

ON THE NORMATIVE PARADIGM OF SWORN TRANSLATION IN THE REALM OF LAW

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Abstract

In the 1920s the Polish legislature adopted a whole range of normative acts focused on the protection of the Polish language and on sworn translators practicing in official contexts. In accordance with statutory law, since 2004 sworn translators have been considered a profession commanding public trust. Among the many professional duties associated with sworn translators' performance, the regulations emphasize the duty to translate both spoken discourse and written texts with precision and faithfulness, and make sworn translators liable to disciplinary sanctions for poor quality work. The principles and rules for practicing the profession of sworn translator are enumerated in the Professional Sworn Translator's Code of 2018.

Keywords: legal interpretation, sworn translator, legal language, literal translation

1. The sworn translator's normative background

Together with the increase of national awareness and identity, there arises a need to use one's mother tongue as the official language in public contexts. Pursuant to Art. 27 of the Constitution of the Republic of Poland of 2nd April 1997, the Polish language is the official language in the Republic of Poland. It is also the case that the bureaucratic changes in the functioning of states have necessitated the use of sworn translations in connection with official and administrative activities.

On 31st July 1924, the Act on the official state language and the language of offices of central and local administrative authorities¹ was adopted together with the Act of 31st July 1924 on the official language of the courts, prosecutors' offices and the notary²; the two acts were accompanied with other legal documents regulating in detail the use of the Polish language in areas that had earlier been under partition. The law currently in force in this domain is the Act

¹ Dz.U. [Journal of Laws] 1924 Nr [No.] 73 poz. [item] 724;

² Dz.U. [Journal of Laws] 1924 Nr [No.] 78 poz. [item] 757;

of 7th October 1999 on the Polish language³, which asserts that the Polish language should be protected and that it should be used in the course of the performance of public tasks and transactions, as well as when implementing labour law provisions on the territory of the Republic of Poland.

In situations envisaged by the law, the official language creates the necessity to produce translations from a foreign language to the official language. Nowadays, sworn, certified translations are usually required in such situations. As the following verdict claims: “Due to the evidential value of foreign language documents, it is essential that as a rule sworn translations should be produced. Only such translations are subject to the presumption of fidelity, which arises from the principles of practicing the profession of sworn translator. In the case of unfaithful translation professional liability is incurred”⁴.

The first normative act regulating the institution of the sworn translator after Poland regained independence was the Regulation of the Minister of Justice of 24th December 1928 on sworn translators⁵, which stated that sworn translators were to be appointed by the minister of justice, who would also assign their seats. Until 2004, there had been several legal regulations of the institution of sworn translator and they all in principle concentrated on entrusting translators with the **function** of *sui generis* trial assistants, established for the purposes of trials (Dz.U. 1987 Nr 18 poz. 112 [*Journal of Laws* 1987 No. 19, item 112]) and other legal proceedings before courts and other authorities. On 25th November 2004, the Parliament adopted the Act on the Profession of the Sworn Translator⁶. The Act redefined the status of sworn translators, recognizing the performance of a sworn translator’s duties as a **profession of public trust**. A profession of public trust is exercised in relation to social values and interests of particular importance, and for their implementation. The need for such regulation was caused on the one hand by the rapid increase of translation services in Poland for both public and private entities caused by Poland’s accession to the European Union, and on the other hand by the need to ensure the appropriate quality of translations and the need to impose professional liability on the translation service providers (contractors) in this area of economic activity, who, *ex definitione*, became professionals.

The term “professional” is a kind of a rhetorical *ad docendum* figure, referring to a person professionally involved in—in this case—specialized translation of written and spoken language; an expert, a competent specialist who takes responsibility for the diligent performance of his or her profession. The requirements for the profession of sworn translator are stipulated in detail in the relevant Act. In addition, the right to practice this profession can only be obtained

³ Dz.U. [Journal of Laws] 1999 Nr [No.] 90 poz. [item] 999; Dz. U. [Journal of Laws] 2019 poz. [item] 1480;

⁴ Wyrok [judgment] WSA w Warszawie [Voivodeship Administrative Court in Warsaw] z dnia 23 sierpnia 2013 r. [of 23 August 2013] III SA/Wa 228/13; available at: orzeczenia-nsa.pl [accessed 02.08.2019];

⁵ Dz.U. [Journal of Laws] 1928 Nr [No.] 104 poz. [item] 943;

⁶ Dz. U. [Journal of Laws] 2019 poz. [item] 1326, henceforth referred to as the “Act” [Ustawa];

after taking the oath and being enrolled in the list of sworn translators kept by the Minister of Justice.

The conventional act (cf. Czepita 2017, p. 86 ff. on conventional acts in general and the literature cited therein) of taking the oath performed by persons authorised to exercise the profession of sworn translator is an obligatory element of the appointment procedure which takes place before a person can practice this profession, and is seen as an instrument of professional formation, thanks to which the profession could be exercised in accord with legal professional and ethical standards. The oath is in fact a solemn declaration that the person will perform the tasks entrusted to him or her conscientiously and impartially, with respect for maintaining state secrets and other secrets protected by the law, and being guided in his or her conduct by honesty and professional ethics. The content of the oath is a repetition of the statutory requirements for the practice of this profession. Pursuant to Art. 14 of the Act, a sworn translator is obliged to perform his or her professional tasks with particular diligence and impartiality, is obliged to keep secret the facts and circumstances with which he or she became acquainted in connection with the translation, and also to constantly improve his or her professional qualifications. The correctness and reliability of a sworn translator's performance is monitored by the voivodship Marshall in authority at the translator's place of residence. The terms and conditions of professional liability of sworn translators are set out in the Act. Professional liability is disciplinary liability. The Act envisages the possibility of disciplinary penalties such as admonition, reprimand, temporary suspension of the right to practice the profession, as well as deprivation of the right to practice the profession in the most serious cases. Proceedings on professional liability are initiated at the request of the Minister of Justice or a voivodship Marshall; they are carried out by the Committee on Professional Responsibility of Sworn Translators affiliated with the Minister of Justice. The Committee consists of nine persons, including four lawyers appointed by the Minister of Justice, four translators named by translators' associations, and one person indicated by the minister responsible for employment (Art. 29, section 1 of the Act). The accused person has the right to appeal to the Court of Appeal. A sworn translator also bears civil law liability for the failure to perform duties or for malpractice with regard to the obligation that he or she agreed to accept, i.e. translation service (contractual liability), or for damage caused by tort (delict/tort liability), and he or she may even bear criminal liability in certain situations, should he or she commit a crime.

