.

English legal system. A comparative approach

The two principal legal systems in the world today are those of civil law and common law. Continental Europe, Latin America, most of Africa, much of Central Europe and many Asian nations are part of the civil law system. Civil law originates from ancient Roman law, updated in the 6th century A.D. by the Emperor Justinian and adapted in later times by French and German jurists. England, along with the United States and other countries once part of the British Empire, belong to the common law system. It is important to underline that English law simply implies the law of England and Wales, since Scottish law has its own autonomous tradition.

Common law developed in the Middle Ages and came to mean the whole law of England, as distinct from local or regional rules. England, in the process of constructing a flexible legal system of its own, was less influenced by certain sources, like the Justinian's legal system or, later on, the ideals of the French Revolution embodied in the civil code of 1804 (cf. Walker 1980).

Judge-made law

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The common law system consists of unwritten "judge-made" law, while the civil law system is composed of written codes. In civil law countries all law is codified in civil, penal codes or statutes. The doctrine provides guidance in their interpretation, leaving to judges the task of applying the law.

Doctrine and jurisprudence

One of the major differences between the two types of legal systems is represented by the priority given in English law to jurisprudence over doctrine. Jurisprudence provides the principal source of common law, while civil law jurisprudence applies general principles and is only a secondary source of law. Conversely, doctrine developed by treatise writers in civil law is often considered a source of law, while it lacks binding force in common law systems.

This difference in priority can be explained by the role that the legislator plays in both traditions. Civil law adopts Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the role of judges is strictly limited to applying the law. Common law, on the contrary, finds in judge-made precedent the core of its law.

The binding force of precedent

In the common law system, judicial decisions have the force of law and must be respected by the public, by lawyers and by the courts. It is the so-called "concept of precedent" as expressed in the Latin expression *stare decisis* ("let the decision stand"). The decisions of a higher court must be respected in the same or similar cases decided by the lower courts. In civil law, decisions of the higher courts do not have the binding force of law in succeeding cases: a judge in the civil law system is not legally bound by the previous decision of a higher court in an identical or similar case (cf. Goodrich 1994: 2080-2086).

The role of legal translator in cultural mediation

Differences in culture and traditions represent one of the main hindrances to the translator's work. While the legal system in English-speaking countries relies on the common law tradition, in Romance speaking countries, such as Romania, it is based on the civil law tradition (cf. Nadrag, Buzarna-Tihenea 2014: 204-213). That is the reason why, before he can transfer a specific concept from one language to another, it is necessary that such a concept exist in the target language, both at a cultural and linguistic level. In

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particular, the enormous disparities between common law and civil law procedures render the translating process even more complicated and challenging.

Firstly, it must be remembered that the idea of semantic equivalence remains a much-discussed concept. Many translation theorists maintain that equivalence between two languages is a pure and unattainable ideal and the expression will be used here to designate a simple linguistic correspondence.

Sapir believed that translating does not only imply the choice of "equivalent" linguistic terms, but a real change in the way we perceive everyday reality: "No two languages are ever sufficiently similar to be considered as representing the same reality. The worlds in which different societies live are distinct worlds, not merely the same worlds with different labels" (Sapir 1929: 214).

Solutions are not simply found in dictionaries but in a correct and realistic approach to the text: translating involves an accurate work of research and terminological consultation on specialised texts. The translator becomes a researcher and a mediator who, after having deepened his or her knowledge in a specific field, acts between two universes that are conceptually and linguistically distant from each other. Similarly, Luminita Frentiu and Lucia Beica acknowledge the great responsibility that is implied when translating legal texts:

It takes years of experience working with legal documents, reading legal texts in both source and target languages, and becoming familiar with the mentality of legal professionals and the lay public to develop a sense of current, proper legal style; and even then, translators often feel obliged to rely on common sense and instinct in deciding how much to manipulate the style of a text. (2001: 44)

Translation techniques

This last section will be devoted to some examples of "problematic translations" and to the translation theories generally applied in the case of cultural or semantic discrepancies between English and Romanian legal texts.

