

Discovering Communication Routes in Translation: Comparative Law as a Translator of Legal Culture

Simina Badea

Assistant Professor, PhD, University of Craiova, Romania

Abstract

Various areas of knowledge provide the opportunity to discover and explore communication routes in all fields of human activity involving intuition, creative power, even speculative insight. The aim of this study is to point out such communication routes in translation, a tool of paramount importance in the arsenal of the comparatist as a translator of legal culture. A recurrent theme in debates about the nature and aims of comparative law, the concept of legal culture has aroused the interest of comparative law scholars, especially after the 1990s. Considering the strong relationship between language, culture and law, one can rightly note that a comparatist, while inevitably assuming the role of translator, should constantly undergo a process of becoming an intercultural person, one mediating between (at least) two legal cultures. He should identify similarities and interpret differences that exist between legal systems for the purpose of establishing communication in a cultural framework, thus contributing to the dislocation of functionalist, instrumentalist understandings of law and focusing on meaning as determined by context.

Keywords: language, law, legal culture, translation, communication

JEL: Y80, Z10

1. Preliminary issues

The adventure of exploring various areas of knowledge provides the opportunity to discover and follow communication routes in all fields of human activity involving intuition, creative power, even speculative insight (Smarandache & Vlăduțescu, 2014; Smarandache, Vlăduțescu, Dima & Voinea, 2015).

This study aims to highlight such communication routes in translation, an indispensable, priceless tool in the arsenal of the comparatist as a translator of legal culture.

In legal translation, a domain that happily – and challengingly - unites law and language, the comparatist, who often performs the role of translator, has to temper the incongruities of legal systems and, at the same time, preserve the identity marks of each legal culture. Linguistically, he has to deal with the hesitations raised by the respect and fidelity he owes to the source language and the conceptualized linguistic possibilities that the target language offers.

One of the goals of a comparatist's endeavours is to identify similarities and interpret differences that exist between legal systems, thus establishing communication in a cultural framework, contributing to the dislocation of functionalist, instrumentalist understandings of law and focusing on meaning as determined by context.

2. Comparative law as a translator of legal culture

2.1. Language and law

Historically, language and law have embraced human aspirations towards a universalist perfection aiming to eradicate disorder (Grosswald Curran, 2008, p. 691).

Although the status and role of language and law may differ from one society to another, the two are inseparable, for “he who seeks law should start by language” (Vltmer & Streiter, 2007: 345). From a certain perspective, this means that in linguistic terms, law appears as a highly developed specialized language, a body of linguistic means pertaining to a specific field and ensuring communication in that very domain. But the structure of law cannot entirely be revealed based on the structure of language. The latter must make use of another type of technique in order to express the ideas of an ideal, normative system. It is generally agreed that law is rendered through legal language and the solutions of law can be found in texts, hence the notions of law must be ‘translated’ into language so that they will take effect.

Language can be studied as a cognitive model for comparative law, for it is intimately related to the inner characteristics of legal systems, cultures and mentalities (Grosswald Curran, 2008: 676).

2.2. Law and culture

After the 1990s, comparative law scholars have witnessed the explicit concern with law's relation to culture, especially with the concept of legal culture, a recurrent theme in debates about the nature and aims of comparative law. Some even consider that its role is decisive in the reorientation of the entire field of comparative legal studies. The idea of legal culture appears as an embedment process implying that law, with all its rules, practices and conventions, doctrine, institutions, etc., is entrenched in a broader culture. Quite often, conceptions of legal culture go beyond the "professional juristic realm", encapsulating elements that characterize "a more general consciousness or experience of law" largely shared and shaped by those who live in a particular legal environment (Cotterrell, 2008: 710). These elements may refer to the fundamental, traditional values and principles of a legal system, shared beliefs and customs, thought patterns and common interests.

Shifting away from the more traditional emphasis on attempting to neutralize legal differences, the advocates of a cultural focus point out similarities and celebrate differences between legal ideas, legal systems and legal traditions, in brief legal cultures, developing an empathy for the other, a concern with legal experiences taking place within various legal environments. Their merit is to have replaced instrumentalism and functionalism with a highly contextual, interpretive approach and with a hermeneutic methodology (Cotterrell, 2008; Riles, 2008).

The legal culture perspective perceives law as necessarily different from the law existing in another culture, conferring integrity, recognizing identity and uniqueness, safeguarding coherence of the culture in which law exists.

In this framework, comparative law is thought to have become more than a translator of law, it is a translator of legal culture.

