



## ORIGINAL PAPER

# Translation as Transplant in Contemporary Law

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### Abstract

The present paper aims at exploring legal translation under the more comprehensive umbrella-concept of 'legal transplant'. The main objective hereby pursued is to depart from an analysis of the theory of legal translation based on linguistics, to a larger framework which allows for a consideration of other crucially important elements to be accounted for in the process of translating law. Thus, understanding the cultural, social, political, economic, historical, geographical and identity-related peculiarities of a given legal system is indispensable in the process of legal translation. The above are all key factors which either allow the success or bring about the failure of the transplant. By adopting an interdisciplinary methodological framework, the present paper reaches the conclusion that the process of translating, or 'transplanting', law from one legal system to another is inextricably linked to non-linguistic phenomena, to be carefully taken into account, if a successful outcome is desired.

**Keywords:** *Legal translation, legal transplant, 'legal irritants', legal culture, 'forms without substance'*

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### Clarifying Terms: Translation & Legal Translation

Nothing is quite so straightforward today, in the age of ‘globalisation’ and ‘Europeanization’, as it used to be (or perhaps, some may point out, straightforwardness, simplicity have never at all been regarded as attributes of language or, for that matter, of translation; they may, at most be coveted goals outlined in slogans and recommendations). The concept of ‘translation’ echoes rich complexities and an incredible large and volatile spectrum of analysis, as do its conceptualisations. The many layers of conceptualisation mount to converge on and support a three-pillared structure, composed of the *whats* (*what is translation?*), the *whos* (*who translates? and whom is it translated to?*) and the *whys* (*why and for what purposes do we translate?*).

The answer to the question ‘*what is translation?*’ is as broad and intricate as the notion of ‘translation’ itself. We could refer to translation as a “process of a product” and hereby include “literary translation, technical translation, SUBTITLING and MACHINE TRANSLATION” (Shuttleworth, Cowie 2014); we could define it as “the transfer of written texts [which] also includes INTERPRETING” (Shuttleworth, Cowie 2014); we could metaphorically compare translation to a GAME or MAP and acknowledge the existence of such peculiar activities as ‘diagrammatic translation’, ‘inter-semiotic translation’, ‘paraphrase’ and ‘pseudotranslation’ (Shuttleworth, Cowie 2014). Meaning and equivalence are recurrently referred to as essential defining markers. Thus, translation has been viewed as “the replacement of textual material in one language (SL) by equivalent textual material in another language (TL)” (Sager, 1965: 20 in Shuttleworth, Cowie 2014). Sager Jakobson understood “translation in semiotic terms as ‘an interpretation of verbal signs by means of some other language’” (1959/1966: 233 in Shuttleworth, Cowie 2014). A further definition belongs to Nida & Taber and underlines that “translating consists in reproducing in the receptor language the closest natural equivalent of the source-language message, first in terms of meaning and secondly in terms of style (1969/1982: 12 in Shuttleworth, Cowie 2014)”. Source and target texts and cultures have also been mentioned in relation to the process of translation, as follows: “translation is the production of a functional target text maintaining a relationship with a given source text that is specified according to the intended or demanded function of the target text (translation skopos)” (Nord, 1991: 28 in Shuttleworth, Cowie 2014).

The concept of ‘translation’ is admittedly fuzzy and the theories which approach it have a veil of ambiguity about them, due to lack of consensus “over any universal principles of translation” (Shuttleworth, Cowie 2014) and to the interconnectedness of the term with an array of confusing notions (interpretation, transfer, transformation, negotiation, appropriation, equivalence, take-over, reproduction etc.) which are either subservient to it or partially or completely altering. ‘Everything [is and] must be translated’ in the *infra-*, *micro-*, *macro-* and *supra-world* of language, culture and communication – “everything must be permanently translated, submitted to translation. Everything must be translated, i.e. everything must be at all times reflexively negotiated, appropriated, transformed, subjectivized. To take over without translation means to take over reflexively, without thought, economically, fast culture, i.e. ephemeral cultural life, to swallow anything (in every sense) without chewing and digestion. [...] TRANSLATION IS THE NEW PARADIGM AND THE NEW POLITICAL SCIENCE, the only one commensurate with the globalisation of the world” (Ghiu, 2015: 15). It is essential that we comprehend the concept of ‘translation’ not merely from the perspective of linguistics and semiotics, but in its entirety and complexity, as immovable part of the

fabric of contemporary social, political and cultural realities; as inextricably linked to traditions and mentalities; and as carved deep into history – because translation “emanates only from and as history: it is purely contingent, that is why it must be continuous and explicit [...]. Translations are themselves historical, they age and must be restored” (Calotă, 2015: 12, Interview with Bogdan Ghiu).