Within the scope of the requirements for the performance of the profession of sworn translator, the Act is supplemented in a specific way with the principles of professional ethics and the principles of professional practice contained in the Professional Sworn Translator's Code. The code was adopted by the resolution of the Supreme Council of the Polish Society of Sworn and Specialized Translators PT TEPIS No. 33/10/18 of 1st October 2018⁷, replacing the previous Sworn

⁷ The text of the Code is available at tepis.org.pl [accessed 06.08.2019].

Translator's Code provided by the same Society. The text of the Code was developed by the Code Editorial Committee in cooperation with representatives of the Ministry of Justice and members of the Inter-institutional Consultative Committee following both the suggestions offered by the members of the Society and non-affiliated sworn translators, and on the basis of the Sworn Translator's Code of 2011. The legal status that should be recognised for the currently binding codes of ethics of the professions of public trust in the Polish normative system has been the subject of an ongoing scientific debate, and is most frequently referred to with the use of the phrase "soft law, weak law" (Skuczyński 2010, pp. 51-52). The sets of deontological rules known as "codes" are developed by self-government bodies of individual professions of public trust created pursuant to Art. 17, clause 1 of the Polish Constitution of 2nd April 1997, mainly on the basis of statutory delegation. It must, however, be noticed that with regard to the profession of sworn translator, the code does not meet the relevant requirements and cannot be recognised as this type of regulation, as it was adopted by only one of many associations of sworn translators, and one that is not universally accepted within the professional milieu; in addition, all those changes occurred in circumstances where the profession had not (and has still not) established a professional self-governing body despite the fact that there existed (and still exists now) the legal possibility of its establishment. Therefore, the Professional Sworn Translator's Code can only have the function of a text that provides recommendations addressed to persons practicing the profession (cf. a similar point made by Kubacki 2008, p. 156) and is of para-legal character. It constitutes a kind of paradigmatic model with regard to practicing the profession of sworn translator and with regard to the ethical attitude for the professionals of this type; it constitutes a point of reference for the assessment of the practitioner's professional attitude and may be found relevant both by translators and the reviewers of their professional performance.

One may also look for some details with regard to the rules of translation practice in the body of Polish and international industrial normative rules and the rules that standardize the processes of linguistic translations, e.g. the international standard ISO PN-EN ISO 17100: 2015-06, concerning written translation services, which has been in force since 2015. In addition, there are two complementary standards: ISO 20771 (Specialised translation — part 1. Legal translation — Requirements) and ISO 21999 (Quality assurance and assessment in translation — models and metrics). "Together with the ISO 17100 standard, these two new standards are designed to lay the foundations for the entire translation process and define the requirements and models used in quality management in specialised translation."⁸ The ISO 20771 standard contains terms and definitions from the field of law and legal culture; it also indicates the

⁸ The text can be accessed at the site of the Polish Association of Translation Companies [Polskie Stowarzyszenie Biur Tłumaczeń – PSBT] [24 June 2019].

requirements for the professional competences of translators, their revisers and reviewers (Popiołek 2017, pp. 160 ff.).

2. The normative paradigm of sworn translation

To present the matter of sworn translations against its normative background with clarity and order I shall focus on two paradigms which arise from all current legal and para-legal regulations in the field: the ethical paradigm of a professional person, i.e. a sworn translator and of the performance of his or her profession, and the paradigm of sworn translation.

2.1. The ethical paradigm of a professional person—a sworn translator and of the performance of the profession

Next to his or her formal obligations, such as conducting a repertory, performing professional activities specified in art. 13 of the Act⁹, performing translations in proceedings conducted pursuant to the Act, or at the request of the court, a prosecutor, the Police, or public administration bodies, etc., a sworn translator is primarily bound by his or her substantive and ethical obligations related to the production of a correct translation. This task, just like the other tasks, should be performed, pursuant to art. 14 of the Act, **with particular care and impartiality**. In the language of the law, particular care is the highest care, i.e. “due” diligence that we can expect from a professional. A more detailed description of this type of diligence can be found in the Professional Sworn Translator’s Code, where in section I, entitled “Professional ethics of sworn translator”, in § 2, it is stated that: “A sworn translator produces the translation entrusted to him with particular **care and diligence**, which includes, *inter alia*, a **personal**, diligent execution of the translation or a verification of a translation provided by another person, producing certified translations in accordance with the legal and formal principles for certified translation specified herein in the present Code ...”. It is worth noting that the drafters of the Code identify careful and diligent action with a personal production of a translation, which, however, does not result from the dictionary meaning of the terms used. A doubt may arise as to whether the performance of a translation by a third party, in a situation where the sworn translator “subcontracts” the performance of such a translation, could be considered a disciplinary tort, a misconduct and malpractice which should amount to a breach of the statutory duty of diligent action. In fact a professional person is legally

