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PRIVATE INTERNATIONAL LAW AND EUROPEAN HARMONISATION OF PRIVATE LAW

Comparative law and legal translation

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I. Introduction

The translation of legal texts is a practice boasting a long history. The best known artefacts in this field include the peace treaty between Egypt and the Hittite Empire in 1271 BC as well as the translation of the *Corpus Iuris Civilis* into numerous languages after its initial translation into Greek. The translators of these and other legal texts from past centuries – most of whom remain unknown to us – must certainly have reflected on the methodological problems associated with their complex and demanding task. Unfortunately, these reflections have not been handed down in history.

Systematic study has only recently begun in the field of legal translation, but many significant problems have already been identified and the research has certainly shown its practical applications with the help of comparative law, legal linguistics and legal data processing. Although the development of European Union law has undeniably stimulated the discussion of legal translation, officially bilingual or multilingual countries (i.e. Finland or Canada) have been familiar with the problem for some time. In these countries, the subject makes up one of the standard topics for legal research and education.

II. Historical overview

To date, legal translation has primarily been researched through the perspective of terminology. In this regard, the emphasis has fallen largely on the question of how terms indigenous to one legal system can be conveyed in the equivalent terms of another legal system. Research aimed at demarcating areas of semantic correspondence among legal terms, e.g. *beni* (Italian), *biens* (French) or *goods* (English). Moreover, legal linguistics has shown that the transfer of information not only takes place within the context of legal systems, but also concerns two predominantly technical language systems.

This poses two significant problems. First, there is the question of the conditions under which the target legal text corresponds to the source legal text, whereby the requirements of equivalence must be ascertained in the context of a technical language. Second, specific problems must be resolved, depending on which source language is being translated into which target language. After all, a legal system with numerous institutions that have developed over time represents only one of challenges for the translator. The language system itself with its syntactic and semantic implications places certain demands on the translator and even creates limits for the translation.

III. Linguistic equivalence

The theory of translation is based on an understanding of two texts: a source text which is to be translated and a target text which is the result of the actual translation process. The task of the translator is to establish a relationship of equivalence between the source and target texts, i.e. a substantive homogeneity.

The term "equivalence" has been discussed in numerous linguistic works. In this regard, the spectrum of opinion ranges from an "everything goes" mentality to the assertion of the fundamental impossibility inherent in the act of translation – in other words, the factually contingent, unavoidable failure through intermediary approaches presenting requirements for approximate equivalence or suggesting the redefinition of the concept of equivalence.[1] Occasionally, equivalence has been described as an illusion.[2] For all intents and purposes, this diversity of opinion is neither surprising nor accidental. It

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[1] *Torop*, Granicy perevoda, [1998] 26 Sign Systems Studies, 137 et seq.

[2] *Snell-Hornby* (ed.), Übersetzungswissenschaft. Eine Neuorientierung, Tübingen (D), 1986, at 13.

is the natural result of different linguistic approaches which have proposed various solutions for the problem of equivalence on the basis of conflicting theorems.[3]

However, once the term "equivalence" has been clearly defined,[4] it performs an important function in the science of translation. For instance, the problems relating to legal translation – especially in the field of terminology – can be more easily presented with the help of the definition proposed by *Reiß* and *Vermeer*. Nevertheless, functional equivalence depends not only on the terminology, but also on the legal text, with all its syntactic, semantic and pragmatic implications.

IV. Background to the current discussion on legal translation

Weisgerber launched the debate on translation problems as an analysis of error, working from the premise of the fundamental impossibility of textual translation.[5] As noted by *Mincke*,[6] *Weisgerber*'s perception is paradoxical insofar as the editorial suggestions he makes in his critique of international treaty texts actually manifest the possibility of translation, rather than impossibility that he maintains.

Kielar makes an insightful link between the problem areas from an analytical viewpoint.[7] She views the technical legal language as interconnected with the systematic structure of the law and language. This specialised and technical legal language can be separated from the general language by the means of contrasting analysis.

