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Towards a Norm-Based Approach in Translation of Legal Provisions

Rola normy prawnej w przekładzie przepisów prawnych

Grzegorz Panek

CHAIR OF CIVIL PROCEDURE, FACULTY OF LAW AND ADMINISTRATION, UNIVERSITY OF SILESIA
KATOWICE, UL BANKOWA 11B

grzegpanek@o2.pl

Abstract

If norms, as understood in the theory of law, are mental representations of legal provisions, the latter viewed as a unit of text, one may reach the conclusion that equivalent translation of a legal provision is a rendition from which identical norms may be mentally inferred. In this paper, we are going to show how norms inferred from the source text provision may profile the expressions used in the target text. The norm-based approach opens up space for cognitive analysis, since it is the competent interpreter's mental semantic matrix that determines the norm, understood as an output of interpretation.

1. Introduction – the basic assumption

Before we move to the relation between the notions of "norm" and "provision," implied in the title of this paper, we shall start with one of the most general statements possible when it comes to theory of translation. We are going to invoke the thought of one of the founders of Polish modern translation studies, Olgierd Wojtasiewicz. In his *Wstęp do teorii tłumaczenia,* originally published in 1957, the author provides us with a definition of translation we could currently call cognitive. Quite surprisingly, as emphasized by Tomasz Krzeszowski in the preface to the second edition (1992) of the book, nowadays, once the triumphant period of transformational-generative grammar is generally considered over, the validity of Wojtasiewicz's book is striking in the light of contemporary cognitive linguistics.

The scholar defined translation as follows:

> The operation of translation of the text "a" formulated in the language "A" into the language "B" consists in formulating the text "b" in the language "B," which text (b) is going to evoke the same or very similar associations among its receivers to the associations aroused among the receivers of the text "a." (Wojtasiewicz 2005:28; translated by G.P.)

2. What is supposed to be equivalent?

As we can see, Wojtasiewicz focuses on the notion of comparable associations aroused by the source and target text among their addressees. When it comes to the level of purely linguistic analysis, the question of what units of text are to evoke the same impressions, associations, the scholar introduces a rather vague concept of signal:

> By signal we understand (...) the material side of an expression (H. Greniewski's terminology), in other words the written or spoken text. (...) The concept of the assignment of certain signals to certain psychological conditions (of the nervous system) in the mind of the sender, and the assignment of certain psychological conditions to certain signals by the receiver, plays the key role in this respect. (Wojtasiewicz 2005:19; translated by G.P.)

Drawing the reader's attention to signals, the author does not determine the linguistic, or grammatical size, formal dimension of the notion. This idea may remind us of Ronald Langacker's (2000) phonological pole of symbolic structures (according to the researcher, every linguistic structure is bipolar, on one hand there is the phonological pole, on the other, the semantic one). Technically, we could distinguish between the phonological and semantic poles while analyzing every symbolic structure of language, be it a short single lexical unit or the whole text.

Teresa Tomaszkiewicz (2002:10-22) puts the emphasis on the level of text and draws the attention of translation theorists to the study of comparative textology, demonstrating for instance that the Western genre of CV's (Curriculum Vitae) has greatly influenced the textual type we used to call "życiorys." J. Pieńkos (2003:174-175) stresses that we never translate one language into another one, but always a particular source text into the particular target text. Additionally, he points out that a word or expression has a particular pragmatic sense only within its context, and that the level of sentence is not enough to describe the context. In order to do that, we need to treat the level of text as the primary point of reference, not only when it comes to the style, but also the meaning of lexical units plunged in the particular text.

We may agree that remarks as these above are definitely true whenever our aim is to render the stylistic or syntactic structure of the source text cross-culturally. However, if we want to render lexical units, especially specialized terminology of law, we must refer to something more abstract and more general than the text itself. We have to exceed *parole* and venture into the *langue,* the sphere of competence, on the search for sense or meaning of particular expressions. Definitely, the systematic interconnections between particular texts in one language must be taken into consideration if we are to pinpoint the pragmatic sense of a particular term. For Eugen Wüster (1959), the founder of the study of terminology, there are four layers of analysis when it comes to defining a particular term: ontology, epistemology, designation and discursification. If we are to confine our semantic analysis to the level of a particular text or a given textual genre *in genere*, our ability to capture the phenomenon of discursification is at risk. Legal terms do not function in isolation within the texts they appear in, their analysis cannot be constricted as well to the genre, say, of an obligational agreement. Legal terms function within the whole branches or even systems of law with all the judicature, jurisprudence, theory and practice of law application behind. In order

to capture the sense of particular expressions, we have to venture beyond the text, in the conceptual, abstract and mental realm of legal norms.