The art of translation is today a mundane extension of communication and cultures; much as we may philosophy with regard to it, there is nothing philosophical about translation, as it is no longer the appanage of the elites, but a necessity, a fact, a tool for the many to decode and recode meanings, to ‘translate translations’ – “language itself is translation [;...] there are no languages, there are only idioms, *uses*” (Ghiu, 2015: 35-36), and to conquer as ‘subjects’ or fall as ‘objects’ – “WHOEVER TRANSLATES WIELDS, RULES – or at least is not unconsciously mastered, is merry, has more changes to be respected, is subject, not object” (Ghiu, 2015: 16).

The concept of ‘legal translation’ has been in the spotlight for quite a while, but its tapestry is only now beginning to fully surface in the context of the enlargement of the European Union, within the frame of which 28 Member States and national legal systems and 24 official and working languages are harboured. The peculiarities and difficulties related to the distinct, sometimes merely deceptively similar legal systems, cultures, languages, to which add the issue of the EU law, which is, “quite simply, a *new* legal language” (McAuliffe, 2009: 106), that of the Eurospeak or Eurojargon (French) – which is “reflect[ed] in Eurotexts [...], i.e. a reduced vocabulary, meanings that tend to be universal, reduced inventory of grammatical forms (...)” (Snell-Hornby, 2006: 142), as well as the issue of interpretation, alongside the closely related topic of subjectivity – all acts of interpretation involve a certain degree of subjectivity, intention and deliberateness, i.e. “defining the meaning of words involves choice and is not a completely value-free process” (Paunio, Lindroos-Hovineimo, 2010: 398) and the linked matter of the “interaction of those cognitive factors that directly affect the entire process, namely, knowledge, experience, processes of decision making and problem solving, [...] memory, motivation or, finally, creativity, as the result of the interaction of the above factors” (Kościałkowska-Okońska, 2011: 116).

The translation of legal terminology from one source legal language into a target legal language is a complex and difficult phenomenon due, firstly to the “system-specificity of [...] legal language, [i.e.] within a single language there is not only one legal language, as, for instance, there is a single chemical, economic or medical language within a certain language. A language has as many legal languages as there are systems using this language as a legal language” (de Groot, 2006: 423). The meanings of words are not only subject to the evolution and change of language(s), but also to the particularities of the ‘legal culture’ they are either created or developed into. To understand and translate concepts presupposes thorough knowledge of the legal culture they arise from, which “[...] in Legrand’s depiction, is focused on the accumulated professional traditions, styles of thought and habits of practice of lawyers but [which also] extends beyond these to stress their roots and resonances in much wider aspects of cultural experience” (Cotterrell, 2003: 150). The non-legal and non-linguistic factors which have to be accounted for in the ‘legal translation’ equation are incredibly diverse and unsettling, perhaps at times even incomprehensible or easily overseen. We often speak about the failure of legal translation due precisely to the fact that laws are carved deep into the ‘*mentalité*’ and the ‘social context’ of a particular system. Pierre Legrand introduces the concept of ‘*legal mentalité*’, “making the argument that the laws of a legal

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culture cannot be unpicked or disentangled from the meanings that arise as a result of the distinct cognitive structure prevailing within it [...]" (in Hendry, 2014: 97). 'Place' or 'social context' plays an equally fundamental role in the creation of the meaning of legal concepts. Thus, according to Legrand, "[p]lace [...] is not a mere static backdrop to legal meaning: it is a dynamic constituent of it'" (in Hendry, 2014: 97).

The translation of law is, hence, so much more than the translation of legal language; language, and related semiotic and linguistic traps and complications, are merely the thinnest of the layers that make up this complex phenomenon. It is why the present article analyses legal translation as sub-branch of the umbrella-concept of 'legal transplant'. In order to understand the profound implications of the act of translating law, its successes and failures included, we must depart from the realm of linguistics and semiotics (whilst still acknowledging its importance in the process of translation) and account for the non-linguistic factors which play an equally important role in the process of translation. In this respect, the metaphor of the 'legal transplant' provides a larger and more comprehensive methodological and theoretical framework for the purpose of enlarging the spectrum of analysis as regards the act of translating law and the hereby inclusion of key non-linguistic factors which contribute to either the success or the failure of translation.

But before moving on to a different section of the paper which will explicate the concept of 'legal transplants', there still remain two unanswered questions to be further down exposed.

