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Equality of Languages at a Time of Legal Multilingualism

INTRODUCTION

The ordinary meaning of the term "multilingualism" refers to a situation where several languages are used. Similarly, legal multilingualism denotes the phenomenon of law expressed in two (bilingualism) or more languages. Drafting law in a number of languages represents only one aspect of legal multilingualism. The crucial element of multilingual law is the equality between languages in which law has been enacted, or the equality between language versions of a legal act.

In this paper, I will first explain how the afore-mentioned linguistic equality is understood (Section 1 and 2) and then describe the methods employed to achieve this equality (Section 3 and 4). The analysis is based on the comparative study of legislative drafting techniques applied in the Canadian bilingual legal system and in the multilingual legal system of the European Union – the two settings that have gone to great lengths, albeit using different approaches, in an effort to guarantee equality between language versions of laws in effect of these two jurisdictions. The investigation focuses mainly on the drafting of EU secondary law and Canadian federal governmental bills.

SIGNIFICANCE AND MEANING OF LINGUISTIC EQUALITY IN OFFICIALLY BILINGUAL CANADA AND THE MULTILINGUAL EUROPEAN UNION

The equality between language versions of a legal act is expressed in the principle of equal authenticity, which is accepted and applied in Canada and in the European Union. In order to explain better the gist of this principle, the reasons for legal multilingualism in both systems should be indicated at the outset.

Legal multilingualism stems from official multilingualism which gives a special status to languages known by the main linguistic groups within a territory. In the case of multilingual states, national languages usually become official[1], whereas in the case of international or supranational organizations, the official languages of their institutions are usually selected among official languages of their member or party states. According to Section 16(1) of the *Canadian Charter of Rights and Freedoms* – a part of the *Constitution Act, 1982*[2], English and French are the official languages of Canada. In the European Union, the Council Regulation No. 1 of 15 April 1958[3] indicates twenty-three languages[4] that are the official languages and the working languages of the EU institutions (Article 1).

In the European Union and in Canada, official multilingualism gives citizens access to law and to institutions in language(s) they know. Consequently, official multilingualism in both settings allows maintaining personal monolingualism[5]. Furthermore, the multilingualism of EU institutions

[1] An exception to this rule can be illustrated by the language regime in Cameroon that is a multilingual country comprising some 248 indigenous languages, one *lingua franca* (pidgin English) and two official languages (English and French). English and French – the two official languages – are not the national languages of Cameroon. The choice of the two languages as official was, on one hand, a continuation of colonial language policy, but on the other hand, it was an easier solution than the choice of an official language or languages from 248 national languages. The example of Cameroon illustrates very well the difference between official and national languages. For details on official bilingualism and language regime in Cameroon, see int. al. G. Echu, *Official bilingualism and the policy of translation in Cameroon*, in: M. Thelen, B. Lewandowska-Tomaszczyk (eds.), Translation and Meaning Part 5, Maastricht 2001, pp. 335–343.

[2] Enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11.

[3] OJ 017, 06.10.1958; hereinafter the Council Regulation 1/1958. The Regulation 1/1958 was enacted on the basis of Article 290 of the EC Treaty.

[4] They are (in alphabetical order): Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, and Swedish.

[5] Robert Phillipson considers multilingualism of the EU as a democratic right of the peoples of Europe and notes that "[t]he right in question [the right to multilingualism] seems to refer to the right of each European "people" to their own language (a right to monolingualism?), which converts in the EU into the right to be informed in the relevant official language". According to me, the same can be stated in reference to the Canadian official bilingualism.

reflects the policies of monolingualism exercised in Member States. Member States attach great importance to their national languages. Multilingualism, which guarantees equality between the EU Member States" national languages, "is a visible and audible manifestation of the Union's respect for the equality and autonomy of the member nations". In Canada, language has also a political aspect because of its relation to the two most influential cultural and linguistic groups within the federation. Hence, in the case of the European Union, official multilingualism reflects equality between Member States, whereas in Canada bilingualism is identified with the equality between Anglophones and Francophones. However, the equality between Member States or between linguistic groups can be actually reflected in a language regime only if equality between official languages is assured.

As regards legal multilingalism, it is important for linguistic equality that a citizen is able to understand – and, consequently, has access in the language he knows to – all legal acts that affect him. Therefore, legislation should be formulated in all official languages. This is important not only in Canada where domestic federal law binds directly all citizens, but also in the case of EU supranational law which – although enacted by the institutions of the European Union – is in some cases directly applicable and takes direct effect in Member States without the need for being incorporated or implemented by national authorities.

As far as EU secondary legislation is concerned, the afore-mentioned Council Regulation 1/1958 provides that regulations and other documents of general application shall be drafted in all the official languages (Article 4). In Canada the requirement to make, enact, print and publish all Acts of Parliament in both official languages stems from Section 6 of the *Official Languages Act, 1988*[6]. Moreover, Section 133 of the *Constitution Act, 1867*[7] grants the right to use English and French in parliamentary debates and requires English and French be used in records and journals of the Houses of Parliament and in printing and publishing Acts.

The requirement to draft and publish legislation in all official languages is strengthened in Canada and the EU by the established legal consequences that come about when one of the official language versions is found missing. In Canada, a court can rule that if a legal instrument is drafted, enacted

[6] An Act respecting the status and use of the official languages of Canada; [1985] c. 31 (4th Supp.); [1988] c. 38, assented to 28th July, 1988.