Other conceptions of legal translation focus on the area of legal terminology.[8] The perception of the denotative character of translation can be traced back to *Mincke*. In his opinion, legal terms refer to the relevant areas of a legal system; a technical translation therefore requires a descriptive language that can render the incompatible legal terms without any material losses in terms of content. *De Groot* follows a similar tack. He discusses the problems of legal translation in terms of comparative law, which in his view comprises the key element in legal translation. In his view, the level of difficulty of a legal translation does not primarily depend on linguistically determined differences, but rather on structural differences between legal systems.[9] In this respect, the relationship between the languages is only of secondary importance in comparison with the relationship between the legal systems. As an example, *De Groot* cites the largely unproblematic case of translations from Danish into Norwegian, and the case of multilingual states with a single legal system – such as Finland – where the problem falls away entirely, despite the linguistic differences between Finnish and Swedish, the two national languages.

Making legal language uniform at the international level is of the utmost importance for *De Groot*. He therefore advocates the development of a legal metalanguage to convey legal terms that are defined by national law.[10] A complete equivalence between the terms of two legal systems can only be attained if both legal languages refer to the same legal system, positing an acceptable equivalence between two legal systems and not two languages.[11] If no equivalence can be established, *De Groot* suggests several alternatives: citation of the non-translated term, paraphrasing, the creation of neologisms or a combination of these.

The structural similarity between translation and the process of qualification in private international law is obvious. Initial discussions of this problem in the conflict of laws also pointed to the fundamental impossibility of qualification.[12] The mere fact that the qualification of legal terms regularly takes place outside of the static classification process already runs counter to the fundamental impossibility of qualification. Thus, the problem of qualification can basically be resolved. This presupposes, however, the application of methodologically sound techniques. For the translator, this means having to rely on a methodical source in answering questions of qualification which may arise in individual cases. The significance of the act of qualification in private international law in the descriptive model of legal translation has not been conclusively defined. It must be determined whether qualification is the method of legal translation or whether it is only an aid in the translation process.

Vogel made a novel attempt at describing legal translation. His analysis of the translation process differentiates between general language terms and legal terminology. The choice of non-technical words such as *Verbindung/Bindung*[13] – made with reference to a text concerning the relationship between West Germany and West Berlin – can contain as much legal relevance as a juridical terms, e.g. a trading company or partnership (*Handelsgesellchaft* in German) or public limited company (*Aktiengesellschaft* in German).[14]

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3 *Mounin*, Les problèmes théoriques de la traduction, Paris (F), 1963, at 9.

4 E.g. as equivalence in relation to the functional constancy between source text and target text: see *Reiß/Vermeer*, Grundlegung einer allgemeinen Translationstheorie, Tübingen (D), 1984, at 140.

5 *Weisgerber*, Übersetzungsfehler im Südtirol-Konflikt, Innsbruck (A), 1961.

6 *Mincke*, Probleme der Übersetzung von Rechtstexten, unpublished manuscript.

7 *Kielar*, Language of the Law in the Aspect of Translation, Warsaw (PL), 1977.

8 See e.g. *Mincke's* contributions (*supra* note 6), also refer to his text in the Dutch language, Vertalen binnen een tweetalig rechtssysteem, in: *Balkema/de Groot* (eds), Recht en vertalen, Deventer (NL), 1987.

9 *De Groot,* in: *Balkema/de Groot* (eds) (*supra* note 8), at 18.

10 *De Groot* supplemented his theses on the problem of translation in "Das Übersetzen juristischer Terminologie" in: *De Groot/Schulte* (eds), Recht und Übersetzen, Baden-Baden (D), 1999 and "Een tweetalig juridisch woordenboek" [1990] De Juridische Bibliothekaris.

11 *De Groot*, "Een tweetalig juridisch woordenboek" (*supra* note 10), 21.

12 *Bartin*, De l'impossibilité d'arriver à une solution définitive de conflicts de lois, [1897] 24 Journal de droit international, *passim*.

13 Both mean "ties", but were understood by negotiators of the Berlin Agreement as conveying varying degrees of intensity. *Verbindung* suggests "ties" such as "connections" (e.g. train connections) while *Bindung* – literally a "knot" – denotes a stronger bond.

14 *Vogel*, Juridiska översättningar, Lund (S), 1988, at 34.

