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THE PARAMETERS OF MULTILINGUAL LEGAL COMMUNICATION IN A GLOBALIZED WORLD

ABSTRACT: In law a tendency towards a tighter global embedding of national legislation can be observed. A few historical notes on the evolving of national legal systems will be the basis for the identification of the parameters of international legal communication and the factors influencing legal translation. An attempt at defining legal translation from the viewpoint of LSP-communication leads to a comprehensive overview of the key parameters for legal translation.

KEY WORDS: legal communication, legal translation, communicative parameters, legal systems

1. Introduction

Legal communication is changing due to the development of legal communication spheres. This paper attempts to give an overview of the parameters which determine legal translation and how it is embedded in new global communication patterns. We will attempt to analyze the parameters for legal communication in general, and in particular for legal translation, with respect to the global changes taking place nowadays in relation to their historical dimension. This topic is at the crossroads of varying disciplines as it is influenced by legal theory and history, linguistics, semiotics and translation theory.

2. Legal communication

The assumption that legal translation is an „act of communication within the mechanism of law“ (Sarcevic 1997: 3,55) has been underlined by Sarcevic: Legal translation and all legal communication in general is firmly rooted in the discipline of law. Law itself can be described in a threefold approach (Fuchs-Khakar 1987:36) as

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1. a regulatory framework for social interaction emphasizing its functional role in society;
2. the discourse of legal experts, underlining its LSP character;
3. the communication within an institutional framework specifying a sphere where legal discourse is taking place.

Law as a regulatory framework for social interaction has legal content at its basis, namely the rules and regulations for a specified social area: What to do in the case of a murder, an unjustified dismissal of a worker or a car accident etc. A array of statutes and rules for specific situations in our society make up for a specific legal content. Combined, they constitute a legal system as the law for specific situations is brought under the umbrella of a common system, bringing single provisions and regulations into relation and coordinating them. To set up such a system of rules and regulations language as a means of communication is needed: Each legal system uses one or more national languages to make laws, to enforce the law, to talk about the law. As such, each communicative act serves a specific purpose within law. In fact, we can say that communication is a purposeful activity with the most basic purpose being the regulation of community life. Within law, groups of specialists have developed different patterns of communication according to their role in the system. Law however, is also addressed to each individual citizen, to the man on the street, as they are required to abide by the rules of the law.

Accordingly, the key parameters governing legal communication can be summed up as follows:

1. legal content
2. legal system
3. language
4. people
5. purpose

The text or the actual communication taking place is a product of these elements: it is about a specific legal topic within a broader legal framework of reference, i.e. a national legal system or a supranational legal framework; it is written in a specific language; the text pursues a specific purpose and there are people who perform the communicative act and people at whom the communicative act is directed.

Text linguistics introduced the distinction between text internal and text external factors where syntactic, structural and semantic text description

categories are regarded as text internal, while pragmatic and functional categories are seen as text external (Adamzik 2004:53 with reference to Dressler 1972). This has been applied also in translations oriented text analysis (Nord 1995:40) as well as for legal translation: Wiesmann (2004:83) distinguishes between a text with a function (text internal) and the factors of legal translation such as the objective of translation, legal systems involved, addressee of translation, applicable law, status of translation which she regards as text external factors. For legal communication this distinction seems not so fruitful. A distinction between the text as a linguistic entity and its communicative environment or pragmatic embedding seems a little bit construed since the textual appearance and the linguistic function of a text is in the first place a result of the communicative environment. A text does not have a function for itself, a legal text has a function within a legal system, as such it is the result of a network of legal provisions and specific legal content, it serves its purpose within this legal system. Therefore, a text cannot be seen as an autonomous entity outside the legal system. There is no contract without reference to a specific legal framework, be it national or international; we cannot have an independent legal text, a sentence, a communication of dismissal, a writ or any other legal text without a system of laws of other legal texts to which the text is connected. Each legal text has implicit or explicit references to other legal texts: this strong intertextual dimension is a typical feature of legal texts (Busse 1992:60). Intertextuality is reflected in the embedding of a specific text in the legal system as a whole.

