Translating the DCFR and Drafting the CESL

A Pragmatic Perspective

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Pragmatic Issues in Translating the DCFR and Drafting the CESL: An Introduction

*Barbara Pasa and Lucia Morra**

1. A few words on the rationale behind this book on legal translation, after the increasing number of excellent works published in the last decade. Although the need to know something about translation of legal texts in a multilingual environment has been met on a fundamental level, what is still lacking is a common theoretical understanding of this unique enterprise, in the different fields of philosophy, linguistics, legal-linguistics, and law. The motivation behind our project, however, was not only theoretical; we were also looking for a deeper understanding of the complexity of legal translation processes, which involve many institutional and non-institutional actors, each applying different methods of translation. To this end, we thought that it would have been useful to provide an interdisciplinary overview of the application of legal translation mechanisms to two different legal texts, a legislative text (the CESL – Proposal for an EU Regulation on Common European Sales Law) and an academic work (the DCFR – Draft Common Frame of Reference). The aim was to understand what comes *before* and lies *behind* these enterprises of legal translation, that is to say, the fundamental stages and their consequences and effects on the final outcome, both in the case of the formal legislative procedure for the adoption of a European Regulation (the CESL) and in the case of a completely different procedure (the DCFR). We also thought it was worth investigating the role of both the EU Court of Justice and the national courts, to understand what comes *after* the enterprise of legal translation, in interpretation of these sources, the CESL a source of positive law in the strict sense, and the DCFR an authoritative source in a traditional sense. Views and experience were fruitfully exchanged with European colleagues from various fields, an exchange that seems to have sown the seeds for further interdisciplinary exploration of either a practical or theoretical nature in the area of legal translation.

First, we invited a number of highly-qualified colleagues to a conference – "*Pragmatic Issues in Legal Translation – From the different language versions of the DCFR to the CESL proposal*" – that took place in Torino at the end of November 2012. It was organized by the *CDCT – Centro di Diritto Comparato e Transnazionale (Centre for Comparative and Transnational Law)* and by the Department of Law of the University of Torino within the project "The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilization of national legal traditions?",

* This Introduction is the product of a joint project. Although it has been jointly conceived and discussed, Lucia Morra has contributed section 3, Barbara Pasa section 4, while sections 1, 2, 5 and 6 were written jointly.

coordinated by Michele Graziadei, a member of the Conference's Scientific Committee, together with Gianmaria Ajani, Silvia Ferreri, Lucia Morra, Barbara Pasa and Rodolfo Sacco. The enthusiasm with which our guests participated in the project, the collaborative atmosphere in which the conference took place and the interesting discussions raised by the various contributions encouraged us to collect the papers presented and publish them together. This publication includes papers by an emerging vanguard of scholars whose work is worthy of widespread discussion, and by well-recognized scholars in the field of legal translation, such as Susan Šarčević and Rodolfo Sacco. Together they constitute an exceptionally strong community of comparative lawyers, linguists and philosophers capable of building bridges between these inter-connecting fields.

2. The book is structured in four Parts. The first two are more general in approach and look at the historical and philosophical background of legal translation; the third focuses more narrowly on some stages in the translation processes that led to the DCFR and the CESL, of which the fourth Part contains a short selection.

The first Part – ***Historical Outline*** – outlines the historical background of legal translation, first in general terms (**Chapter 1: Rodolfo Sacco**), and then more concretely with many traditional examples drawn from comparative law (**Chapter 2: Barbara Pozzo**), and finally as applied to the DCFR and the CESL (**Chapter 3: Susan Šarčević).** The last chapter **(Chapter 4: Michele Graziadei**) advances the hypothesis that the laws of the Member States may eventually spontaneously converge in attributing the same meaning to a certain term or expression within the EU.

The history of legal translation is described by a pioneer in this area, **Rodolfo Sacco (Chapter 1)**. He shows (in French, a fitting choice, in view of the book's theme) how debate on legal translation was inspired by philosophical and linguistic research on translation. As is known, the world legal community discovered that translation was problematic only in the second half of the last century. Until then, legal concepts were not only considered to be clearly defined in each legal system, but also to be related to universal and eternal legal concepts shared by all legal cultures and languages. In such a view, the only condition for translation to be performed was finding in the target language the same concept denoted by a term of the source language, a task considered as not always easy, but feasible, at least in principle.

Confidence in the possibility of relatively straightforward translation, however, faded when both the analytical school of philosophy and hermeneutics showed that meaning is necessarily shaped by the conceptual system it is part of, and hence translation must be an indeterminate task. Following this theoretical line of argument, scholars of legal translation began to gather evidence of the impossibility of achieving uniform application of a multilingual legal text even when adopting equivalent translations, given that interpreters (judges) of that text assign it a meaning which will vary according to their legal culture and experience.