⁹ Art. 13: A sworn translator is authorised to: 1) preparing and certifying translations from a foreign language into the Polish language, from the Polish language into a foreign language, as well as reviewing and certifying translations within this scope which have been prepared by other persons; 2) preparing certified copies of documents written in a foreign language, reviewing and certifying copies of documents prepared in a given language by other persons; 3) performing interpreting.

responsible for the production of a correct translation, and there is no mention in relevant documents, and no provision even in the Code that would explicitly indicate that the personal performance of the service is inherent in the translator's responsibility. On the other hand, there are professions, in particular professions of public trust, where personal relationships based on trust and related to the professional performance of the contracted service are of fundamental importance; for instance, a patient chooses his or her doctor, similarly a client selects a lawyer (a proxy), and a person in need of a translation likewise chooses a sworn translator whose competence and knowledge he or she can fully trust.

The feature of carefulness and diligence being referred to in § 2 of the Code further embraces "... accepting work to the extent where it can be completed in due time in accordance with the above-mentioned requirements", i.e. **dutifulness** and being **deadline-conscious**. The very same paragraph of the Code also formulates the requirement that sworn translators should show criminal law-oriented due caution while preparing their translations ("The translator should also exercise due caution required in the given circumstances, as stipulated in criminal law.").

In § 3 of the Code it is indicated that it is a sworn translator's personal responsibility that the translation produced by him or her should show fidelity, i.e. that there must be compliance of the translation with the contents of the source document in accordance with the principles of specialist translation. It is evident that the drafters of the Code recognise the special importance of the value of loyalty to the source text and, despite the fact that this value has not been mentioned in the Act, they grant it primary importance. This perspective has been elaborated further in the course of establishing the principles of the sworn translator's professional practice in § 17, where it is stated that a sworn translator should translate a document reproducing the exact form in which the document in question was originally written or spoken, rendering the whole content of the document without omitting any item, and without adding or changing anything. Section 2 of the same paragraph includes a kind of legal definition of what fidelity means in translation, which is phrased as "maintaining compliance of the translation with the content and, to the amount attainable, the style of the source document; it is not identical with the literal nature of the translation". The very last assertion is clearly a novelty when compared to the Code of 2011.

The fact that a translation must be characterised by fidelity amounts to a kind of **axiomatic standard** for sworn translations, which will be hereby subject to **the presumption of faithfulness**, and therefore **truthfulness**. In professional practice, however, this fidelity—truthfulness—can be assessed in the *ad casum* contexts, and in specific cases the presumption is rebuttable. We shall return to this issue in further sections.

One of the important paradigmatic features of a sworn translator's performance is impartiality, which must accompany the process of performing the tasks assigned to the translator. Impartiality should be manifested primarily in that the

translator should refrain from expressing his or her personal opinions and refuse to take into account any unjustified suggestions that the commissioners or the contracting parties might have; it is also manifested in refusing to represent the commissioner's or some other contracting or third parties' stance or interest, which refers in particular to persons whom the translation might concern or persons whose messages are being translated.

Another socially significant value of the performance of both a sworn translator and in fact any translator providing his or her services in an official situation is professional secrecy, i.e. confidentiality involved in the act of translation, which is linked to the translator's statutory obligation to keep secret all facts and circumstances with which he or she becomes acquainted in the course of preparing translated documents (Article 14 (1) (2)) of the Act). This obligation finds its formal protection under art. 180, § 1 of the Polish Code of Criminal Procedure. It provides that persons obligated to keep secret information defined as "classified" or "confidential," or being subject to a legal obligation of professional secrecy related to their profession or official function may refuse to testify as to the facts to which this obligation extends, unless, for the benefit of justice and where specific laws do not provide otherwise, they have been released by the court or a state prosecutor from the obligation of secrecy; in such a case the order may be subject to appeal. The obligation of professional secrecy is also reflected in § 5 of the Code, which provides that a sworn translator's professional secrecy embraces the confidentiality of proceedings, negotiations, correspondence, personal data, and other secrets protected by the law; it is simultaneously prohibited for the translator to use confidential information obtained in connection with the commissioned translation for personal gain. It must be emphasised that in a lawful state both institutional guarantees of professional secrecy and material guarantees are of prime legal importance for both a sworn translator and a translator who is not registered as a sworn translator but provides translation service in an official context. The institution of translators' professional secrecy should legally be of absolute character in order to provide real protection of the rights and interests of the persons for whom the translation is being made. In the opinion of the Polish Ombudsman, the protection of the translator's professional and official secrecy regulated in art. 180 § 1 of the Polish Code of Criminal Procedure fails to protect the said rights and interests in a sufficiently effective way as in certain proceedings-oriented contexts it exempts the translator from the obligation of professional secrecy with regard to the information obtained in connection with the act of performing the commissioned translation, even though the situation in general falls under an absolute (i.e. irrevocable) requirement of professional secrecy, a requirement that also imposed on other professionals, e.g. attorneys or civil officers. Such situations may result in circumventing the law and in breaking fundamental legal standards in the rule of law in the state. Thus, in the Polish Ombudsman's opinion, the institution of professional secrecy of translators should be secured and legally regulated in a

way analogous to that in which the professional secrecy of lawyers, legal advisers, mediators or notaries is protected¹⁰.