[7] The Constitution Act, 1867 (30 & 31 Victoria, c. 3, U.K.).

and published only in one official language the entire instrument is invalid until this instrument is re-enacted in both official languages.[8] In the European Union, the consequence of a lack of the version that should have been drafted, authenticated and published in a new language was determined in case *Skoma-Lux sro* v *Celní ředitelství Olomouc* C-161/06 of 11 December 2007. The European Court of Justice discussed the lack of a proper publication of a Community regulation in the Official Journal in the language of a new Member State, which became an official language of the EU. In the afore-mentioned case, the ECJ decided: "a Community regulation which is not published in the language of a Member State is unenforceable against individuals in that State" (paragraph 74(2)). However, the enforceability of the act does not mean that the act is invalid (paragraph 74(2)).

To sum up drafting and publishing laws in all official languages is inevitable for linguistic equality. However, it is not enough to publish legal acts in the official languages merely for informative purposes. If an actual linguistic equality is to be guaranteed, a citizen must be able to invoke, before a court, a legal provision in the language he knows. Moreover, courts should establish the meaning of a legal provision on the basis of all language versions. Alike in unilingual legal systems, only authentic texts of normative acts can be invoked before courts and be taken into consideration for judicial interpretation. Consequently, multilingual law must be not only drafted and published in all official languages, but also enacted and authenticated in these languages, and especially all language versions of a legal act must be equally authentic. This requirement is expressed in the principle of equal authenticity which is analyzed in the subsequent section.

2. EQUAL AUTHENTICITY – EQUALITY THROUGH LEGAL REGULATIONS

From a legal standpoint, linguistic equality is guaranteed in the principle of equal authenticity that is the basis of EU legal multilingualism and Canadian

[8] See the ruling in the *Reference Re Manitoba Language Rights*, 1985, 1 S.C.R. 721 where the Supreme Court of Canada stated that legislation enacted, published and printed only in one language is, and always have been, invalid.

legal bilingualism. In Canada and in the European Union, all official language versions of a legal act are equally authentic; in consequence, they are equally valid and equally binding. Therefore, they all have to be taken into consideration for interpretative purposes. None of them can be regarded as a translation or a copy, because they all are originals regardless of how they are drafted (theory of originals texts[9] accepted in the EU and Canada).

The Council Regulation 1/1958 which determines the official languages of European Union institutions and the languages in which secondary legislation is to be drafted[10], does not directly state that all official language versions of a legal act are equally authentic[11]. It is, however, commonly accepted that the term "official languages" means not only that legal texts are published in these languages but also that all official language versions are considered equally authentic[12].

Moreover, the principle of equal authenticity has been directly expressed and confirmed several times in the case-law of the European Court of Justice and of the Court of First Instance, as well as in the opinions of the Advocates General[13]. The Court stated that the different language versions are all equally authentic and that an interpretation of a provision of Community law involves a comparison of the different language versions[14].

In Canada, the principle of equal authenticity is directly expressed in Section 18 of the *Constitution Act, 1982* which provides that "[t]he statutes,

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9 On the theory of original texts, see: S. Šarčević, *New Approach to Legal Translation*, The Hague 2000, p. 20, 64.

10 As explained above, the paper concentrates on the secondary legislation of the EU. However, it should be mentioned that in the case of primary law, there are specific provisions in each treaty directly express the principle of equal authenticity. For instance, Article 7 of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (O.J. 17.12.2007, C 306/135) provides that the Treaty has been drawn up in a single original in all official languages and that the texts in each of these languages are equally authentic.

11 In EC legislation, however, the authenticity of each language version is sometimes directly addressed. For instance, the *Rules of Procedure of the European Commission* provide the definition of "authentic languages" for the purposes of these Rules. According to Article 17 (5) of the Rules, "«authentic languages» means all the official languages of the Communities, (...), in the case of instruments of general application, and the language or languages of those to whom they are addressed, in other cases" (OJ L 347/87 of 30.12.2005).

12 F. Dessemontet, T. Asnay *Introduction to Swiss Law*, 2nd edition, The Hague–Boston–London 1995, pp. 11.

13 As far as the opinions of Advocates General are considered, see, for instance, the opinion of Advocate General Alber delivered on 16 May 2002 in Case C-257/00 *Nani Givane and Others v. Secretary of State for the Home Department* [2003] ECR I-345, esp. par. 29; or the opinion of Advocate General Stix-Hackl delivered on 10 May 2005 in Case C-247/04 *Transport Maatschappij Traffic BV v. Staatssecretaris van Economische Zaken* [2005] *ECR I-09089* , esp. par. 17; the opinion of Advocate General Leger delivered on 13 November 2003 in Case C-371/02 *Bjornekulla Fruktindustrier AB v. Procordia Food AB* [2004] ECR I-5791.