2.3. Translation as a means of intercultural communication

Translation is "formally and pragmatically implicit in every act of communication, in the emission and reception of each and every mode of meaning" (Steiner, 1992: XII). It enjoys full recognition in a multilingual context, going beyond chaotic plurality, which can cause heuristic misunderstandings, even impossibilities, and the myth of intercomprehension through linguistic uniqueness. A universal language and

a universal law are utopian, sometimes concurrently. Languages are not confined to communicating information, they carry and create cultures. Therefore, translation must be developed as a means of communication, as a way of knowing and enriching one's own language so that people will constantly discover the spirit and 'fragrance' of original multilingualism (Eco, 1994, in Dănișor, 2015, p. 143). A unique, universal language would render the spirit poor, but, on the other hand, the uniqueness of language is determined by and forges "a unique world perspective, an irreproducible manner of seeing and understanding" (Grosswald Curran, 2008: 680).

Legal translation is a means of intercultural communication, as translators and comparatists alike find communication routes in the former, convey differences and similarities of legal cultures. A legal term should and does translate what a society carries in itself.

Translation is based on intercultural communicative competence, related to communicative competence in a foreign language, i.e., a person's "ability to act in a foreign language in a linguistically, sociolinguistically, and pragmatically appropriate way" (Ryan, 2011: 428). The affinity between communicative competence and intercultural competence results into intercultural communicative competence.

One of the major contributions to the view on intercultural competence was the model that Byram and Zarate (1997) presented as input for the Common European Framework of Reference for Languages (Council of Europe 2001). They introduced what they termed four *savoirs* (Byram and Zarate 1997), including: *savoirs* (declarative knowledge), *savoir faire* (skills and know-how), *savoir être* (existential competence), and *savoir apprendre*, which was further extended by Byram (1997) to include *savoir s'engager* (critical cultural awareness/political education).

Considering the recognized and revered relationship between language, culture and law, one can rightly note that a comparatist, while inevitably assuming the role of translator, should constantly undergo a process of becoming an intercultural person, one mediating between (at least) two legal cultures. He should cultivate intercultural communicative competence and the five *savoirs* that fall into categories of knowledge, skills, behaviour and attitudes/traits.

2.4. Translation and comparative law

Translation is nowadays one of the main components of comparative law. Critical Legal Studies comparatists have turned to linguistics and literary theory hoping that they will enable them to derive new heuristic devices and routes, while shifting from the traditional concept of 'legal style'

to that of 'legal consciousness' and trying to update, even replace the idea of 'legal transplants', considered inappropriate, unable to capture the phenomenon of transferring law from one context to another. Terms such as 'globalizations', 'productive misreadings' and 'translations' are used "to effect a paradigm shift in theories of legal change that are capable of accounting for domination and power disparity" (Mattei, 2008, p. 827).

In terms of comparative law, language knowledge is a component of the foreign legal systems under examination; moreover, it is "the most efficient shortcut to understanding how to understand" (Grosswald Curran, 2008: 682). Language, through translation, allows entry into another world, it opens new perspectives on intercontextual understanding, while identifying and communicating alterity.

Most people are unable to read foreign texts except in translation. Language depends on translation in as much as the latter becomes a mechanism essential to meaning construction.

Translation should not impede communication between legal systems and cultures. On the contrary, it should preserve their identity and specificity and manage, at the same time, the incongruities tending to bar exportation and importation of terms, notions and concepts in the field.

The pre-stage of translation is to decipher the conceptual value of the source text, to interpret it. Thus, the meaning of a legal text can be determined according to (Frydman, 2005, in Ruffier-Meray, 2007: 244):

1. The intention of its author as reflected in the will of the legislature
2. The act the text pertains to and, in a broader sense, the coherence of the legal order that it expresses and the general principles of law governing that legal order
3. The situation to which the text applies and a balanced analysis of the interests and values in question.

At every stage of translation, it is important for comparatists to understand the culture that foreign law inhabits, to become familiar with every individual actor that generates meanings in law. Even when foreign notions or rules seem intelligible, there are still problems of translation, either in the most obvious sense, when the language of the comparatist differs from the language of foreign law, or in a subtler sense, when the same language unites two legal cultures (e.g. English and American), and, in this case, it is not easy to identify deeper differences in, for instance, "patterns of values and beliefs, historical experience, and national outlook" (Cotterrell, 2008: 722).

It is hard to evaluate the quality of translation, there have been many attempts in history to prescribe rules and steps to be followed, to critically analyze existing translational practices, to set principles, methods and rules meant to enlighten translators (Chromá, 2014: 148). The solutions are not universally valid and the complexity of practical problems still causes debates.

Although the potential of comparative law is enhanced through translation, there are various difficulties that a comparatist has to surpass. There have been debates as to whether genuine communication can be established between two legal presences, whether communication denotes an exchange of equivalent concepts.

Just as comparative law means much more than legal rules and notions subjected to comparison, translation is more than an act of comparison as a basic pattern of analysis and a search for equivalents, it is an infinite source of links and associations triggered by words and concepts.

