National language, and for foreign languages which we need for many purposes but which are not part of our National identity and ancestral heritage. That is the logistics of the language campaign today.

The future of a truly independent Malta depends on the right feeling and clear thinking of the younger generation who are publicly expressing their dissatisfaction with the present colonial mentality of some of the older generation. When the older generation fails to lead, the younger generation has no choice but to assume the leadership in its stead, and that briefly is the new Maltese History in the making.

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LANGUAGE AND LAW

By G. MIFSUD BONNICI

I

IN introducing a subject as complex as 'Philosophy of Law', I must first attempt to clear up certain difficulties of terminology.

The term itself 'Philosophy of Law' needs clarification. We use it here in the sense it is used on the Continent and it is convenient to note its common usage: Filosofiae juris; Filosofia del Diritto; Philosophie du Droit; Philosophie des Rechts; Filosofia del Derecho; Filosofia de Direito; Filosofia dreptului. The difficulty arises when we consider English practice. The term has not been traditionally used and although it now occurs more often, English writers still call Philosophy of Law by some other name. Unfortunately there is no uniformity in the use of other terms. The traditional 'Jurisprudence' is being used less often but it has been replaced by the use of terms which are chosen according to the personal preference of the author.[1] Thus when, in a recent work we read 'the book provides a brief review of some of the more urgent problems which the Idea of Law will be called upon to tackle' it is clear that Lloyd is using 'The Idea of Law' to mean Philosophy of Law in the continental sense.[2] He uses earlier, 'philosophy of Law' but abandons it for a personal preference. Even his use of capital and small letters for the two terms is significant. Similarly, Friedmann, prefers the term 'Legal Theory' and uses it to cover all that makes up the History of Philosophy of Law, when he writes 'It is therefore, inevitable that an analysis of earlier legal theories must lean more heavily on general philosophical and political theory, while modern legal theories can be more adequately discussed in the lawyer's own idiom and system of thought'.[3]

The position is clearly unsatisfactory. There is perhaps no other branch of knowledge where the name of the study itself is subject to personal preference and choice. This causes, not infrequently, bewilderment and confusion especially among non-English students and scholars.

[1] For the meaning of 'Jurisprudence' itself see Dias, R.W.M. – 'Jurisprudence' London 1964 Chapter 1. Introduction pp. 1-16. He concludes thus 'In short, the word "Jurisprudence" means whatever a person wants it to mean' (p. 4)!
[2] Lloyd Dennis – *The Idea of Law* London 1964. Preface. p. 10.
[3] Friedmann, W. – *Legal Theory* – London 4th Edition 1960. p. 4.

II

At the root of all that has been said above lie the fundamental differentials which divide the Western World into two juridical cultures – the Continental and the Anglo-Saxon. These differentials blossom forth in language. When we are dealing with concepts we may pass unnoticed differences of substance because we readily assume that the concepts we receive are the same as, or at least correspond to, the concepts with which we are familiar. We receive them usually at second hand, in the language which we normally use. It is only when we know the other language well that we realize, at first hand, that the difference sometimes is not merely linguistic.

Continental culture has inherited from Rome two different concepts expressed by two different words, closely linked but separate and distinct – 'jus' and 'lex'. All continental languages maintained this distinction and have two words to express each of these concepts as 'diritto' and 'legge' in Italian, 'droit' and 'loi' in French and so on. English expresses both concepts by the single word 'Law'. Or does it? Did English juridical thinking in fact distinguish the two concepts? Of course the difficulty is soon overcome when 'jus' is translated as Law and 'lex' is translated as Positive Law. But in point of fact one doubts whether any English writer does keep in mind this distinction for long, or constantly and meticulously uses both terms. But even if they do, we are still in the wood; for how are we to deal with the further distinction between what in Italian is known as 'legge' and 'legge positiva'? The use of 'Statute' helps, but, again, it has not been generally adopted and in the land of Common Law it creates difficulties in another respect.

The same thing happens when we have to deal with another fundamental concept – Right. All the major continental languages use one word to cover the two concepts which in English are expressed by the two words Law and Right. This is Diritto, Droit, Recht, Derecho. Continental writers distinguish the two meanings of the same word by referring it to the object (Law) or to the subject (the person and therefore, Right). Thus, to take Italian as our example 'Diritto' in the objective sense means what in English is Law, while 'diritto' in the subjective sense means what in English is Right. The trouble starts, however, when one hurridly translates 'Diritto' as Law, according to the procedure and in the sense we mentioned in the preceding paragraph, and then proceeds to talk of 'Law' in the objective sense and 'Law' in the subjective sense (right), which is sheer nonsense for the English 'Law' has no objective and subjective senses. The word 'Law' is never used in the 'subjective sense' at all; for that, there is the word 'Right'.

