

Comparative Law and Legal Translation

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Abstract: Comparative law is a discipline that focuses on the rules governing various legal systems in order to determine to what extent they differ from one another. The analysis of various legal norms gives the translator the ability to investigate relevant historical, social and cultural aspects of a nation and to identify the causes and effects of the various factors conditioning the legal systems concerned.

Keywords: comparative law; legal translation; comparison; specialized language

1. Introduction

The development of law over time demonstrates the existence of a plurality of sources in the legal system of every country. The reason for this derives from the complexity of social relations subjected to rules and to the variety of forms of organization and government of society, from the organization of activities and the competence of state bodies and public authority. For human society, law is a must and it is identified in a set of norms meant to organize the various aspects of social life.

Comparative law has been approached in many studies,² especially for presenting legal trends and for taking advantage of new ideas emerging after war. Various definitions of comparative law have been provided, many of them taking into account historical facts and the political reality of the time.

Due to various, mainly political, circumstances, specialists felt the need to thoroughly investigate this discipline, this leading to the organization of conferences and symposia on the topic. In 1900, when the first International Congress of Comparative Law was held in Paris by French jurists, the main objectives appeared to be the access to a law common to all humanity and a response to new social and political realities. The idea of a common law was

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² In this analysis we will simply present a brief introduction to comparative law, without entering into the specialized literature.

created to overcome barriers of legal concepts which had formed over time as a result of historical facts, not for specific reasons.

Once the war began, comparative law started developing due to several factors: the occurrence of new states after World War II, eager to elaborate their own rights and several agreements aiming to standardize private international law. In such a context, a new law was needed, considering that law is a social phenomenon in constant transformation. The need for unifying the legislation gave rise to the International Institute for the Unification of Law in Rome, and later, after World War II, of the United Nations.

The emergence of various economic agencies made the study of comparative law essential, giving birth to the European Economic Community in Rome in 1957, today's European Union. Economic negotiation among several states, the variety of institutions and the different standards favoured the comparison of legal norms, in order to verify the possible convergences between legal systems and the possible alignment of legislations. A political and legal system, unique in the world, has been developed in time, namely the Community Law. Nowadays the European Union law is the "primary" tool for the treaties which form the basis or the fundamental rules of the entire Community activity. The "derivative" side of EU law includes regulations, directives and decisions which originate in the principles and objectives set out by treaties. The application of community law is achieved through regulations which apply directly to citizens and businesses. The interpretation of European legislation is done through European law, as a set of various legal systems of the Member States, which are primarily responsible for transposing and applying it properly.¹

The notion of comparative law should not be related to a branch of law only, but it should adopt different methods of comparison. The need for comparative legal training has recently boosted the research activity in the field of comparative law worldwide. Nonetheless there are programs of comparative legal training due to the fact that the difficulties encountered by comparative law are not only legal, but also linguistic and cultural. Moreover, in approaching comparative law there are also many difficulties in understanding legal concepts, legal terminology and/or legal institutions.

Today comparative law does not strictly imply studying legal systems, but also analyzing human or social areas, mainly in translations. There are other sciences

¹ See the website of the European Union.

which use comparative analysis in their studies: e.g. comparative linguistics and the contrastive study of different languages or idioms. From this point of view, the main goal in comparative law is to understand legal issues, especially those which are different in various legal systems and, eventually, if possible to study affinities between legal systems.

2. Legal Comparison

Law has always had a comparative component, due to the reciprocal influences in its coexistence with other types of law. As far as the comparative study of law is concerned, it implies highlighting similarities or differences between various legal systems. Due to the European globalization, comparative law has increasingly grown in all its dimensions: economic, political or in terms of cultural integration. In the new European context, a complete alignment of legislation does not exist, due to the existence of structural differences between the legal systems involved. Considering the problems that operators of law and legal scholars are called to give a solution to, the comparative method facilitates the solutions adopted.

Legal comparison is a science which focuses on the rules governing the various legal systems in order to determine to what extent they match and how much they differ. The analysis between the different legal regulations gives the researcher the ability to investigate the historical, social and cultural life of a nation, and to identify the causes and effects that have resulted in the social media concerned.

The comparison of legal systems has always responded to certain objectives that go beyond the simple comparison. From the beginnings of comparative law as a discipline, the comparison was mainly used in order to improve economic legislation. Other systems were analyzed in order to identify legal deficiencies and to adopt legislation considered to be particularly necessary. From the point of view of macro-comparison, comparative law deals with the study of various legal systems (see Common Law, Civil Law, Islamic Law or Asian Law), while from the point of view of micro-comparison, the comparative study focuses on the correspondence of only two nations, i.e. institutions, matters and applicable standards. Subsequently, comparative law started being seen as a means of understanding more clearly the rights of others, in order to improve international relations.

The purpose of legal comparison is to harmonize the legislation (the extraction of common principles and values) in order to draw up classifications in the field of

law and freedoms. The extent to which legal comparison is an effective tool for measuring the efficiency of the legislative solutions introduced by each legal system can be easily noticed. In other words, legal comparison may be seen as a necessary tool, and even more when debates on legislation appear to be very complex.

