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LINGUISTIC FACTOR IN LEGAL ADAPTATION

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Legal rules, doctrines, principles etc. are larger units that consist of a number of smaller entities – concepts, which, united by different semantic links, form these larger units. Taking legal concept as a complex structure, semantically embedded into the legal context and thus reminding a "crystallized rule of law", we will be treating it as a legal transplant. A move of a concept from one legal system into another usually means its move from one language into another. Therefore, concepts, among other transplants, are most influenced by linguistic factor that can modify its functionality in the legal order. The aim is to show how linguistic nature of concepts in law influences their legal nature when they are being transplanted.

Key words: legal transplant, legal concept, harmonization of law, EU law, semantics, functional equivalence, linguistic factor, transplantability.

History proves the fact that law travels from system to system and legal ideas migrate. We can see it from the spread of the Roman *Corpus Iuris Civilis* throughout the West European countries and formation of the common law in the ancient times, as well as from migration of the private legal works in the period of feudalism, from adoption of the French civil code in Belgium and application of various legal traditions (taken from Germany, France, Switzerland, Italy) in the modern Turkish legal system; the list of examples is non-exhaustive. Within the ambit of comparative legal studies the mainstream theory that observes the movement of law from one legal system into another is called the theory of *legal transplantation* (the term was proposed by Alan Watson in 1970s [see more about the theory in 1; 2; 3]).

In the majority of scientific works on legal transplantation the various factors are observed – legal, political, social, geographical, economic etc. However, the conflict between the recipient legal system and law that is being transferred may also have linguistic nature, as language is capable of creating various obstacles for adaptation of the new law, and a number of good researches have brought some light on the subject of language-law interrelation.

It was in 1990s when comparative law theorists and practitioners started discussing more widely the role of language in comparative law and the particular importance of referring for comparative purposes to the legal sources written in several languages [4]. It worth mentioning some studies conducted on this topic. Developing the theory of legal transplants, Alan Watson writes about linguistic deficiencies as a formidable barrier between the scholar and his subject [1]. Vivian Grosswald Curren sees language as a cognitive model for comparative law and discusses the problem of finding equivalents in the two different languages for the certain legal notion [5: 675−707]. Jaakko Husa, from a functionalistic standpoint, draws a relation between legal linguistics and functional comparative law, bringing together the practices of translation and legal comparison [4: 209−228]. The book

Comparative Legal Linguistics by Haaiki Mattila [6] is one of the first monographic attempts to examine the functions and characteristics of legal language and the difficulties of legal translation. These contributions have made a lot to justify and stress the importance of combining legal and linguistic approaches. In this paper we will try to look deeper into the law-linguistics interrelations and observe how and where exactly comparative law and linguistics clash.

It is worth to start studying law-linguistics interrelations with the level of concepts and their terms because this is exactly where any language for specific purposes fully reveals its nature. We will make an attempt to combine the two scientific paradigms into one study: one of linguistics and another of comparative law, and in such a way to examine the two natures of the phenomenon of "concept-transplant". On the side of comparative law we will take the theory of legal transplants, and on the side of linguistics the theory and methodology of terminology as a field will be applied.

Linguistic factor in transplantability is mentioned by Yves Dezalay when he is writing about mistranslations: "the first complication", he states, "begins with terminology" [7: 244]. Indeed, when it comes to the cross-border movement of law, it looks like linguistic factor primarily impacts the level of concepts and their terms. Still, concepts have been often disregarded in the scholarly works on legal transplantation. It has been assumed that ordinarily only the larger units, such as rules, laws, doctrines, principle, are transplanted, and not concepts alone. Also, by mistake, it may seem that complications the concepts cause are relatively less severe, not leading to significant problems in the legal order. Finally, it is frequently regarded that the work on the level of concepts is a task for a linguist, and positive or negative effect of linguistic factor depends on the target and source languages only. These three statements will be disproved further in the study. It will be noticed that there are cases when the reason for linguistic complications in transplantability is objective, i.e. the differences of the conceptual systems inside the source and the target legal systems.

Remaining to be both, legal and linguistic notions, up to now legal concepts have been observed either from legal or linguistic perspective, depending on the purposes and a standpoint of a research. But, as it will be concluded further, these perspectives are closely related and can be very productive when merged together. Despite the numerous differences between comparative law and linguistics, we will see that sometimes their paradigms are overlapping. These disciplines can describe and explain the same processes, but in different scientific discourses, using their own tools of scientific proof. The key pragmatic question to answer here is how we can improve the concept linguistically in order to turn it into a successful legal transplant. This question deserves special attention in the context of EU law transposition.