14 See the following judgments of the ECJ: judgement of 6 October 1982 in *Case 283/81 Srl CILFIT* [1982] ECR 3415, par. 18; judgment of 24 October 1996 in Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-05403, par. 25 and 28; judgment of 17 July 1997 in Case C-219/95 *P Ferriere Nord SpA v. Commission of the European Communities* [1997] ECR I-04411, par. 12; judgment of 17 December 1998 in case C-236/97 *Skatteministeriet v. Aktieselskabet Forsikrinsselskabet Codan* [1998] ECR I-08679, par. 25; see as well the judgments of the CFI: judgment of 6 April 1995 in case T-143/89 *Ferriere Nord SpA v. Commission of the European Communities* [1995] ECR II-00917, par. 31; judgment of 6 October 2005 in joined cases T-22/02 and T-23/02 *Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd v. Commission*, [2005] ECR II-04065, par. 42.

records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative" (emphasis added). The rule has been confirmed in the *Official Languages Act, 1988*, in Section 13.

The equal authenticity rule was formulated for the first time in 1891 by the Supreme Court of Canada in *C.P.R. v. Robinson*[15] and then consistently confirmed by the Canadian courts. In *C.P.R. v. Robinson*, the Court stated that in the case of ambiguity of official language versions "one must be interpreted by the other". According to the Court, it is immaterial whether the article was first written in French or in English because both versions are equally authoritative and therefore, both have to be read to determine the intent of the legislation. Hence, due to the equal authenticity rule, even if one version is known to be just a translation of the other, the two versions have to be given the same weight during interpretation[16]. This results from the theory of original texts which provides that regardless how both versions of the legal act were prepared, none of them should be considered a translation or copy[17].

The Supreme Court of Canada, in *C.P.R. v. Robinson*, noted also that "[t]he English version cannot be read out of the law. It was submitted to the legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is"[18].

According to Côté[19], both language versions of the legislation form together one bilingual and authoritative text of the law, since they both constitute authentic expressions of the law. Consequently, in case of discrepancies between language versions of the interpreted legal act, none of them should be preferred or prevail[20]. If the two versions are in conflict, the court should find the meaning of the provision that is shared by both versions of the legal act. This rule is called the shared or common

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15 *C.P.R. v. Robinson* (1891), 19 S.C.R. 292.

16 P.-A. Côté, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, Brooklyn Journal of International Law" 2004, Vol. 29, No. 3, p. 1067.

17 R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th edition, Butterworth's Markham, Ont. 2002, p. 74–75; Cf. *Medovarski v. Canada (Minister of Citizenship & Immigration;* [2004] FCA 85) where the Federal Court of Appeal, in Section 79 refers to the statement of Sullivan.

18 Cf. Section 79 of the judgment of the Federal Court of Appeal in *Medovarski v. Canada (Minister of Citizenship & Immigration*; [2004] FCA 85) where it has been stated that "(...) since both versions of the legislation are equally authoritative, we are faced with two versions of the same law (...)".

19 P.-A. Côté, *Bilingual Interpretation...* , pp. 1067–1068.

20 See paragraph 18 of the judgment in case *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship & Immigration)* ([1998] 2 F.C. 303, 2 F.C. 303, [1997] F.C.J. No. 1713), where the Federal Court of Appeal stated that: "[t]his principle [principle of equal authenticity] implies that neither version of a bilingual statute is paramount, and one language is not to be given priority over the other". See also paragraph 79 of *Medovarski v. Canada* [2004] FCA 85. The Court referred to Sullivan in both rulings (respectively R. Sullivan, *Driedger on the Construction of Statutes*, 3rd edition, Toronto 1994, p. 218 and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th edition, Butterworth's Markham, Ont. 2002, pp. 74–75.

meaning rule[21] and is constantly reaffirmed in Canadian case law[22]. The shared meaning principle is the basic rule and the first step in the interpretation of bilingual law in Canada. However, it is just a guide for interpretation, not the absolute rule[23]. The Federal Court of Appeal in case Flota Cubana de Pesca v. Canada, 1988[24] stated that the shared meaning rule is applied because "the law is presumed to say the same thing in both languages, if a common meaning can be found which reconciles both versions, this meaning must prevail, unless it leads to absurd or unacceptable results"[25]. When the rule is applied, it should be taken into account whether or not the shared meaning is compatible with the intention of the legislature[26].

Although the European Court of Justice does not refer expressly to a shared meaning rule, it proposes a similar interpretation rule in cases of divergence between authentic language versions of a legal instrument. The ECJ underlined in case 30/77 *Regina* v. *Bouchereau* in 1977 and then constantly confirmed[27] that "[t]he different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part"[28].

This interpretation rule formulated by the ECJ in *Regina* v. *Bouchereau* can be compared with the following statement of the Supreme Court of Canada in the judgment in *Schreiber v. Canada* (2002) "[w]here the meaning of the words in the two official versions differs, the task is to find a meaning common to both versions that is consistent with the context of the legislation and the intent of Parliament"[29].

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21 Côté (1999: 412) refers to that rule as *la recherche du sens commun*. The expression "shared meaning" can refer to a literal shared meaning or to a notional shared meaning.

22 P.-A. Côté, *Bilingual Interpretation...* , pp. 1070–1071; ; R. Sullivan, *Sullivan and Driedger...*, p. 80. For instance, see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), p. 1071; *Dean v. Beothuk Data Systems Ltd.* [1998] 1 F.C. 433, par. 29; *Medovarski v. Canada* [2004] FCA 85, par. 77.