Abstaining from the notions of style and syntax, we should consider norms as the elements which correspond to the similar associations evoked in the mind of the source and target text receivers – the criterion of successful translation postulated by Wojtasiewicz. It is a particular norm that will determine the grammatical character of target language symbolic units, the equivalence of which is going to be examined. If norms are mental reflections of textual provisions of law, reflections of directive nature, we might conclude that an equivalent translation, from the semantic and pragmatic point of view, is such a rendition of the source text from which the same or similar norms may be deduced.

3. Norm vs. provision

According to the contemporary theory and philosophy of law, there is no legal norm without interpretation. A legal norm, regardless of the ways in which it may be internally sub-divided, practically equals provision of law plus the mental activity of its interpretation (Nowacki, Tobor 2002:56-82).

In the light of this initial norm-related statement, we may reach the conclusion that term "law" itself is more polysemic than a lay person could initially suppose. The name does not denote only a set of legally binding acts of a given country, or the set of their texts, setting aside the application of these (Morawski 2005:244). It may refer to a single provision of a certain statute, a norm inferred from such a provision, or to the whole system of norms, set of provisions. If the latter are understood, as in the contemporary jurisprudence (Nowacki, Tobor 2002: 15-18), as mere pieces or units of text, not equipped in the abstract, conceptual character of a norm, we cannot speak of any material connection between them. As a result, rather than speak of systems of legal provisions, one should invoke the term "system" predominantly in relation to the mental inventory of norms. The key notion of structure, which is a *conditio sine qua non* of any type of system, can be attributed only to sets of norms, mental reflections of the provisions of law. S. Wronkowska (2004:244 ff) distinguishes between the binding character of a provision (which must be enacted pursuant to valid prerequisite procedures) and of a norm (its applicability, the obligation on the part of particular organs to apply the rule). In its broadest sense, law is a system of entangled norms shaped in the process of legal interpretation (not simple provisions of a statute which stand on their own, on paper). Law, in the broadest sense of the word, is a system of norms inherent to human mind, even though these are inferred from provisions written on paper.

The relation between norms and provisions may be considered tricky. Most certainly we cannot speak of one to one quantitative correspondence between the object and effect of interpretation (provision and norm), as one norm may be deduced from a number of articles or even a couple of legal acts. On the other hand, a single provision, say, an article of a statute, may give rise to a number of norms applicable in a particular context. We are going to see more precisely how it works shortly.

As a consequence of the tricky character of a norm of law, the fact that there is no strict one to one correspondence between particular norms and certain provisions these are inferred from, we are not entitled to state legitimately what could seem probable from the point of view of Wojtasiewicz's grasp of the concept

of signal, namely that the provision may be considered a notion similar to Langacker's phonological pole, whereas the norm may be associated with the semantic pole of the same phenomenon. Langacker (2000) actually speaks of the two poles of certain symbolic structures, and, as we have concluded, norms and provisions frequently do not boil down to one symbolic structure expressed in a given act. Contrarily, particular norms may stem from the provision the translator is currently interested in, but it may also be influenced by constitutional provisions or articles of some other binding legal acts. The concept of norm, for all its abstract character, makes us expand the textual genre-oriented approach to translation.

