Secondary term formation within the EU: term transfer, legal transplant or approximation of Member States' legal systems?

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ABSTRACT

The EU legal system and the legal systems of its Member States have to adapt to the ever-changing nature of society and are therefore in a constantly evolving state. The EU, which is characterised by a unique lawmaking system, has proved to be an inexhaustible source of legislation, giving rise to a dynamic legal context. The same dynamicity can be observed also from a linguistic perspective. Due to the multilingualism principle, which makes multilingual communication a mandatory activity in EU institutions, new EU legislation and, consequently, new legal concepts are expressed in equally authentic texts. As a result, 23 different varieties of national official languages are being developed within the EU and existing terms are already undergoing a Europeanisation process. This paper presents a case study conducted on the terminology extracted from a corpus of parallel EU documents in English and Italian on the specific subdomain of the standing of victims in criminal proceedings and victims' rights, and discusses the consequences of concept transfer between legal systems within a multidimensional context and in terms of monolingual and multilingual secondary term formation.

KEYWORDS

Secondary term formation, concept transfer, term transfer, EU terminology, harmonisation of EU law.

1. Introduction

Since their foundation, the European Communities first and the European Union later have proved to be an inexhaustible source of legislation for all Member States, giving rise to a very dynamic legal context. The same dynamicity can be observed also from a linguistic perspective. The multilingualism principle, which requires that EU legislative documents are published in the 23 official EU languages in order to ensure that every EU citizen can access them in the official language(s) of his or her country, makes multilingual communication a mandatory activity in EU institutions. In order to fulfil this requirement, EU institutions need to resort to translation, although from a legal point of view EU documents cannot be considered translations, but rather equally authentic versions (Cao 2010: 73). The introduction of new EU legislation, and consequently the emergence of new legal concepts, together with the requirement to comply with the multilingualism principle, have given rise to 23 EU official languages that should "allow for a clear delimitation from national regulations" (Fischer 2010: 23). These languages will henceforth be referred to as 'EU languages' (ibid.).

This paper aims at depicting the unique features characterising the lawmaking process within the EU that have notable consequences for the evolution of EU languages in general and EU terminology in particular. For

the purposes of this paper the peculiarities of the development of EU law are analysed from a terminological perspective, focusing on the influence of EU law on the creation or development of new terms from already existing concepts and terms within the Member States in order to meet the need of finding appropriate designations for EU concepts. The examples provided are all extracted from an English-Italian corpus of victim-related texts described in section 3.

2. The uniqueness of the EU lawmaking process

The European Union legal system, as well as the systems of its Member States, are in a constantly evolving state, as they all have to adapt to the ever-changing nature of society. However, there are some features that differentiate the two systems. On the one hand, national law generally aims at being comprehensive and is the result of consensus between national forces that share the same legal system and background. On the other hand, European law aims at finding common solutions in selected policy areas and results from agreement at the supranational level, which involves all the Member States and their own legal cultures, to find a common ground for confrontation and negotiation first, and for approximation or harmonisation later. For this reason, EU law is sometimes described as *droit diplomatique* (Robinson 2008: 192). However, if the first source of legal knowledge can be considered internal to the EU, as it is derived from within the Member States, there are also external factors that come into play in the development of EU law, i.e. documents adopted by other international bodies, such as the Council of Europe or the UN. Although not legally binding for EU institutions, these documents may serve to trigger or even guide the development of new legislation and thus influence the language it is expressed in.

Once the existence of internal (Member States) and external (other international bodies) sources is acknowledged, it is worth noting that the resulting law does not constitute a new system that is separated or isolated from its national sources. The EU legal system is in fact intertwined with the Member States' legal systems both before and after its adoption. In fact, national law and EU law are mutually influenced in a circular process: EU law results from the merger, harmonisation, further elaboration and innovation of legal provisions which already exist in different Member States and, once enacted, needs to be adopted and enforced by the Member States. This link is further strengthened by the administration of justice in the so-called 'European area of freedom, security and justice', which is carried out jointly by national courts and the European Court of Justice. Because "EU law and national legal systems constantly interact with each other" (Hirsch Ballin 2005: 5), the EU legal system can be considered to evolve in two interconnected, and possibly overlapping ways, namely a derivational process based on already established legal norms and an innovative process necessary for the development of new EU norms. However, the role of EU legislation is