23 Cf. *R. v. Cie immobilière BCN* [1979] 1 S.C.R. 865; *Doré c. Verdun (Municipalité)* [1997] 2 S.C.R. 862 (S.C.C.).

24 *Flota Cubana de Pesca v. Canada* ([1998] 2 F.C. 303, 2 F.C. 303, [1997] F.C.J. No. 1713).

25 See: R. Sullivan, *Sullivan and Driedger...*, p. 80.

26 P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed., Carswell 2000, p. 328.

27 See, *inter alia*, Case 100/84 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1985] ECR 1169, paragraph 17; Case C-372/88 *Milk Marketing Board of England and Wales v. Cricket St Thomas Estate* [1990] ECR I-1345, paragraph 19; Case C-437/97 *EKW and Wein & Co. [2000] ECR I-0000, paragraph 42;* Case C-384/98 *D. v. W [2000] ECR I-6795,* paragraph 16; Case C-449/93 *Rockfon A/S v. Specialarbejderforbundet i Danmark* [1995] ECR I-4291, paragraph 28.

28 Case 30/77 *Regina v. Bouchereau* [1977] ECR 1999, paragraph 14.

29 *Schreiber v. Canada (Attorney General)* [2002] SCC 62. *Cf.* also *R. c. Lamy* [2002] SCC 25; *R. v. Mac* [2002] SCC 24; *R. v. Proulx* [2000] 4 W.W.R. 21, 2000 SCC 5.

Hence, it can be stated that both Canadian and EU courts respect the principle of equal authenticity and assure the equality of all official and authentic language versions of legislation when multilingual law is applied. This practice, however, does not stem only from a formal requirement to respect equal authenticity. There is twofold criticism of the analysed principle which undermines its value and questions the requirement to take into consideration all official language versions when the meaning of a legal text is ascertained. Firstly, it is indicated that due to differences between languages, it is not possible to create two or more language versions which could render the same meaning. Therefore, the uniform interpretation of all language versions is in fact impossible. Secondly, it is noted that multilingual law is usually drafted by means of translation. Thus, the version written in the language used when a legal text was first drafted – not the versions attained by means of translation – should be taken into consideration for interpretative purposes[30]. The example of French versions of Canadian federal law, which in the past were often omitted during judicial interpretation, because until late the 1960's French normative texts were drafted poorly and by means of translation[31], demonstrates how important the proper legislative drafting method is.

In order to avoid these forms of criticism which challenge the principle of equal authenticity and linguistic equality, nowadays EU institutions and Canadian Department of Justice make an effort to draft multilingual legal texts in a way that, firstly, assures a very high quality of all language versions, and secondly, makes it impossible to pinpoint one language version as entirely original. The two subsequent sections describe the legislative methods applied in the EU and Canada in order to guarantee linguistic equality already during drafting process.

[30] This clash between presumptions of the equal authenticity principle and the practice of legal multilingualism is described as fictions of equal authenticity (E. Wagner, Translation of Multilingual Instruments in the European Union, in: S. Šarčević (ed.), Legal Translation. Preparation for Accession to the European Union, Rijeka 2001, p. 67) or as paradoxes of legal multilingualism (A. Doczekalska, *Drafting and interpretation of EU law – paradoxes of legal multilingualism*, in: G. Grewendorf, M. Rathert Formal Linguistics and Law, Berlin, New York (Mouton de Gruyter) 2009, pp. 339–370).

[31] For more details, see: S. Lortie, R.C. Bergeron, *Legislative Drafting and Language in Canada*, Statute Law Review 2007, Vol. 28, No. 2, pp. 83–118.

3

LINGUISTIC EQUALITY THROUGH QUALITY OF ALL LANGUAGE VERSIONS

One of the presumptions of the principle of equal authenticity is the assumption that all authentic language versions of a legal act have the same meaning. If all authentic language versions actually render the same meaning, then there would be no reason to disregard one version because of discrepancy. Such uniformity is not easy to achieve, especially in the case of EU law created through a negotiation and consultation process involving several EU institutions or bodies. Moreover, each of these institutions has its own services assisting in the drafting process, i.e., translation services and lawyer-linguist groups. Therefore, strict cooperation between institutions and their associated services should be assured, and the form and structure of legal acts, as well as legal terminology, should be standardized. In order to improve the quality of legislative drafting, EU institutions as well as their services have prepared drafting guidelines, glossaries, terminology databases, style guides and reports on drafting quality[32]. The same practice of preparing and applying manuals and glossaries can be observed in Canada[33].

Both Canadian and EU drafting guidelines and manuals contain methods and rules which standardize drafting techniques, legal language and terminology, as well as the form and structure of legal instruments, and facilitate the drafting of coherent and uniform law and help to draw up consistent and equivalent language versions of a legal act.

First, coherent legal drafting is easier to achieve when legal acts are written in plain language. Therefore, Canadian and EU guidelines emphasize that law should be drafted in a simple way and short sentences should be drawn up[34]. Moreover, the same structure and organization of

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[32] The following EU drafting guidelines and manuals can be indicated: *Commission Manual on Legislative Drafting,* the Council's *Manual of precedents for acts established within the Council of the European Union* , the *English Style Guide - A handbook for authors and translators in the European Commission* adopted by the European Commission Directorate-General for Translation, the *Interinstitutional style guide - Vade-mecum for editors* adopted by the Office for Official Publications of the European Communities, the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions* adopted in 2000 by the European Parliament, the Council and the Commission.

