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Legal Language and EU Integration

— The Case of the Western Balkans

*Aleksandra Čavoški**

Abstract

This paper investigates whether the Western Balkans, in particular four case study countries of the former Yugoslavia (Croatia, Serbia, Bosnia and Herzegovina, and Montenegro) can be seen as a particular region in terms of legal language and legal culture. By examining legal language and legal translation within the EU accession process, this paper argues that nation state formation and ethnic conflict had little impact on legal languages and cultures which remained very similar in these four countries after the break-up of Yugoslavia. Furthermore, through analysis based on neo-functionalist theory of EU integration, this paper explains how legal translation, though not a part of a deliberate EU enlargement strategy, becomes a vehicle of further EU integration as a result of political spill-over. It is particularly relevant in the case of the Western Balkans whereby both the European Commission and the sub-national bureaucracies make a full use of a common legal language and culture to their advantage to facilitate the accession process through the lens of legal translation. The paper concludes that the four countries of the Western Balkans can be viewed as a particular and unique region resulting from a shared legal language and culture which may have potential implications for the EU's policy of multilingualism.

Keywords

Western Balkans, EU integration, legal language and culture, neo-functionalism, legal translation, European Commission, sub-national technocrats

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1. Introduction

Several years ago I read a book *Language and Identity in the Balkans* by Robert Greenberg which explores the development of recent linguistic policies in this region. The author begins with an anecdote about his visits to Croatia and Serbia in 1990, just before Croatia gained independence in 1991. During his fieldwork in Zagreb he started talking about his plans for July and to his surprise Croatian colleagues reprimanded him for using the Serbian word *jul* rather than Croatian *srpanj* (Greenberg, 2008: 2). He was somewhat surprised by this comment, though he knew that language was a sensitive issue. What escaped the attention of many people at the time was that language had become such an important part of national identity, not only in Croatia and Serbia, but in all countries that emerged from the former Yugoslavia.

As a lawyer who grew up in the former Yugoslavia, this intersection between language and politics is particularly meaningful to me. The importance of legal language and legal culture in this region has wider implications. As legal language differs from standard language (see Tiersma, 1999; Friedman, 1964), the impact of nation state formation on legal language and culture requires careful consideration. This has been overlooked in the developing scholarship on law and language discussed below, as the existing linguistic and political science literature predominantly examines the relationship between standard language, politics and national identities. In particular, the question of legal language and state building is of great relevance for former Yugoslav countries which were part of the same legal system and shared the same legal history and culture for over 40 years.

The issue of legal language is particularly pertinent to the on-going EU enlargement process whereby Western Balkan candidate and potential candidate countries, in fulfilling the membership requirements (including political, economic, legal and administrative criteria) are effectively changing their own legal systems in line with EU law. Accession countries must “take on the obligations of membership” (EU Council, 1993: 7.A.iii), which means that each accession country has to translate the EU *acquis*¹ and transpose it into its national legal system prior to its accession to the EU. To that effect, translation becomes a constituent part in building a new legal language and culture, since it lays the framework of a post-accession legal order.

This paper investigates whether the Western Balkans,² in particular four case study countries of the former Yugoslavia – Croatia,³ Serbia, Bosnia and Herzegovina, and Montenegro – can be seen as a particular region in terms of legal language and legal cul-

¹ Body of EU law. Both the terms “EU *acquis*” and “EU law” are used interchangeably.

² Western Balkans is a term that the EU uses to denote a group of accession countries in Southeast Europe, including the following countries: Montenegro, Albania, Serbia, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia and Kosovo* (this designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence).