The following represent only some of the translation strategies in use today:

Diffusion. This approach consists of conveying the same information through a longer lexical form in the target language. The word ‘implementing’for example was not translated by a single Romanian word and the translators of the Protocol thought it appropriate to use the three-word idiom “punerea in aplicare” (Art 6, al.11 L157/31).

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Conservation. The option to leave the original term in the target text is an alternative solution for those English legal words not corresponding to an equivalent concept in Romanian. The *Crown Court Prosecution Service*, for instance, is an organisation created by the Prosecution of Offences Act 1985 to conduct the majority of criminal prosecutions in England (Collin 1999). Like many other English institutions, it is missing in the Romanian system and is therefore untranslatable. However, the conservation of the original form in the target language enables the translator to keep the "shade of specificity" of the original term itself. Another example, chosen from the treaty to which we have referred is the noun “acquis”, for which the Inter Active Terminology for Europe provides the following definition:

The Community acquis is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises:

the content, principles and political objectives of the Treaties;

the legislation adopted in application of the treaties and the case law of the Court of Justice;

the declarations and resolutions adopted by the Union;

measures relating to the common foreign and security policy;

measures relating to justice and home affairs;

international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union's activities.(<http://iate.europa.eu/iatediff/FindTermsByLilId.do?lilId=767495&langId=en>)

Differentiation. This strategy operates a differentiation between words in the target language according to their context. It is not uncommon, in fact, to find English terms with a double equivalent in Romanian. An example is given by the word *instrument* (See Art 3, al 7, L157/30), which can be translated by both "instrument, dispozitiv" and "document formal sau legal" (Pop: 256). While the former is a technical term, the latter is used in the legal field.

Literal translation. This is a technique generally used to bridge conceptual gaps in the target language. This kind of translation is also called "overt translation" (Fawcett 1997: 113) as it is instrumental and visibly reads like a translation. The goal of literal translation is to reproduce the idea expressed by the original word in the target language.

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Literal translation often represents a valid strategy of approach for those terms that are completely absent in the English or Romanian legal system. This is the case of *circuit judge,*a judge in the Crown Court or a County Court who tries cases along one of the six circuits/ districts into which England is divided: Northern, North-Eastern, Midland and Oxford, Wales and Chester, South-Eastern, and Western (Collin 1999). Since this process is thoroughly foreign in the Romanian system, the literal translation "judecător itinerant" (Hanga, Calciu 2007:305) is the most adequate solution to make the concept clear to the target reader. When using this particular strategy, the translator generally refers the reader to footnotes for further details and explanations.

One of the threats in legal translation is represented by those words that, in spite of their similar etymology, refer to different meanings in the source and target language. False cognates or the so-called "false friends" are very common and especially dangerous for the translator, since even a small oversight can have serious repercussions in the field of law. "Crime" is only one example out of many: it does not refer to the Romanian word "crimă", but to "infracţiune", that means

…an illegal act which may result in prosecution and punishment by the state if the accused is convicted. Generally, in order to be convicted of a crime, the accused must be shown to have committed an unlawful act **(actus reus)** with a criminal state of mind **(mens rea).** The main types of crime are: **1. crimes against the person:** murder; manslaughter; assault, battery, wounding; grievous bodily harm; abduction; **2. crimes against property:** theft; robbery; burglary; obtaining property or services or pecuniary advantage by deception; blackmail; handling stolen goods; going equipped to steal; criminal damage; possessing something with intent to damage or destroy property; forgery; **3. sexual offences:** rape; buggery; bigamy; indecency; **4. political offences:** treason; terrorism; sedition; breach of the Official Secrets Act; **5. offences against justice:** assisting an offender; conspiracy; perjury; contempt of court; perverting the course of justice; **6. public order offences:** obstruction of the police; unlawful assembly; obscenity; possessing weapons; misuse of drugs; breach of the peace; **7. road traffic offences:** careless or reckless driving; drunken driving; driving without a licence or insurance. (Collin 1999)

The linguistic difficulties originating from cultural and social differences are inevitable. Translators offer their contribution in bridging communication gaps through high-quality language knowledge, constant research and attentive analysis. Their

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intermediary role is indispensable, as obstacles in cultural contact will never be overcome until diversity is understood and accepted rather than disguised.

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