

## **Multilingualism and Legal Terminology - some Difficulties on the Way of the Europeanization of Law**

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### **Working paper**

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First of all, I would like to thank Prof. Dobrić Basanež and prof. Bajčić for inviting me to speak at this conference. Moreover, I would like to apologize for my modest English language. As you have heard, I am a court interpreter for Italian language so this means that Italian is my first foreign language. Nonetheless, I decided to speak today because I am well aware of the increasing importance of the English language in the contemporary society and in my profession. As every other researcher who studies law in Europe, and all over the world, I have to compare different legal systems.

Comparative law is an essential part of any field of Law. More specifically, I deal with family law. One of the purposes of my research is to investigate different legal solutions in order to improve my national legal order and to understand the process of the Europeanization of Law. There is no doubt that primarily I use my knowledge of the law to do it. I have to go deeper and deeper, like every scholar, in my legal researches. Nevertheless, in my point of view, it is not enough. The essential tool, which permits me to understand law and to compare different legal systems, is

the knowledge of foreign languages. As I have already said, my first language is Italian. My knowledge of Italian permits me to also understand other languages, which are familiar to it, like French and Spanish, in order to compare these legal systems with domestic law.

However, that is not enough, in particular when we speak about the process of Europeanization of Law. Whether the first language, which our Croatian legal system refers to is German, today nobody can give him/herself the luxury of not speaking English. Therefore, even if my English is not very good, I have to speak in English to communicate. English is *de facto* the new lingua franca.

Some of the fundamental values of The European Union are cultural and language diversities. Indeed the multilingualism is highly supported. Actually, we have a very well-known slogan, which underlines this: united in diversity.

The cultural, language and tradition diversities of the single member states represent an important aspect of the EU legal system. The process of Europeanization of Law is not yet completed; on the contrary, we are at the initial level, in particular in family law, succession law and so on.

The multilingualism has a big influence on the relation between law and language. We have 24 official languages for 28 Member States and the purpose is to apply one uniform European law to all the Member states in all 24 versions...

It requires perfect translations...or better...translators who are superheroes!!!

In my opinion, a perfect translation does not exist as well as a perfect language does not exist.

Furthermore, what would it be a perfect translation? As a lawyer, I think that a good translation should be based on the spirit of the language and on the interpretation of the law. In other words, I am not sure that a literal translation is opportune. As prof.

Susan Šarčević underlines, it is important to also bear in mind the comprehension of the text.

In this short lecture, I would like to point out two aspects: firstly, the affirmation of the English language as the new *lingua franca*; and secondly the *pro et contra* of the European official multilingualism. While preparing this lecture, many times I stopped and thought: what is the connection between these two aspects? Isn't it contradictory to think on one side about English as *lingua franca* and on the other side about the European multilingualism?

I realized that these aspects are complementary and not in contradiction, especially when we speak about European legal culture and legislation.

In fact, it is unreal to imagine that we (I mean lawyers) can communicate in our original languages. None of us speak all the European official languages. The English language is a very good vehicle for the fast circulation of legal thoughts, concepts and models.

On the other hand, the European law, across the primary and secondary legislation enters the single Member states and becomes a relevant part of national law. Therefore, it is important to implement the European law with respect to the different national legal cultures, traditions and languages.

So, what happens frequently? The drafting of the European legislation occurs very often in one language: English. Not exclusively, sometimes it occurs in French or in German, but the drafting is never in all the official languages of the European Union. (See essential bibliography: Ioriatti Ferreri)

Are we talking about the English language spoken in the U.K. or are we talking about the so-called English from Brussels?

A Long time ago Latin was the lingua franca. Latin was the logical solution to explain ancient Roman law and the legal systems, which derived from it. I mean all the legal systems that we use to consider civil law tradition, even if inside this big family there are many different laws.

Today the lingua franca is English. The English language is strictly connected with the common law tradition. Common law diverges from civil law in many aspects.

The most important one, which we have to consider in this context, is the fact that civil law is based on written law. The existence of a written legal text gives an objective dimension to the law, which means that the role of the lawyer and interpreter, especially in the past, was limited to the literal interpretation and/or literal translation.

The civil law tradition was highly influenced by the era of the big Codifications. In the 19th century, the influence of the Codifications was present in all the countries of civil law traditions. It entails that our legal systems circulated and our languages weren't so strictly connected with our law.

Sometimes in civil law a conceptual identity exists even if there is a lexical divergence. Moreover, there is often also a lexical convergence. For instance: *contratto, contrat, contrato* etc...but the English word contract has a different meaning! (See essential bibliography: Sacco, Pozzo...)