The four listed parameters are decisive for every act of communication in law and we will look at these parameters in detail taking into account historical developments and their impact on legal translation.

2.1. Legal systems

The main characteristic of legal discourse is its dependence on national legal systems which determines intertextual references to specific legal backgrounds and creates problems whenever communication attempts to bridge national borders, that is, in every type of international or intercultural communication. Translation is per definitionem a kind of intercultural and international communication and is thus, affected by intercultural communication difficulties. The different national legal systems and the problems arising from this for legal translation have been addressed many

times (DeGroot 1991, Sarcevic 1989, Gemar 1982) and this fact has even been labeled as a salient characteristic of legal translation. But a short look at the historical development of law teaches us that such rigorous division into autonomous legal systems is a rather recent phenomenon in law which, moreover, has been weakening in very recent times as will be shown further on.

Legal systems are bound to the concept of statehood. Modern statehood began after the religious turmoil of the Thirty Years War with the Treaty of Westphalia in 1648 when two basic principles were introduced: the principle of territoriality and the principle of sovereignty. To avoid war, people have to enter into an agreement, thereby transferring their rights to a sovereign entity. Through this power the sovereign is now in the position to protect its subjects both from internal and external aggressions. Through this explanation, the sense and the need for a state is justified. Jurisdictional concepts in turn flow from sovereignty. The scope of a sovereign government's law corresponds to the geographic boundaries of the its territory. all legitimate power was drawn into a single sovereign, who absolutely controlled a defined territory and its associated population. State power was rendered territorial.

This emerges clearly in the two following quotations:

“What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co- extensive with its territory.” US v. Bevens, 1818

"The Court concludes that the military base at Guantanamo Bay, Cuba, is outside the sovereign territory of the United States...writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States." Rasul v. Bush (DC Circ., 2002)

The acceptance of national sovereignty by others, gives the right to a state of territorial integrity and self-determination and binds itself to accept this right of other states. The international community of nations is structured around the principle of sovereignty.

Territoriality in turn provided the bedrock principles for the development of international law in the 18th and 19th centuries, when Westphalian territorial sovereignty became supreme in Europe, and spread slowly and unevenly to the rest of the globe.

Today however, it is indisputable that territoriality is decreasingly important as a jurisdictional principle. The general but somewhat uneven tendency over the last century has been to loosen these geographic restraints and by some countries to increasingly assert domestic law beyond sovereign borders. This was done on the basis of flexible, functional concepts such as

“interests analysis” which found application in some areas of law with extra-territorial effect - antitrust, securities, criminal law, intellectual property, to name just some - territoriality has been slowly detached from sovereignty.

Territoriality and sovereignty were the historical requirements for modern states to evolve. National legal systems as we know them today however, are the result of a process which began at the beginning of the 19th century with the codification of law in Europe (Allgemeines Preussisches Landrecht 1794, the first German civil code, the Code Civil or Code Napoleon 1804, the Austrian Allgemeines Bürgerliches Gesetzbuch 1811). This process led to the development of modern national states in Europe. Single states created national legal systems by differentiating their laws. Jurisprudence became focused on national law, something which was previously unknown when Europe cultivated its century-old tradition of Roman Law - the *Ius Commune* - in one language, Latin. Even though the *Ius Commune* was only subsidiary law in addition to the particular rights of each region or country, it quickly created a common legal basis because of its adaptability. The legal establishment of the middle ages was a system that comprised multiple, layered power centers and different sources of legitimation, allegiance, and status.

This came to an end with independent legal systems. The object of jurisprudence was narrowed down to national law and this was criticized heavily by many scholars, especially by legal historians in the second half of the 19th century. Rudolf von Jhering even called this process a degradation of legal sciences. he said:

„Die Wissenschaft ist zur Landesjurisprudenz degradiert, die wissenschaftlichen Grenzen fallen in der Jurisprudenz mit den politischen zusammen. Eine demüthigende, unwürdige Form für eine Wissenschaft!“ (Rudolf von Jhering: *Geist des römischen Rechts* auf den verschiedenen Stufen seiner Entwicklung: 1. Teil 1852, 15).