The first is concerned with the 'whos' of translation, i.e. *who translates?* and *whom is it translated to?* The actors who partake in the process of translation also actively contribute to its alteration. The profile of all parties involved in the translation of law, i.e. the 'text producers' and the 'receivers', has undergone considerable changes due to the socially culturally and linguistically resonating phenomena of globalisation and information technology. The roles of legal translators have, for instance, changed dramatically since the beginning of the 20<sup>th</sup> century, from "traditionally act[ing] as [...] mediator[s] between text producers and receivers in a sterile triadic relationship [to] succeed[ing] into converting [their] passive role in the communication process into an active one, finally emerging as [...] text producer[s] with new authority and responsibility" (Šarčević, 1997: 87). We, therefore, speak about a revolution of the manner in which we perceive and understand once clearly-cut, distinctive roles and responsibilities, which we now see as hybridized and heterogeneous. The distinctness between the drafter, the translator and the reader has become paler and their role-playing less clearly delineated – for instance, "in the late seventies legislative reforms in Canada led to the introduction of new bilingual drafting method which have revolutionized the role of the legal translator by transforming him/her into a co-drafter with broad decision-making authority" (Šarčević, 1997: 87). Multi-linguaging, digitalization and computerization have equally out the act of translation into new perspectives. In view of these changes, the legal translator's role is now more complex, but equally more unstable; similarly, his/her "relationship with the other text producers is now a dynamic one, in which there is mutual cooperation between producers, all of whom are encouraged to interact with the actual receivers" (Šarčević, 1997: 87). Hence, the questions 'who translates' and 'whom is it translated to' can no longer be regarded in isolation, as the boundaries between text-makers (drafter and translator) and text-recipients (specialist interpreter – judge and non-specialist reader – the wider public) begin to fade away or be

somewhat differently renegotiated in the age of supranational law-making and multilingualism.

*Why is law translated?* Are there other reasons besides the obvious ones related to the transfer of legal information from one legal system into another so that it may be understood and appropriately applied to particular circumstances, in the light of specific interpretative techniques? We may dare say that there are, especially if we think of legal translation as an act of cultural manifestation or as an expression of social and linguistic identity. Although such concepts as culture, identity, mentality or law may be countlessly divided into further sub-concepts and related theoretically-philosophical enterprises and endeavours, there can be no doubt about their existence and interconnectedness. As long as they do not become “a priori and untreatable *fixisms*” (Smeu, 2013: 2), the above categories influence the act of translation and its performer uninterruptedly. What then appears to be simply the translation of a legal text is in fact the unexpectedly complex act of legal culture carry-over; what seems to be the quest for equivalence in legal translation may in fact signal a search for cultural, social or political similitudes and compatibility; ultimately, what only appears to be a translation of language, is in fact the translation of a language which will always carry within it the imprint of the community, alongside its historical and geographical reverberations and its ‘intimate structures’ reflected as identity. What ought to be finally understood in the context of this discussion is that law is essentially a worldly phenomenon, a live mechanism of regulation which responds to societal, cultural, political and economic evolution and changes. Law, so inextricably bound to the world, comes to life through language which cannot but account for the extra-legal metaphor of the world and mirror this complex relationship accordingly.

### **Translation as Transplant or the Language of Legal Cultures and Identities**

According to Pierre Legrand, the verb ‘to transplant’ refers in law to “the transfer [which] occurs across jurisdictions: there is something in a given jurisdiction that is not native to it and that has been brought there from another” (Legrand, 1997: 111). There is an immediate set of question which Legrand poses after making the above statement and which is presented here for the purposes of a subsequent analogy: “What, then, is being displaced? It is the ‘legal’ or the ‘law’. But what do we mean by the ‘legal’ of the ‘law’?” (Legrand, 1997: 111).

If we ought to consider translation as the transplantation of concepts from one legal language into another, we should ask ourselves similar questions: what, then, is being transferred? A concept pertaining to a source legal language into its host legal language equivalent? But what exactly do we mean by the transfer of legal concepts from one language into another – i.e. do we only refer to issues of linguistics and associated challenges in legal translation (vagueness, ambiguity, approximation or untranslatability), or do we also account for the “social, historical [and] cultural substratum” (Legrand, 1997: 112) of the borrowings? To both, actually. To the need of understanding and overcoming language-related problems, adds the more compelling realisation of the fact that, via translation, circulates a multitude of sometimes irreconcilable cultural peculiarities, political views and interests, social traits, historical and geographical specificities, as well as certain identity-related values, all of which have helped shape the meaning, functions and scope of one concept within the frame a particular legal system and all of which will continue to linger on as indelible residues in the substructure of the concept, even after it has been transplanted, i.e. translated. And it is precisely due to this non-linguistic load that is being carried over during the translation process that the act of

