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Legal English as the *Lingua Franca* for International Law. Traits and Pitfalls for ESP Practitioners and Legal Translators.

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The dismantling of international boundaries in the pursuit of international markets and global agreements has meant the matching of different legal frameworks in the global context, as well as the implementation of legislative procedures and juridical processes across countries. Hence, it could be said that globalized business activities and dispute resolution through arbitration between individuals and institutions has been accompanied by a process of legal internationalization. However, such a process requires a common language for legal officials and scholars to understand one another, and such language is, undeniably, English. Hence, the advent of the so-called 'Anglo-internationalization of business', with major impact over the last two decades which is unlikely to change in the near future. In fields such as the legal profession, linguistic phenomena coming from different cultural systems and structures are peculiar to each language and country, thus challenging the ability and skills of the translator, linguist and/or specialist in the area. This talk will provide explanation of the historical, epistemological, functional, anthropological and hermeneutical differences between the Common law system of Anglo-American countries and the Continental system of most of Europe (including Finland and Spain), in order to provide a conceptual framework that may account for the complexity of Legal English, and what problems may the translator and LSP practitioner be faced with when trying to account for some of its peculiarities.

Keywords: *lingua franca*, legal translation, legal language, legal linguistics

1 Introduction: law, language, power and legitimation

The dismantling of international boundaries in the pursuit of international markets and global agreements has meant the matching of different legal frameworks in the global context, as well as the implementation of legislative procedures and juridical processes across countries. Hence, it could be said that globalized business activities and dispute resolution through arbitration between individuals and institutions has been accompanied by a process of legal internationalization. But such a process requires a common language for legal officials and scholars to understand one another, and such language is, undeniably, English. In view of the global prevalence of English as the *lingua franca* of legal transactions and communication, the present paper attempts to supply an overall explanation of the historical, epistemological, functional, anthropological and hermeneutical differences between the Common law system of Anglo-American countries and the Continental system of most of Europe (including Finland and Spain). Providing a conceptual framework of this kind may underline some aspects that contribute to the complexity of Legal English, and give an account of the sort of problems that the translator and LSP practitioner be faced with when trying to tackle some of its peculiarities.

To start dealing with the topic of the relevance of legal English as a global instrument of communication, one could start wondering about the nature of law, and whether there is such thing as 'natural law' or 'natural justice'. In my view, this idea is more apt for fantasy novels like Lord of the Rings and Game of Thrones, since law, like language, is a cultural product, an ideological artefact: it is the most important social accord in democratic societies, and governs with the highest directive force every society worldwide. That the law overall is not always in harmony with the laws of nature is clearly illustrated in the recent Russian Act that decriminalizes domestic violence, or if we consider that Islam has the judgment of stoning for those women who are engaged in sexual activities outside of marriage. Thus, an institution such as marriage is created "by social agreement" (D'Andrade 1984: 91), and its existence is solely supported by the adherence to the rules that constitute it. Therefore, the 'rule of law' is a convention developed through the tides of time, which is aimed at establishing the social norms and behaviours of a given community. Cultural schemas in the legal area like the above-mentioned marriage, or like contract, for example, constitute artificial constructs by means of which the human world organizes the coexistence and conviviality of its members. At the same time, it is necessary to add that the both the directive force and the ideological character of legal texts are conferred by language, being both, language and law, products of human cognition. It is not sufficient to say that language is a tool for law, but rather that law is exercised through language, linguistic knowledge and legal knowledge being inextricably intertwined in legal discourse (Salmi-Tolonen 2011).

Actually, there is a dual assumption underlying the present paper: the first is that law is an institution indissolubly linked to power as much as it is to language. As the most powerful of all institutions, the law uses the enabling mechanisms of authority, status and influence to exert domination, coercion and control over subordinate groups and this power is imposed through language by the state, by its laws and conventions or by the organizations for which we work. It may be said that the acquisition or exhibition of supremacy is carried out by a specialised community that produces the legal texts, and this is achieved through the technicality, precision and complexity of its written texts (Gibbons 2004), which constitute an intentional exercise of elitist and exclusionary practices (Goodrich 1987). Complexity and detachment, in turn, solidify the cohesiveness and 'insiderness' of the legal profession, and contribute to the relative distance between those with the power to make the laws and those who legitimately use it. The rationale underlying law is that it exists for the exercise of social control, which is why the predominant character of international treaties, constitutions, orders, regulations, insurance policies and contracts is mainly prescriptive (Orts 2016). These general features, that is, the social distance between those who issue and those who use the law, and the hierarchical order that legal communities (whether law courts, international legal organizations and bodies) wish to establish contribute to the perception of legal language as a "fossilized language" (Alcaraz & Hughes 2002: 9).