³ Croatia is the only country from this bloc which joined the EU (1 July 2013).

ture. By examining legal language and legal translation within the EU accession process, the paper explores whether nation state formation had an impact on the development of legal language and legal culture in those countries. Despite the fact that standard languages became an important part of national identity in the former Yugoslav republics, this paper argues that nation state formation and ethnic conflict had little impact on the legal language and culture of those republics. Consequently, the paper puts forward the potentially contentious argument that legal languages and cultures remained very similar in those four countries after the break-up of Yugoslavia.⁴

Furthermore, through analysis based on the neo-functionalist theory of EU integration, usually employed in the field of political science, the paper develops a new approach to the study of legal language and translation and to the discussion of EU integration itself. This novel application of neo-functionalism to the relationship between language and legal systems demonstrates not only its relevance beyond the domain of political science but also provides an explanatory model to examine how legal translation, though not a part of the deliberate EU enlargement strategy, becomes a vehicle of further EU integration. The paper argues that the EU acts as a cohesive force in further unifying legal languages and cultures in those four countries via the accession process. A neo-functionalist model explains how the two main actors, the European Commission and sub-national technocrats, took advantage of the identical accession process in the four countries and the common legal language and culture to pursue their objectives within this process.

Finally, the paper concludes that the four countries of the Western Balkans can be viewed as a particular and unique region resulting from shared legal language and culture reinforced by the EU's approach to integration through legal translation. This may have potential implications for the EU's policy of multilingualism. Greater cooperation with regard to the legal translation of EU law between the countries in the region, once the remaining accession countries become EU members, may help to ensure the sustainability of that multilingual policy.

Thus, the paper structure is as follows. The first part of this paper examines the legal and linguistic scholarship on the Western Balkans and sets out the research framework that forms the basis of this paper. The second part briefly outlines the history of languages in the Western Balkans countries. The paper next evidences the common legal language and culture and explores the extent to which these were impacted by nation state formation. Following that, the paper deploys a neo-functionalist model to examine how legal translation within EU enlargement contributes to further unifying legal languages and cultures in the region. The paper concludes by exploring the broader implications of a common legal language and culture in the region on EU multilingualism policy.

⁴ In order to denote the idea of similar legal languages and cultures in the four chosen countries, this paper will use two terms interchangeably throughout the text – common legal language and culture or shared legal language and culture.

2. State of the Art and the Research Framework

2.1. Review of the Existing Scholarship

Research on language in the Western Balkans in the linguistic and political science literature primarily focuses on language as a marker of national identity in nation state formation in the former Yugoslav republics. A major contribution to this scholarship is Greenberg's seminal work on language and identity in the Balkans (Greenberg, 2008), which provides an important explanatory account of the intersection of language, politics and culture in the region. His main hypothesis states that the birth of new standard languages in the Balkans since 1991 was a direct result of the nationalist policies in Croatia, Serbia, Bosnia and Herzegovina, and Montenegro. This work has important purchase in examining this region, where language assumed a significant role in building or strengthening national identities. Greenberg examines the history of the Serbo-Croatian language, which was the official language in those four countries and its demise resulting in the development of four successor languages of Serbian, Montenegrin, Croatian and Bosnian.

Similarly, earlier research on post-conflict language policy discusses the process of fragmentation of Serbo-Croatian. Sito-Sučić examines how new linguistic identities have become an integral part of national identities (Sito-Sučić, 1996). She examines the difficulties in advocating the thesis of one nation identified with one language and one territory. A more recent case study of the former Yugoslavia by Bugarski (2012) explores the role of language in constructing collective identities, as well as playing a role in establishing and modifying ethnic boundaries in relation to political borders. The author examines dialectological and historical developments in order to identify changes in ethnic and linguistic boundaries within the context of Balkan nationalism. Despite the fact that language was used as a weapon during the conflict, the author argues that the four distinct national languages (Serbian, Croatian, Bosnian and Montenegrin) nevertheless remain a viable linguistic entity (Bugarski, 2012: 219).

However, the existing scholarship is limited to the discussion of intersections of politics and standard languages, while there is a gap in the scholarship on legal language and culture in Western Balkans countries. Moreover, there is a significant gap in law and language literature in relation to the EU enlargement and legal translation of the EU *acquis*, which was not the case during previous accessions, in particular during the enlargement to Central and Eastern European countries (see Cunningham, 2001; Gozzi, 2001). The only Western Balkan country examined in regard to legal translation and enlargement is Croatia, which successfully joined the EU in 2013. The collection edited by Šarčević examines three main themes on the challenges faced by Croatia, including

“theoretical and practical aspects of translation and language policy in the European Union; basics of legal translation and procedures for legal translators; translation and translator training in Croatia,

and Croatian terminology for EU terms in the Croatian edition of the EUROVOC Thesaurus” (Šarčević, 2001: VI).