Until very recently this was one of our typical disorientations, Indeed, we have been unfortunate enough to be caught in the vice of the word-concept relationship. We have a continental juridical culture which we strain to express in the English idiom. We have to fit concepts into a language which has other concepts and therefore appropriate words to express those concepts but not others. We are not alone anymore. We are not in fact amazed, to read the following in a recent translation of Giorgio Del Vecchio's 'Philosophy of Law': 'Distinction between objective and subjective Law. It is an easy matter to clarify at this point, two distinct meanings of the word 'right' which are closely connected to each other.'[4]

We observe here that not only 'Law' is being given an objective and subjective sense but even 'right' has now acquired two distinct meanings. This is incomprehensible (or at least 'technical') to anyone who is unfamiliar with Italian and who therefore is blissfully unaware that both 'law' and 'right' in that passage are simply 'Diritto' and 'diritto' in the Italian original.[5]

III

One seems to detect at this stage of our itinerary an objection with which we have become quite familiar in our everyday life, in similar situations. This is usually formulated as follows: Granted that all this is so, is it all that important? After all, it is merely a question of words:

> 'What is a name? that which we call a rose.
> By any other name would smell as sweet'[6]

Poetry is indeed a terrible adversary. In its beautiful garb of powerful mnemonic effect it can make the false appear to be true. Moreover, it has a unique vitality. Verses such as these, which are dependent for their true meaning on the whole context, because of their aesthetic quality, acquire an autonomous and independent life of their own and are so transmitted by mere repetition. It is in this autonomous form that they stick to the memory.

We do not wonder why Plato was so distrustful of poetry. The Sophists

[4] Del Vecchio, Giorgio – *Philosophy of Law*. The Catholic University of America Press. Washington 1953. p. 280.

[5] All this has so far been limited to the field of Philosophy of Law, wherein jurists are tending more and more towards a common conception of problems and solutions. Fortunately there is very little point in trying to translate into English, continental works which deal with 'civil law' doctrines. The potential confusion there is naturally greater. The results will be far more pathetic.

[6] Shakespeare – *Romeo and Juliet* – Act II. Scene II.

of the Athens of his time, showed how fantastically easy it is to quote a line or two of Homer or Hesiod to prove, or disprove, any thesis which is in discussion. Plato had no alternative. He had to eliminate poetry from his educational programme for the Guardians of his Republic.[7] Poetry being beautiful, vital and memorable, soon acquires a character of *authority*, irrespective of its content.

In point of fact, we are here face to face with a simple problem of communication. In the lines just quoted from Shakespeare the term 'rose' is of no importance for two persons who, in each other's presence smell the same flower. Here the problem of communication is resolved through the sensation of smell and language is hardly necessary. The term acquires relevant importance when one of the factors in the picture changes; when the parties are not together, or they wish to communicate on the past or the future or they wish to establish the identity of the flower or one of them happens to have influenza and unfortunately, cannot smell.

We need not linger on this digression. If we were to insist on an analytical demonstration of why the problem of words and terms and meaning and connotation is of the greatest importance and significance we would be labouring the obvious. Incredible though it may seem, however, the obvious has been ignored, and sometimes completely forgotten over and over again in the cultural history of the West. More and more scholars have come to realize that we have received false ideas about ancient, medieval, and sometimes even later thought, simply because a term was wrongly 'translated' from the original. This would be the beginning of a whole series of wrong transmissions – all based on the initial distortion. The distortion in fact continues to deteriorate still further the more it is mishandled and when we receive it, not at second or third hand, but sometimes even at fourth or fifth hand, we get a completely wrong picture.

We have reached the point today of having to repeat the original untranslated word or term to capture once again the true meaning which it originally had. Time and labour have had to be expended on the rediscovery of that which should have never been lost in the first place – a sheer waste of time and scholarship. One natural reaction to the chaos which is created by the mishandling of ideas whether in translation or in transmission has been that of returning over and over again to the original. It would be foolish not to be distrustful. But this process cannot with reason be carried on systematically. Sheer volume renders it impossible. Scholars must trust scholarship. Otherwise the frightening limitations will cripple every attempt towards that global vision which is so

[7] Plato – *The Republic* – III – 377 – 398.

necessary in the present stage of our culture. Scholarship cannot do without its own code of ethics.