As evident in § 1 of the Code, the translator's ethical paradigm also includes values such as the integrity, or dignity, of a sworn translator as a person of public trust. Such **integrity** may become affected, as the Code indicates, by e.g. the content of the translated document, remuneration, or working conditions, which can all provide grounds for refusing to translate (section 2: "A sworn translator **shall not undertake translation** should the content of the document, the remuneration or working conditions affect his professional integrity"). [emphasis added, MZK]. The attempt to define the conditions affecting the translator's professional integrity is an effort taken in order to formulate and objectify them; however, the indicated conditions neither refer to the circumstances of the act of translation on the part of the sworn translator, nor involve the commissioner's (the ordering party's) actions, which, when taken in combination with the firm recommendation to refuse to translate, can be considered excessively radical and far-reaching.

Reconstructing the sworn translator's ethical paradigm, and following the Code, we must further stress the prohibition of unfair competition, which the drafters of the Code evidently identify with the practice of offering underpriced translations where the fee is wilfully undercut. It is worth noting that similar provisions included in self-government deontological codes and in resolutions presented by professional self-government bodies, were repealed by the Minister of Justice as being in conflict with the principles of freedom of contract and monopolistic practices of professionals.

Recognising a statutory obligation, the newly introduced Code imposed the obligation to **improve professional qualifications**, which means that translators remain under an obligation to constantly deepen their knowledge, improve their language and translation skills, and develop specialist knowledge and knowledge about national and international legal transactions; at the same time professional translators should share their personal experience and professional knowledge with other translators, in a spirit of collegial solidarity within Poland itself and internationally.

Section II of the Professional Sworn Translator's Code, entitled "Professional Practice of a Sworn Translator", is a comprehensive elaboration and a supplement to art. 14 § 1 and 2 of the Act. It primarily indicates the formal rules of practicing the profession, restating the statutory obligation to conduct a sworn translator's repertory with a list of activities, indicating the need to store documents and digital records securely, protecting them against destruction, distortion or loss, including loss of data and access to data by unauthorized persons; it also mentions the use of a particular type of seal for stamping documents, etc.

¹⁰ Polish Ombudsman's (RPO [Pol. Rzecznik Praw Obywatelskich], officially translated as Commissioner for Human Rights) address of 9 June 2019, no. II 519.1184.2018II.2018.MH; to Minister of Justice, rpo.gov.pl, [accessed 16.08.2019];

Chapter 2 of the Code provides elaborated rules stipulating how to prepare a written translation. The chapter contains a number of definitions: the definition of a document, of an electronic document, and of a Polish official document; it defines the distinction between the original and a copy of a document in writing and explains the conditions for a translator's use of workshop aids and his or her access to auxiliary materials and consultations with experts, including experts with knowledge of a foreign specialist language; it indicates the features defining a document drafted in a written form, and relates to the formal, material shape of the translation, which includes preservation of the graphic layout of the translated text, providing markings of the end of each paragraph and of any incomplete line, including references to the external features of the document, of a stamp imprint, a national emblem, a business logo, and elements of the official letterhead; of any corrections and changes, records of proper names, and finally about instances of incorrect spelling or grammar forms, and any other errors in important parts of the source document, which taken all together all not exhaust the list. Moving with the times, the Code allows computer-assisted translation and machine translation. It indicates detailed rules for written translation, the way in which various elements of translated texts must be transcribed, and further indicates the ways to formally prepare the translated document before its final presentation to the client, e.g. binding and sealing multi-page text documents and stamping the translation with the sworn translator's round seal.

In chapter 3 the Code continues to set out the principles of interpreting, indicating interpreters' basic rights, such as the right to obtain information with regard to the subject matter of the translation in advance, the right to determine the translation technique, the right to determine arrangements in terms of where the translator will work, the right to demand good audibility of the participants' verbal input, the right to have the pace and manner of the verbal exchanges of the participants of the event adjusted to the interpreter's capabilities, the translator's right to take notes during the act of interpreting, respect for the agreed working time of the interpreter, etc. In this context it is also worthwhile to confront the rule contained in § 68 that had been present in the Sworn Translator's Code of 2011, with the corresponding rule phrased as § 75 of the Professional Code of 2018. The older § 68 regulated the obligation to secure **faithfulness** (fidelity) in the act of interpreting and stated:

“A sworn translator should translate foreigners' utterances exactly in the form in which he heard them, rendering the entire content of the utterance, without omitting, adding, or altering anything. Faithfulness of translation also means using the right style and, should it be necessary, the obligation to supplement the translation with relevant information or a comment where it is needed for a proper interpretation of its linguistic content and speaker's intention”.

In the currently binding Code, such obligation has been phrased in a different way; establishing in § 75 the principle of maintaining the grammatical form, according to which:

“1. A sworn translator uses the same grammatical form that the person who produced the utterance used (does not change an expression in the first person into a third person). 2. If a sworn translator gives his personal statement, he is obliged to inform the client or the contractor about it, referring to himself in the third person (e.g. The translator requests clarification)”.

At the same time, § 79, entitled “Interferences in the communication process”, says that a sworn translator should notify the person conducting the activity should he find or be afraid that incomplete understanding has occurred in the communication process, or should there be a need to supplement the translated statement with information or comment necessary to understand the content and intentions of the translated discourse.

2.2. The paradigm of sworn translation

The sworn translation paradigm can be reconstructed on the basis of the ethical paradigm of a professional person—a sworn translator and that of the performance of translator’s professional practice.

Such a paradigm consists of three rudimentary values of sworn translation, viz. **diligence** with **reliability**, **faithfulness (truthfulness)** and **impartiality**, which together make up the triad of basic values of a professional translation.