Šarčević’s (2013) analysis that the EU’s policy of multilingualism leads to legal uncertainty (as a result of the imperfection of legal translation) is also interesting. That analysis is relevant to the Western Balkan countries, as are some proposals in the literature for policy reforms. Schilling, for example, proposes the option of one authentic language in the EU as a way of ensuring legal certainty that may be compromised by numerous authentic languages (Schilling, 2010). He does recognise that the choice of an authentic language could be difficult and offers several ways of doing this; the simplest being one authentic language for all legislative acts (Schilling, 2010). Other options include a European reference language model with two authentic reference languages (Luttermann, 2009) or adopting English and French as mandatory consultation languages (Derlén, 2011). Šarčević (2013) also puts forward the option of a greater harmonisation of EU laws as a means to ensure the sustainability of this EU multilingualism principle.

2.2. Research Framework

Whereas existing scholarship in the area predominantly focuses on the relationship between language and national identity, this paper discusses legal language and culture and the impact of the EU enlargement on legal language in the Western Balkans. To this end, one must define the concepts of legal language and culture as constituent parts of the research.

The study of legal language transcends many disciplines. Linguists and lawyers are at the forefront of this scholarship, each of them examining various aspects of legal language. The literature provides no definitive definition of legal language that would be acceptable both for lawyers and linguists. Many linguists working in this field understand legal language as a language for special purposes used by a variety of legal professionals (Mattila, 2006; Biel, 2007). They view legal language as formulaic and technical with its “own domain of use and particular linguistic norms” (Mattila, 2006: 3). Legal scholars are less inclined to define legal language and tend to understand it in much broader terms. Besides legal terminology, which is a significant starting point in analysing legal language, they think about the context in which law evolves and how political, historical and social factors may have an impact on its development. As Tiersma (1999: 7) argued, it would be impossible to “appreciate the nature of legal language without knowing something about its history”. More importantly, legal language cannot be divorced from legal culture as it is inherently embedded in a legal culture specific to each state. This makes it different from any other technical language, such as medical language which transcends individual cultures and expresses a global scientific field. As McAuliffe argues, law can be seen as a culture-specific communica-

tive system; as a result, legal concepts and language become specific to a particular legal culture (McAuliffe, 2014). Thus, understanding and defining legal language is largely dependent on defining the notion of legal culture since both concepts are inseparably interlinked.

For the purposes of this analysis, the concept of legal culture includes both legal rules, values, doctrines and attitudes about law in society. This broad definition suggests that legal culture has both prescriptive and descriptive connotations by comprising the idea of compliance with legal rules, as well as the attitudes on what those rules should entail. This is in line with the existing interpretations of this concept. It was introduced by the legal sociologist Lawrence Friedman in the late 1960s. He defined legal culture as “what people think about law, lawyers and the legal order; it means ideas, attitudes, opinions and expectations with regard to the legal system” (Friedman, 2006: 189). His definition does not include legal rules, though other scholars recognise rules as a constituent element of this concept (Nelken, 2012). Friedman also makes a distinction between the internal legal culture, which is a “culture of lawyers and judges”, and the external legal culture which is the “culture of everybody else” (Friedman, 2006: 189). The term legal culture is often replaced with similar terms such as legal tradition, law in action and legal ideology (Nelken, 2012). However, these synonyms are often defined and understood in the same way. Merryman & Pérdamo (2007: 2) define legal tradition as a “set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity, about the proper organisation and operation of law”.