generally complementary to national legislations, as its aim is "to interact with national and sub-national rules" (Hirsch Ballin 2005: 12). Since the relationship between law and language is so intimate — law coming into being through language (Tiersma 1999: 1) — it goes without saying that it is language itself which is one of the first elements to be affected by lawmaking. Due to the fact that legal contents are necessarily expressed through language, within the EU context the consequences of the interactions in the lawmaking process described above may be traced in 23 languages.

3. EU languages and EU terminology

EU legislative provisions need to be sufficiently flexible to make it possible for Member States to ensure that any diversities among national legal traditions, methods and systems are respected and preserved, even when common goals are pursued and equal rights are to be granted. This "normative flexibility" is reflected in the 23 different EU languages which, in order to guarantee the maximum degree of uniform interpretation, need to be both sufficiently vague to adapt to the distinctive multilingual character of the EU and clear, simple and precise (Joint Practical Guide 2003: Guideline 1). Accordingly, every EU language should be as plain as possible and ambiguities should be avoided by a consistent use of uniform terminology not only within a single text, but also across different texts tackling the same issue. For clarity and simplicity's sake, guidelines suggest that unnecessary Eurojargon should be avoided and terms should not depart from their meaning in ordinary, legal or technical language (Joint Practical Guide 2003: Guideline 6). However, due to the regulation of specific aspects of law via common legislation, EU institutions cannot do without legal terminology. The development of terminology at the EU level relies on two processes: on the one hand, EU institutions create neologisms in order to designate new concepts that are introduced within the EU legal system, and on the other, they resort to secondary term formation (Sager 1990: 80) when transferring legal concepts from one legal system into another.

The following section discusses a case study on the consequences of the transfer of concepts between national legal systems and the EU in terms of secondary term formation (Fischer 2010: 26-31). The case study from which the examples below are extracted is part of a wider ongoing research project in the field of multilingual terminology about EU and national criminal law. The analysis adopts a qualitative research approach and is conducted on a parallel corpus containing EU texts in English and Italian downloaded from the EUR-Lex portal and consisting of approximately one million word tokens. The text selection for the compilation of the corpus was driven by a single criterion: all the texts have been selected on the basis of their relevance to a specific subtopic in the broad domain of criminal law, i.e. the standing of victims in criminal proceedings and victims' rights. Therefore, the analysed corpus is not

limited to binding and non-binding legislative texts (e.g. framework decisions, directives, recommendations and opinions), but also comprises preparatory acts (e.g. legislative proposals and opinions, Member States' initiatives, legislative resolutions), consultation and reporting documents (e.g. green papers, reports) and case-law (e.g. references for preliminary rulings, opinions of Advocates General, judgments).

4. Concept transfer between legal systems

Neither the EU legal system as a whole nor individual EU legal concepts make up an artificially created rootless legal order, but rather result from negotiation, harmonisation and innovation of already available legal material. As far as terminology used in EU legislation is concerned, the Joint Practical Guide aimed at persons involved in the drafting of EU legislation suggests that terms should not depart from the meaning they have acquired within the national languages. Nonetheless, when examining individual EU legal terms it becomes apparent that system-specific terms have been taken out of their original contexts and have undergone a phase of "conceptual stretching" (Sartori 1970: 1034) so as to be suitable to meet the requirements of the broader EU setting. Some scholars have described this process as neutralisation (Kocbek 2011) resulting in a delocalised language (Ferrarese 2007: 179). However, apart from neutralising the characteristics which are bound to the national legal systems, the transfer of concepts — and thus of terms — from a nationally-framed legal apparatus to a supranationally-conceived one, together with the interaction of different national legal languages at a supranational level, adds European features to the concepts through a process of semantic derivation (Mattila 2006: 113). The Europeanisation of legal terminology is going on in 23 different languages: because each individual legal term is language- and system-dependent, this process affects different terms in different EU languages. For instance, in the EU-Italian subcorpus the meaning of the term *risarcimento* ('compensation provided by the author') has been deprived of the meaning it bears in the Italian national legislation and it serves as a headword in the multi-word term *risarcimento da parte dello Stato* ('compensation provided by the state'), where the term *indennizzo* would instead be expected to occur.