Legal science has been degraded to a state jurisprudence, its research borders now correspond to political borders: a humiliating and shameful situation for a scientific discipline.

To alleviate this situation new previously unknown disciplines appeared roughly in the same period of time, such as Comparative Law, studies of foreign law, and later Private International Law.

Today, social and economic changes on a global, regional and local level put pressure on national legal systems. European unification, world-wide treaties, global institutions and other forms of international cooperation threaten the two pillars of statehood, territoriality and sovereignty. Capital,

labor, goods, and ideas move largely without regard for political borders. Globalization is pushing back the nationalization of legal systems initiated in the last 200 years by eroding the authority of national states and undermining the principles of territoriality and sovereignty.

The concept of globalization is difficult to grasp, but a few central features of the phenomenon can be clearly identified. Globalization has to do with people from different continents meeting, communicating with each other, doing things on a global level, with a global perspective: be it companies selling products or services, or international organizations like the OECD or the IMF, geographical distances are disappearing and some form of global society is emerging. Roland Robertson, one of the main globalization theorists, defines globalization as the compression of the world and the intensification of consciousness of the world as a whole (Robertson 1992:8) and he goes on: „as part of the general globalization process, the new forms of electronic communication are giving rise to virtual neighborhoods or communities, these being examples of the way in which identification and participation are increasingly deterritorialized“ Robertson (1999:7). National states have found different means to counteract this difficult situation, like increased international cooperation, or new models of governing, Global Governance based on subsidiarity.

In the light of these historical developments, rigorous division into autonomous national legal systems can be seen as a transitory phenomenon which began at a certain point in time and will come to an end at some other point in time. It is certainly not the rule in law, it is rather an exception in legal history.

Globalization softens the once strict barriers of national legislation, but national legal systems will not disappear completely. They will rather be supplemented by a strong framework of international law. In the future, maybe we can distinguish a strong common legal basis (referring to international and regional law) and some legal particularities for each region or country. In a certain way and to a certain degree, similar to the legal setup of the middle ages.

2.2. Language

The relationship between law and language has been dealt with extensively in many disciplines. By the first half of the 19th century, Friedrich Carl von

Savigny had already compared law and language: they are similar in that both are the product of a long development in a society; in both disciplines what has come into being spontaneously in society, in a second phase of development becomes the object of further investigation and scrutiny by academics: jurists in the one case and grammarians in the other (von Savigny:1814).

More recent approaches (Oppenheim, Bobbio) see law as language where each legal activity corresponds to a text, law is nothing else than a class of sentences, a set of texts, a corpus of norms. This corpus then is the object of analysis by jurists who operate on a meta-linguistic level. For Bobbio (Bobbio 1950:97) the work of the jurist, meaning law professors, legal experts, is a linguistic analysis of the normative propositions of a legal system. The three tasks of the jurist are in this respect: **purificazione**: to purify the language of legislation to make it more rigorous; **completamento**: to complete as much as possible the language of the legislator, and **ordinamento**: to bring it into a system.

This holds true for continental law where the roles of legislators who make laws, jurists who interpret the norm, and judges who apply the law, are strictly divided. Critics of this approach cite the existence of systems of norms that are not collections of linguistic entities, or norms that were codified only ex-post by legislators. In this sense, law is something completely independent of language. Taboos or other forms of prescriptive codes of conduct exist without the need to articulate them explicitly. Road signs are an example for the use of another semiotic system, a prescriptive code of conduct on the basis of pictorial signs more or less without language.

„Il diritto non ha bisogno della parola. Il diritto preesiste alla parola articolata“ (Rodolfo Sacco 1992, a scholar of comparative law) *Law does not need language. Law exists before articulated speech or language*

Sacco (1992) postulates that law exists before language, it is something in the human mind that is not related to language in general, and not related to a specific national language. In modern legal systems, however, language is the most important means of communicating and operating with law.

