

The following article, “Rechtsverordnung” and the Terminology of Legal Translation, by Geoffrey Perrin, appeared in *Lebende Sprachen* Nr. 1/1988

Geoffrey Perrin has kindly allowed me to make it available online at [www.margaretmarks.com/Transblawg](http://www.margaretmarks.com/Transblawg).

Not only does it offer advice on translating the word ‘Rechtsverordnung’ that is still useful today, but it also describes the process a legal translator went through to express a concept from a foreign legal sentence in English.

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## “Rechtsverordnung” and the Terminology of Legal Translation

### 1. Introduction

The special terminological problems involved in the translation of legal texts are by now fairly well known. They have their root in the difficulty of applying to this sphere one of the basic tenets of successful terminology work – namely, the need for a comparison of the system of concepts as between one language (more precisely, culture) and another (Picht and Draskau 1985; Hohnhold 1986). The institutions of the various legal systems around the world can differ vastly from one another, particularly where the one system is assignable to the Roman law tradition (e.g. the Federal Republic of Germany) and the other to the common law tradition (e.g. England and Wales). To take just one example: even as “obvious” a translation as “prosecution” for “Strafverfolgung” fails in fact to convey an essential conceptual difference – the German procedure is governed by the principle of mandatory prosecution (Legalitätsprinzip/legality principle), the English one by the principle of discretionary prosecution (Opportunitätsprinzip/expediency principle). It was no doubt just this kind of difficulty which was being referred to when, at the opening plenary session of the 1. Deutscher Terminologie-Tag, a plea was made for the holding of a special conference on the problems of “vergleichende Terminologie”.<sup>1)</sup>

In the following, I am going to try and throw some light on the difficult decision-making process involved in the terminology of legal translation. To do this, I propose to take a particularly knotty problem from this field (one which is occasionally the topic of queries I get from other translators) – namely, the English rendering of the German “Rechtsverordnung” – and to attempt to establish criteria which will permit us to arrive at a satisfactory translation.

### 2. “Rechtsverordnung”

Creifelds (1983) has the following to say about the “Rechtsverordnung”:

*Rechtsverordnung ist eine allgemein verbindliche Anordnung für eine unbestimmte Vielzahl von Personen, die nicht im förmlichen Gesetzgebungsverfahren ergeht, sondern von Organen der vollziehenden Gewalt (Bundes-, Landesregierung, staatliche Verwaltungsbehörden, aber auch Selbstverwaltungskörperschaften) gesetzt wird. Die Art des Zustandekommens unterscheidet die Rechtsverordnung vom formellen Gesetz, ihr allgemeiner Inhalt von dem auf die Regelung eines Einzelfalles gerichteten Verwaltungsakt, ihr Wesen als Rechtsatz von den nur verwaltungsintern wirkenden Verwaltungsvorschriften. Da sie Rechtsnormen enthält, ist die Rechtsverordnung Gesetz im materiellen Sinn. ... ein formelles Gesetz kann die vollziehende Gewalt zum Erlaß von Rechtsverordnungen ermächtigen. ... Unzulässig ist ... die Ermächtigung zu „gesetzesvertretenden“ Verordnungen i.S. einer selbständigen und ursprünglichen Regelung einer Materie; Rechtsverordnungen dürfen nur zur Durchführung und zur inhaltlich bereits vorgezeichneten Ausfüllung und Ergänzung des formellen Gesetzes ergehen.*

The language professional coming new to the field of German-English legal translation quickly discovers that this concept is most frequently rendered in English translations enjoying some sort of official status by “ordinance”. Examples are legion: it will suffice here just to mention the translation of the Federal German “Arbeitsförderungsgesetz” (Employment Promotion Act) done by the International Labour Office (e.g. section 3 (5), sections 108 and 109) and of the Federal German “Gesetz gegen Wettbewerbsbeschränkungen” (Act against Restraints of Competition) contained in F.-K. Beier et al. (1983) (e.g. sections 33 and 109). What justification is there, then, for using this term in English translations?

Let us start by considering legislative practice in the United Kingdom. An ordinance here is a comparatively rare and highly specialised form of legislation, as is made clear in Martin (1983):

**ordinance** n. *One of the forms taken by legislation under the royal prerogative, normally legislation relating to UK dependencies.*

The term also has an archaic ring about it, as evidenced by the observations made by Walker (1980) and Padfield (1981:16).