Therefore, when dealing with EU legal terminology it is first of all necessary to specify which EU languages are under consideration. In the present paper, some examples of the consequences of the Europeanisation process for EU-English and EU-Italian are presented. As the legal terminology analysed reflects the evolving character of EU victim-related legislation in these two language varieties, the terms presented are to be considered as instances of terms developed via secondary term formation within these two EU-languages only and further investigation is needed in order to establish the existence of the same or similar processes in other EU-languages. Moreover, due to the existing links between the national and the supranational jurisdictions, in the

present paper secondary term formation is considered a process in need of special attention in translation-oriented terminological databases intended to account for the multilayered European legal reality. In order to provide sufficient conceptual and linguistic information to translators whose knowledge in a specific legal subdomain may not be advanced, such databases should take into consideration the multidimensionality of the underlying conceptual structure and provide their intended users with the information needed to distinguish between the different layers so as to clarify both the semantic content and the origin of a certain term and thus facilitate the retrieval of the most appropriate translation equivalent according to the context.

4.1 Monolingual secondary term formation

The Europeanisation process undergone by national concepts leads to two different types of term transfer between legal systems, which can be ascribed to monolingual and multilingual secondary term formation. According to Sager (1990: 80), monolingual secondary term formation starts from an already existing term and consists in its revision within one linguistic community. For instance, within the Italian national legal system the concept underlying the term *danno non patrimoniale* ('non-pecuniary loss') has undergone profound modifications, its meaning changing from several types of non-economically assessable losses to the losses that only concern the injured person's intimate sphere and back again to a more comprehensive category of losses. However, even if we consider only one linguistic community present in a Member State, we need to acknowledge that this specific community is subject to two legal systems at the same time which use different terminologies within the same language. Therefore, when taking into account monolingual secondary term formation within the EU, the transfer of a concept from the national to the EU conceptual system or vice versa is implied. Due to the different needs of the two legal orders, the transfer of a concept may lead to the modification of the concept itself, even if the term denoting it undergoes no change. In order to illustrate the complexity of this type of secondary term formation within the EU framework, two examples from EU-English and EU-Italian are discussed below.

The first article of the Council Framework Decision 2001/220/JHA, i.e. the milestone document for the approximation of national legislation on the standing of victims in criminal proceedings, is entirely dedicated to defining concepts which are fundamental to this specific subfield. The first concept to be defined is actually *victim*: "a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State." The definition shows that EU lawmakers provide the intended users of the document, i.e. national lawmakers, with a series of minimum requirements that a person needs to fulfil in order to be classified as a crime victim. It also makes an explicit

reference to the Member States' legal systems, as the acts or omissions provoking victimising consequences need to be regulated by domestic criminal law. This example shows a Europeanised concept that originated in national legal systems but has not become completely independent of them. However, a comparison with the meaning of the same term as used in the Code of Practice for Victims of Crime published in 2005 and applying to people being victimised in the UK reveals a difference in the underlying concept. Even if the concepts embedded in the European and British systems designated by the term *victim* are not incompatible, the boundaries of the national concept are established more clearly than those of the European one: according to the Victims' Code of Practice, a victim is any person who has made an allegation to the police, or had an allegation made on his or her behalf, that he or she has been directly subjected to criminal conduct under the National Crime Recording Standard (NCRS) and is therefore entitled to the services available to crime victims (Victims' Code of Practice 2005: 2-4, 21). It can therefore be concluded that both the broad semantic field of criminal justice and the much more specific field of the status and rights of victims of crime are multilayered. Both at the European and British levels, criminal law protects the person who has been directly subjected to criminal conduct, but information on what criminal conduct is and what activities need to be accomplished for the person to be considered a victim entitled to victim support services are only determined within the domestic system. This discrepancy establishes a conceptual asymmetry between the supranational and the national levels, disguised by the same designation.