However, my second assumption is that power, mainly in democratic societies, cannot be administered without consent. In other words, if those subject to the law are to comply with power, they must be persuaded to believe in the legitimacy of rules (Simpson & Mayr 2013). In fact, according to Kairys (1990), the great source of the law's power is that it enforces, reflects, constitutes, and legitimizes dominant social and power relations without the need for or the appearance of control from outside. In other words, dominant groups have to work at staying dominant by generating consent among the population, and consent is achieved through the dissemination through language of the beliefs, practices and discourses of the ruling group. It is precisely because the power of law needs to appear legitimate in order to be accepted, that this process of legitimation is mainly expressed, not through coercion (imposed by legislation and law courts) but through the deployment of strategies of verbal persuasion on the part of the law-makers, those who produce legal texts. As Mattila affirms:

> In society, the most important category in written word is the law, which under democratic conditions calls on the understanding and loyalty of citizens as members of the legal community. […] In a democracy, the law possesses a function comparable to that possessed, under a despotic government to physical violence and its counterpart, fear. […] The legal community is essentially a community of persuasion, not a community of constraint. (2013: 51–52)

2 Legal English as the *lingua franca* of international law

On another note, the dismantling of international boundaries in the pursuit of international markets and global agreements has meant the matching of different legal frameworks in the global context, as well as the implementation of legislative procedures and juridical processes across countries. Hence, it could be said that globalized business activities and dispute resolution through arbitration between individuals and institutions has been accompanied by a process of legal internationalization (Klabbers & Sellers 2008). But such a process requires a common language for legal officials and scholars to understand one another, and such language is, undeniably, English. The basic tenet underlying this talk is, thus, that international legal transactions are for the most part, carried out in English, which implies that international litigation and legal practice worldwide are conducted in English as well. Hence, the advent of the so-called 'Anglo-internationalisation of business', with major impact over the last two decades which is "unlikely to change in the near future" (Vogt 2004: 23). The economic, social and political pre-eminence of countries like the USA or the UK has made universal the usage of public and private legislation instruments like world agreements (UNCTAD, CISG and UNCITRAL conventions) as well as international contracts in the form of INCOTERMS, for example.

The fact that English is currently the main tool for international communication among the different specialised communities may pose fewer problems in the field of scientific terminology (Cabré 2004), where words, mostly Latin cognates, have a definite meaning understood by the community at large. However, in fields such as the legal profession, linguistic phenomena coming from different cultural systems and structures are peculiar

to each language and country, thus challenging the ability and skills of the translator, linguist and/or specialist in the area. In Mezey's words (2001: 35):

> If we are to make headway in understanding legal studies as cultural studies and legal practice as cultural practice, then a contingent clarification of the vague concept of culture is an important threshold question. The goal […] is to understand law not in relationship to culture, as if they were two discrete realms of action and discourse, but to make sense of law as culture and culture as law, and to begin to think about how to talk about and interpret law in cultural terms.

Zweigert & Kötz (1998, in Bernitz 2010) construct a taxonomy based on the division into the following "legal families of the world": the Romanistic legal family (based on the French Civil Code), the Germanic legal family (Germany, Austria, Switzerland), the Anglo-American legal family, the Nordic legal family, the socialist legal family and other legal families (The Far Eastern legal family, Islamic law, Hindu law), but for the purposes of our paper we will conceive Civil or Continental law as including the Germanic and Nordic families and discuss about Continental and Common law instead. Carrying out legal transactions worldwide, hence, implies here understanding the differences and subtleties between the legal tradition of the English-speaking world and, in the European context, the Continental law, which constitutes the basis of legal practices in most of the countries of the EU.