Moving to the other major English-medium legal system, that of the United States, we find that Farnsworth (1983:57) has the following to say: “Municipal enactments, commonly called ordinances, are usually of only local interest.” In fact, Farnsworth (loc. cit.) places ordinances, together with municipal charters, rules and regulations, on the eighth and bottom rung of his hierarchy of US legislation.

(As regards the notion of hierarchy: I do not intend here to get bogged down in unnecessary details of the relationship between regulatory provision at the federal level and that at state level, either with regard to the United States or to the Federal Republic of Germany.) And should we choose to regard Farnsworth only as a persuasive authority, then the United States Code Annotated (Title 5 § 5520) is, to continue the legal idiom, surely a binding one. This section, dealing with city or county ordinances providing for the collection of employment tax, contains under (c) (3) the following definition:

*“ordinance” means an ordinance, order, resolution or similar instrument which is duly adopted and approved by a city or county in accordance with the constitution and statutes of the State in which it is located and which has the force of law within such city or county.*

It can thus be seen that although ordinances do indeed have “the force of law” in both the United Kingdom and the USA (cf. Creifelds (loc. cit.): “Rechtssatz”), there must nonetheless be strong reservations about employing the term as a translation of “Rechtsverordnung” if we take the notion of “system” as a criterion. Whilst “Rechtsverordnung” is a middle-order concept in the Federal German regulatory hierarchy (it has above it “Verfassungsrecht” and ordinary “Gesetze”, and below it, the “Verwaltungsakt” and the “Verwaltungsvorschrift”), and can relate furthermore to virtually any subject-matter, “ordinance” in both England and the USA is a lower-order entity<sup>2)</sup> – in the former country because of its restricted scope and frequency, in the latter because of its lack of importance relative to other types of regulatory provision.<sup>3)</sup>

Thus far, the issue seems fairly clear-cut: the differences between the German and the English-language concept outweigh the similarities. Before we can start to draw conclusions for our work as terminologists, however, we must first answer another question: are there any English-medium legal systems in the world which employ the term “ordinance” in a sense which differs from that understood in both the USA and the UK?

Research into this point produces an answer which is really only the start of the terminologist’s problems, not the end: namely, “yes”! The WIPO (World Intellectual Property Organization) document PAC/CE/1/2, relating to a meeting of experts on industrial property protection, contains in Annex 1 a “List of Selected Trademark Laws”. There, on page 3, under (g), we find entered for Hong Kong: “Trade Marks Ordinance 1954 (revised edition of 1964)”. The context makes clear that in Hong Kong, an ordinance is at least equivalent in status to a “Rechtsverordnung”.

### 3. Conclusions

Faced with the kind of terminological decision we have here, we need to look carefully at the communicative situation, and at one element of it in particular: the addressee. Putting it simply, it boils down to a question of reader-expectancy: where we know that the recipient of our translation is familiar with an English-medium system of law in which “ordinance” is a middle or higher-order concept (as in Hong Kong), we can justifiably use this term to render “Rechtsverordnung”. In the other two cases which may occur, however – that is, the reader of our translation is known to be most familiar with an English-language legal system in which “ordinance” is a lower-order concept, or the audience is so wide and varied as to be unspecified – we need to find another term. The question, of course, is *what!*

Let us look again at the two major English-medium legal orders and see whether either of them offers any help here. In the UK, the form of statutory provision which has grown most sharply in volume in recent years is delegated legislation. Martin (op. cit.) defines this as follows:

#### delegated legislation (subordinate legislation)

*Legislation made under powers conferred by an Act of Parliament (an enabling statute, often called the parent Act). The bulk of delegated legislation is governmental: it consists mainly of . . . instruments of various names . . . made by ministers. . . . Its primary use is to supplement Acts of Parliament by prescribing the detailed and technical rules required for their operation; unlike an Act, it has the advantage that it can be made (and later amended if necessary) without taking up parliamentary time.*

The similarity with the Creifelds’ definition given above is unmis-

takable (cf. also Creifelds' observation: "Das Institut der Rechtsverordnung hat in neuerer Zeit große Bedeutung erlangt, weil es den zeitraubenden Weg der Gesetzgebung erspart und schnellere Anpassung der Rechtslage an veränderte Verhältnisse ermöglicht."). Consequently, I see no good reason for not adopting "delegated legislation" as a rendering of "Rechtsverordnungen" where the latter is used as a general collective term. "Delegated legislation" I prefer to its synonym "subordinate legislation" for the simple reason that I have actually found the former, but not (yet) the latter, used in texts with an international circulation – namely, Council of Europe documents (see for example the judgment of the European Court of Human Rights in the Deumeland case, § 66).