When comparing EU and national terminology, the same EU concept can also be used to illustrate another type of monolingual secondary term formation. According to Guideline 5.3.2 of the Joint Practical Guide "terms which are too closely linked to national legal systems should be avoided." For the sake of fulfilling this requirement and maintaining a formal correspondence with the other linguistic versions of Council Framework Decision 2001/220/JHA, Italian drafters used the term *vittima*. However, a similar concept to the one envisaged by the Council Framework Decision can be found in the Italian national system, and, more specifically, in the Italian Criminal Code (*Codice Penale*) and Code of Criminal Procedure (*Codice di Procedura Penale*), where it is termed *persona offesa dal reato* ('person who has been subjected to a crime'). Nevertheless, the term *vittima* itself is not a neologism in Italian. Indeed, it is a word usually used both in everyday language and by criminologists to refer to a person who has suffered from a crime. However, although it can also be occasionally found in some Italian bills and laws (see, for example, Legge 26 marzo 2001, n. 128, and Camera dei Deputati 2009), the term *vittima* is still not considered a proper technical term of Italian legal language because of its lack of clear-cut boundaries. Pursuing the "deliberate vagueness of legal concepts" (Liebwald 2007: 134) necessary for EU provisions to be suitable to cover future, possibly unpredictable circumstances and at least the typical cases already provided by the national legal systems, EU Italian

drafters opted for a term that is uncommon in national legal instruments and provided it with an additional, subdomain-specific meaning.

The English example illustrates a case of polysemy, with the same term being used to refer to a broader concept pertaining to the EU legal framework and a narrower term with a more clear-cut meaning within the British context. On the other hand, the Italian case exemplifies the existence of two terms referring to similar but non-perfectly overlapping concepts and provides an example of partial synonymy that, however, encourages the migration of a term from one subject field, i.e. criminology, or from everyday language, to another subject field, i.e. criminal lawmaking, as can be seen in the 2002 bill for a Framework law on the assistance, support and protection of victims of crime (Camera dei Deputati 2002).

4.2 Multilingual secondary term formation

Due to the Member States' involvement in the EU lawmaking process, the comparison of their legal traditions and expertise is a requisite activity. In the new EU legal order being created, the influence of Member States' legal cultures (see, for example, de Cruz (2007: 160 ff.)) and systems can result in more or less direct legal transplants, i.e. the movement of legal rules, principles, institutions and structures from one legal system to another (Watson 2000). Nevertheless, it may be difficult to identify the conceptual links between domestic traditions and the EU legal system, given the supposedly sufficient degree of autonomy which should be maintained by each. However, the phenomenon of legal transplants can occasionally be self-evident even at the EU supranational level (see, for example, Bengoetxea (2008: 427 ff.)). As a matter of fact, legal transplants may lead to terminological consequences that can be detected in EU documents, i.e. to multilingual secondary term formation, which, according to Sager (1990: 80), consists in the interlingual transfer of a term between different linguistic communities. In order to illustrate this term formation mode, an example is provided below.

The introduction of the term *restorative justice* in the *acquis communautaire* dates back to the 2002 Initiative of the Kingdom of Belgium, in which the concept it refers to has been defined as a "broad approach in which material and immaterial reparation of the disturbed relationship between the victim, the community and the offender constitutes a general, guiding principle in the criminal justice process" (Initiative of the Kingdom of Belgium 2002: 21). Since then, no clear-cut definition has been provided in a legally binding document. In spite of being introduced at the EU level, restorative justice is still an *in statu nascendi* problem-solving approach to crime in some Member States, such as Italy. The major proponents of this approach advocate it as being "the dominant model of criminal justice throughout most of human history for all the world's peoples" (Braithwaite 1998: 323). However, other scholars