IV

We have now to consider the truth of the proposition, that word or term and concept are sometimes inextricably linked. This may be better restated perhaps as follows: Some words or terms are essentially tied up with a group of connotations and accordingly cannot be translated. In translation, words and terms have to be changed. Quite frequently translators fall into the trap of searching for the equivalent 'words' confidently expecting that this word-substitution will work out by itself the miracle of communicating the same concepts which are expressed by the original word. Werner Jaeger gives us a typical illustration of what we mean: It is impossible to avoid bringing in modern expressions like *civilization*; *culture*, *tradition*, *literature* or *education*. But none of them really covers what the Greeks meant by *paideia*. Each of them is confined to one aspect of it; they cannot take in the same field as the Greek concept unless we employ them all together.[8] It follows that we cannot find a substitute for the Greek word; we do not have any equivalents; it is untranslatable. It has to be taken over lock, stock and barrel. The truth is that language should be primarily considered to have an eminently cultural value and content. All languages would be equal and therefore interchangeable if all cultures were equal. This manifestly is not the case.

Languages are interchangeable when they can be referred to the same cultural context. Words and terms which express simple basic concepts have their equivalents in other languages because simple basic concepts are common to all cultures. Words and terms which have the complex and sophisticated connotations of a higher culture do not have their equivalents in the language of a lower culture. This explains the continuous 'borrowing' of one language from another. Words, like water, flow from a higher to a lower plane.

Sometimes the matter cannot be explained by the vertical plane of 'higher' and 'lower' cultural content however, but rather by the horizontal one of simple difference in cultural development on parallel lines which, however, do not coincide. Here again words and terms may not have their equivalents and a literal (word for word) substitution is completely useless and one can only fall on a definition or description in another language of the word or term of the original language.

[8] Werner Jaeger – *Paideia*: Vol. I.
Translated from the German Edition by Gilbert Highet, Oxford 1954. Preliminary Note.

V

Having sought to establish these premises we can now apply them to the field of Law.

Law constitutes Society and maintains it in being. The language of Law therefore in every society has always a particular and intimate cultural significance. This is why what has been observed above applies especially to the problem of translating juridical terms and concepts. A masterful testimony of this is given by Ernest Barker which merits a lengthy quotation. Barker translated parts of Gierke's 'Das Deutsche Genossenschaftsrecht' (The German Law of Associations). At the end of what has already become a famous introduction to Gierke's text, Barker writes of the problems which he came across in the translation. 'It has proved difficult, and indeed impossible, to put Gierke's thought into an English style which would seem natural and easy to English readers... I cannot be sure that I have rendered faithfully the exact sense of many of the German terms. Here once more, I may quote some words of Maitland: 'The task of translating into English the work of a German lawyer can never be perfectly straight forward. To take the most obvious instance, his *Recht* is never quite our Right or quite our Law'. I confess that I found Recht even more difficult than Maitland suggests. Not only does it mean something which is neither exactly our Right nor exactly our Law; it also means something which is like our 'rights' and yet not exactly the same. *Recht* to the German writer is not only something 'objective' in the sense of a body of rules (either natural or positive) which is in one way or another obligatory; it is also something 'subjective' in the sense of a body of rights belonging to a person or 'Subject' as his share in (or perhaps we should rather say his position under) the system of 'objective' Right. If *Recht* was thus troublesome, *Naturrecht* and its adjective *naturrechtlich*, were even more so. Maitland was so much troubled by the adjective that he inserted the English term nature-rightly. I found myself shy of that term, and I have translated Gierke's *die naturrechtliche Gesellschaftslehre* as the natural law theory of Society. But I know that I have not exactly hit the mark. As Maitland says 'a doctrine may be *naturrechtliche* though it is not a doctrine of Natural Law nor even a doctrine about Natural Law'.