3. Legal Translation

The adhesion of many countries to the European Community has brought the need for official translation of various texts of different kinds. This adhesion raised the problem of translation, and overnight, it emerged the need to “adapt” all legislation to the European Union. This is due to the fact that all states of the European Union differ in their culture, history, politics and law and even in their state government. This process of European integration raised the discourse related to translators, that themselves came into contact with a terminology and phraseology which was often unknown to them.

The specific difficulties arising from legal translation are strictly related to the concepts and institutions that govern society. Law and language are inseparable concepts, making it impossible to perform a legal translation which reflects the same legal concept, without a base of legal knowledge of the legal systems involved in the translation of a legal text. Legal translation is not only the transfer of a linguistic system to another; it is an act of multicultural communication.

In 1958 Regulation No. 1 of the European Economic Community establishes the multilingual government. This means that all texts of the member States (regulations, standards, directives) have an authentic character and are published in the Official Gazette of the European Communities. This activity arises from the legal obligations of the Treaties and also from the political obligation of the countries which have become EU members. It means that all the documentation such as reports, brochures, information, laws about life and about the functioning of the European institutions are translated so that citizens are well informed about their rights, since the new laws are producing effects for them.

Born as a requirement of the European Union, the legal translation is defined as “a complex strategy of reading and writing that is located in a historical and cultural moment, giving life to texts that are in turn able to generate new readings” (Voli apud Osimo, 2000).

The factors which gave rise to these translations requirements are economic, political and legal. One of the main factors has been international trade (the origin of the European Economic Community) which involves numerous administrative documents (contracts and other types of transactions). Secondly, the translation became more demanding because of the creation of political and economic blocks in order to harmonize the legal systems and to create new regulations, mandatory Community rules for the member States. The last factor, but not the least, is the increasing mobility, caused by numerous activities, study or tourism, which has generated legal or administrative relations. This implies that all the activities of the citizens passed by the European legislation, which resulted in the translation of all types of documentation. As Boija Albi states, “legal translation is a constantly expanding discipline that is facing new challenges and demands every day” (Borja Albi, 2003). In this new European context, the problems which will be encountered are the difficulties to express specific legal concepts of a particular country that do not correspond to the legal reality (legal institutions or entities) that in order to respond to the “legal question” are not transferable from one system to another.

Comparative law represents the main basis in the translation process, due to the fact that the translator must face not only legal, but also cultural and linguistic problems. Legal translation and comparative law are in a relationship of interdependence and interdisciplinarity. The main difference in the legal systems does not only lie in the incongruity between concepts, but also in the lack of parallelism [...]. Each system is governed by different rules (Calvo, 2002). This means that it is imperative to be familiar, besides law, with other sciences such as history, philology, philosophy or linguistics to fully understand the meaning of the rules and legislation in various legal systems.

The translation of specialized language is subject to terminology and knowledge of the matter dealt with in the text. Translating legal documents means knowing the linguistic expressions that enunciate legal concepts, because texts have legal effects. In addition to the issues related to terminology, legal translation finds or is faced to different linguistic and legal structure units. The translator will have to be both a translator and a lawyer specialized in comparative law, or an interdisciplinary entity between a translator - an expert of the origin and destination languages - and an attorney. Laws, court decisions or instances have their own characteristics¹. Legal translation depends on each type of text; legal texts commonly use argumentation, in judicial decisions, and exposure in laws.

¹ In addition, there is a different textual and grammatical organization.

Therefore, the translator of legal texts is not a linguistic and cultural mediator, but a mediator between two legal systems (Nord, 1997).

The interpretation of the legal text intended to translation into another language, must be done through the inventory of all potential interpretations, considered as possible elements for a correct interpretation and translation, respectively. Good understanding of Community law implies a greater understanding of legal terminology. Given the complexity of legal terminology, confusions are often incurred due to the lack of equivalence in the target language. Legal translation differs from other types of specialized translation in terms of legal texts that produce legal effects and in its high level of faithfulness in order not to give rise to various interpretations (Harvey, 2002). A complete analysis must take into account the peculiarities and purposes attributed to the text.

The comparative method, which is interested not only in legal systems, but also in institutions, must observe some specific aspects in its analysis: a. knowledge of the terms of the comparison, studying the sources and the interpretation; b. understanding the terms to be compared, at present times and as historical facts; c. make a real comparison between the existing reference relationships i.e. historical, political and social relations.

The purpose of comparison between legal systems would be a unification of systems, hard to perform since the contrasts are just too different from a historical and political point of view. The difficulties are not only in legal-administrative documents, but also in laws which have legal effects for a community. Sarcevic notes that the incongruity between legal systems represents one of the major difficulties that a legal translator encounters (Sarcevic, 1997).

The legal language may be defined as a set of terms and expressions that denote principles and rules to which the human relations within society are subjected. Therefore, linguistic and legal systems are comparable, and any ambiguity can be resolved during translation, using contexts and with reference to the legal system of the text under discussion.

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