New linguistic approaches – of which the analysis by *Sarcevic* may be paradigmatic – concentrate on rather pragmatic aspects of legal texts and underscore the need for the development of general translation strategies.[15] In contrast, examinations of a legal nature by authors such as *Mattilas* place the emphasis on comparative law elements, although textual aspects are increasingly included in these comparative legal analyses.[16] However, both of these trends are characterised by increased tendency towards approximation and efforts to discuss legal translation problems within a broader context, more in keeping with the complexity of legal and linguistic problems.[17]

V. Elements of the descriptive model for legal translation

It follows from the various above mentioned studies that legal translation is primarily characterised by the denotative components of the technical language, whereas the legal system itself guarantees the basis of the translation. Denotation forms only a part of the entire process of translation, although its importance cannot be denied.

In fact, an entire text – and not just terms – is the subject of translation, even though many translators concentrate only on the terms as such. Every text also has a connotative level, which is semantically as important as the denotative level. Furthermore, text is defined by tense, mood and other linguistic features; it is constituted but also limited by the specific language system. Naturally, connotative aspects of a legal language are incorporated into the translation.

The descriptive model which up to now has been based on denoters is weighed down by one problem. It is unclear how the denotation referred to by the denoters is to be understood. The denoters depicted as the pillars of the descriptive model – i.e. the relevant legal terms – must refer to a common subject matter in order for the descriptive model to function. Since this fact has generally been acknowledged, a call emerged for a metalanguage as the descriptive "instrument" for the individual legal languages. References were made in this regard to civil law theory, comparative law and the exemplary description of all legal systems in order to produce a usable object for denotation.

The denotation and connotation of legal terms thus enable the determination of the feasibility of functional equivalence. The relevant legal term in the source text denotes and connotes a position or an area within its own legal and language system; furthermore, this term forms a part of a complex technical language structure, which in turn also defines it.

In practice, existing conceptions point to a translation which is of a technical nature. The relevant technical legal language is marked by lexical, semantic and often intercultural facets which must be taken into consideration in the translation process. The syntactic implications for translation – a much neglected area in the study of translation theory – will most certainly gain importance as research in this field continues.

Another model for technical translation is the translation into a metalanguage as the universal descriptive language for the propositional content of legal texts. The framework for developing this language is found in comparative law, which examines basic terms and legal structures in an international context. By taking into account the legal-linguistic components of the legal languages – in particular, the syntactic and pragmatic meanings of legal texts, a metalanguage will emerge not only containing a few succinct legal words, but also representing a thesaurus of the legal language.

A metalanguage already exists with regard to legal terminology for fundamental problems of contemporary continental civil law: the Latin of Roman law. At most, however, the Latin allows only for an understanding of certain basic problems relating to legal dogma which are seldom the topic of legal translations. This has lent increasing support to arguments for a metalanguage based on comparative law as the best medium for legal translation.

An antithetical concept of technical legal translation could be based on the basic structures of colloquial language. If informal language offers an adequate guarantee for the meaning of the words, then why should it not qualify as the universal descriptive language of the law? This especially holds true for areas such as international legal relations that are still wrestling with their own language. However, this concept has not been given much consideration in research to date.

VI. The role of comparative law

The question arises as to the extent that the discussion to date has helped to solve problems relating to the translation of legal texts. In essence, it concerns the question of whether the problem of the legal translation can be solved by means of the application of linguistic theorems or only through an interdisciplinary approach. Although a clear answer to this question might seem obvious, it should be explicitly formulated.

The current discussion of legal translation could create the impression that the discussion concerning the substance of foreign law and its comparability, which was originally in the foreground, has become less important, given the slew of description models with a purely linguistic orientation and debates on argumentation. However, this initial impression is deceptive, since legal translation is and remains at its core linked to the contents of the respective legal institutions.

The discussion of the problems of legal translation from a

[15] *Sarcevic*, New Approach to Legal Translation, The Hague (NL), 1997.

[16] *Mattila*, Vertaileva oikeuslingvistiikka, Helsinki (FIN), 2002.

[17] *Galdia*, Juridisten tekstien kääntäminen, [2003] 1 Lakimies, 21.

comparative law perspective revolves around the term "denotation". A legal term under legal system A, understood as a systemic term, is transformed into another term under legal system B by finding a term that corresponds with the function of the legal term under legal system A. This allows, for example, the English legal term *trust* to be translated into German as *Treuhand* in certain instances.