This still leaves us with the problem of what to do when "Rechtsverordnung" has specific reference.<sup>4)</sup> The most important form of delegated legislation in the UK is the statutory instrument, the latter being known up to 1948 as statutory rules and orders (Walker op. cit.). If we look a little more closely at the term "statutory order", we notice something rather interesting: its two constituent elements (statutory + order) form a neat semantic fit with those of "Rechtsverordnung" (Recht + Verordnung). The semantic transparency of the term, lacking in the more modern expression "statutory instrument", obviously commends it from the point of view of international comprehensibility, and in fact, I have found it used in two translations, one of major significance – that of the German "Bürgerliches Gesetzbuch" (Civil Code) done by Forrester et al. (e.g. section 1615f (2)) – the other also by no means unimportant: that of the Federal German "Warenzeichengesetz" (Trademark Law) published in an issue of the WIPO review, "Industrial Property".<sup>5)</sup> The first is notable for the fact that it is an American work, so we can assume that the term "statutory order" must be readily understandable to anyone with a US legal background. The second – unfortunately! – is notable for the fact that the translator blots his copybook by translating "Rechtsverordnung" in section 36 subsection 1 as "statutory order", and then unaccountably following this up by translating the same German term in section 36 subsection 2 as "ordinance"! As a final point, I should perhaps mention that in the UK, "statutory order" is by no means as obsolete a term as I may have inadvertently suggested – in fact, it still occurs today alongside "statutory instrument" (see for example the statutory instrument reproduced in Padfield (op. cit.: 393)).

Summing up, I would like to make the following points in relation to the translation of legal texts:

- (i) The elaboration and consolidation of legal terminology for translation purposes demands much painstaking research and constant reference to original texts in both source and target language.
- (ii) The choice of one term rather than another will in some instances be determined by reader-expectancy (some may prefer to call this "reader-experience" or "reader-background"). In the present article, this has been exemplified by the choice between "ordinance" and "statutory order".<sup>6)</sup>

Admittedly, both these points apply equally well to most other forms of translation – for instance, the "horses-for-courses" approach proposed in (ii) was described in relation to technical translation at the Johannes Gerlach "Seminar für Computerunterstützte Übersetzung" in Cologne in October 1985, where the possibility of storing in a data-retrieval system customer-specific wishes with regard to terminology was explained. My main reason for emphasizing these two points here is my belief that they have special relevance in connection with what Picht and Draskau (op. cit.: 128) have called the "soft sciences".

One point I have not touched on, as it would have made the present article unreasonably long, is what to do when the target language offers no term whatsoever which we can adopt or adapt for translation purposes, simply because the legal institution referred to in the source language (here German) does not exist in any English-

medium system of law known to us. Again, the phenomenon of "creative terminology" – filling a gap, which will not always be the same as text exegesis – is probably common to all the soft sciences, which in turn suggests that there is indeed a good case which can be made out for a major conference to look at the special difficulties of those of us working in these "high risk" translation areas!