In general terms, the basic traits of law in EU countries are as dissimilar as might be expected from a supranational rule of law that mainly contains like the Western civilization at large, two systems springing from two different legal traditions: Common law, based mainly upon case law, with some degree of legislation and Continental, or Civil law, based mainly upon codification. The coexistence of both systems and the role of English as an instrument of legal communication are especially relevant in the supranational reality, which is the European Union, with 24 official languages and three official "procedural languages": German, French and English. Since the eastern European enlargement in 2004, the use of French has declined in conference meetings and German is, these days, an official language on paper only, the professional communities being forced to receive and massively transmit information in English as the main working tool (Tetley 2000).

Geographically speaking, the Common law constitutes the legal foundation, not only in England, Wales and Ireland, but also in forty-nine U.S. states, nine Canadian provinces and in most former colonies of the British Empire which, in many cases, have preserved this law as independent States of the British Commonwealth. The state of Louisiana in the United States uses bijuridical Civil law because it was once a colony of France. In contrast, Civil law was to be eventually divided into three different families: that of the codified Roman law (systems that were influenced by the Code Napoleon, such as Continental Europe, Québec and Louisiana); that based upon Germanic law (Germany, and the Nordic countries, the latter lacking codes), and that of uncodified Roman law (such as Scotland and South Africa). Civil law countries include all of South America (except

Guyana), almost all of Europe, China, and Japan. South Africa, Namibia, Botswana, and Zimbabwe are also bijuridical, i.e., they follow a combination of both legal systems. According to Cao, the law of the EU is also to be classified as a mixed jurisdiction (2007).

3 Factors of difference between Civil- and Common-law systems

Before I deal with the consequences of having English as a *lingua franca*, the present paper will be primarily organised dealing with the factors that, from my point of view, underlie the differences between these two dominant legal systems, namely historical, epistemological, functional, anthropological and hermeneutical.

From the historical point of view, Continental law stems from the Justinian Code or Corpus Juris, which was adapted and newly codified in the 19th century by Napoleon and named the Napoleonic Code by express wish of the French Emperor. After the Enlightenment, the Justinian legal legacy developed in the continent into several comprehensive, systematic legal codes, shaped by the Roman tradition, which embodied the ambition of rulers to rationalize the law. The result was a compact normative body where "there is scarce life beyond codes" (Duro 2005: 620); a body of rules mainly made up of written norms, where case law and custom have a subsidiary role. On the other hand, the Common Law of English-speaking systems was also partially inspired by the Roman law at its inception, but had an earlier birth and evolution than the Continental Law, even if it materialized in the 12th century after the conquest of England by the Normans, who systematized it and started to codify it (Tiersma 1999). Hence, the influence of Roman law in the Anglo-Saxon tradition harks further back, since the array of sources and procedures known today as the Common Law was developed after the eleventh century and only in the second half of the thirteenth century the system took its place as an independent entity.

From the epistemological point of view, there are substantial differences between the two systems. Civil law is mainly a deductive system, which applies general rules to social realities. This deductive character of Civil law when applying and interpreting norms was inherited from the Cartesian tradition of knowledge and science, which have their origin in Descartes' thinking in the 17th century. Specifically, Spinoza and Leibniz were the ones who later developed the epistemological trend that pervaded Europe throughout the 18th century. Cartesian rationalism, of an expository and abstract nature, states that the pursuit of reason falls on knowledge and reasoning, granting theory and concepts an essential and organizational nature, and giving ideas a crucial role (Bristow 2011). The research of knowledge dwells upon the confirmation of previous theories, and not on empirical observation or innovation. Within this epistemological context, the Legal Rationalism of Civil law requires and relies on a total, universal and coherent system of rules, from which all possible solutions can be deduced. Legal sources arise from a single authority, a written code, and, therefore, the only role of judges is to decide, through a deductive procedure, whether reality is inside or outside the norm.