1. Linguistic Nature of Concepts in Law

Linguistics describes a concept as a substantial content of a term, a cognitive, "supra-empirical category" [8: 1035] which is an abstract form of reality reflected in it. As Maria Teresa Cabre puts it, a concept is "a unit of content consisting of a set of characteristics," where characteristics of a concept are the defining properties, attributes and their relations that describe the concept [9]. Harmonization of the conceptual characteristics (i.e. on the level of concepts) is the first compulsory prerequisite for successful harmonization of laws (i.e. on the higher level, the level of language).

The idea of taking a concept and a term as the separate research objects is debatable, considering nominalization as an inevitable phase of a concept formation. It is claimed that the concept cannot function without a term as its formal "cover up" [10] and simply does not

exist before being nominalized. This idea of socio-cognitive terminology is not disregarded in this article. Conversely, research results prove that legal concept does not function in the legal system until it is signified there with a term. However, in the context of legal transplantation we deal with the two legal systems, and thus two terminology systems that, in addition to qualitative differences, diverge in a quantity of concepts and consequently a quantity of terms. This means that in the context of legal transplantation the concepts should be described as existing in one system and not yet existing in another, but in the process of being transferred. In legal reality it is a foreign concept which is being transferred first, not a term as a whole. Only later, the fact whether the terminological cover-up will be transferred along with the foreign concept depends on the method of nominalization that terminologists choose to signify a concept in a target language. Only if terminologists have preferred using the foreign verbal form of the concept (either modified in the target language or not), one may claim that the foreign concept is transferred along with its verbal form.

In this manner treating the concepts alone as an object and overtaking linguistic perspective, the main points of interest are identification of characteristics forming the domain of the concept, mapping links with the other conceptual domains, and working on grammatical features of formal (terminological) representation of the concept and syntactic features of its use in a certain text-context. This list of actions deserves special explanation.

Most of the legal concepts refer to abstract reality. The concept is represented in a set of characteristics that together form its *intension*. Processes, objects, states and features in legal reality of a concept refer to is its *extension*. It is in the various sets of characteristics (intension) that the concepts differ from one another. Therefore, a good conceptual description, i.e. definition, must include a clear "opposition of distinctive characteristics that distinguishes concepts" [9: 96]. A major tool here is the method of concept analysis that is aimed to:

(1) establish conceptual systems within the domain, and links between these systems and those of related domains;

(2) develop conceptual frames of the terms through the analysis of the concept's properties;

(3) identify semantic borders between closely related concepts, and

(4) (when two or more languages are at stake) match concepts between languages [for more details see 11].

Only after these tasks on the semantic level are performed, one can proceed to the next phase, i.e. encoding conceptual information in terminological units. We encounter cases when the concept has not yet been lexicalized, and therefore this phase involves choosing the most logical term for a concept-transplant.

2. Legal Nature of Concepts in Law

Linguistics is primarily interested in "word knowledge", analytic information. Contrary to that, law is concerned with synthetic information, "world knowledge" [9: 7−8]. Limiting analysis of legal concepts to linguistic perspective and claiming that concepts and terms are the exclusive specialty of linguistics and cognitive science will show just one side of the coin. The purpose of this part is to observe legal nature of concepts in law.

"Every doctrine […] is supported by a particular conceptual structure which makes the doctrine workable" [12: 782]. According to this essentialististic perspective, legal concepts are the real entities with inherent meaning, the "building blocks of rules" [12: 782]. As a part of world knowledge, the primary function of legal concepts for a lawyer is either descriptive

or classificatory. They depict reality, helping determine to which extent a certain law can be applied.

The closest to analysis of conceptual layer in comparative studies was Oliver Brand who developed his method of "conceptual comparison" as an alternative to the other methods of legal comparison (widely used nowadays functional method, Mattei's comparative law and economics, Legrand's hermeneutic exercises in comparative law, Frankenberg's critical comparative law). Brand started treating legal concept as a *tertium comparationis,* and so brought up the role of conceptual structures in establishing similarities and differences between legal systems. His method consists of three phases: conceptual orientation, which is construction of abstract concepts from the elements of legal reality; systematic comparison, which is matching and assessing the rules/institutions from different legal system against this abstract concept; and finally creation of the network of all concepts that would represent a certain legal system [13].