#### 4. Notes

- <sup>1)</sup> The choice of expression was, admittedly, a rather unfortunate one, since as we have already indicated, all terminology work presupposes comparison. What was meant was, however, clear enough! Another recent conference which dealt with the specific problems of legal translation, in particular the text-variety "contract", was the 12th. annual conference of the International Association for Language and Business, held at Mons, Belgium, in November 1986 on the theme "Synergy and diversity in industry, law and language" (see the report in "Language Monthly", No. 39, December 1986, p. 19). "Text exegesis" was there proposed as a way of getting round these problems.
- <sup>2)</sup> It was perhaps this status discrepancy which prompted the translator of the "Grundgesetz" (Basic Law – published by the Press and Information Office of the Federal German Government) to render "Rechtsverordnung" with "ordinance having the force of law" (e.g. Article 80). There are two points to be made about this: firstly, in a formal sense, "ordinance having the force of law" is a little on the unwieldy side, especially if it needs to be used frequently; secondly, and more importantly, as regards substance, we have already demonstrated that ordinances do indeed have the force of law, so the formulation employed here is actually tautological.
- <sup>3)</sup> There are, in fact, historical exceptions to this in the USA – in other words, instances where an ordinance is indeed a piece of legislation of no small significance. The outstanding example of this is probably the Northwest Territorial Government Ordinance of 1787. A similar position obtains in the UK also if we take a historical perspective (see the entry in Walker (op. cit.)). It will, I hope, be reasonably clear, though, that my approach in the present article is synchronic rather than diachronic: that is, I am only concerned with the term "ordinance" as used in a modern legislative context.
- <sup>4)</sup> Walker (op. cit.), in his entry on "ordinance", points out that delegated legislation in France can in fact take the form of an "ordonnance" ("ordinance"). To use this term in an English text, however, and to expect the reader to attach a French meaning to it, is – to put it mildly – probably rather an unreasonable approach.
- <sup>5)</sup> It is worth mentioning, too, that "statutory order" is also given in the Romain dictionary as the penultimate suggestion in a fairly lengthy list of proposed translations of "Rechtsverordnung".
- <sup>6)</sup> A third rendering of "Rechtsverordnung" which one sometimes comes across is "regulation" – see for instance the translation of the German "Gesetz gegen den unlauteren Wettbewerb" (Act against Unfair Competition) in Beier et al. (op. cit.) (e.g. section 27 subsection 2). I have not attempted to discuss this in my article, as I regard the term as too general and as such best reserved for translating the German "Regelung". The practice has possibly been influenced by the fact that EEC "regulations" – the only type of Community law indisputably directly applicable in all Member States – are known in German as "Verordnungen". This, however, is a special feature of international law, whereas I have been concerned in the present article to compare domestic systems of law. Another possible explanation is that the use of "regulation" to convey "Rechtsverordnung" has been inspired by US federal and state "administrative rules and regulations", the federal variety indeed occupying a middle position in Farnsworth's hierarchy (loc. cit.). As I have already indicated, however, these are very general terms and are probably best kept for "Regel" and "Regelung" respectively, although I must confess that if I were translating for a purely US audience, I might well be tempted at least to review my terminological practice.

#### 5. References

- BEIER, F.-K. et al.: *German Industrial Property, Copyright and Antitrust Laws*, Vol. 6 in IIC Studies (Studies in Industrial Property and Copyright Law), Verlag Chemie, 1983.
- Council of Europe: European Court of Human Rights, Deumeland Case (9/184/81/128) – Judgment, Strasbourg 29 May 1986. (All judgments of the European Court of Human Rights are also published by the Carl Heymanns Verlag KG.)
- CREIFELDS, C.: *Rechtswörterbuch*, C. H. Beck'sche Verlagsbuchhandlung, 1983.
- FARNSWORTH, E. A.: *An introduction to the legal system of the United States*, 2nd. edition, Oceana Publications, Inc., 1983.
- FORRESTER, I. S. et al.: *The German Civil Code*, North-Holland Publishing Company, 1975.
- HOHNHOLD, I.: *Zehn Grundsätze zu Themenkreis 1 des I. Deutschen Terminologie-Tags*, Cologne, 27th./28th. November 1986: Terminologierarbeitung und -sicherung (Grundlagen der Terminologearbeit) (in particular Grundsatz 2).
- International Labour Office (ILO): *Employment Promotion Act*, Legislative Series, 1969 – Gef. F.R.I.
- MARTIN, E. A. (ed.): *A Concise Dictionary of Law*, Oxford University Press, 1983.
- PADFIELD, C. F.: *Law made simple*, Heinemann, 1981. Revised by F. E. Smith.
- PICHT, H. and DRASKAU, J.: *Terminology: An Introduction*, University of Surrey, Department of Linguistic and International Studies, 1985.
- Press and Information Office of the Federal Government, Bonn: *The Basic Law of the Federal Republic of Germany*, 1981.
- ROMAIN, A.: *Wörterbuch der Rechts- und Wirtschaftssprache*, Teil II, Deutsch-Englisch, C. H. Beck'sche Verlagsbuchhandlung, 1980.
- United States Code Annotated: Title 5, *Government Organization and Employees*, § 5101 to 7100, West Publishing Co., 1980.
- WALKER, D. M.: *The Oxford Companion to Law*, Oxford University Press, 1980.
- World Intellectual Property Organization: Document PAC/CE/1/2 of 6. 3. 86, relating to the First Session (Geneva, May 5–7) of the Committee of Experts on the (sic) Protection against Counterfeiting.
- Trademark Law (Germany, Federal Republic of), in "Industrial Property", December 1979 (Laws and Treaties, Text 3-001).