In its turn, knowledge in the English-speaking traditions has a predominant empirical nature. Ockham's Razor was already a fundamental premise in the Middle Ages, when philosopher William of Ockham denied the existence of universals and stated that there was neither knowledge beyond nominalization or the designation of things, nor any reality beyond what language could define (Orts 2007). Later, over the 17th and 18th centuries, Bacon, Newton, Locke and Hume would develop a purely empiricist theory of knowledge, by which knowledge could only be grasped through objective realities and their analysis (Bristow 2011). Epistemology developed, in this context, in an inductive and analytical line, knowledge being purely pragmatic and operational, and obtained through measurable results. This inductive approach to knowledge also pervades legal reasoning: knowledge in Common Law relates to the reality of a dynamic world where rules are as rare and as uncertain as universals, thus divesting written norms of impartiality (Hale 1820). The legal system is not strictly codified but is made up of specific cases, the main legal source of which is the precedent. These features give the system a flexible nature where potential contingencies are part of the everyday panorama of legal interpretation; where judges feel uncomfortable with conceptual issues of broad generality, going instead from precedent to precedent, solving problems (Lauterwein 2013).

At this point, it may be worthwhile pointing out that, despite belonging to the Civil law tradition, Nordic countries are a case in point and relatively less prone to dogma, since the so-called Scandinavian realism (Hägerström & Ross in Bjarup 2005) conceives law as a system of rules in terms of behavioural regularities among human beings and legal knowledge as an empirical inquiry into the causal relations between legal rules and human behaviour.

If, on the other hand, we regard the functional differences between the two traditions, the Continental systems of law are inquisitorial, "where judges play a very active role in getting to the truth about what happened in a case" (Tiersma & Solan 2005: 37), as a relic from the time when priests led causes in medieval Canon Law. The judge actively steers the search for evidence and questions the witnesses, including the respondent or defendant. On the contrary, the adversarial system relies heavily on advocacy by each party, with a relatively passive judge acting as an umpire. In the Common law, the lawyer has the duty to act zealously and faithfully for his client. Zealous, faithful advocacy means the obligation to search out all favourable evidence, to seek, neutralize or destroy all unfavourable evidence, and to press the most favourable interpretation of the law for his client. The basic values at its heart, such as presumption of innocence, the right to trial by jury, and protection of individual rights, appear to be firmly cemented as the cornerstones of this system.

As opposed to the Civil-law or Continental systems, where law is based on legislation and codes, scrutinised in a very general way and wide scope, when applying law to life,

the Anglo-American, Common-law system is one based upon case law, rather than upon legislation, and codes are non-existent. In Common-law legal systems, the law is created and/or refined by judges: a decision in the case currently pending depends on decisions in previous cases and affects the law to be applied in future cases. When there is no authoritative statement of the law, Common-law judges have the authority and duty to "make" law by creating precedent: it is the so-called *stare decisis* system, or "stay upon what has been decided", which binds courts to consider and follow the decisions taken by superior courts. Lack of codification is taken to such an extent that in England and Wales and in most states of the United States, the basic laws of contracts, torts and property do not exist in statute, but only in Common law, though there may be isolated modifications enacted by statute. Accordingly, Common-law systems have a preference for integrated court systems, with courts of general jurisdiction available to adjudicate criminal and most types of civil cases, including those involving constitutional law, administrative law, and commercial law. Civil-law systems, on the other hand, following the tradition of separate codes for separate areas of law, favour specialty court systems and specialty courts to deal with constitutional law, criminal law, administrative law, commercial law, and civil or private law.

Finally, the law-creating centres in this European Civil-law tradition were universities, and not courts. In this context, academics were much more interested in private law and doctrine, and in the essential aspects of the administration of justice. In contrast, the Anglo-Saxon legal tradition was basically created in the courts, thus giving more relevance to procedure, evidence and the application of court decisions than to substantive rules. Because the origin of Common Law is to be found in local English customs later shaped by the central power of the monarchy, it developed as a law of a public character and was not taught at universities; it is not a law of universal principles, but consists of procedures learnt by custom and practice.

Even if it has nothing to do strictly with the membership to the Continental or Common law systems, but inasmuch as it deeply affects how the law is understood, another of the challenges that cross-cultural legal transactions pose has to do with anthropology, on the subject that Edward T. Hall (1976) defined as high or low context of communication. High context societies (like those of many countries within the Civil system of law) favour a plural type of interaction where a deep understanding of the surrounding factors of the communicative process influence the way in which the message is understood. This implies that the social context is essential for comprehension, family ties are strong and business deals are often closed with a handshake. Countries like these include all Central and South America and the Mediterranean countries. On the contrary, low context cultures (English-speaking countries like the United States, Canada, Australia, England, plus the Nordic countries, and Germany) usually feature more direct and explicit ways of communication, where time is not lost on embellishments and the importance of the message is in its context, such message being a way to exchange ideas, opinions and information.