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translation sometimes fails to accomplish and the transplanted concept is referent to a 'legal irritant' (Gunther Teubner prefers to use the phrase 'legal irritant' instead of the metaphor 'legal transplant', due to lack of suggestiveness of the latter – "transplant makes sense insofar as it describes legal import/ export in organismic, not in machinistic, terms. Legal institutions cannot be easily moved from one context to the other, like the 'transfer' of a part from one machine into the other. They need careful implantation and cultivation in the environment," in Teubner, 1998: 11). Thus, "the process of translating concepts of the imported law into the language of the importing society [can] be a cause of failure" (Guğan, 2014: 296) for at least two reasons: "because it does not succeed in underlining the entire semantics and transport the entire cultural baggage of the exporting society into the importing one, or because, *per a contrario*, it brings with it too much cultural baggage into the importing society" (Guğan, 2014: 296-297).

Legal translation hence presupposes not only the import of language(s), but also the import of 'institutions and ideas' (Guğan, 2014: 286) and fragments of foreign, more or less similar legal cultures which "do not simply enter a new legal system as whole entities but rather set in motion a long and turbulent set of reactions within the host legal system that both reshape the host legal system and the transplanted law" (Riles, 2006: 796).

Ironically enough, and in spite of the general agreement that the transplant of law presupposes a displacement of a part of the original legal culture as well and a re-adaptation of that culture to the new legal environment, there is little consensus as to what exactly is meant by the phrase 'legal culture'. We all acknowledge its existence, but no one, including its coiner, N. Friedman "who has recently manifested reservation as regards the necessity of its existence, by taking into account its abstract, slippery nature and the difficulty of defining it" (in (Guğan, 2014: 328), seems to be able to confer upon it a practical definition, due precisely to the fact that it encapsulates a kaleidoscope of historical, social, cultural, political and economic nuances filtered through the individuals' power to comprehend and interpret. Legal culture can be understood as the way "in which a distinct society/ community, through intersubjective communication understands/ interprets law on the basis of the same stimuli, as well as the way in which a society/ community talks/ writes about law on the basis of the same language. [...] legal culture equally considers the way in which the actors of law act in relation to their own epistemological vision in an institutionalised framework" (Guğan, 2014: 329). The referential instability of the concept of 'legal culture' is hence brought about by the ideological, epistemological, hermeneutical, linguistic, institutional, behavioural and interpretative non-legal categories. Legal culture does not solely refer to the 'internal culture' of legal specialists; "its normative power derives from the relationship between political, social and legal traditions and law, legal institutions, practice and the informal experience of legal culture – inside and outside of the legal community: deeply felt, ingrained attitudes about what law is and should be, and how it should translate into institutions, institutional roles and procedures and rules – in short, a legal system" (Brants, 2010: 2).

Legal systems create law that can and, ideally, is applied to the social reality of the day. Yet the changing nature of societies, their continuous evolution, amplifies the difficulties inherent to the interaction between one legal system and the other. It is difficult to harmonize and reconcile two legal systems, which may indeed adhere to the same legal family, but could nonetheless have evolved differently, in accordance with their own histories and necessities. It hence becomes all the more understandable that the

meaning of a word cannot “survive the journey from one legal system to another” (Legrand, 1997: 117). There is no imaginable way in which a concept, be it faithfully transposed from the original legal culture (if at all proper to that importing legal culture), can remain unfettered upon entry into the host legal system. This is due to the fact that, “[i]n order to transport a single word without distortion, one would have to transport the entire language around it”. Indeed, “[i]n order to translate a language, or a text, without changing its meaning, one would have to transport its audience as well” (Hoffman, 1991: 175 in Legrand, 1997: 117).