This paper argues that the legal language and culture in the Western Balkans has become more unified with the EU enlargement process. The neo-functionalist theory of European integration provides an explanatory framework for legal translation and legal language as forces for integration between these countries. The neo-functionalist theory was initially developed by Ernest Haas and offers a theoretical model of European integration (Haas, 1958). The main hypothesis states that the process of regional integration is driven by non-state actors (both sub-national and supra-national) who have an interest in pursuing political integration (Haas, 1958; Schmitter, 2005). Though states are important actors in the process (Schmitter, 2005), this theory places an important emphasis on the role of non-state actors, in particular technocrats such as the European Commission and regional bureaucracies that try to exploit the inevitable “spill-overs” that occur when “states agree to assign some degree of supra-national responsibility for accomplishing a limited task and then discover that satisfying that function has external effects upon other interdependent activities” (Schmitter, 2002: 2).

Neo-functionalist scholars make a distinction between the functional and political spill-over. Functional spill-over is a consequence of the interdependence between sectors of a modern industrial economy whereby integration in one sector inevitably leads to integration in a different sector (Slaughter & Mattli, 1993: 463). Political spill-over entails the process of adaptive behaviour where supranational and national actors and

groups change their expectations and values in the light of sectoral integration (Slaughter & Mattli, 1993: 464).

If applied to issues of legal language and legal culture in the Western Balkans, this theory explains how legal translation, though not a part of a deliberate EU enlargement strategy, becomes a vehicle of further EU integration as a result of political spill-over. It is particularly relevant in the case of the Western Balkans whereby both the European Commission and the sub-national bureaucracies make a full use of a common legal language and culture to their advantage to facilitate the accession process through the lens of legal translation. Lawyers, linguists and others involved in the translation process at the sub-national level are technocratic and comprise a “functional category likely to be receptive to integration” (Slaughter & Mattli, 1993: 462). As a result, there is a spill-over effect between sub-national actors (technocrats) who are willing to cooperate through the process of legal translation and learn from each other’s experience in legal translation within the EU accession process. No less important is the spill-over effect where the Commission incentivises cooperation between regional authorities by creating the same accession process for all candidate countries. This, coupled with the fact that legal languages and cultures are very similar in the four states examined here, incentivises sub-national actors to adopt the same laws and regulations and processes to meet the membership requirements. The final outcome of this approach becomes harmonised legal languages throughout the countries of the Western Balkans which significantly expedites the process of the EU enlargement.

3. History of Standard Languages in the Western Balkans

In modern Europe language played an important role in state and national identity formation. As language can be an indicator to demarcate one ethnic group from other groups, or facilitate communication within one ethnic group (Barbour & Carmichael, 2000), language became an important marker of national identity. It was not surprising that, in Europe from the eighteenth century, links between the language and nation became increasingly close (Burke, 2004), in particular as a political tool of unification.

Unlike other European countries, nation state formation of the Socialist Federal Republic of Yugoslavia (hereafter: former Yugoslavia) followed a different path as language did not play a key role in state building.⁵ The main idea of creating this new

⁵ As notions of nation state and nation building are important for this discussion, it is useful to explain it in more detail. In the International Encyclopaedia of Political Science, Kersting (2011: 1646–1650) offers a good explanation of both concepts. Nation-states are considered to be mostly multi-ethnic and composed of various sub-nations. Nation building is seen as a process of collective identity formation to assert power in a certain territory which is dependent on the successful interaction between different ethnic groups. Kersting points out the processes of nation building became important in countries which disintegrated, such as state and nation failure in the Soviet Union, Czechoslovakia, and the former Yugoslavia (2011).

state was based on Yugoslavism whereby peoples in Yugoslavia were joined together in “brotherhood and unity” (the 1974 Constitution, main principles I). It was this sense of common Yugoslav identity, rather than language, which was the primary unifying factor among constituent peoples.⁶

The country was created in 1944 and throughout its history changed its name and constitutions several times.⁷ The former Yugoslavia consisted of six republics including Bosnia and Herzegovina, Macedonia, Slovenia, Serbia, Croatia and Montenegro (Article 2 of the 1974 SFRY Constitution), though the early constitutions only recognised five constituent peoples – Serbs, Croats, Montenegrins, Slovenes and Macedonians.⁸ The Serbo-Croatian language was one of the official languages in the former Yugoslavia, though this language has a longer lineage going back to the mid-nineteenth century.⁹ According to the 1850 Vienna Literary Agreement, Serbian and Croatian writers and philologists established general guidelines for the formation a common literary language. The status of Serbo-Croatian as an official language was formally recognised after the end of the Second World War and the creation of the Socialist Federal Republic of Yugoslavia, though the early 1946 Constitution (in Article 65) deliberately omitted to specify the official language at the time. This lack of any specific reference to an official language in the first Constitution was not surprising as state ideology advocated that peoples of Yugoslavia are of the same origin with no significant differences between languages. Surprisingly, ethnic and religious differences were not officially perceived at the time as divisive and important, though there were significant ethnic cleavages in the former Yugoslavia.