[33] The following Canadian drafting guidelines and manuals can be indicated: the *Guide fédéral de jurilinguistique législative française* prepared by the *Groupe de jurilinguistique française*, *Legistics* (manual on drafting an English version), the *Legislation Deskbook* (*Manuel de légistique,*) the *Guide to the Making of Federal Acts and Regulations* (*Lois et règlements, l'essentiel*), *Legislative Drafting Conventions, Drafting Notes, Legislation Deskbook* and *Federal Regulations Manual*.

[34] For Canada, see, e.g., the *Drafting Conventions of the Uniform Law Conference of Canada* and *Legistics*; for the EU, see, e.g., the *Joint Practical Guide* and the

a legal act in all languages promote consistency between language versions. Therefore, drafting manuals indicate parts and elements of the act and explain what each part should contain[35]. The formulas always used in legal instruments are also listed. Guidelines clarify as well to what extent differences in syntax, number of sentences in one section or article are acceptable. In Canada, more differences are allowed than in the European Union. Taking into consideration the number of official languages of the EU, any divergences between language versions as regards form or structure, even at the level of a sentence, should be allowed only with great caution.

Moreover, in order to assure coherence and consistency of legal acts in all languages, both in Canada and in the European Union, drafting guides indicate reference materials, such as dictionaries, glossaries, terminological databases, handbooks on grammar, style, or legal writing and expressions, guides on legislative drafting or on institutions. Accordingly, in case of any doubts, drafters, translators, lawyer linguists, legal revisers and editors look up and search for the necessary information in the same materials. As regards Canada, reference materials are indicated in *Legistics*, whereas for the European Union, reference works are listed in the *Interinstitutional style guide – Vade-mecum for editors*.

The Canadian and EU manuals and guidelines also underline that law should be drafted in a way that respects Canadian legislative bilingualism and EU legislative multilingualism, respectively. It means that a drafter should take into consideration that a version that s/he is drafting is not the only language version of a legal act and that sometimes it is necessary to adjust language versions to each other so all of them can render the same meaning in correct and idiomatic language[36].

To sum up, the analysis of drafting guidelines and manuals used in Canada and in the European Union suggests that these two jurisdictions follow common rules and principles in the drafting of legal texts expressed in more than one authentic language. According to these guidelines, in Canada and in the European Union, all language versions should

Fight the Fog Campaign of the Translation Service of the European Commission.

35 For Canada, see, e.g., *Drafting Conventions of the Uniform Law Conference of Canada*; for the EU, see, e.g., *Commission Manual on Legislative Drafting* and the *Manual of precedents for acts established within the Council of the European Union*.

36 For Canada, see, e.g., Rule 36 of the *Drafting Conventions of the Uniform Law Conference of Canada*; for the EU, see, e.g., guideline 5 of the Joint Practical Guide.

be drafted in a simple, clear and coherent language, which assures the full equivalence between them. Moreover, as regards Canada, drafting should respect the bilingual and bijural character of federal law[37], whereas concerning the European Union, drafting should take into consideration the multilingual and autonomous nature of supranational law. The application of these rules should actually result in producing equally authentic language versions of a legal act. The next section explains whether this equality can be achieved during the drafting process and which drafting techniques fulfill this objective.

4 LINGUISTIC EQUALITY THROUGH LEGISLATIVE DRAFTING PROCESS

This section demonstrates how the drafting methods can fulfil the assumptions associated to the principle of equal authenticity. In Canada, bilingual federal legislation is co-drafted, i.e., both language versions are simultaneously drawn up, and as a result it is not possible to determine in what language a multilingual legal act was originally drafted. It is not possible to simultaneously draft law in twenty-three languages. However, EU institutions combine co-drafting and translating in various degrees in such a way that it is not possible to identify the sole original language of the entire multilingual legal act.

4.1. Co-drafting method in Canada

Although the legislative process takes place mainly in the Houses of the Parliament, legislative drafting of federal governmental bills[38] is centralised in the Department of Justice and is carried out by the Legislative Services Branch[39]. It is in the Legislative Services Branch that bills – to be

[37] Canada is described as a *bijural* country because of the coexistence of two legal traditions, i.e., common law and civil law, within its legal system.

[38] Since the co-drafting method is mainly applied when federal governmental bills are drawn up, the paper focuses only on these bills.

[39] A. Covacs *The French Jurilinguistics Group of the Department of Justice*, Canadian Paliamentary Review 1983, Vol. 6, No. 1, available at: http://www.parl.gc.ca/infoparl/english/ index.htm (21.12.2004, last consulted in January 2006).

introduced in the Parliament - are prepared in the two official languages. Until the late 1970s, a draft bill was usually prepared by the Legislation Section in English and then literally translated into French by a service outside the Department of Justice. Afterwards it was not even revised or reread by a French-speaking lawyer. This situation was changed in 1979, when the French Jurilinguistics Group (FJG) was created in the Department of Justice[40].

The drafting process can begin when the Cabinet gives the approval to the policy proposal and authorises the drafting of the bill. The Cabinet approval has a form of a Record of Decision which includes drafting instructions that have been prepared for the Memorandum to Cabinet.