It is, therefore, the dependence of a legal concept on the source legal system of the importing society that causes confusions, ambiguities or faulty adaptations of the legal transplant. In view of this, higher importance should be granted not to the process of transplantation, or translation, in itself, which is ultimately a ‘mechanical’ one, but to the legal cultural background (Guțan, 2014: 292). Thus, if the imported law is so tightly linked to the initial cultural background, it will give leeway to zero malleability, will therefore be ‘imposed’ and will consequently become an ‘irritant’ (Guțan, 2014: 329). In the end, “the law of the importing society will not completely assimilate this imported law, instead it will make leeway for ‘an evolutionist dynamic in which the meaning of the external rule will be rebuilt, and the internal context will suffer a fundamental change’” (Teubner, 1998: 12 in Legrand, 1997: 292), such as is the case of the process of the unification of law in the EU, burdened with legal, political and cultural conflicts and divergences. On the other hand, those legal words which come into the new culture by translation will have to bear the burden of being subjected to a “different rationality and morality” which will ceaselessly pressurise them into changing and adapting to their host system. “Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it ipso facto a different rule. As the understanding of a rule changes, the meaning of the rule changes. And, as the meaning of the rule changes, the rule itself changes” (Legrand, 1997: 117).

### **Translation as Transplant: ‘Form without Substance’?**

The translation, or transplantation, of foreign concepts is not new to the Romanian legal system. Admittedly, the ‘often irrational’ (Guțan, 2014: 306) import of models, institutions, concepts has become ever so more important since Romania is a Member State of the European Union, the country’s legal, political and economic culture thus being aligned to the requirements and challenges of a supranational system, often itself the playground of divergent political forces and interests, a “space of potentially conflicting interactions between national legal cultures and systems, on the one hand, and between the latter and European law, on the other hand” (Guțan, 2014: 306).

Nonetheless, as early as the 19<sup>th</sup> century, on the brink of a newly forming, modern legal and political Romanian culture, strongly influenced by Occidental models, there already were warnings against the thoughtless, too rapid import of foreign ideas and concepts into the yet too young Romanian legal culture. Much as today, mimesis, the lack of a thoroughly designed transitional framework which would gradually accommodate the wave of borrowings, the absence of any long term education or training which would instil the new generation of specialists with vision and knowledge regarding the old ways, as well as the new, and the more general disinformation of popular actors were prevalent. Thus, “sank up until the beginning of the 19<sup>th</sup> century in Oriental barbarism, the Romanian society began to awaken from its lethargy around 1820”... infused with the “ideas of the French Revolution”... our youth began to emigrate towards those “fountains of science

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in France and Germany”... yet being only able to grasp the “outer lustre. [...] not-ready as they were, our youth, stunned by the great phenomena of modern culture, could only [grasp] the effects, but not also the causes, they could only see the outer forms of civilisation, but could not [comprehend] the deeper historical fundaments, which have necessarily produced those forms and, in the absence of which, they could not have existed” (Maioreescu, 1868 in Filimon, 1998: 104).

The dangers and failure of transplants about which too little was known or a too superficial knowledge was available to the importers of the day were hence an intensely debated topic. In his 1868 article, “În contra direcției de astăzi în cultura română” [“Against the Contemporary Direction in Romanian Culture,” *the present author’s translation*], Titu Maioreescu warned against the “falsification of etymology and [Romanian] philology” (Maioreescu, 1868 in Filimon, 1998: 107), as a result of such publications written in Latin which “were aimed at showing strangers the cleanness of the language spoken by the Romanian people, but which [in fact] showed a language that has never been and will never be spoken by the Romanian people” (Maioreescu, 1868 in Filimon, 1998: 107).

Then and now, questions related to form and substance, to what a legal culture borrows, to what end and how it proceeds to adapting the imported forms (be they larger conceptual models, or smaller terminological units) bear significant relevance. Can the “assumed foreign institutional frame” be adjusted to the “internal social forces” (Schifirneț, 1996: 53) which make up the substance to which Maioreescu refers? What is more dangerous when “empty foreign forms [are] produced or translated” – “the lack of any fundament whatsoever [of the act of production or translation], or the lack of any necessity of this fundament in the public” (Maioreescu, 1978: 150 in Schifirneț, 1996: 53)? Do we simply copy, with regard to neither the borrowed nor the borrower, forms and models (for instance, Maioreescu asked himself whether the constitutionalism taken over from England could truly “adapt to the real life of the Romanian people,” in Schifirneț, 1996: 54) in the absence of any effort to set the basis of our own original creations (in Schifirneț, 1996: 54)?

The translation of law hence presupposes bridging this legal language to the other, this legal culture to the other, this legal mind-set to the other. One in the absence of the other equals failure. There can be no form without substance; evolution must lie upon ‘enduring fundaments’ and not on the “immita[tion] and reproduct[ion] of the appearances of culture, [...] confident in that the fastest [approach will also ensure the realisation] of freedom in the [post]modern state” (Maioreescu, 1978: 148 in Schifirneț, 1996: 54).

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