In general, the task of a sworn translator, as confirmed in the content of relevant laws and deontological standards, is to render the source text in the target language in a way that is maximally **faithful** and **accurate**, with the use of specialized terminology and due respect for all formal and legal principles of specialised translation. Thus, the above-mentioned requirements indicate that the practice of sworn translation is closer to translation standards that essentially emphasise the formal equivalence between the source text and the target text, i.e. their formal lexical and grammatical similarity rather than a type of functional equivalence, which would aim to achieve the effect of inculturation in translation¹¹.

3. Translation standards in practice

The report on the operation of the Professional Accountability Commission of Sworn Translators affiliated with the Minister of Justice published in January 2018 (tepis.org.pl [accessed 21 June 2019]) shows that in 2017, 61 complaints were received by the Commission, including 12 documents from the Minister of Justice and 49 from voivodship Marshalls. Compared to the years 2012 and 2013, the number of complaints had increased; 33 complaints were filed in 2012 and 35 in 2013. There are numerous possible reasons for the increase and many factors

¹¹ This idea was put forward by an American linguist and translation theorist – Eugene Nida. It was formulated in the context of Biblical translations, but can also be applied with reference to translations of other texts;

may have played an important role, including the fact that there had been a significant increase in the total number of translations made, but also an increase in the total number of professional sworn translators.

The said report of the Commission further shows that the most frequent infringement of the Act in 2016 was related to art. 14, paragraph 1, point 1 and included instances of a breach of the obligation to perform the tasks entrusted to the translator with special care and impartiality, in accordance with the principles arising from relevant legal provisions and deontological standards. They were, therefore, disciplinary torts, delicts consisting in the improper and non-diligent (Article 21 (1) of the Act) performance of the profession by the accused, which included preparing translations which were unfaithful with regard to the source texts. However, the provisions of the Act do not explain the deeper meaning of the evaluative expressions and remain, as can be easily seen, quite laconic.

Therefore, there arises a justified question: how should the expressions “special care and impartiality” and “faithful to the original” be understood in practice? As has already been pointed out above, for a translation to be faithful means that it is characterised by truthfulness; this veracity is the statutory and axiomatic standard of such a translation—hence the special importance of the very standard.

The practice of sworn translations indicates that, essentially, the phrase “faithfulness/fidelity to the original” means that the translator’s entire attention is placed on the dictionary meaning of the language used in the source document, and that he prepares his translation following rigidly interpreted formal and grammatical principles, i.e. creates a literal translation. However, providing literal translation, i.e. a word-for-word translation, may result in the creation of an **unfaithful text**, a text that does not offer fidelity in its reception, especially when it does not respect the rules of the target language and does not observe its surface structures (Król 2018, p. 111). Engaging in literal translation may produce various results, such as an intercultural misunderstanding or a text that is ridiculous and opaque; it may even lead to producing ungrammatical texts. This will occur more often in machine translation. The literal, i.e. word-for-word translation of the sentence below provides an illustrative example: “The lawyer is not easily shocked in the way the general public may be” (T. Parsons 1962, p. 68, example cited after King 2018, p. 111). In Google translation into Polish this sentence reads: “Adwokat nie jest łatwo zszokowany, tak jak może to być opinia publiczna.” (translate.google, [accessed 05.07.2018]), which in literal back translation reads: “An attorney is not easily shocked, as it may be public opinion”. In another version we receive: “Adwokat nie jest łatwo zszokowany w sposób, w jaki może istnieć opinia publiczna” (translate.google, [accessed 07.07.2018]), which in turn translates back into: “An attorney is not easily shocked, in the way as there may be [may exist] public opinion”. The 2018 Professional Sworn Translator’s Code “legalizes” the long-existing practice of using computer software supporting the translation process, i.e. computer-assisted translation

(CAT) and the use of commonly available online systems and tools for automatic (machine) translation, on the condition that they shall ensure the confidentiality of the transmitted data. It is evident that the use of such technical facilities in conjunction with a situation where a translator accepts too many assignments, commissioned translations that go beyond his or her capacity, creates the danger that translators will produce unfaithful texts.

The example cited above invites the formulation of an obvious truism, viz. that every translation is to a greater or lesser extent an interpretation; therefore translators, including sworn translators, are in fact interpreters. In the field of law, in quite a specific way, interpretation plays a significant role in determining the meaning of applicable legal norms and binding contractual provisions.

In the Polish theory and philosophy of law, two basic concepts of juristic interpretation have been developed: a clarificative concept, the core meaning of which is contained in two Latin *paremias*: *Clara non sunt interpretanda* and *Interpretatio cessat in claris*, and a derivative concept, which is characterized by the maxim: *Omnia sunt interpretanda* (Zieliński 2005, p. 120). The first doctrine is related to the presupposition of the existence of the situation of isomorphy, viz. when a given rule of law can be directly understood and thus there is no need for an act of interpretation (e.g. *Who kills a human being shall be subject to the penalty of imprisonment*), and to the presupposition of the situation of an act of interpretation, where there arises a need to give meaning to an unclear legal norm (Wróblewski 1988, pp. 122 ff.). The other doctrine makes the assumption that, allowing some simplification and disregarding a number of other assumptions (Brożek, 2006, *passim*) irrelevant to the present analysis, we always disambiguate and interpret a legal provision at the time of construing a legal norm on the basis of legal texts (Zieliński 2005, pp. 120 ff.) because every case of law application involves an act of interpretation. In order to declare that a rule is clear, we must first understand it—even if we are unaware of it, i.e. we must interpret it. In essence, however, the two theories really differ in their underlying assumptions and the starting points that they assume. The clarificative doctrine of juristic interpretation (Wróblewski 1972, pp. 121 ff.; Morawski 2014, chapter I, points 1-2) is practiced primarily in the process of applying law, e.g. during court proceedings, when there is a dispute with regard to the importance of some applicable legal rule; it has a fundamentally pragmatic sense. For example, what meaning should be assigned to the illness-related concept of “confinement” or (being) “bedfast” (cf. Pol. “choroba obłożna”) if the legislator failed to provide a legal definition of the term(s)? The dictionary meaning of the concept is synonymous to “bedridden” or “confined to bed by illness” (in Polish: “przykuty do łóżka”, “złożony chorobą”; acc. to synonym.net [accessed 3 August 2019]). However, the Supreme Court chose to decide that the term would cover any medical condition that should require that the patient remains under constant medical care, resulting in a significant and permanent disruption to the patient’s daily routine (Supreme Court judgment of 8.I.1993, reference number III ARN