To meet such difficulties, I have put the German equivalent in the text, by the side of the English word wherever I thought that the reader would like to know what it was, and I have added an explanatory footnote wherever I thought that it was necessary. But that is far from solving all difficulties. A word in one language has a variety of connotation, which it may not have in another. *Gesellschaft*, for instance, means both Society

at large and the sort of particular society which is a partnership or company or *societas*. Our English 'society' will not do the same work; and I have had to translate *Gesellschaft* differently in different places,' and after giving further examples, Barker observes that 'to distinguish their shades of meaning, and to find their English equivalents, is as delicate a matter as the matching of fine colours'.[9]

That passage bears out many points we have touched upon. One point needs special emphasis. English and German are two languages which have particular linguistic affinities besides a common lineage. They both belong to a common West European civilization. And yet the difficulties in translation persist in the field of Law because they serve different legal cultures. The linguistic affinities are completely irrevelant when we have to deal with different legal concepts. Translating Gierke into Italian or French, in fact, would be a comparatively easy task, for German, Italian and French serve to express the same juridical concepts; they all serve or express a common legal culture.

Barker's testimony is clear enough and strong enough to make us realize that the difficulty is not one which can be brushed aside or ignored. Nor can it be classed as of secondary importance. It is rather basic and radical. Its roots lie in the differences in legal cultures. To think that a unity can be achieved by linguistic substitutions is not only superficial but idiotic. It is in fact attempted by those who consider language to be a mere convention rather than a cultural-social instrument of fundamental importance.

VI

The difficulties we have been discussing seem to have their origin in language or rather in the variety of languages, but it would be more correct to say that they arise because of the variety of cultures. In our case, the variety of juridical cultures. We have already noted that the difficulties encountered by Barker would not be encountered by a French or Italian translator of Gierke. The English-German linguistic affinities are not as relevant as the Franco-Italo-Germanic juridico-cultural affinities.

If therefore, one is aware that it is not so much the language that matters as the culture, one's perspective must be adjusted to a new angle of looking at the problem of translation. If a given culture A has a given concept B expressed by the term C and we are set the task of translating

[9] Ernest Barker – *Natural Law and the Theory of Society 1500-1800 by Otto Gierke* – Translated with an Introduction by Ernest Barker. Cambridge 1950. 1 XXXVIII-XC.

the concept, we must first examine whether the other culture D has in fact any affinities with culture A. The greater the affinity, the greater the possibility that concept B is possessed also by culture D which, therefore, must have a term F to express the concept B; the first two factors, – culture and concept being constant and connected, the third – the term – being variable and different. Most translators tackle the problem linguistically concentrating on the variable third factor and achieve a false correspondence at the top without any roots at the base. Even when the variable thirds are almost identical – as Right and *Recht* in Barker's quotation – this only serves to complicate the problem precisely when it appears to have solved it so completely.

VII

To some it may well seem that we are labouring the obvious. Unfortunately it is not so. Only those who have had actual experience in the field have been faced with evidence enough to thrust forcibly upon them the acuteness of the methodological problem and its widespread implications. Allott, describing his researches on African Law, testifies to it as follows: '... does X customary law have a word for "law"? Our first problem is to decide what this question means. The naive notion that one must seek exact one-word equivalents for each word in the English language must be dismissed. Perhaps what the inquirer wishes to know is whether the language has a term which performs some of the same functions as the English word "law" that is, refers to the same phenomena. Pick up any book on jurisprudence and you immediately find that English-speaking jurists are by no means agreed on what are the characteristic phenomena to which the English word "law" refers; how, then, is one to discover both the corresponding phenomena and their collective "name" in the X language?

'We started off on a quest for the equivalent of an English word. Perhaps this was an approach from the wrong end. Let us try to explore the same field from the opposite direction by examining the vocabulary of the X language in what we would call legal contexts, and by seeing what items this contains and what their function is. Among these items we may well find a set of terms which refer to the practices of the people, the body of rules to which a court appeals when deciding a case, the commands of a ruler, and so on. Terms of this sort in Sesotho were investigated by myself in conjunction with Professor Westphal and Basatho informants.

'The primary requirements for investigation was that the terms should be used in and refer to, legal situations. This having been established –

at least provisionally – the terms were then investigated in collocation. The terms selected, which could all be roughly described as nouns, might be the subject or object of verbs, in other words of processes, and they might be combined with adjectives or other nouns, and so on... At the same time the futility, or at least the irrelevance of the original problem demonstrated itself. Sotho is almost as rich in terms of this type and in their combinatory possibilities as English; this richness would be lost by any crude attempt to set up one-word parallels between Sotho and English. At the most there was a partial convergence of function between particular Sotho and English terms, for example between Sotho "malao" and English 'law' or between Sotho "mokhwa" and English 'custom'.[10]

VIII

We can now conclude these preliminary remarks by tentatively formulating the propositions that we have arrived at:

1. The problem is mainly one of culture and not simply and solely one of language.
2. Literal Juridical translation from one language into another is only possible if both languages serve the same juridical culture.
3. Transmission between two different juridical cultures is only possible if one culture adopts the actual terms used by the language of the other culture.