In the translation of legal terms, one often resorts to pairs of terms which appear somehow connected by a relationship of equivalence. The legal denoters which have to date been applied in the descriptive model – e.g. *Versäumnisurteil* (German for "default judgment") and *yksipuolinen tuomio* (Finnish for "ex parte decision") have the same legal "meaning", but the question is what do they *denote*? The difficulty of answering this question may provide more fertile ground for further analysis than the eventual answer itself. At the very least, the difficulty may illustrate that the two designated terms might lack a common denoter. They function differently than synonyms; the terms "mean" the same thing to jurists, even though they are not identical. They are also not really similar because they exist in the context of different legal and language systems, but still they remain comparable. It can be safely said that the functional method of comparative law has proven the comparability of such legal terms. The aforementioned terms can also be compared by reference to their connotations. In respect of the first term, it would be sufficient to provide a linguistic basis for the functional comparative law term in order to determine the connotations of the legal terms.

Therefore, the legal-linguistic studies which highlight the comparative law method seem to point in the right direction. These include e.g. research on unjust enrichment,[18] a private law institution in numerous legal systems, which was aimed at establishing the relevant contents of the term for translation purposes, before translation into the applicable legal terms *onrechtvaardige verrijking* (in Dutch) or *enrichissement sans cause* (in French) is possible. These decisions, which form an integral part of the translation process, are made taking into account the structural differences between the relevant legal systems and the functional embodiment of the respective terms in the national law framework, which contextually either allow or preclude the relevant systemic terms.

However, such an analysis can only be applied broadly, since structural and functional differences do not become obvious otherwise, thereby prompting the translator to use terms that are lexically related, but inappropriate from a comparative law perspective. This problem is also illustrated by reference to criminal law terminology. For example, based on the former system of differentiation prevailing in French law, the general term *infraction* (German: *Straftat*; Italian: *reato*; English: *crime*) has three subcategories, represented by the terms *crime*, *délit* and *contravention* (English: *felony, misdemeanour, petty offence*), which in turn correspond with historical legal terms in Italian (*crimine*, *delitto*, *contravvenzione*) and German (*Verbrechen, Vergehen, Übertretung*). However, in both Italian and German criminal law, the terminological structure has changed to the extent that a *Straftat* in German law is now classified as either a *Verbrechen* or *Vergehen* and the general category of *reato* in Italian law is subdivided into *delitto* or *contravvenzione*, although the subcategories in Italian and German no longer overlap in terms of their content.[19] Comparative research on terminology in German and Finnish criminal law yields similar results, which goes back to the fact that the Finnish system has only one standard term that can be rendered in legal German as *Straftat,* as Finnish criminal law no longer distinguishes between *Verbrechen* and *Vergehen*.[20]

The approximation of law often takes place via indirect avenues and comparative legal research has shown that the historical *ius commune* sometimes better reflected the current perceptions of harmonised law than its modern counterpart. Of course, the complexity of legal relations was of a different nature then, which in turn makes some of the more ambitious developments in national legal systems understandable.

The structural feature common to legal translation – the absence of universally operative terms of reference in the sense of *Beaudoins*[21] – can be overcome only through the comparison of legal institutions on a case-by-case basis, as illustrated above. From today's perspective, it seems justifiable to say that legal translation is in practice as well as in theory is a secure profession demanding special technical knowledge because of its complexity.

VII. Outlook

The existing findings of mostly terminology-orientated studies on the translation of legal texts have defined the essential problem in legal translation as the legal and technical qualification of legal institutions. The problem of qualification, which is the reinterpretation of mostly incompatible legal terms, can be solved only by comparative law methods. Nevertheless, the scope of debate surrounding legal translation is characterised by an increasing amount of questions which relate to the technical language and pragmatic aspects of legal language. These are in turn elements of legal linguistics – which is indeed an evolving field of study for which the conditions and methods must still be clarified. The conceptual convergence of these two disciplines may result in procedures that will facilitate the methodically sound translation of legal texts.

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[18] *Mattila* (*supra* note 16), at 515.

[19] *Arntz*, The Roman Heritage in German Legal Language, in: *Mattila* (ed.), The Development of Legal Language, Helsinki (FIN), 2002, at 49.

[20] *Galdia* (*supra* note 17), 17.

[21] *Beaudoins*: "absence of universal operational referents", Legal Translation in Canada, in: *Mattila* (ed.), The Development of Legal Language, Helsinki (FIN), 2002, at 119.