4. Alternative grasp of the concept of norm

The distinction between the abstract, mental norm and the graphical form of a provision conceived as a piece of text is not always sufficiently recognized in the study of legal translation. Obviously, it is not going to be as valid for scholars preoccupied mainly with textual studies, or answering the question of how the same logical functors (Ziembiński 2000: 19-21, 77-92)[1] are realized internationally in various special languages of law, as to these researchers who investigate the semantic or pragmatic meaning of legal lexis. Broadly speaking, the syntax of legal provisions may be analyzed in general terms of grammatical structures and characteristic trademarks of textual genres, whereas legal lexicon is highly specific, idiosyncratic and hermetic, and most importantly, conceptually autonomous in relation to the text. While textology helps the linguist disambiguate characteristic stylistic and syntactic features of a given genre, say particular types of contracts, we cannot escape or avoid any reference to the notion of norm when it comes to lexical semantics. The concepts expressed in statutory acts must be perceived from the point of view of certain normative *schemata*, to invoke Langackerian (2000) terminology, as from the linguistic perspective, processes of norm-inference may be accounted for by means of Langacker's psychological processes of *comparison, association, abstraction*. These psychological processes reach deeper than the context of one particular text. Norms become *automated* in the mind of a competent lawyer (or, analogically, legal translator). Legal terms do not function in isolation, and, for another thing, they are usually not static phenomena given once and for all. Rather than that, they need to be constantly interpreted and reinterpreted along new precedent court decisions or newly introduced legal provisions which profile the hermetic conceptual framework of various legal institutions (Eskridge 1987:1479 ff). In Polish literature this is a concept adhered to by M. Matczak (2008:66 ff). From the point of view of cognitive linguistics, concepts encountered in legal norms may be analyzed in terms of dynamic radial structures, abstract and mental.

Ewa Myrczek (2005), primarily interested in the grammatical and textual instantiation of logical functors in statutory texts, provides a rather neutral definition of norm, without the focus on the opposition: norm vs. provision:

> The problem of the legal norm has also been discussed in terms of 'legislative sentences' which consist of the following elements: fact situation (...), statement of law (...) The statement of law, which specifies its modality, is always in the main clause (or clauses), whereas the elements pertaining to the fact-situation are more

[1] According to Ziembiński, functors are words or expressions which are neither sentences nor names, but which serve the purpose of linking expressions in more complex structures and expressions.

> flexible, being formulated as adverbial modifiers in a subordinate 'if' or 'where' clause (Myrczek 2005:XIII)

Myrczek discerns between two elements of a norm, the *fact-situation* and the *statement of law*. While the former corresponds to what jurisprudence calls *hypothesis*, one may detect in the latter concept the notion of *disposition* (Nowacki, Tobor 2002: 74-81). The hypothesis, or fact situation, *specifies the conditions under which the particular rule operates, (...) it gives conditions of application of a given norm,* as Myrczek put it (2005:XIII). In other words, the hypothesis part delimitates the scope of applicability, the legally relevant factual situations in which a given norm should be applied. The *disposition,* on the other hand, determines the legal consequences that should be ascribed to the circumstances described in the *hypothesis*. More generally speaking, the disposition tells the addressees of a given norm what to do, or what not to do, if the factual situation described in the hypothesis occurs. The division depicted by Myrczek is one of the possible solutions while searching for the internal structure of a norm. Other alternatives are to distinguish the third element, namely a *sanction,* the consequences the addressee of the norm has to face if he or she does not comply. We may also differentiate between sanctioned norms - addressed to everybody, and sanctioning norms – whose addressees are state organs applying law (for instance courts), and which instruct judges or state officials what sanctions to apply if somebody does not conform to the sanctioned norm (Nowacki, Tobor 2002: 74-82).

As linguists and theorists of legal translation, we are not as much interested in the distinctions offered by the theory of law as in their practical consequences in translation. From this point of view, we may criticize the apparent Myrczek's identification of particular norm elements with certain parts of a sentence, understood as a purely grammatical syntactic unit (for example the conclusion that *the statement of law, which specifies its modality, is always in the main clause,* found in the quoted fragment). By attributing grammatical qualities within a given sentence to either the hypothesis or the disposition, the author seems to overlook the jurisprudential division between the norm and provision. While examining certain textual features, the author is probably entitled to such a simplification, Yet, speaking of grammatical structures connected with the hypothesis and disposition (as these are expressed in certain parts of a provision), the author remains on the level of provisions from which the norms are yet to be inferred, deduced.