Having arrived at these propositions, we must finally strike a note of warning.

In proposition I, we have stated that the problem is *mainly* one of culture. Sometimes the problem is further complicated by the fact that although both languages serve the same juridical culture there remains the unsurmountable linguistic obstacle which touches the bed-rock, inherent differentials which lie deeply buried in the complex reality of the varieties of language. Thus although, as we have said, German and the Romance Languages serve by and large similar juridical cultures, the scholar can suddenly be confronted with this sort of difficulty: *'Il parlare di verbi modali tedeschi in una metalingua romanza è fonte di complicazioni. Giustamente Georg Simmel ha assimilato uno dei verbi modali, il* Sollen, *ad un modo di pensare come il futuro o il passato, come il congiuntivo e l'ottativo. Il modo di pensare germanico, espresso nel Sollen, trova nelle lingue romanze un'espressione completamente diversa. Per esprimere un comando o un desiderio molto forte – cioè per rendere il senso di un imperativo – le lingue romanze ricorrono al futuro ottativo*

[10] Allott A.N. *Law and Language* University of London 1965. pp. 25-27.

(*Heischfuturum*): *là dove in tedesco troviamo un* Sollen, *le lingue romanze presentano un futuro (o anche un presente)*' and comparing the translations of the Decalogue in the romance languages with the german translation, it is noted that '*là dove il tedesco usa il* Sollen, *le traduzioni romanze usano il futuro*'.[11]

[11] Losano Mario G. – *Per un 'analisi del "Sollen" in Hans Kelsen'* in *Rivista Internazionale di Filosofia del Diritto* Anno XLIV. Fas. III. 1967. pp. 548-549.

CICERO AND MALTA

By Joseph Busuttil

(I)

58 B.C. was certainly not the happiest year in Cicero's eventful life. His arch enemy Clodius, on being elected Tribune in October of the preceding year, proceeded to take vengeance on the Orator for having given evidence against him in 61 B.C. Clodius, however, was merely an instrument in the hands of Caesar who wanted Cicero removed from Rome so that he could move safely to his Transalpine Province.

In the first months of 58 B.C. Clodius carried a general resolution, a *plebiscitum*, to the effect that any one who had put Roman citizens to death without trial should be 'forbidden fire and water', i.e. exiled. Cicero, who during his consulship in 63B.C. had had the Catalinarian conspirators executed without trial, recognized the meaning of the resolution. Towards the end of March, on the advice of his friends, he left Rome and headed for Vibo in Bruttium, where his friend Sicca had an estate.

Cicero thought of moving South to Sicily and Malta.[1] For this reason he contacted Vergilius, the *propraetor* of Sicily and his brother's friend.[2] Vergilius, however, refused to offer him a refuge as an exile, possibly not to incur Clodius's anger.[3]

In April, word reached Cicero at Vibo that Clodius's resolution had become law and that it was emended to the effect that he was not allowed to live anywhere within four hundred or more miles of Italy. This again put Sicily and, of course, Malta out of the question. He travelled to Brundisium and from there to Thessalonica where he lived at the house of his friend Cnaeus Plancius.

In his defence of C. Plancius in 54 B.C. Cicero states that he had wanted to take asylum in the Province of Sicily because that island was more than a second home to him and because it was governed at the time (59-58 B.C.) by Caius Vergilius. When one examines the various letters written by Cicero and sent to his friend Atticus and to others in the course

[1] Cf. Pro Cnaeo Plancio, XL, 95: Siciliam petivi animo, quae et ipsa erat mihi sicut domus una coniuncta et obtinebatur a C. Vergilio; Cf. Also Ad Att. III, IV.
[2] Cf. Pro C. Plancio, XL, 95: Quocum (Vergilio) me uno vel maxime quum vetustas tum amicitia, cum mei fratris collegia tum rei publicae causa sociarat; Cf. Ad. Fam. 11, XIX: Caius Vergilius, propinquus tuus, familiarissimus noster.