Some of the Brand's ideas in the context of his method are impossible to leave behind. As an example, one of the ideas from the method of conceptual comparison is related to qualitative and quantitative analyses that help establish properties of a legal concept. And at this point Brand's comparative method coincides with linguistics, for the qualitative analysis is nothing else but examination of *intension* (key properties that define the concept), whereas quantitative analysis discovers *extension* (representation in legal reality) of the concept.

At certain matters, however, the views of linguistics and law discord. Linguistics proclaims terms as contextually independent units. They can be ripped off from the context, defined in the dictionary without losing anything of their substance. In contrast to that, lawyers see legal concepts and their terms as context-dependent units. They are not "free-standing", but acquiring their meanings from legal theories and doctrines. This entails a reasoning that interpretation of legal concepts cannot be conducted separately from interpretation of the norms these concepts are taken from. Legal concepts thus can be imagined as structures "embedded" into the norms [9: 1]. This idea of concept-norm interrelation got much attention from theorists who elaborated the feature of a legal concept to be always semantically embedded into the piece of law it functions in.

In relation with the previous thought, Biel describes legal reasoning as "if-then" mental model; and it is a legal term that is capable of connecting conditions with effects, turning itself into a "reduced representation of legal rules" [14]. In fact, everything in law can be reduced to a concept. Even a legal culture can be viewed as a "multi-layered" concept [15]. Developing this thought further on and moving from interdependence of a legal concept and its legal norm to interdependence of a legal norm and its legal system, we will get to the conclusion that each legal system is characterized by its own unique system of concepts, and equality between concepts in different legal system is hardly possible.

After this representation of a concept in law from a legal perspective, the next step would be to prove that concepts can be treated as legal transplants by comparative law.

Translators can argue that terminology itself is not transposed separately in the same way laws, institutions and other legal entities can be transposed. From their perspective, the new terms come from one language into another via the process of translation. It is through this practice the new terms, those that have no equivalents in the target language, are distinguished from those terms that have at least partial equivalents. This is when nominalization of the foreign concept takes place. However, legal translators, unlike translators in other fields, should practice comparative law. They should focus on the concept, its semantics and functions in the legal system.

Several works in the field of comparative law can be mentioned as a factual proof that legal concepts can be taken as transplants. G. Teubner [16] observed *good faith* as a principle which was transplanted to British law through the European Consumer Protection Directive. Although he writes about *good faith,* calling it *a principle*, from linguistic perspective *good faith* is a concept first of all. The project of EC Consumer Law Compendium can also be of interest as a proof. Compendium is built up as a comparative analysis of the transposition of eight consumer law directives into the national laws of 27 member states. Separate chapters are devoted to the transposition of different legal instruments and provisions. Among those, some parts are specifically assigned to transposition of separate terms and variation of their interpretation and wording in member states' national legal systems. It actually reminds terminological analysis in linguistics.

3. Linguistic Factor: Scope of Cause.

Semantics Equivalence versus Functional Equivalence

Linguistic factor and the other factors of transplantability are closely interrelated, as conceptual system of language reflects the legal system. Therefore, legal factor (differences and similarities between the source and target legal systems) influences linguistic factor and vice versa. Although it is relatively easy to remove a linguistic obstacle, ignoring it in the process of transposition of law may have unpredictable complications.

The importance of linguistic perspective in a study of European law integration was addressed by Kjaer who stressed that "[q]uestions on language and translation […] reveal details of the rise and development of a common European law" and presented linguistic processes as actions "on the micro-level of law that aggregate with other micro-level actions to form and shape general processes in law"; that may "support, delay, or promote integration" [17: 231−349].

In order to have a clear understanding of how linguistic factor works, it is necessary to elucidate what happens on the level of languages when the new law (and concepts within it) is transferred. A.L. Kjaer terms the linguistic processes that accompany cross-border movement of law as *discursive implementation*. Mentioning this notion in the context of Scandinavian law, Kjaer focuses on "the language choices that Scandinavian Supreme Court judges make when referring to […] concepts and principles developed in the case law of the ECtHR". In the broader vision, conceptual system is a part of a legal discourse, constantly used in a certain legal discourse community.

Kjaer shows the relation between the type of discursive implementation and the level of European legal convergence (this level varies from transplantation to the full integration of the legal concept). According to this correlation, the way the EU concept is formally represented in the new terminological system (as a calque, transliteration, borrowing, neologism or paraphrasing) indicates whether it has just been transplanted or already integrated into the new system [17: 336]. This correlation does not seem to work in all cases: legal reality shows that a concept can have a borrowed form, but be well-integrated into the system.