84/92), with no mention of there being a need for the patient to be literally bedridden. In the Insurance Dictionary, in turn, we can find a definition which explains that it is a medical condition lasting more than 24 hours and one that would make it impossible for the patient to come to the medical out-patient clinic, which in turn would entitle the patient to request a home visit (insurance.com.pl [accessed 3 August 2019]). Therefore, accepting the clarificative concept of legal interpretation, there is no need to interpret the words “confinement” or “bedridden person” if the concept is understood directly and it is considered to be clear (*clara non sunt interpretanda*), e.g. in relation to a sick person who for a long time has already been confined to bed, “bedridden” due to a serious terminal disease which results in a prolonged state of lying in bed. However, if the term gives rise to some doubts in a specific context, it should be interpreted. The Constitutional Tribunal in its judgment of 28 June 2000 (K25 / 99, OTK 2000, No. 5 item 141, p. 35) indirectly confirmed this point of view, stating that: “In a rule of law the interpreter must always give priority to the linguistic meaning of a legal text. If the linguistic meaning of the text is clear, then—in accordance with the *clara non sunt interpretanda* principle—there is no need to resort to other, non-linguistic methods of interpretation”.

The idea of the derivative concept of the interpretation of law is in turn quite clearly reflected in the judgment of the Supreme Administrative Court of 30 November 2005 (reference number FSK 2396/04, orzeczenia.nsa.gov.pl [accessed 16.08.2019]):

“Constitutional review must always be based on a definite content determined in the process of legal interpretation, as there is no pure, abstract meaning of a provision that could be adopted without any act of interpretation; in this sense even ‘*clara sunt interpretada*’. As the Court acknowledges, this thesis is widely represented within the field of the theory of legal interpretation”.

Jurisprudence indicates three types of legal interpretation: linguistic, systemic, and functional (teleological), taking into account the context where the legal rule applies (Wróblewski 1988, pp. 117 ff.), and formulating the interpretative directives of the first degree which are characteristic of the relevant type. Directives of this kind function as guidelines for the interpreter showing how to interpret a given law.

The linguistic interpretation derives from the language in which the legal rule must be pronounced so that the addressee of the law could get to know its content. It must be remembered that the theory of law recognises a distinction between legal language (Pol. *język prawniczy*) and the language of the law (*język prawny*). The language of the law is the language in which legal provisions are phrased, i.e. it is the language which operates on different types of units, including systematic and classificatory, editorial, and syntactic units of a legal act, which direct certain patterns of behaviour and come directly from the legislator (cf. Article 415 of the Polish Civil Code: “Anyone who is at fault for causing damage to another person is obliged to repair it”). Legal language is—generally speaking—the language of

the legal practice and application of the law. It is the language in which legal norms, i.e. statements of directive nature, are phrased to indicate rightful patterns of behaviour under specific circumstances. Such norms are built of elements contained in legal provisions according to a specific pattern (e.g. when someone who is fully incapacitated and due to being legally incapacitated cannot be liable, is at fault for causing damage to another person, he is not obliged to repair it). The linguistic interpretation directives of the first degree refer to the relation of the legal language to the common language (there is a presumption of the common language in relation to the legal language), the language of the law (“język prawny”) to the legal language (“język prawniczy”) (there is a presumption of the language of the law in relation to legal terminology), but they also constitute other recommendations, such as: linguistic expressions with the same wording cannot be given different meanings within one legal act, unless such an act provides an indication that there is such a possibility; it is unacceptable to establish the meaning of a legal rule in such a way that there are phrases within that would be treated as redundant (Lang, Wróblewski, Zawadzki 1986, pp. 443-444).

The systemic interpretation formulates directives with regard to the determination of the meaning of a legal rule in the context of a legal system, in which such a norm belongs and whose features it “inherits”. Performing an act of systemic interpretation, we must not fail to remember one of the basic postulates of the legal system, viz. the consistency of this system; hence one of the directives states, for example: The interpreter should determine the meaning of the interpreted norm in such a way that it would not entail any contradiction between the interpreted norm and any of the norms belonging to the same legal system (Lang, Wróblewski, Zawadzki 1986, p. 445). In particular, the interpreter should take into account the hierarchical structure according to which norms are ordered in the legal system, and he should determine the meaning in such a way that a lower norm is not inconsistent with a higher one (e.g. a statutory norm with a constitutional norm). An important feature of a legal act belonging to a particular legal system is its coherence and internal rationality, which is secured by the proper systematization of that act, hence the directive which states: When determining the meaning of a norm, the interpreter should consider the internal systematization of the legal act (Lang, Wróblewski, Zawadzki 1986, p. 445). One of the best known, widely respected, and very intuitive directives is the rule saying that exceptions should not be broadly interpreted (*exceptiones non sunt extendendae*) (Morawski 2014, pp. 193 ff.).