(see, for example, Newburn (2003: 233 ff.)) maintain that, although sharing some commonalities with indigenous justice traditions (e.g. Maori and Native American), such claims have no historical grounds. Accordingly, restorative justice should rather be considered a new philosophy and practice of criminal justice that has been developing in different forms (e.g. victim-offender reconciliation programmes and family group conferences) in western countries since the social movements of the 1960s, while the term *restorative justice* itself was coined in an English-speaking environment (the coinage of the term is attributed to the psychologist Albert Eglash (1977: 91)). Leaving aside the issue of finding the origins of this approach, as far as the EU Member States are concerned restorative justice practices were already applied in some States before the appearance of the concept within the EU legal system, while in other Member States similar practices were still in their embryonic stage. In Italy, for instance, restorative justice measures have been applied within the juvenile criminal justice framework since the early 1990s, but are still in their infancy in the adult criminal justice system (Ministero della Giustizia 2000). Therefore, restorative justice in Italy can be said to refer to a secondary, marginal form of justice, developed out of previous foreign legal experiences, which is still felt to be unusual and unfamiliar by Italian citizens. EU documents confirm this attitude by reflecting a certain degree of variability in the usage of terminology: while in the EU-English documents the term *restorative justice* is used consistently, the data extracted from the EU-Italian subcorpus show that the same concept is designated by five different terms with different frequencies, thus showing that in Italian the concept has not reached the same degree of terminologisation as in English. Among these terms, the most frequent is *giustizia riparatoria* ('justice restorative'), used both in the 2002 Initiative of the Kingdom of Belgium and in documents issued by the Commission and the Parliament. The second most frequent term is *giustizia riparativa* ('justice reparative'), used for the first time in the *acquis* in 2011 both by the Commission and the Council. The lack of a one-to-one mapping between term and concept in the Italian subcorpus shows that the terminologisation process of a concept that was developed outside the Italian legal system – and is probably still perceived as a foreign one – has not reached its end within EU institutions. On the other hand, the trend that can be observed in Italian texts describing restorative justice programmes and measures which are mainly applied in foreign countries shows that among the ranks of Italian legal experts a narrower range of possibilities is available, as what they generally opt for is either the term *giustizia riparativa* or the English loan term *restorative justice*. Therefore, it can be concluded that the transfer of the concept designated by the term *restorative justice* into the EU and Italian legal systems has not followed the same path: within EU-Italian a proliferation of terms can be observed, whereas in the national variety of the same language a smaller spectrum of variation can be seen.

5. Conclusion

The European Union represents a "complex institutional structure" with a "unique legal character" (de Cruz 2007: 158), in which 23 EU languages coexist in order to fulfil the multilingualism principle. As the EU legal order is partially derived and partially further elaborated from the Member States' national legal systems, the EU languages are used to refer to a conceptual system that shares several features with national jurisdictions but also differs from them. Therefore, a certain degree of terminological innovation can be observed in the languages used to express the *acquis communautaire*.

In this paper the transfer of concepts between Member States' legal systems and the EU supranational legal system was taken into account in order to focus on secondary term formation and the terminological asymmetries that can be found when comparing national language varieties and their EU counterparts. The analysis carried out on a corpus of EU both legally and non-legally binding documents dealing with the standing of victims in criminal proceedings and victims' rights in EU-English and EU-Italian has provided examples of monolingual secondary term formation, i.e. the revision of an already existing term within one language, and multilingual secondary term formation, i.e. the transfer of a term between different languages, in the specific context of the EU. Unlike other cases where the core conceptual system in which the terms involved in such processes of secondary term formation is shared, within the EU these phenomena are inextricably interconnected with the underlying legal systems the terms refer to. Therefore, EU secondary term formation takes place in a context in which the presence of one or more languages is to be accounted for together with the existence of as many different conceptual systems. This multidimensional context represents a hothouse of formally old but conceptually revised or new terms that may be considered potential pitfalls both for translators and terminologists. On the one hand, from a translator's perspective, such multidimensionality may pose difficulties in the mapping of a certain term to the appropriate conceptual system, therefore leading to a misinterpretation of the source text. On the other hand, from a terminologist's perspective, multilingual terminology management systems may still not be sufficiently refined to represent subtle conceptual differences occurring within one or more languages and conceptual relations among different co-existing legal systems. The ongoing research project which this paper is part of is intended to delve into the possible improvements to translation-oriented legal knowledge representation.

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