The same does not happen in common law. I mean, in the English language it is quite difficult to "accept" new terminology, because it is more strictly connected with the common law tradition.

Nonetheless, answering the question, what is happening now is that non-native speakers are using the English language. And what do they do? They create a new law (European law, which is often the result of a compromise of different legal

solutions that we used to call common core), which is mostly from civil law tradition, even if not exclusively!!!

Non-native speakers draft EU legislation or new sources of Soft law in English, while thinking in German, French, Spanish, Italian, Polish, Bulgarian, Croatian and so on. The result is often a new legal institute, which is not national, neither of *common law* even if written in English.

Therefore, this is a new English language. The so-called English from Brussels, or Euro-English or “globish” (global English).

Prof. Sacco asserts that now we have two English languages: 1) the English language of the UK (or generally of the common law) and 2) the English language used to fell linguist barriers, which does not deal with common law.

It can be concluded that we are assisting a kind of crossbreeding of the English language, which is no longer connected with the *common law*. Moreover, the purpose of this new English is not a connection with other languages, but rather to be used to create the European law *in fieri*, which represents the result of the thoughts of many different lawyers of different European countries. I would like to point out that this “new English” is also very problematic for English lawyers...

I find this new use of the English language very risky. Indeed, considering that the EU has 24 official languages, it can imply new translations and interpretations in the single European languages. Somehow, in my point of view it can make us separated in diversity, because it generates new, artificial legal divergences, which in the civilian tradition does not exist.

I would like to underline that I have no pretension to assert that we are on the wrong path. I do not have the same opinion as some of the very famous scholars, for instance Legrand who asserts that there is no way to translate the law.

To the contrary, I would say that both lawyers and translators have to be conscious of these new challenges. In my opinion we have to work together to improve interpretation and translation techniques.

After the drafting phase in English is completed, the translators then have the extremely hard job to understand what the EU Legislator actually means and to translate the legislation in all 24 languages being careful to give the same meaning to all the official translations.

The result does not necessarily have to be a complete literal and formal identity, because it would be unreal. We can conclude that today the objective dimension of law is no longer so evident as in the past. For this reason it is not sufficient to interpret and/or translate literally the legal text.

Rather we have to practice and understand where the hidden dangers are. In the Italian language they are called “falsi amici”. It is the case of similar or identical words to define a legal institute. To the contrary when a similar word does not exist in a language, the risk of misunderstanding is lower. For instance: trust (See essential bibliography: Benacchio)

Some tricky words could be:

*Sentence*: it is not *sentenza*, *presuda*. *Sentence* refers exclusively to criminal law. The Italian word *sentenza* is the English word *decision* or *judgment*.

Condition is not *condizione*, *uvjet*. It means *clausola contrattale* or in Croatian *ugovorna klauzula*.

NB: *Condizione* in Croatian is *uvijet*: different words for the same legal meaning

Moreover, the English words *Jurisprudence* and *case law* in the past were used to be counter posed. Now, in the new English they are used as synonymous. (See essential bibliography: Sacco, Pozzo, Ortolani, Ioriatti Ferreri...).

Moreover, it is possible that the same legal concept has different meanings in different languages. For instance alimentacija, alimenti, alimony. They all have the same root. Nonetheless, they are expressions of different legal institutes.

Moreover, we have to consider the so called legal irritants. Just one example: the word reasonable, or more specifically its legal meanings.

The written law, as civil law, which is not based primarily and exclusively on the case law has difficulties to use this word because of its vagueness. Prof. Troiano, an Italian professor of private Law, wrote a book of 600 pages about the meaning and the transplanted in the civilian tradition of this term, which is different from the good faith even if understood in its objective or subjective meaning. The same problem exists in the British Law (see essential bibliography: Teubner).

From the lawyers point of view the word's interpretation goes first, then comes the translation.

As I have already pointed out, for these reasons we have to work together and find out new methodological approaches.

In this regard, in my opinion, it can be useful for both lawyers and translators to analyse the Canadian situation. (See essential bibliography: Ortolani). They have two languages and two legal systems. It is necessary to bear in mind the influence of French law in Quebec. They are conscious of these differences and they normally draft in both languages. The predominance of common law is evident (but not necessarily of the English language).

Coming back to Europe, before finding new approaches, I think that it is necessary to make a list of these new and specific problems given by the official multilingualism and the unofficial predominance of the "new" English:

- 1) the translation is not from one language to another language; instead it is from a new language and new concept to an old language. Prestigious scholars (Sacco, Pozzo, Ioriatti Ferreri) used to speak about conceptual neologisms in the English language;
- 2) On one side we have this new English and on the other side the remaining 23 languages. Many other “old” problems arise from the translation from one “traditional” language to another.
- 3) The focus is on the interpretation of the English word. It is a kind of one-way road. It also represents a difficulty for English lawyers;
- 4) This new language is not the result of a free movement of legal systems. To the contrary, it is often the result of a legislative imposition. For this reason, it will be more difficult to find a way out. (See essential bibliography: Benacchio).