An important landmark in the creation of the new language was the 1954 Novi Sad Agreement which stipulated the main decisions regarding the language reached by Serbian and Croatian linguists and writers (Novi Sad Agreement, 1954). There was an agreement that Serbs, Croats and Montenegrins share a single language with two equal varieties: *ekavian* (Serbian) and *ijekavian* (Croatian).¹⁰ The official name of the language was to include reference to both Serbian and Croatian and both alphabets, Latin and Cyrillic, were to be regarded as equal. Nonetheless, the 1963 Constitution of the Socialist Federal Republic of Yugoslavia proclaimed Serbo-Croatian/Croatian-Serbian language as an official language in former Yugoslavia together with Slovenian and Macedonian (Article 131 of the 1963 SFRY Constitution). The 1964 Constitution re-

⁶ The anthem of former Yugoslavia, which invoked a common South Slavic identity, was indicative of this.

⁷ In 1944 it was called the “Democratic Federal Yugoslavia” (the state was created after the liberation of Belgrade); in 1946, it changed its name to “Federal Peoples Republic of Yugoslavia” and finally in 1963 it assumed the name “the Socialist Federal Republic of Yugoslavia”.

⁸ Initially, Muslims were not initially recognised as a constituent people, as religion was not regarded as a determinant of the national identity in line with the communist teaching. This was later changed with the 1974 Constitution which added a sixth torch to the state coat of arms representing Muslims in Bosnia.

⁹ In the Constitution of Kingdom of Serbs, Croatian and Slovenians, which led to the establishment of Kingdom of Yugoslavia in 1931, the official language was titled Serbo-Croatian-Slovenian language.

¹⁰ Translation by Greenberg (2008).

quired the mandatory use of Serbo-Croatian and the Latin alphabet in the Yugoslav Army and in Yugoslav diplomatic missions (Article 42 of the 1963 Constitution).

However, from the 1970s assertions of ethnic identity slowly gained prominence. There were calls for a more significant role for the republics within the federation. This prompted the adoption of the 1971 constitutional amendments and the 1974 Constitution as an effort to ease ethnic differences; the republics were given a right of veto in the decision-making procedure.¹¹ Moreover, these creeping ethnic differences also had implications on the linguistic policy in the Federal Republic of Yugoslavia. The 1974 Constitution deliberately failed to name official languages in the former Yugoslavia where it only stipulated that languages of all peoples are official, as are all scripts (Article 264 of the 1974 Constitution). Unlike the 1963 Constitution, there was no special provision on the use of one language in the army and for diplomatic purposes.

It was not surprising that in the midst of emerging nationalism language also gained a special significance as a part of ethnic identification (Greenberg, 2008). This was especially pertinent in Croatia and Bosnia and Herzegovina where different ethnic communities lived together. At the time of former Yugoslavia three ethnic groups lived in Bosnia and Herzegovina; Bosniacs,¹² Croats and Serbs. After the Yugoslav wars, ethnic conflict resulted in greater alignment of administrative borders with ethnic ones (see Greenberg, 2008: 9). In time, all six republics gained independence and recognised their own standard languages as official languages – the Croatian language in Croatia, the Serbian language in Serbia, the Montenegrin language in Montenegro while three languages (Bosnian, Serbian and Croatian) gained official status in Bosnia and Herzegovina. With the exception of Croatia and Slovenia, which have already joined the European Union, four successor countries are waiting in the queue for the EU membership.