Leaving aside theoretical considerations and philosophical schools, language plays a critical role in law, for the following reasons: It is a general principle in law that all rules must be made public: this is the general principle of publicity: law has an intrinsic obligation to be made public: and citizens have the right to know the laws governing their lives. On the other hand, law is about

talking and communicating within the framework of prescribed rules. Law has evolved as a means of escaping armed conflict and instead bringing conflicts between citizens onto a higher level where things can be sorted out without recourse to violence. So communication is a fundamental trait of law.

Reverting to history again, there is a strict link between the creation of national legal systems and the discovery, construction, deepening and emancipation of language communities. Language was placed at the centre of cultural and political movements which eventually led to linguistically homogeneous national states. National legal systems could not have evolved without the creation of national states based on language as the main identifier of communities. While this is true for a historically retrospective analysis of legal systems, it is nonetheless hard to find a single language which is strictly linked to a particular national legal system today. Obviously, language communities are linked to particular legal traditions, such as English to the tradition of case law. As a result of colonialism, conquests, unsuccessful nationalistic movements and other historical developments, most languages today are linked to more than one national legal system: Many states use two or more languages within their legal system, or one language is used by more than one country (such as German for example which is used in 5 countries: Germany, Austria, Switzerland, Italy, Belgium).

So we might have two languages used in the same legal system (federal law in Switzerland), or even a third language used for a smaller part of the legal system, for example as a regional minority language such as German in Italy (Mayer 1999). In this case however the same language will be the language of another legal system, or maybe of two other legal systems (such as Germany and Austria).

Law is communication, law is language. However, communication needs to differ depending on the legal context. The main legal context is the national legal system or the international or regional legal framework, as we have seen. This represents a macro-context which can be structured into more specific legal fields such as hereditary law, commercial law, penal law and so on. Within these legal fields there will be different communicative levels such as jurisdiction, legislation and legal science as well as different communicative situations. On a micro-level the communicative situation corresponds to the use of a specific communication pattern. It is at this level that legal content and linguistic form combine and produce legal genres and subgenres.

2.3. People

At micro-level, it is people who communicate. In law, different persons and roles are linked to the three traditional areas of jurisdiction, legislation and doctrine or science of law: judges and lawyers, lawmakers and politicians, professors and students of law. All of these are subject specialists or legal experts who draft and use legal texts. But also non-specialists play a role in legal communication: laymen may be the authors of legally binding texts, such as in contracts, or the addressee of legal texts written by legal experts such as in verdicts or statutes.

For the translator it is of utmost importance to know what kind of knowledge the addressee of a translation will have with regard to legal concepts and norms. Every legal expert can be regarded as such only for his specific legal system: he will be familiar with the concepts, with the norms, with principles and ideas as well as with the language and the phraseology of his particular legal system. When he reads a text in his language, he will automatically establish a link to this framework of reference and interpret the text accordingly. The translator has to be aware of this and carefully choose the language of the target text. The most important parameter for a translation will be then to know the framework of reference or the legal system of the target text reader as well as the addressee of the translation.

2.4. Purpose

Language is used in particular communicative situations serving particular communicative purposes. The basic assumption is that the function of a text, the aim of a communicative action within the legal context is of overall importance. Many authors distinguish between the linguistic function of a text which is inherent in a text and the communicative aim of a text or the aim of communication a particular text serves. A third factor would be the aim of the translation which is equal to the communicative aim of the target text. We distinguish, therefore, the text function, the communicative purpose and the translation purpose.

The communicative purpose is not a text-internal feature; it is determined by the communicative situation and what the author of a text wants to achieve in this situation. Communicative purposes constitute

text genres while text functions are the basis for more general text types. The translation purpose is the reason why a translation is carried out and it is based on the communicative purpose of the target text. However, there are situations in which the function of a legal text differs from the purpose of its translation: When a statute is translated for a comparative lawyer, the translation will have an informative purpose while the source text is a prescriptive text (Wiesmann 2004:88). This causes the need to distinguish between the purpose of a legal text and the purpose of the translation.