Very briefly, as to the “old” translation’s problems, it is clear that there is the abandonment of the literal translation. More precisely, due to the multitude of the official languages in Europe, it is evident that we have to look at the comprehension of the text. The lawyers will speak about cohesion of the literal and the teleological interpretation of Law. In this regard, shortly, I would like to point out the central role played by the Court of the European Union. One of the Court’s duties is to guarantee the uniform interpretation and the application of the European law. Considering that the EU has 24 official languages, it means that the European law should have the same interpretation and application in all the Member states independently from the language of the EU legislation. The uniformity of interpretation and application is functional to the realization of common purposes and to the guarantee of the certainty of law.

Many famous decisions marked the evolution of the case law regarding the interpretation and the relation between different versions of the EU legislation. From



1967 the year of the decision in the case *van der Vecht*, when there were only 4 official languages, many decisions confirmed the necessity to examine more than one language version to understand the meaning of a rule in case of doubt.

In the 70's there were six official languages, but at the same time it was evident that the importance of the English language was increasing. We can point out the case *North Kerry Milk* in the 1977. In this case the court mentioned the importance of the purpose of the legal rule. In other words, it is not sufficient to only consider the literal meaning in order to find the goal of the law.

In the 80's there were 9 official languages. After the decision in the case *CILFIT* the judges in Luxembourg started to think about the literal and the teleological interpretation together.

In the 1990's the decision in the case *Konservenfabrik Lubella* dealt with the problem of the third party's expectation when an error occurred in the translation (Suesskirschen instead of Sauerkirschen). This is a very, very serious problem, which needs to be analyzed separately.

It is evident that the increasing number of official languages intensifies the problem. From 1995 until today, we have gone from 11 to 24 official languages... (See essential bibliography: Pozzo)

Studying and preparing myself for this lecture, I came to some conclusions, which, in my point of view, we have to bear in mind in order to improve translation and interpretation techniques.

First of all, there is no conceptual identity of the same legal institute in every single language. For this reason, it is not opportune to find the equivalent. To the contrary, I believe that often it is better to use and transpose the foreign word (I have already offered the example of the word trust, which in Italian remains the same).

In this regard, prof. Sacco underlined that the relation between word and concept is not the same in all languages (*Il rapporto tra parola e concetto non è lo stesso in tutte le lingue*). The most amazing thing is that prof. Sacco started to talk about the importance of translation 30 years ago!

Professor Sacco asserts that we have to consider some situations when there is no connection between text/word and law in order to really understand how we think when we translate a legal text.

He refers to the law without words, which does not mean oral law.

We must be conscious of some other methods that we use consciously or unconsciously:

- 1) Criptotypes, as methods of Comparison;
- 2) the foreknowledge (*preconoscenza*). Actually, I am not sure that I translated this word correctly.

For this reason, I will try to explain it:

Prof. Sacco, quoting two law philosophers (Gadamer and Esser) observes that the law interpreter gets close to the law already having in mind a kind of prefiguration, a sort of pre-comprehension. Usually the interpreter *a priori* recognizes the *ratio* of the rule.

For instance, Gadamer and Esser used this simple example:

The interpreter (not necessarily also a lawyer) has the prefiguration that the law will punish the thief and not the robbed.

The pre-comprehension does not derive from the legal knowledge. It derives from a connection with the fundamental rules, which govern societies. It is not my intention to minimize the difficulties; I just want to point out the importance of the

comprehension of the text, which has to be based on its pre-comprehension. If a legal institute does not have the equivalent in another country we must not obstinately look for it.

Moreover, coming back to the previous considerations, we have to accept that at the present we frequently have to deal with new legal institutes, or with modified legal institutes. Even if for me, and for the majority of the lawyers, it is hard to believe and to accept.

The question is: is this the translators' job?

I think that the cooperation between linguists and lawyers is fundamental. Everyone has to do his part of the job.

I would like to be more than clear: the linguist is not maybe always able to interpret the law in the most appropriate way. BUT I also believe that often lawyers use the foreign languages too negligently or casually.

Speaking in English or in other languages to communicate and to eliminate barriers is fundamental. Nonetheless, I think that we are not conscious of the consequences of drafting new rules in this new English language.

To conclude, prof. Sacco wisely said: Some people criticize the use of the English language...but they are not aware that their children will criticize the lingua franca even more if it becomes Indian or Chinese.

I am not one of them!

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