When the Legislative Services Branch of the Department of Justice receives a Record of Decision with drafting instructions, two drafters are appointed by the Director of the Legislative Services Branch. They have to be bilingual and trained in law. An Anglophone drafter is responsible for the English version and a Francophone one for the French version. Both drafters cooperate and work together very closely. Their work differs depending on whether drafters work on a new bill or a bill that is to be amended. In the last case, co-drafters prepare only amendments proposed in the Parliament. In the case of a new act, co-drafters, at the outset, decide about a structure of a bill; in particular, how a bill should be divided into sections and paragraphs. If co-drafters predict difficulties as regards the formulation of a bill in one or both languages, they can ask jurilinguists to make relevant research, especially in order to prepare terminology, before the drafting process begins. Although jurilinguists are not present when a bill is drafted, they help the co-drafters in the case of any linguistic difficulties.

The drafting process takes place in special rooms where co-drafters sit side-by-side in front of computers and where there are two additional screens (without keyboards) for instructing officers. Co-drafters – supported by verbal instructions from officers – discuss, first, what should be included in the provision, and then each co-drafter writes a piece of text in the language for he or she is responsible. This text appears in both languages on the screens and is visible to both co-drafters and officers.

[40] S. Lortie, R.C. Bergeron, *Legislative Drafting and Language in Canada*, Statute Law Review 2007, Vol. 28, No. 2, p. 106; A. Labelle, *La corédaction des lois fédérales au Canada. Vingt ans après: quelques réflexions*, in: Proceedings, Conference on Legal Translation, History, Theory/ies and Practice, Geneva and Bern 2000.

The text is then discussed and any mistakes, discrepancies or vagueness are corrected. This method of work – as noted by Katharine MacCormick, Chief Legislative Counsel and head of the Branch – "can be very demanding and fairly stressful, but it does accomplish the job, often when there are extremely short deadlines"[41]. Sometimes, if the provision is very complicated, it can be first drafted in one language and be a basis for drafting in the second language. There is a direct interaction between co-drafters and instructing officers. However, co-drafters, not officers, are responsible for drafting the bill and for its quality. Therefore, co-drafters can refuse to introduce suggestions made by officers on terminology and expressions, structure of the act or choice of legal instruments. The meetings are held in English and French. The instructing officers submit instructions, comments and other documentation in both official languages. Drafters during the meetings use the language of their choice. After every meeting, drafters consult each other on the best way of drafting.

When the draft of the bill is ready, the revision stage begins and a draft is sent to jurilinguists and legislative revisers. Jurilinguists correct all contradictions and discrepancies between language versions in order to ensure the convergence between them. Apart from that, they verify the quality of drafting as regards style, terminology and phraseology in both languages. Jurilinguists correct also grammatical and spelling mistakes. They can also suggest reorganization of a bill if it can improve its readability. Sometimes an Anglophone jurilinguist can suggest changes in the French text and *vice versa*.

A bill is also verified by legislative revisers who consider, not only language issues (like clarity and consistency of language), but also the standard wording of particular expressions, the conformity of the draft with precedents and citations, with rules and standards on drafting. They also take into consideration correctness of cross-references, historical and marginal notes.

Although co-drafting method is very time-consuming, it produces very good results. In particular co-drafting guarantees equality between the language versions, and the high quality of both English and French language versions

[41] S. Bindman, *Legal Drafting: More than words on a page*, Justice Canada, Vol. 1, No. 3, available at: http://www.justice.gc.ca/en/dept/pub/jc/vol1/no3/legal.html (20.10.2005).

4.2. Legislative drafting in the institutions of the European Union

This section concentrates on an ordinary legislative procedure[42], during which the Parliament is together with the Council a co-author of a legal act[43] based on a proposal prepared by the Commission. This section scrutinized the use of languages during the drafting process in these three institutions. The focus is, however, on the last stage, i.e., the finalization of a legislative draft in the Council.

As far as preparation of a proposal in the Commission is concerned, four drafting stages can be distinguished. Firstly, a proposal is drafted in one single language version by technical experts who do not always have broad legal knowledge or experience in legislative drafting. Moreover, they often prepare a draft of a proposal in a foreign language (i.e., a language other than their mother tongue). Secondly, a consultation with different Commission departments is held. The so-called inter-service consultation also includes revision of the proposal by lawyers and legal revisers in the Legal Service. Thirdly, after the internal consultation process, the revised proposal – initially drafted in one single language – is translated into all the other official languages. Sometimes, all language versions of a proposal are compared and revised by lawyer-linguists as regards legal and linguistic quality and coherence between them. Finally, the proposal is adopted by the Commission, published in the Official Journal and sent to the Council and to the Parliament.

When the Commission submits a proposal in all official languages to the Parliament, it is examined by the appropriate committee. During its meetings, the committee's members use their own language. Then interpretation is provided from and into the official languages requested by the members (Rule 138(3) of the *Rules of Procedure of the European Parliament*, hereinafter EP Rules of Procedure)[44].

The Members of Parliament can table amendments to the proposal during the committee meetings in a language of their choice (Rule 150(1) of EP Rules of Procedure). Amendments approved in the committee are

[42] See Article 294 of the TFEU (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008/C 115/01). Before the Lisbon Treaty entered into force, this procedure was called a co-decision.