More recently, however, as scholars of applied ontology have underlined that it is possible to adopt uniform categories across different languages, and cognitive scientists have stressed that human communities approach reality in much the same way,

the legal theoretical focus has shifted towards the idea of the possibility of translation despite its inherent indeterminacy. Indeed, legal translation is a frequent event, and many legal terms specific to a legal community are translated either by using established solutions produced and used in the development of the *jus commune* (a combination of Roman and Canon law) or by using *legal transplants* (the circulation of rules and concepts, even without a common cultural background, between legal systems). In reality, legal translators can cope with the main difficulty in legal translation (namely that law is expressed by written legal texts *and* by customary law, interpretive strategies, *and* latent notions in the interpreter's culture, which Sacco called *cryptotypes*) when they have been trained by comparative lawyers to consider both the literal meaning of the text to be translated and the operational rule behind its literal meaning.

Building on Sacco's ideas and arguments, **Barbara Pozzo (Chapter 2)** looks at the question of the untranslatability of legal concepts and traditional examples of translations, such as *contract/contrat/contratto/Vertrag* and *property/proprietà/ propriété/ Eigentum*. She also points out that while within the Western Legal Tradition it is customary to think of law primarily in written terms, in other legal traditions, such as in China or in Africa, this might not be the case, as the unwritten character of customary rules may prevail in the law in action. Furthermore, legal rules, whether oral or written, might be profoundly influenced by invisible patterns of ordering that need to be revealed before the rules are translated. Hence a necessary task in each legal translation process is to understand the culture in which the rules to be translated are rooted, an understanding that in some cases may prove of extreme importance. Lastly, Pozzo looks at the myth of equivalence, a myth that seems to become "a chimera when legal translation has to face the numerous issues and challenges connected with European multilingualism". Pozzo concludes by pointing out that in the European legal context, English is used as a "neutral or descriptive language" associated with a classic civil law background; it has reached the status of a *lingua franca* at the cost of becoming a Continental legal English which differs from British legal English. In the near future a new translation task could then prove necessary: translating EU-English into British English.

Susan Šarčević (Chapter 3) analyzes in detail the specific difficulty of the EU translation enterprise, a complex interplay between different legal languages and different legal systems. The main problem of EU legislation is not the scarcity of terminological equivalences amongst the EU legal languages, but rather the fact that this legislation must be integrated into the legal systems of the Member States and applied by national courts, and hence European legal terms tend to be interpreted according to national rather than EU law.

As regards terminological choices, although translating EU legislation is, or should be, an act of comparative law, most of the European Commission's DGT (Directorate General for Translation) translators have little-to-no knowledge of their own national law and insufficient knowledge of EU law. Therefore, they often prefer to translate terms literally (*calques*) or to use similar lexical units (*loanwords*) without analyzing or understanding the underlying concept, an approach that casts

doubt on the effectiveness of EU translations, since it often leads to a high degree of formal equivalence at the expense of quality. Šarčević considers the impact this practice has on some myths of EU multilingual lawmaking: the principle of equal authenticity (all texts of EU primary and secondary law, including subsequent translations, are deemed 'originals' and legally binding), its underlying presumption of equal meaning (all authentic texts of a single instrument have the same meaning), and the principle of legal certainty (the effects of the legislation must be foreseeable). She does it analysing some definitions (i.e. *goods*) and general clauses (*good faith and fair dealing*) in the DCFR and the CESL. She assumes that definitions play a key-role in creating uniform European concepts and are, thus, a vital tool for achieving greater predictability and legal certainty in general.

Michele Graziadei (Chapter 4)) analyses the enterprise of translation of European law in relation to Mikhail Bakhtin's concept of heteroglossia. Like the Russian linguist, Graziadei assumes that there are no neutral words because all languages represent their own distinct view of the world, characterized by its own meaning and values. In his view, each text enacted by the EU is an "historic artifact representing a plurality of registers, of points of view, of styles, leading to inevitably hybrid utterances, which altogether give voice to the EU in the many languages of Europe". Each language of the law in all the Member States is strongly enriched by this juxtaposition between different "voices", that are part of what creates meaning between and beyond EU legal texts. Graziadei, drawing examples from his personal experience, sets out to describe EU multilingual law making and how it shapes language – in particular, interaction and negotiation among members of a working group trained as lawyers in different national contexts. A key practice is resorting to terms and expressions already in use at the level of national law, to express European concepts exclusively associated with European law. This practice in itself is not new: linguists have shown how over time new meanings are regularly associated with pre-existing words. However, the real difficulty in the EU context is grasping under what conditions a given term or expression has a new EU meaning, or a meaning used under the law of a Member State. Deciding on this point involves policy considerations, because the more Europeanized concepts are introduced, the more national private law systems come under pressure.

3. The second Part of the book – ***Theoretical Issues in Legal Translation*** – introduces the philosophical and legal-linguistic debate on the relationship between law, language and translation, using as examples some parts of the multilingual translations of the DCFR and CESL. Regarding the rhetorical question of translatability *versus* untranslatability, the *leitmotif* of chapters in this second Part is the awareness that only imperfect translation is feasible, and that different translations of the same legal text will necessarily have different nuances.