The functional (teleological) interpretation makes it possible to determine the meaning of a legal rule with due regard paid to the complex and multi-faceted functional context within which the norm exists, i.e. with regard to the functions of the legal norm, a legal institution or a branch, and the legal system; as well as the purposes and values of the law and legal norms. It is not uncommon that it is just the functional interpretation that makes it possible to determine the sense of a regulation for whose implementation it was adopted.

According to the established order within an act of legal interpretation, the law should be interpreted first with the use of a linguistic interpretation, and then, should the need arise, the other two, or just one of the other interpretation methods should be applied. The Supreme Court in its judgment of 8 January 1993, reference number Act III ARN 84/92 stated: “A grammatical and linguistic interpretation is but one way of (legal) interpretation, and the conclusions derived from it can be misleading and lead to substantially incorrect results, inconsistent with the legislator’s intentions, and sometimes to results that are unfair and harmful. That is why it must be complemented with conclusions resulting from the use of the other types of legal interpretation: historical, systemic, functional, logical, and eventually—if not primarily—teleological” (quoted after Brzeziński, no date, slide 24). Later, the view expressed above was confirmed by the judgment of the same Court of 20 June 1995 III ARN 22/95, where the Supreme Court indicated: “Giving priority to linguistic interpretation could only be accepted in the situation of high coherence within the legal system and high legislative discipline of the legislator. The Polish system of the law does not meet such conditions, and therefore the linguistic interpretation must give uncertain results. It must therefore be supported with the systemic and functional interpretation”. (quoted after Brzeziński, no date, slide 25). It should be added that, although almost 25 years have passed since the ruling, it is still valid due to the features of our legal system.

Considering the result of the interpretation vis-à-vis the content of the binding law, the doctrine of legal dogmatics postulates the pursuit of the *secundum legem* interpretation, i.e. one that is consistent with the law. However, it is not uncommon to find situations where directives of legal interpretation would lead to establishing different scopes of meaning of legal provisions as a result of using different methods of interpretation. This will often result in the creation of a more or less “capacious” meaning of the legal norm being questioned, which in turn may give rise to a rather common in legal practice accusation of applying a *praeter legem* (i.e. extra-legal; “outside of the law”) or even *contra legem* (“against the law”, illegal) interpretation (Lang, Wróblewski, Zawadzki 1986, chapter 21; Opałek, Wróblewski 1969, pp. 267 ff.), which is itself often seen as law-making¹². It should be noted, however, that the content of the binding law **is not** known in advance, just because the law is the result of legal discourse, the use of inferential rules and, above all, legal interpretation; its content is determined in the course of social interaction in the form of, inter alia, the application of law; the law emerges, and becomes the law through the act of interpretation (Dworkin 1986, pp. 52-53). Therefore, in relevant literature one may encounter the opinion that the allegation of using the *praeter legem* or the *contra legem* interpretation amounts essentially to a persuasive measure, and is mistaken in the sense that in fact it relates to a dispute concerning the scope of **one method of interpretation** against **another**

¹² Legal literature includes numerous on-going, unresolved disputes concerning the problem whether courts of justice make law in the course of interpreting legal norms;

method of interpretation, i.e. it is in reality the allegation of *interpretatio praeter interpretationem* or *interpretatio contra interpretationem*, and not *praeter or contra legem* (Wróblewski 1961, pp. 617 ff.).

The significance of the legal interpretation of contractual provisions in the course of the application of the law can be clearly illustrated with the following fragment of one of the judgments of the Polish National Appeals Chamber¹³:

“In the Chamber’s opinion, the three submitted translations, prepared by three different sworn translators (two translations from Spanish and one certified translation from Spanish) indicate unequivocally that the content of the bid bond guarantee submitted by the Appellant—El ejecutor no ha aprobado (spelling “aprobato” as in the original - MZK) garantía suficiente de la realización correct del contra to—can be translated in various ways, and it is impossible to determine that one of the given translations is incorrect ...”.

The legal problem in this case was related to the use of the word “aportado” instead of “aprobado” as in the phrase cited above, which was assessed by the Chamber in the following way:

“...However, in the present case, the documents submitted by the Ordering Party prove nothing more than that the presented warranties included such and no other phrases, and they certainly do not prove that the phrase used in the Appellant’s bid bond guarantee is incorrect and thus it does not safeguard the interests of the Ordering Party, which in consequence should lead to the exclusion of the Contractor from the procedure. The translation from Polish into Spanish of the content of art. 46, section 5 of the Act of Public Procurement Law submitted in court by the participant of the appeal proceedings, uses the phrase “aportado”; it indicates that such translation is possible, but it does not prove that the Appellant’s bid bond guarantee, in which another phrase was used, does not secure the Ordering Party in case of the Contractor’s failing to provide security on due performance of the contract”.

As the cited example evidently proves, it can often happen that a sworn translation imposes on the addressee of such a translation, i.e. on the recipient of the target text, the need to make a further, i.e. the recipient’s own, interpretation of the translated text, an interpretation that will allow us to grasp its sense, and without which the translation provides virtually zero information for the recipient of the source text. Another illustration of the problem can be found in inheritance law: the institution of the reserved share of an inheritance (“legal reserve”), which exists in some legal systems, does not have an exact equivalent in Polish inheritance law, where its nearest counterpart constitutes a different legal institution, i.e. “the reserved portion” (Pol. “zachowek”). Clarification of that kind will be an act of a systemic or functional interpretation, building references between the phrases of the source language as used by a sworn translator and the