Thus, we might add three other parameters to the ones already mentioned:

- the person of the translator and his knowledge
- the purpose of the translation
- status of the translation or alternatively the status of the target text, meaning if the target text is an authoritative legal text or not.

3. Legal translation

At this point we might try to define legal translation on the basis of its characteristics. As an act of communication within the mechanism of law it is first and foremost a purposeful activity. Furthermore it has to do with language for special purposes, since legal language is a type of LSP communication. Specialist communication has been defined on the basis of specialist knowledge by Lothar Hoffmann (1993:614) a German LSP scholar who focuses on the exteriorization and interiorization of specialist knowledge in the act of communication by the individual (reader and writer of texts). Communication leads to the production of a text, or to an act of exteriorization of specialist knowledge in a text.

In law each text is the result of an application of legal knowledge systems as well as legal cognitive processes, and each act of communication reflects a world of normative ideas and projects them into the text which serves a specific communication need. What will be exteriorized by the translator in the target text depends on the purpose of translation and the legal setting in which the target text will be used. Through interpretation of the source text, the translator inevitably chooses, selects and weighs and therefore acts as a sort of filter for the text. We can define legal translation thus as a

1. purposeful activity of

2. exteriorizing legal knowledge systems, legal cognitive processes and norms
3. selected and weighted from a offer of information (interpretation),
4. aiming at disseminating them in another language (interlingual) and/
or
5. in another legal system (transcultural)
6. while assessing their legal effect
7. against the background of relevant supranational and international regulations

The legal effect has to be seen in conjunction with the purpose of the target text and since people from different legal backgrounds communicate in translation, the relevant supranational and international regulations must be taken into account. It should be stressed here that there is no fixed meaning in a legal text which can be transcoded into another language with the help of a dictionary. Meaning is rather constructed in communication by specific communicative parameters (Engberg 2002). Training and education of the translator will be decisive in this respect; for he must be able to judge legal implications and effects in the text which are possible only with appropriate legal knowledge.

While this definition applies to texts which reflect legal content, Engberg (2002) takes a more general approach in defining legal translation when he sees it as a „translation of texts for legal purposes and in legal settings, i.e., a functionally – and situationally – defined translation type“. (Engberg 2002:375). The main advantage of such a broad application would be “that not only prototypical legal texts like statutes and contracts, but also restaurant bills and other texts to be used as evidence, for example in a court case, might be subject to legal translation in this view“ (Engberg 2002:375). Such texts, however, will be subject to an interpretative reading by lawyers to determine their judicial impact and legal importance.

With the growing importance of international legal settings, translation cannot be described solely as an intercultural within one legal system or a transcultural activity between two legal systems. Of special interest will be the cases of supranational law where two or more countries conclude an international agreement to regulate a specific legal matter in a common way, e.g. international agreements like the WTO, but also more complex regional legal systems such as European law . One could argue that it would be a relatively simple case of a translation from language A to language B

within the same supranational legal framework. This would be a rather naive assumption because in most cases a legal language for supranational law does not exist and has to be created anew (Kjaer 1999:70). A translator or the text producer inevitably uses his own terminology or legal language, that is the language of his legal system to express new legal thoughts which then become part of the new supranational framework.

We can change our definition of legal translation accordingly: legal translation within the framework of supranational law would then be the purposeful activity of exteriorizing *supranational* legal knowledge systems, legal cognitive processes and norms, which are selected and weighted from a source text constituting an offer of information, aiming at disseminating them in another language against the background of *national and local* legal systems, while assessing their legal effect.

Three different types of legal translation can, thus, be identified: the translation within one legal system, the translation between different legal systems and the translation in an international context.