One of the questions arising in relation to the notion of equivalence concerns the choice of translation solutions where a legal phenomenon has no exact equivalent in the target language, for translation can rarely achieve a total overlap of meanings between two legal systems.

Without insisting on the theoretical approaches to equivalence, it has been noted that in comparative law, the solutions translators usually resort to are either to translate certain words by approximation or to leave in the original language words that translate poorly (Grosswald Curran, 2008: 680).

At this point, certain linguistic comments seem necessary.

According to Alcaraz (2014), purely technical terms, together with semi-technical vocabulary and shared, common or ‘unmarked’ vocabulary, form a symbolic or representational group which includes all the terms denoting things or ideas found in the real world, either physical or mental. On the other hand, functional items refer to grammatical words or phrases with no direct referents either in reality or in the universe of concepts (e.g. hereinafter, with regard to, in accordance with, under, etc.). This group also comprises deictics, articles, auxiliaries, modals which do not cause serious translation problems.

Such words as title, section or paragraph, form the ‘unmarked’ vocabulary and are frequently found in legal texts. These words have not lost their everyday meanings and have not acquired other by contact with the legal environment.

As for the symbolic items, only purely technical terms and semi-technical or mixed terms deserve attention, as they cause real interpretation and translation problems.

Purely technical terms raise no dispute about their meanings or legal content and function. They are semantically stable and sometimes considered genuine terms of art or legal culturemes. For this very reason, it is believed that they cannot be translated, in the sense that they should just be adapted or left untranslated. Such are the terms: barrister, solicitor, estoppel, common law, tort, trust, etc.

Such terms as common law or estoppel are impregnated with tradition and legal culture, they are so complex in point of legal content, that it is easier to understand them conceptually and preserve terminological accuracy than translate them.

In support of the solution suggesting to leave words in the original language, I would like to present the cumbersome translation of these two terms in *Dicționar juridic englez-român*:

Common law (under the entry common) is translated as: *legea nescrisă, dreptul cutumiar, drept jurisprudențial (spre deosebire de statute law, legea scrisă; de equity, echitate, ca ansamblu de reguli aplicate de Court of Chancery; de legile speciale, cum ar fi legile canonice și legile comerciale; de dreptul civil)/ ‘unwritten law, customary law, case law (as opposed to statute law, written law; to equity, fairness, as the set of rules enforced by the Court of Chancery; to special laws, such as canon law and commercial law; to civil law). It is also referred to in Romanian as drept anglo-saxon (‘Anglo-Saxon law’).*

Estoppel is translated as follows: *regulă de administrare a probelor care împiedică o persoană să nege adevărul unei afirmații pe care a făcut-o și pe care o altă persoană a crezut-o și a acționat în consecință/ ‘rule of administering evidence that prevents a person from denying the truth of a statement that he made and that someone else believed and acted accordingly’.*

The technique of leaving terms in the original language has the disadvantage of alerting the reader “to the irremediably foreign nature of the underlying concept” (Grosswald Curran, 2008: 678), often providing lengthy explanations in footnotes.

In the absence of direct equivalents, a functional adaptation is also possible (Mayoral Asensio, 2003: 59). The translator or comparatist may use the concept that performs approximately the same function in the target language. Let us take the term *magistrate*. In the United Kingdom, it usually

denotes a volunteer of the Magistrates' Courts (also known as justice of the peace). In the Romanian legal system, a magistrat may be 1. a judge, prosecutor or counsellor, or 2. a high official. Therefore, the best solution is to translate the English magistrate not as magistrat, but as judecător (literally, 'judge'). Another solution is judecător de pace (a calque after justice of the peace). There is no judecător de pace in the Romanian legal system, therefore this choice may require explanations.

Semi-technical terms are words and phrases of general use that have acquired additional meanings by a process of analogy in the specialist legal context. They are polysemic and therefore more difficult to recognize, imposing a wider range of choices on the part of the translator. Such are the words: bill, case, consideration, defence, information, the verbs to avoid and to find, etc. For instance, the legal meaning of the verb to avoid in the expression to avoid a contract is 'to terminate a contract' (as opposed to the general meaning 'to keep away from smb/sth; to try not to do sth').

3. Conclusions

Over the past years, the comparatist has come to realize that he should act as an intercultural person, trying to understand law within the landmarks of the people participating in the development of its culture, and operating, as much as possible, in compliance with the thought patterns of the culture in which that law is embedded.

As a translator of law, of legal culture and meaning, comparative law has always made use of various tools with which to translate, tools that it has constantly devised or borrowed in a process of filtering past conceptions and rigidities, while preserving long tested methods of analysis and constructing new paradigms of intercultural communication.

The complex comparative nature of language characterizes law, granting comparative law the importance it deserves as a translator of law and legal culture, "but only so long as comparative law remembers that the comparative undertaking remains one of translation" (Grosswald Curran, 2008: 678).

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