¹³ Judgment of Poland’s National Appeals Chamber of 25 March 2013; KIO 497/13, legalis.pl [accessed 27.06.2019];

context of a specific legal institution and its function in the legal system of the target document's addressee. To provide another example, the phrase "managing director", which is often found in translations from Spanish into Polish, in legal practice is often given the meaning of "the president of the company's management board" to match the institution present in Polish commercial law, even though in reality the two institutions may be shaped differently; similarly, the phrase "limited liability company" is translated into Polish as "spółka z ograniczoną odpowiedzialnością" (literally: "company of/with limited liability/responsibility"), and the Polish term "wydziedziczenie" is rendered as "disinheritance", although the relevant institutions have different meanings in different legal systems (cf. examples from the field of family and guardianship law in Komsta 2017, pp. 142, pp. 146 ff.) and in some legal systems they may even be non-existent (e.g. disinheritance). Thus, a sworn translator dealing with legal texts must face various situations, e.g. situations in which he or she is under the obligation to faithfully translate a term referring to an institution that has its legal equivalent in the target language, but the two differ in their scope and semantic capacity (as in the case of "limited liability company" and "spółka z ograniczoną odpowiedzialnością"). They may also have to deal with situations where the terminological equivalent in the target language has no institutional referent in a given legal system and is thus merely an empty label (as in the case of "trust" and "zarząd powierniczy" (literally: "trustee board") in Polish law). The addressee of such a translation is bound to either request an explanation of the sense, or infer the meaning from the context in which the phrases are used.

However, none of the "translation-related situations" mentioned above could justify a departure from the source text in a sworn translator's work. An allegation of infidelity of the translated text discredits (and disqualifies) the sworn translation and constitutes a serious disciplinary delict (a tort).

Infidelity of the text may also be associated with overinterpretation, that is, a translation which is, in the evaluator's opinion, too arbitrary, inaccurate or imprecise, which may result in a distortion of the sense of the source text. The accusation of overinterpretation is, in principle, of an evaluative and subjective nature, but a translation that can provide grounds and potential for such an opinion most often will not meet the requirement of literality. The infidelity of a translated text can take many forms; it can be intentional, e.g. selective translation by omitting a fragment of the text, but it can also be unintentional, connected with a lack of specialist knowledge or poor language competence on the part of the translator. For example, art. 3 paragraph 1 of the United Nations Convention on Contracts for the International Sale of Goods, drawn up in Vienna on 11 April 1980¹⁴ (example cited after Król 2018, p. 114), whose original text reads: "Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production"

¹⁴ Dz.U. [Journal of Laws] 1997 nr [No.] 45 poz. [item] 286;

(emphasis added - MZK) has been translated into Polish as: “*Umowy na dostawę towarów przewidzianych do wytworzenia lub wyprodukowania będą uważane za umowy sprzedaży, **chyba że** strona zamawiająca towary nie przyjmie na siebie obowiązku dostawy zasadniczej części materiałów niezbędnych do ich wykonania lub wyprodukowania*” (emphasis added - MZK). The error was noticed after the Convention had been in force in Poland (enacted on 1 June 1996) for more than ten years, and was corrected by a Minister of Foreign Affairs announcement of 30 September 2011 on correction of an error¹⁵: Article 3 section 1: “*Umowy na dostawę towarów przewidzianych do wytworzenia lub wyprodukowania będą uważane za umowy sprzedaży, **jeśli** strona zamawiająca towary nie przyjmie na siebie obowiązku dostawy istotnej części materiałów niezbędnych do takiego wykonania lub produkcji*” (emphasis added – MZK)¹⁶, where “chyba że”, which technically means “unless”, but due to the fact that Polish allows double negation suggested a different relation than the original one, was replaced with “jeśli” (literally “if”), which eventually contributed to representing the intended meaning.

4. Conclusions

Legal translation is specialist translation and thus specific. This is at least partly connected with the challenging obligation to show faithfulness and fidelity with regard to the original, which, in turn, will secure its truthfulness. In this perspective there is a fundamental difference between legal translation and translation services provided within other specialist domains, e.g. those focused on texts belonging in science, natural sciences, medicine, or the social sciences. The conceptual apparatus, as well as the knowledge accumulated in such scientific disciplines are of a universal rather than a particular character. In contrast, the particular nature of the cognitive apparatus and legal knowledge are contained and isolated in particular legal sciences focused on the law belonging in a particular state and in local legal dogmas, the realisation of which can provide more insight into the specificity of legal translation.

In the context of the remarks on translation and interpretation offered above it must not be forgotten that in its essence sworn translation is not supposed to replace the source text; following its definition, it is the same text phrased in another (a different) language. In other words, a sworn translation does not replace a foreign language source document or a piece of oral discourse; instead it serves to define what the contents of the foreign text or discourse is. This expresses the very concept of a sworn translation as it is defined both in the Code for sworn

¹⁵ Dz.U. [Journal of Laws] 2011 Nr [No.] 230 poz. [item] 1374;

¹⁶ I owe this example to Prof. dr. hab. Jacek Skrzydło of Department of Public International Law and International Relations, Faculty of Law and Administration, Łódź University, Poland, which I already acknowledged in another publication: M.Z.Król, O tłumaczach przysięgłych oraz tłumaczeniach przysięgłych w dziedzinie prawa [On sworn translators and sworn translation in the legal domain];

translators and in the related texts which refer to sworn translations. This also shows the sworn translator's function whose proper application is guaranteed by the status of the profession of sworn translator as a profession of public trust, performed by professionals. Metaphorically, it can be said that a translator is "the mouth" of the person who issues the document in the target language¹⁷. This is the role that a sworn translator plays according to the currently binding provisions and deontological rules.

[translated from Polish by Iwona Witczak-Plisiecka]

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¹⁷ by analogy to the well-known description of the role of a judge as "the mouth of the law," as attributed to Montesquieu;

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