However, there is a precaution as for the use of only linguistic perspective for legal language. There are aspects in legal transplantation that linguistics if not ignores then is not capable to elaborate without the help of comparative law. The first aspect is the issue of functional equivalence that, according to Paolucci S. [18], combined with substantial equivalence creates the actual legal equivalence, the one we are trying to achieve in attempts to harmonize the EU law.

As it was already mentioned, linguists use to study terms as units consisting of a form (comprised of terminological elements such as morphemes and lexemes) and a meaningful content (i.e. a concept). This perspective takes concepts as semantic formations, thus covering their substance only. In the meantime, legal reality, being multilingual and multinational, has raised the new side of legal concepts. It is the *function* a legal concept has in a certain legal system.

Functional aspect in legal reality is usually determining for lawyers. Writing about the functions of legal institutions, laws, regulations etc., comparative law theorists have introduced another prerequisite for legal concepts to be treated as equivalents. It is functional equivalence explicated as a situation when "the similar problems may lead to different solutions, [where] the solutions are similar only in their relations to the specific function under which they are regarded" [19]. Usually, the functions of legal actors, institutions etc. represented in the concept and its term are prescribed in the legal acts.

Sartori points out importance of taking structural-functional approach in political science. It is equally true about legal settings. No matter in which facet the function is displayed, as "activity of the structure", as the "effect" of the structure, or as a "relation between structures" (as function is defined in mathematics) [8: 1046], by no means can it be disregarded. Following about the function of a concept, Sartori affirms:

"Function points to the mean-end relationship (which becomes from systemic standpoint also a whole-part relationship), i.e. that function is the activity performed by a structure – the means – vis-a-vis its ascribed or actually served purpose. Conversely dis-function, non-functionality […] indicates that the assigned purpose is not served by a given structure" [8: 1047].

In the context of concepts function can be viewed as a *consequence* of the use/misuse of the concept. If consequences in the legal systems under comparison are not identical but sufficiently similar, then we can speak of a "gradation" – difference in consequences of legal concepts.

Applying structural-functional theory to EU law concepts and taking them as structures, we discover that this theory is totally concordant with the processes observed in the EU law terminological system. The theory provides that (1) "no structure is unifunctional"; (2) "the same structure can be multifunctional, i.e. can perform across different countries widely different functions"; (3) "the same function has structural alternatives, i.e. can be performed by very different structures" [8: 1048].

Writing about notions from the foreign legal system, comparatists would rather use the methods of substitution and transposition to find equivalents [20: 23]. Contrary to that, translators of legal texts would better go for direct translation of lexical units (word forms of the terms), in such a way transposing the concept from the source text, rarely checking whether the concept in the target legal system performs the same legal functions as in the source legal system. Not always, but it may happen that the functions of the same concept in various legal systems can be different, even though the characteristics of the concept remain the same. This claims the dichotomy that exists between the functional equivalence and linguistic equivalence.

For sure, it is quite difficult to speak about the function of the concept alone. The reason for this is the way characteristics of the concept are presented. Function of the concept fully shows itself not in the properties of the concept, but in the context of the legal provision where this concept appears. The function usually stands for a consequence of the legal provision. O. Brand is right when noting that "the function shall be determined exclusively in

[the] respective domestic contexts" [13: 455], and it is difficult to predict with an ultimate certainty the function of the concept until the rule actually starts working in the legal system. And it is the function that matters most when it comes to implementation of the EU law directives, the effect of the directive in the member state. Even though we cannot state that *semantics* equals *function*, what can be claimed without doubts is that the anticipated function of the concept is hindered if its interpretation in the legal system of the member state deviates from its interpretation in the EU law. This is exactly where linguistic factor plays out and leads us back to semantic and terminological issues, solvable using linguistic methods.

Thus, the main influence of linguistic factor may have is the effect it causes on the function of the concept in the piece of law. It can be presented in the following sequence. Change of the properties (intension of the concept) impacts concept's applicability (extension), which directly leads to the change of consequences (concept's function).

No matter which metaphor to use (transfer, transplantation, migration etc.), the fact remains: laws travel, and legal concepts as its "building blocks" travel with them; and it is only though analysis of the legal concepts using linguistic methods together with the comparative law strategies can we study the process of transplantation of legal concepts.