[43] G.G. Clariana, *The Quality of European and National Legislation. Comments*, in: A.E. Kellermann, G.C. Azzi, R. Deighton-Smith and S.H. Jacobs (eds.), Improving the Quality of Legislation in Europe, Martinus Nijhoff Publishers, 1998, p. 61.

[44] OJ L 44 of 15 February 2005.

translated into all official languages of the EU, printed, distributed and examined in the Plenary, during which Members of the Parliament (MEPs) have the right to speak in the official language of their choice and their speeches are simultaneously interpreted into the other official languages (Rule 138 (2) of the EP Rules of Procedure)[45].

It should be underlined that amendments in all official languages are scrutinized by the legal revisers. It is important that translation of amendments is prepared not by the same translators who worked on the translation of the Commission's legislative proposal, since the Commission and the Parliament have separate translation services. Therefore, legal revisers examine whether legal terminology is applied correctly and consistently and whether the text of amendments is clear and comprehensible. The task of a legal reviser is challenging, since amendments have to be introduced to all language versions and it is sometimes difficult to adjust them to the grammatical structure of the sentence of which they are to become a part[46]. Therefore, they can create legal, grammatical or stylistic errors very easily. Moreover, MEPs, who have the right to use the language of their choice, not only use their mother tongue but also apply legal terminology which is specific to their domestic legal systems[47]. Consequently, revisers must pay special attention whether terminology applied in the amendments is proper for the autonomous legal system of the European Union.

Hence, in the Parliament and to lesser extent in the Commission, all languages are used to prepare a legislative text. Moreover, lawyer-linguists in both institutions revise multilingual texts. However, the most important step in the process of guaranteeing for equality between language versions is the revision undertaken by jurist-linguists in the Legal Service of the Council. This final phase is undertaken when the substance of the act is established[48]. Jurist-linguists revise concordance, consistency and congruence between all language versions of a legal act and verify the linguistic

[45] The Parliament can decide that it is not necessary to distribute amendments in all the official languages. However, if at least thirty-seven Members of the Parliament object, the Parliament cannot make such decision (Rule 150 (6) of the EP Rules of Procedure).

[46] I. Frame, *Linguistic oddities in European Union Legislation: don't shoot the translator*, Clarity. Journal of the international association promoting plain legal language 2005, No. 53, p. 22.

[47] The official languages of the European Union are also official languages in Member States and are used for drafting national legal acts. Although the EU law is applied, in some cases even directly, in Member States, EU legal system is autonomous and has its own legal terminology. Terms used in EU legislation have their own specific meaning that differs from the meaning of legal terminology used in Member States. Hence, in order to avoid confusions, when EU law is drafted, legal terms too closely linked to national legal systems should be avoided.

[48] J.F. Morgan, *Multilingual legal drafting in the EEC and the work of Jurist/Linguists*, Multilingua: Journal of Cross-Cultural and Interlanguage Communication 1982, Vol. 1, No. 2, p. 109.

and legal quality of these versions[49]. The verification and revision of the final draft of a legal act takes place during a meeting attended by lawyer-linguists (one per each official language) and national experts in the subject-matter of the legislation who participated in the working group which has been preparing the legislative text[50]. The meeting is chaired by one of jurist-linguists who ascertains the language in which the text was drafted. This language or the text in this language are described as "source"[51] or "original" or in the Council terminology as "base language"[52] or "base"[53] or "basic text"[54]. English or French are usually used as a base language.

Once the base language is indicated, the *chef de file* examines whether the text is in line with the *Joint Practical Guide* and the *Manual of Precedents*. The other lawyer-linguists compare versions in their mother tongue with the base text in order to verify correspondence between them and ensure good quality of drafted acts. Consequently, jurist-linguists can clarify the text, make it more logical and coherent, correct terminological mistakes and withdraw discrepancies. In doing so, they have to propose changes to the text. Not only texts that have been translated can be changed, also the base text is changeable; especially when it was badly drafted, or contains obvious mistakes[55]. The shortcomings of the base text are sometimes disclosed

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[49] See: T. Gallas, *Evaluation in EC Legislation*, "Statute Law Revue" 2001, Vol. 22, p. 89; T. Gallas, T. and M. Guggeis, *La traduction juridique dans l'expérience des juristes-linguistes du Conseil de l'Union européenne*, in: J.-C. Gémar, N. Kasirer (eds.) Jurilinguistique: entre langues et droits – Jurilinguistics: Between Law and Language, Montréal 2005, p. 499; M. Guggeis, *Multilingual Legislation and the Legal-linguistic Revision in the Council of the European Union*, in: B. Pozzo, V. Jacometti (eds.), *Multilingualism and the Harmonisation of European Law*, Kluwer Law International, 2006, pp. 113–117.

[50] J.-C. Piris, *The Legal Orders of the European Community and of the Member States: Peculiarities and Influences in Drafting, the English version of the paper submitted for the Conference "The Sir William Dale Memorial Lecture"*, London, 8 November 2004, p. 10; J.-C. Piris, *Union européenne: comment rédiger une legislation de qualité dans 20 languages et pour 25 États members?*, the French version of the paper submitted for the Conference The Sir William Dale Memorial Lecture, London, 8 November 2004, p. 8; M. Guggeis, *Multilingual Legislation and the Legal-linguistic Revision in the Council of the European Union*, in: B. Pozzo, V. Jacometti (eds.), Multilingualism and the Harmonisation of European Law, Kluwer Law International, 2006, p. 115.