In these countries, oral agreements are insufficient and transactions often end up with the drafting of contracts reflecting the accord between the parties. In my opinion, these two ways to conceive how communication works bear an influence on the different ways in which legal texts are interpreted in some legal systems.

Accordingly, and from the hermeneutical point of view, legal interpretation in Continental law has, generally (and this includes Nordic countries, where preparatory legislative material, doctrines and cases supplement voids of meaning) a contextual and purposive orientation: the legislative text is the starting point for the scrutiny of specific instances of legal performance, and the interpretive approach is teleological or spiritual, as, not only the words in the text, but also the intention of the legislator, count. The contextual and purposive aspect of Continental hermeneutics implies that the legal text must qualify as a whole, being analysed from the perspective of its full meaning and elasticity to adapt to legal purposes. This entails that, from a certain point of view, Civil-law legislative texts are characterized by their open texture and made up of simple, uncomplicated sentences that state policy and principles in broad terms, rather than comprehensively exploring every conceivable contingency.

In contrast, in the inductive legal tradition within which Anglo-American systems exist, the interpretive mechanism is ontological: every word has its own specific weight, and, consequently, to construe law and subsequently apply it, words have to be dismembered, pulled apart, so as to disambiguate the text. It is, precisely, the tension between precision to be as accurate as possible and flexibility, to be able to capture every possible contingency in life affairs what, ironically, makes legislative texts in English so difficult to understand. Laws and cases must be exhaustively interpreted through specific semantic principles that judges follow implicitly and which constitute 'intrinsic' − i.e., merely textual aids for interpretation (Crystal & Davy 1969; Riley 1991): those of *eiusdem generis*, *noscitur a sociis*, *expressio unius et exclusio alterius* and the so-called Golden Rule. Hence, due to the restrictive nature of these techniques of construction (Cao 2007: 114), Common law statutes lack significant propositions of law, but abound in definition provisions. This taste of statutes in English for legislative definitions, normally long and syntactically dense, reflects the eagerness of the text to avoid ambiguity and approach the utmost accuracy and precision of reference.

4 Legal English. Consequences and hindrances of Legal English as the common language for the law.

On a syntactic and lexical plane, legal English is a complex kind of discourse. Not only because of the technicality that characterizes legal discourse in general: an additional factor for its opacity is the linguistic implications of the obsession with textualism of Anglo-American systems, which is translated into the way English legal texts are worded.

From the lexical point of view, autonomy of interpretation means that the legislative text in English must, paradoxically, be both accurate and flexible. Accuracy entails that the text must able to anticipate and constrain future actions and events, and, hence, is to be full of technical, archaic and formulaic terms. Syntactically, these texts are fairly dense in construction, partly because of the customary practice to formulate subsections, and sometimes even entire sections, as a single complex sentence "built up from a dizzying number of subordinate and interpolated clauses and phrases, which are distributed over the paragraphs and subparagraphs" (Alcaraz & Hughes 2002: 107).

In view of the dissimilarities between the two systems under consideration, and regarding the peculiarities of Legal English, the adoption of English as a *lingua franca* for law entails functional problems and miscommunications. The Common law is a system where parliamentary laws are considered to be incomplete until the moment they are covered by a body of precedents specifying how to interpret them, and where legal exegesis mainly deals with distinguishing the *ratio* (the reason for deciding) and the *obiter* (the 'other things said') in a precedent, the meaning and scope of words being minutely and exhaustively analysed. There are other operative differences, such as the fact that the fundamental division Common law-Equity is unknown in many Civil-law countries (where equity is not a body of rules parallel to case law, but a principle of fairness and justice embodied in the laws), and private law is organized into topics (tort, contract, family, probate, property, trust), rather than forming a body of rules for individuals to organize their relationships, administrative courts being absent. Finally, Latin maxims are not the same in common and Civil-law systems, since they belong to the interpretive techniques and peculiar phenomena within the system, such as for example, the concept of *mens rea* in criminal law, or the maxims *eiusdem generis* and *noscitur a sociis*, typical of Common-law exegesis.