4. Classification of factors

Coming back to the decisive factors governing multilingual legal communication listed above which are to be applied to legal translation as well, it is important to order these parameters into categories to get an overview of potential situations for legal translation. An initial possibility would be to try to integrate all parameters into a formal table (Sandrini 1999:24), but such an approach can never be exhaustive and if it really comprises all factors it would become too complicated. Such a table must take into account not only the aforementioned five parameters, but also the type of the source text, the purpose of the translation and the status of the target text.

A valid alternative might be to propose a layered structured approach. A good starting point for this is the distinction made by Madsen (1995) who spoke about three universes that cover „the essential factors that are relevant to translation of legal texts“ (Madsen 1994:291):

1. a legal universe, meaning the extralinguistic reality, the world of legal actions;
2. a textual universe, meaning the descriptions of legal actions fixed in a text; and
3. a translator's universe.

Madsen analyses the ties between the legal text and the legal reality and comes to the conclusion that „the cornerstone of a model for translation of legal texts must be the rooting of the legal text in a legal system“ (Madsen 1994:292), meaning that top priority should be given to the legal universe, establishing thus a hierarchical relation between these three universes. All of the parameters mentioned should be allocated to one universe.

The following parameters would be assigned to the legal universe: legal content, legal system. What legal system does the source text belong to? In what legal setting is the source text originally used? What is the legal background of the addressee of the source text? Does the translator have the appropriate legal knowledge and training? And with respect to the target text: In what legal system will the target text be rooted? What legal action will be performed with the target text? In what legal setting will it be used? From what legal background do the receivers of the target text come?

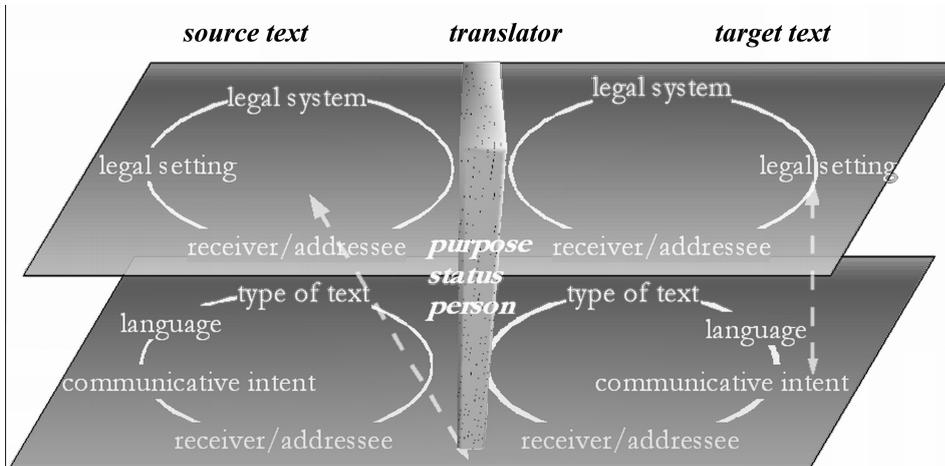
The parameters of language, purpose and people are assigned to the textual universe and the following questions must be asked: What type of text is the source text? Is the source text a legal binding text? Who is the author of the text? What is the language of the source text? What is the original communicative intent of the text? Who is the recipient of the source text, specialist or non specialist? And with respect to the target text: Will the target text be an authoritative translation? What is the communicative intent of the target text? Who are the recipients of the target text (specialists or non specialists)

And the translator's universe is responsible for the parameters: purpose of translation, people who reflect the person of the translator. What is the purpose of the translation? What are the interpretative capabilities of the translator? How much legal knowledge does he have? What is the status of the translator?

The three universes can be combined to attain three layers, each representing one universe with the translator's universe representing a bridge separating the source text from the target text as shown in the graphic below.

With the help of this structure we can analyze legal translation by selecting aspects from each layer and putting them into perspective. For example, the legal context and the communicative intent of the target text, or the type of text and its status and the status of the translation, and so on.

Thus, all the different perspectives on legal translation and the different



functions of this type of translation can be represented. This multifaceted and transdisciplinary aspect makes legal translation such a thrilling and interesting area of research.

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