[51] J.-C. Piris, *The Legal Orders of the European Community and of the Member States: Peculiarities and Influences in Drafting*, the English version of the paper submitted for the Conference The Sir William Dale Memorial Lecture, London, 8 November 2004, p. 9.

[52] J.F. Morgan, *Multilingual legal drafting in the EEC and the work of Jurist/Linguists*, Multilingua: Journal of Cross-Cultural and Interlanguage Communication 1982, Vol. 1, No. 2, p. 114.

[53] J.-C. Piris, *The Legal Orders of the European Community and of the Member States: Peculiarities and Influences in Drafting*, the English version of the paper submitted for the Conference The Sir William Dale Memorial Lecture, London, 8 November 2004, p. 9.

[54] T. Gallas, *Evaluation in EC Legislation*, Statute Law Revue 2001, Vol. 22, p. 90; T. Gallas, *Understanding EC Law as "Diplomatic Law" and its Language*, in: B. Pozzo, V. Jacometti (eds.), Multilingualism and the Harmonisation of European Law, Kluwer Law International, 2006, p. 114. Compare French equivalent "texte de base" (J.-C. Piris, *The Legal Orders of the European Community and of the Member States: Peculiarities and Influences in Drafting*, the English version of the paper submitted for the Conference The Sir William Dale Memorial Lecture, London, 8 November 2004, p. 7; T. Gallas, T. and M. Guggeis, *La traduction juridique dans l'expérience des juristes-linguistes du Conseil de l'Union européenne*, in : J.-C. Gémar, N. Kasirer (eds.), *Jurilinguistique: entre langues et droits – Jurilinguistics: Between Law and Language*, Montréal 2005, p. 499.

[55] T. Gallas, T. and M. Guggeis, *La traduction juridique dans l'expérience des juristes-linguistes du Conseil de l'Union européenne*, in : J.-C. Gémar, N. Kasirer (eds.), *Jurilinguistique: entre langues et droits – Jurilinguistics: Between Law and Language* ; Montréal 2005, p. 499 ;
J.-C. Piris, *The Legal Orders of the European Community and of the Member States: Peculiarities and Influences in Drafting*, the English version of the paper submitted for the Conference The Sir William Dale Memorial Lecture, London, 8 November 2004, pp. 10–11; J.-C. Piris, *Union européenne: comment rédiger*

through the comparison of this text with translations. Paradoxically, multilingualism of EU law can contribute to the improvement of the quality of all language versions. Moreover, sometimes it is necessary to introduce changes into the base text in order to adjust it to linguistic needs of other language versions.

The above analysis demonstrated that it is possible to draft a multilingual legal act in a way that all language versions are originals and convey the same legal meaning and use idiomatic language. As a result, presumptions of the principle of equal authenticity are not fictions and equality between language versions is assured in the drafting process. These guarantees are fully provided by the simultaneous co-drafting method applied in Canada at federal level, which does not contain any elements of translation.

However, because of a great number of official languages in which EU law is drawn up, the Canadian co-drafting method cannot be applied for EU legislative purposes and translation must be present in EU legislative drafting. On the other hand, although language versions of EU legal acts are not drafted simultaneously, still requirement of the principle of equal authenticity that all language versions are originals can be fulfilled. While it is possible to ascertain in which language the proposal was drafted and in which languages the legislative text was negotiated, at the level of individual provisions it is not possible to indicate whether and which language influenced the provision in question. As explained in this paper (Section 4.2.), the original version, i.e., base text, can be changed because comparison with translated versions reveals mistakes or vagueness in the base text or the base text must otherwise be adjusted to the linguistic needs of other language versions. Therefore, the base text is not anymore an "original text". It is rather a hybrid text influenced by other languages and, in fact, it can be difficult to point only one language as a source (original) language. As a result, one cannot reject any of the language versions of a legal act on the basis that it is not original. Moreover, during the whole legislative process, a constant effort is made in all institutions to use all official language to draft legislative texts. It is true that a proposal is drafted only in one language in the Commission and then translated into all the other official languages. Paradoxically, the text of the original proposal is often of much

une legislation de qualité dans 20 languages et pour 25 États members?, the French version of the paper submitted for the Conference The Sir William Dale Memorial Lecture, London, 8 November 2004, p. 8.

worse quality than its translations. This stems from the fact that in the European Union legislative proposals are drafted by experts in the domain which is being legislated but who are not trained in legislative drafting and very often draft in a language other than their mother tongue. As a result, texts written by non-native speakers are sometimes incomprehensible to native speakers of the language in which the act was drafted[56]. On the contrary, versions, which are translated by professional translators into their mother tongues, are of much better quality. It is in the contradiction to the common opinion on the inferiority of translation. However, all shortcomings are overcome, and inaccuracies and discrepancies are corrected during the revision process. Consequently, one can state that not only Canadian co-drafting but also EU drafting process is able to guarantee equality between authentic language versions of a legal act.

[56] M. Guggeis, *Multilingual Legislation and the Legal-linguistic Revision in the Council of the European Union,* in B. Pozzo, V. Jacometti (eds.), *Multilingualism and the Harmonisation of European Law,* Kluwer Law International, 2006, p. 115 .