The main problem connected with such an approach is that a single provision of law, understood as a unit of text, may, and usually does, give rise to a number of norms rather than a single one. On the other hand, a single legal norm may stem from a number of provisions, for example certain rights guaranteed by the Constitution are expressed more precisely in certain subject-specific *legi speciali* of various parliamentary acts. In other words, while generally complicated, the relation between a norm and a provision does not boil down to the statement that the former is the semantic and the latter is the phonological pole of one symbolic structure. Norms are derivative in relation to provisions, but these two do not form any common symbolic structure. Norms are simply more abstract than provisions. In modern Western literature the tendency to search for solutions which do not

necessarily stem from the literal understanding of a provision are best epitomized by A. Barak's concept of purposive interpretation (Barak 2005:125 ff).

5. Relevance of norms in translation

From the point of view of the semantic contents of the target text of translation and their correspondence in relation to the source language provision, the following observation made by Jopek-Bosiacka (2006) may shed some light on our distinction between the norm and provision:

> ...a grasp of a legal text has to take into account the fact that legal interpretation consists in reproducing legal norms from legal provisions. Hence, from the point of view of the process of translation, the correct rendition of a legal text is the one that does not distort the contents of legal norms contained in the legal text. (Jopek-Bosiacka 2006:25; translated by G.P.)

Basically, the task of legal translators is to render provisions of law, not norms, since translators and interpreters work on texts. However, while doing so, the translator should not neglect the norms potentially lurking in the provision he or she is working on. A particular translation is not going to be successful if the source and target texts give rise to blatantly different normative directives. This is similar to G. Jäger's (1975:111) concepts of "communicative" and "functional equivalence" in the theory of translation. The former of the two preserves the "communicative" and the latter the "functional value" of the original text. These terms in turn denote respectively: the meaning intended by the author and the total of the potential functions of language signs in more specific contexts.

6. An example

In order to exemplify the above regularities, a slightly silly situation is going to be depicted. It is noteworthy that the difference between norms and provisions is most apparent in the case of ridiculous provisions of law. This particular case refers to a "high heel race" organized this year by a woman magazine in one of Poland's biggest cities. The idea behind the event was to organize a running race for women who were supposed to wear high heel shoes. Broadly speaking, the situation narrated here was related by a user of an Internet law forum,[2] a male not admitted to the event because of his sex. The official rules of the race, printed in the magazine and binding for the organizers, state as follows:

> 1. Uczestniczyć w biegu może każda osoba pełnoletnia. Osoby niepełnoletnie mogą wziąć udział za zgodą rodziców.
> 2. Liczba uczestniczek jest ograniczona. Jedynie 100 pierwszych kandydatek zostanie dopuszczonych do biegu.

The contents of these two points may be rendered in English as follows:

> 1. Every person of age may participate in the race. Minors may participate under parental consent.
> 2. The number of women participating in the race is limited. Only the first 100 candidates shall be admitted.

[2] The thread in question may be found here: http://forumprawne.org/viewtopic.php?p=297534&highlight=#0297534 [data dostępu: styczeń, 2008]

If we are to state whether the translated text retains the contents of the original regulation, it should be exactly determined what norms can be deduced from both and checked if these norms are corresponding. According to the first article of the original Polish text, the first norm tells the reader that every person of age may participate in the race. One must conclude that the term "person" does not determine sex. An adult or a minor may be either female or male. As a consequence, everyone, regardless of their sex, may partake.

Only the second of the two regulations directly speaks of females. However, we must also answer the question: in what context? Apparently, this provision does not stipulate that males may not run in the race. The provision of the race regulations we are talking about merely confines the number of female participants. In the light of this second point, *a contrario,* the number of possible male participants is to be considered unlimited. For the obvious gap in the regulation, we must logically conclude that the article does not explicitly ban men.

Consequently, the norms we may infer from these two points provided by the Internet forum user, are as follows:

1. Everyone may participate in the event, regardless of their sex.
2. The number of female participants is limited to 100.
3. The number of male participants is unlimited.