The legal perspective, interested in a concept as an accurate reflection of the legal reality, helps obtain a deeper understanding of semantic and functional features of a legal concept, its relation to the legal context. In the meantime, the linguistic perspective explains which semantic qualities make a legal concept travel and which semantic processes take place when a concept moves from one legal system into another. Moreover, it reveals the causes of different pitfalls in harmonization of law, i.e. those that are related to languages, as well as suggests solutions for each type of the negative effect. The mere presumption that if the transplant works well in one legal system it will be as effective in another legal system is misleading. Between the transplantation and implementation there must be a stage of "legal-linguistic adjustment" that will ensure the effectiveness of the newly transposed piece of law. Therefore, the comparatists recommend using the functional approach in addition to the semantic and the formal approaches. The checklist for the legal linguist working with the transplantation of legal concepts includes:

1. identifying the core characteristics of the legal concept to be transplanted;
2. comparing the linguistic forms this concept has in different languages;
3. defining the concept in the national legislation, consistently transposing its core characteristics (if any missing);
4. checking the definitions and forms of other concepts from the same semantic field against the newly transplanted concept;
5. monitoring the consequences of the use of the concept in a legal provision in order to check whether its function corresponds to the one assigned by the legislator.

The concepts-transplants need attention from the source legal system as well. Brought together, perspectives of linguistics and comparative law on concepts give an answer as to the qualities that make the concept travel easier across the legal systems.

Avoiding these steps and not checking the concepts, both before the transplantation and when implementing the fundamental provisions of the EU directives in the national legislation, may cause severe modification of functionality of the EU law in the domestic legal system, for it is true indeed that the conceptual differences between the legal systems are only "the tip of the iceberg of law" [15: 349], and ignoring them is not noticing the obvious.

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МОВНИЙ ЧИННИК В АДАПТАЦІЇ ПРАВА

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Мета цього дослідження – запропонувати можливі шляхи полегшення та вдосконалення адаптації європейського права за допомогою юридичної лінгвістики. Це питання адаптації є особливо гострим тепер, коли Україна перебуває в процесі євроінтеграції та активно впроваджує директиви Ради Європи в українське законодавство. Нові концепти права запозичуються разом з нововведеними законами та потребують певної модифікації / адаптації у правовій системі (та юридичній терміносистемі відповідно) для того, щоб забезпечити належне функціонування нового права.

Для того, щоб досягнути цієї мети, було застосовано дві парадигми: лінгвістики та порівняльного права. Вибрані теоретичні напрацювання цих двох дисциплін було взято разом для вивчення концептів права як трансплантів, щоб простежити, як мовний фактор впливає на властивості концепта права та його здатність адаптуватися в новій правовій системі. Це дає фактичну інформацію про те, як можна вдосконалити концепт права семантично, формально та функціонально, щоб перетворити його в так званий «успішний правовий трансплант».

Концепт права, як об'єкт дослідження лінгвістів та юристів, дотепер вивчався з погляду лише однієї з дисциплін, залежно від того, хто брався за дослідження. Проте методології цих двох, здавалося б дуже різних дисциплін, є напрочуд продуктивні, коли вони починають працювати разом. Новизна такого підходу полягає в застосуванні теоретичної бази лінгвістики та порівняльного права на спільному об'єкті дослідження.

Статтю розпочато з огляду теорії про правові трансплянти з царини порівняльного права, а також ідеї застосувати цю теорію разом з лінгвістикою до концептів права та почати розглядати їх як малих трансплантів. Для цього концепт права спершу описано з погляду лінгвістики, для якої це відносно автономна значеннєва складова термінологічної одиниці з характеристиками, що, взяті разом, формують дефініцію цього терміна; а згодом з погляду правознавства, для якого концепт − це немов «кристалізований» елемент права вищого порядку (принцип, закон, регуляція тощо), що позбавлений своєї семантичної «автономії», оскільки його інтерпретація залежить від правового контексту, наприклад, законодавства, де цей концепт функціонує. Наступним кроком дослідження є аналіз самого мовного фактора, дія якого проявляється у взаємозалежності семантичної, формальної та функціональної еквівалентностей. Це відкриває правові трансплянти як тривимірні одиниці (семантика + форма + функція), серед яких в контексті гармонізації європейського права функціональна еквівалентність є остаточною метою. Отримані теоретичні висновки окреслили головні кроки для здійснення в роботі з трансплантацією концептів з одної правової системи в іншу.

Результати такого дослідження дають змогу випрацювати стратегію для інтерпретації концептів європейського права в правовій системі України. Цю стратегію можна надалі застосовувати в створенні нового законодавства та внесенні змін до нього задля гармонізації права та гарантування правильного функціонування принципів європейського законодавства в українській правовій системі.

Ключові слова: концепт-трансплант, адаптація права, мовний фактор, гармонізація права, семантика, функціональна еквівалентність.

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