Additionally, there are other areas that make it difficult for some legal cultures to understand the Anglo-American legal mind; cultural clashes, such as the fact that in the Mediterranean countries some provisos would never enter a contract, since they are supplied by the law itself, and oral agreements are frequent. Other misunderstandings could be generated in the field of contract, where false cognates abound. Apart from the word 'equity', previously discussed, there is also an interesting discussion regarding the word 'execution', which, according to Mattila (2013: 346), in Continental law would refer to the performance of a contract, whereas in Common law would refer to the moment when the contract enters into force. There are other examples. In Spanish, for example, 'fraud' which refers to intentionally deceptive words or acts on the part of the contracting parties is more often than not, translated into Spanish by its cognate, *fraude*. However, *fraude*, according to the Real Academia Dictionary (DRAE) is 'an act that constitutes an attack against the State or an individual', or, alternatively, 'a crime committed by a person who is in responsible for supervising the performance of contracts at large'. This makes 'fraud' and *fraude* a perfect example of the kind of false cognates that should be avidly avoided.

Also, because of the predominance of English logic, worldview and preferences (Focarelli 2012), many incorporations of English legal concepts take place, not always with the best of lucks. There are words like 'factoring', 'joint venture' or 'broker' that may be easy to adopt because their univocity of meaning, often displacing other existing words in the target language for the sake of prestige. Contrary to these cases, false loans or false xenisms occur which are not really borrowings, in the sheerest of senses, but consist of an erroneous assimilation in the target language of a term that does not exist as such in the source language, but has its morphological and phonetic origins in it as a *lingua franca*. This is the case of 'mobbing', which is used in the English version universally to define what is called 'workplace bullying and harassment' in English and American law. Sometimes, however, when the new word is unreadable, the user may opt either to adapt its morphology to the target language, or alternatively, translate it literally. Mattila (2013: 348) refers to the word 'class action' (UsE), or 'group action' (BrE), which is translated literally to other languages like Italian, German, Spanish or French.

Finally, one further consequence of the widespread use of English is that some concepts from the Anglo-Saxon substantive law have become blurred when being transferred to other systems (Audit 2001). Let's think, for example, of the phenomenon of 'tort', an extra-contractual civil wrong, which has been made itself known to non-English jurists under a variety of names (*ilícito civil*, *préjudice*, *unerlaubte Handlung*, etc.), none of which covers its full semantic spectrum. Conversely, the Anglo-American perceptions, and the legal concepts attached to them, have crept surreptitiously into the substantive law of the country of reception and sometimes have deep consequences for the way juridical acts take place. The jury system, for example, a growth of the English system, has been later adopted by other legal systems, sometimes with the name included (Alcaraz & Hughes, 2002). Some legal experts even state that the prevailing use of the English language as the language of the law has distorted the institutional and conceptual differences among the different legal systems (Vogt, 2004), raising the crucial issue of the so-called "non-neutrality of language" (Gotti 2005: 17). This is especially true of the English terms used in contractual law to dispense remedies in the scope of Equity with no exact equivalent in other languages, phenomena such as 'estoppel', 'specific performance' or 'rescission', which are often mistranslated or misused in the context of international transactions.

5 Conclusion

All in all, as trade barriers break and free trade areas and new supranational economic policies are created, new attitudes, new legal rules and new approaches to international legal drafting and interpretation are required, if the emerging multinational and multicultural legal order is to be made more just and effective. Therefore, as Engberg has stated (2014), the need is urgent to interpret legislation from a multilingual and multi-cultural

approach that provides solutions to commercial and legal conflicts resulting from international transactions with the respect due to culture-bound specificities. In this context, an 'uncommon-law' kind of English is required, aiming at the neutrality of some universal legal concepts, making the drafting of legal documents a more flexible task for the non-native legal practitioner and fostering effectiveness in communication, devoid of stilted stylistic correctness. This is a task to be tackled by translators and applied linguists, with the support of policy-makers at the core of transnational organizations, such as the European Union, or at the helm of international ones, such as the United Nations or the International Chamber of Commerce, just to provide some examples. After all, a true *lingua franca* for all is needed, as an unbiased, multicultural means of communication to achieve mutual understanding and linguistic consensus in an ever-changing, globalized world.

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