If we are to apply the approach we have assumed, in order to see if the translation provided here is relevant and equivalent, we should check whether the translated provisions trigger the same norms. The first of the two points is rather unproblematic. The term "osoba," defined in the Civil Code is internationally well enrooted in the Roman tradition, and as such has the direct English equivalent of *person,* an expression camparably neutral in terms of gender. "Osoba małoletnia," analogically, has a direct equivalent, "minor." The reader may deduce the same initial norm from the target text, as it also states that everybody, both men and women, are allowed take part in the event. The second provision is slightly more complex. In order to depict the phrase "uczestniczki," the expression "women participating" was used. "Female participants" could unnecessarily imply the opposition "female-male" and suggest that the authors of these provisions had envisaged that there were going to be men willing to run). Naturally, the most obvious direct equivalent would simply be "participants" (neutral as to gender). However, even if "uczestnicy" are generally translated as "participants" in legal texts, here the well established translation schema would not render the whole absurdity of these two points, as the norm inferred from the second provision would limit the number of all participants – men included - to 100. In our rendition, we did what we did and the target text looks unexpectedly awkward, which could be even more striking if "kandydatki" were rendered as "female candidates," however, on the whole, our rendition conveys and preserves the absurd but original normative meaning.

7. Conclusions

To conclude what has been said so far, we may state that equivalent translation of a legal provision is a rendition from which identical norms may be mentally inferred. Once this goal is achieved, dynamically or formally, the result is going to be an equivalent translation. Obviously, this type of equivalence is not ultimate but

only gradable. As a result of the socio-cultural differences in motivation of legal terms, their meaning will never be synonymous. We should bear in mind that a single norm may be inferred from a handful of provisions, just as a single provision may give rise to a number of norms. In the first case the situation of a translator is much more difficult, as the particular configuration of legal provisions and their mutual relation, which influence the construction of a given single norm, will always be culture- or system-specific. Hence, we may only generally try and approximate the ideal. The type of equivalence depicted here should be treated as a goal which we are trying to approach as close as possible.

Paradoxically, one of the possible accusations against the norm-based approach in translation of legal provisions is that we do not only translate texts for texts, but also build bridges between various normative systems. One of the basic assumptions in the study of translation is that we are supposed to render *parole,* not *langue*. Still, being able to construct norms and preserve these in the target text requires some *competence* – not only in the specialized lexicons of law, but also directly in law - on the part of the translator. However, our goal is to handle the semantic redundancy of certain lexical units used in legal contexts, redundancy understood as the amount of linguistic signals exceeding the minimum necessary in order to render the message, or to put it simpler, the degree of predictability of a given element on the basis of overall context. (Kielar 1973:19) In the case of legal terminology used in a given context, it is difficult to say what is redundant, as one cannot expect in advance what semantic components are going to be valid and, most importantly, binding for the addressees of a given norm or parties of a contract. We cannot possibly predict the whole factual spectrum of events in which the norm may ensue legal consequences. The norm-based approach opens up space for cognitive analysis, since it is the competent interpreter's mental semantic matrix, prerequisite knowledge, that determines the norm, understood as an output of interpretation. In order to achieve the goal of handling redundancy properly, we need to refer to the notion of norm. As written above, we understand an equivalent translation of a given legal text as a rendition from which the same or very similar norms may be inferred. This statement looks like a paraphrase of Wojtasiewicz's 50 year old definition of translation in the legal context.

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Znaczenie normy w procesie tłumaczenia przepisów prawnych

W tym artykule zajmujemy się wzajemną relacją pojęć „norma" i „przepis" prawa, a także znaczeniem powyższego rozróżnienia w praktyce tłumaczenia tekstów prawnych. Przepis w teorii prawa definiuje się generalnie jako jednostkę redakcyjną tekstu, podczas gdy norma jest pewną wypowiedzią dyrektywną wyabstrahowaną w umyśle osoby interpretującej z jednego lub wielu przepisów. Każda norma wymaga wykładni przepisu, nie ma norm bez interpretacji tekstu prawnego. W teorii tłumaczenia przyjmujemy założenia wstępne Olgierda Wojtasiewicza (1957) i definicję tłumaczenia tego autora, według której ekwiwalentny jest przekład tekstu, który wywołuje u swoich odbiorców skojarzenia takie same, bądź bardzo podobne, jak tekst wyjściowy u swoich czytelników/słuchaczy. Adaptując definicję Wojtasiewicza dla potrzeb tłumaczenia aktów prawnych, twierdzimy, że ekwiwalentne jest tłumaczenie tekstu, z którego można wywnioskować te same lub bardzo podobne normy co z tekstu oryginalnego. Aby uwzględnić elementy normotwórcze w swojej pracy, tłumacz prawny powinien znać prawnicze dyrektywy interpretacyjne i podstawy instytucji prawnych, którymi się zajmuje.