The question of the feasibility of legal translation, as said above in the first Part, has been investigated in theoretical terms since the second half of the last century, mainly after the philosopher Willard Van Orman Quine illustrated the radical indeterminacy of translation, imaging the situation of a linguist approaching a "hith-

erto unknown language". Since then, legal scholars have debated the possibility of a determinate translation of legal texts: if the meaning of a legal concept depends to a large extent on the conceptual legal system it belongs to, it follows that it cannot have a determinate translation in another legal system. As said above, many irreducible differences between the concepts characterizing each legal system have been identified since then. At the same time, the need for translations between different legal languages has grown, and translations have been successfully performed despite these differences. After all, the communication between the various legal cultures of the EU negates one of the pre-conditions of Quine's experiment. Only when there is no previous point of contact between two languages, does translation between them prove to be an indeterminate enterprise, and obviously this is not the case with legal translation in the EU context: the very idea of creating 'common', shared, law for different legal systems demonstrates that their legal cultures have been in contact for a considerable time. Despite its inherent indeterminacy, legal translation of EU texts cannot then have the dramatic consequences it has in Quine's experiment: terminological equivalences chosen by legal translators are surrounded by a halo of indeterminacy, but this is generally restrained by the interpretive praxis of the legal communities. After all, legal translation cannot have a more determinate outcome than ordinary communication: just as communication succeeds in ordinary exchanges despite differences between meanings built by speakers and by their interpreters, in the same way legal translation takes place despite unavoidable differences between the meanings given to the words by the translators.

Thus, the legal theoretical focus considers now what (if anything) makes a legal translation possible, what 'possible', or better, 'successful' may mean in this context, and how the necessary differences between concepts coined in different legal systems may be mitigated. The idea is that legal translation is possible, and to be successful – and in the case of multilingual normative texts, this means that the different language versions of a statute, regulation or directive have the same legal effects – it needs a common frame of reference, to be either built or retrieved.

A common frame of reference may be described as a shared cognitive environment, namely a set of assumptions shared by a community and widely expected to be easily accessible and retrievable by its members. The relationship of this shared set of values with translation is underlined by **Francesca Ervas (Chapter 5**). Speakers communicate thoughts using semantic representations (coded meanings, namely meanings conventionally attached to linguistic units, see also Visconti, in this volume), and these representations will only 'guide' the addressees in recovering these thoughts. Failures in translation happen because addressees must enrich the semantic representations encoded by an utterance in order to transform them in the proposition expressed – in a complete thought –, and different languages make different strategies of enrichment possible: for instance, a language may be equipped to encode very subtle nuances, whilst another one may express equivalent nuances encoding only vague semantic constraints on the interpretation, thus forcing translators to produce inferences through the interaction of the coded meanings with contextually relevant data (see also Engberg, in this volume). This *pragmatic*

enrichment has multifarious possibilities, namely it may lead to ranges of inferences within which the translators have to choose. When an established common frame of reference is shared by different languages, the oscillations between these multiple possibilities of enrichment are mitigated.

As regards legal translations of EU normative texts, at least in the field of private law (especially contract law), most of this common frame of reference has been built, retrieved, and restated within the academic Draft Common Frame of Reference (DCFR) that the European Commission asked European comparative lawyers to build in order to achieve greater harmonization. Published in 2009, the DCFR is a "trans-systemic instrument formulated for the first time in a neutral meta-language with uniform concepts expressed in a terminology detached from national legal systems and cultures to the greatest extent possible" (Šarčević, in this volume). Still, according to **Jaap Baaij (Chapter 6**), this instrument alone does not prevent implementation of a normative text (a Directive or a Regulation; a national statute; a judgment of a domestic supreme court or the Court of Justice of the EU – CJEU) in the different legal systems from resulting in different outcomes, remedies and solutions, jeopardizing the required equality of legal effects. The uniform understanding of EU law the CJEU required seems then to be a goal which is impossible to reach. Interpreting all language versions in which EU law is enacted consistently is impossible not only when a multilingual legal text is produced by the legislature (as in the case of the Regulation Proposal on CESL) and by the judiciary (as in the case of a precedent, i.e. the CJEU precedents, Art. 267 TFEU) and then translated by official translation services, but also when it is the outcome of a doctrinal work (as in the case of the DCFR), where academics seek to adopt legal terms perceived as 'neutral' in the legal culture in which they will be interpreted. The reason for this failure lies in the domain of legal interpretation more than in that of legal translation: the CJEU's requirement can be accomplished only if all language versions are collectively given a uniform interpretation by the national courts.

The concept of 'system neutrality' in the drafting of legal rules which are intended to interact with a variety of domestic legal systems is discussed in detail by **Gerhard Dannemann** (**Chapter 7**). He asks whether translations should be system neutral or system specific. Adopting a neutral term entails the risk that it will mean nothing to national judges. On the other hand, using a national term (often only partially equivalent to the European concept) entails the possibility of encouraging judges to interpret the term in accordance with its national meaning, thus frustrating efforts to achieve uniform interpretation and application of European concepts. Using a term already belonging to a legal system entails attaching culture-bound connotations to the legal concept that could lead to different outcomes. However, as Baaij (in this volume) notes, the very fact that differences in national implementations can be detected proves that there is a common ground on which these differences may be expressed, and proves the existence of a discursive ground on which these differences may be mitigated – in particular, through interventions by the CJEU and intercommunication between the CJEU and national judges.