4. The Impact of Nation State Formation on Legal Language and Culture

As shown above language became an important part of national identity, leading to the emergence of four distinct standard languages in the four former Yugoslav republics. However, nation state formation and ethnic divisions did have little impact on the creation of new legal languages and legal cultures in the countries that gained independence after the break-up of Yugoslavia.

While the break-up of Yugoslavia led to divergent standard languages, legal languages and cultures remained consistent throughout the former republics. Two factors

¹¹ Article 295, paras 1 and 2. See also Articles 298, 299, 300 and 301.

¹² It is important to note that the Constitution of Bosnia and Herzegovina uses the denotation “Bosniacs”. Thus, the author will use the term “Bosniac” throughout the text. See Article IV of the Constitution.

affect this. The first is the legacy of the same legal history and culture shared by former Yugoslav republics. The second factor is the EU's approach to integration through legal translation where the European Commission and sub-national technocrats are incentivised to cooperate, leading to a greater uniformity of legal languages and cultures in those four countries. Thus, this section will briefly explain the legal system in the former Yugoslavia and then examine two factors that were instrumental in preserving the common legal language and culture.

4.1. A Glimpse of the Former Yugoslav Legal System

Before examining the consistency of legal languages and cultures in these four countries, it is important to briefly sketch the history of the legal system in the former Yugoslavia. This is necessary for understanding the context in which the law developed, as well as comprehension of legal culture as a dynamic concept shaped by a country's own particular history and its trajectory over time.

The legal system of the former Yugoslavia falls within the group of civil law systems based on Roman law. In its development it was heavily influenced by Austrian legal culture before the First World War¹³ and subsequently by French legal culture after the First World War. Following the establishment of the Federal Peoples' Republic of Yugoslavia in 1946, powers were divided between the federal and republic levels (Article 44 of the 1946 Constitution). All subsequent constitutions contained the same provision on the division of powers. The exclusive competences of the federation to enact legislation were extensive including, *inter alia* property law, contract law, tort law and criminal law while shared competences remained limited (Article 161 of the 1963 Constitution).¹⁴

It is interesting that the 1963 Constitution had an explicit provision on legal language, i.e. the use of language in the official publication of laws. It was stipulated that federal laws and other general acts of federal bodies were to be published in Serbo-Croatian/Croatian-Serbian, Slovenian and Macedonian (Article 131 of the 1963 Constitution). A similar provision was omitted from the subsequent 1974 Constitution, as at that point Yugoslavia encouraged the use of languages of all peoples in the various republics as a way of reducing ethnic divisions. However, in practice it was still the Serbo-Croatian language that was regarded as official. It is worth noting that official publications of laws and regulations were done in two scripts (Latin and Cyrillic) and different scripts were perceived to sufficiently reflect a distinction between languages in different republics. Thus, laws in Croatia were published in the Latin script and *ijekavian* pronunciation, in Serbia in the Cyrillic script with *ekavian* pronunciation, in Montenegro in

¹³ A good illustration is the 1929 Civil Procedure Act, which predominantly was a translation of the Austrian Civil Procedure Act. See Sedlo (2013).

¹⁴ This Article also prescribed shared legislative powers between the federation and republics.

the Cyrillic script with *ijekavian* pronunciation, in Bosnia and Herzegovina in both scripts with *ijekavian* pronunciation. The official publication of laws in Slovenia and Macedonia was in the Slovenian and Macedonian languages, respectively.

The establishment of the federal political system, combined with the rules on the use of language in official publications of laws and regulations, led to the creation of a unified legal system and legal language throughout the former Yugoslavia. The majority of basic substantive laws were adopted at the federal level, which contributed to ensuring a general and consistent application of laws in all republics. This is best illustrated by certain federal laws enacted at the time that applied uniformly in all six republics, including the 1978 Law on Obligations (sl. list SFRJ 29/78), 1980 Property Act (sl. list SFRJ 6/80), and the 1976 Criminal Code (sl. list SFRJ 44/761329). The rules of the court governing practice and procedure in civil, criminal and administrative cases were adopted at the federal level after the Second World War as soon as the new state was created. For example, the Civil Procedure Act (sl. list FNRJ 4/57) was adopted already in 1956¹⁵ and subsequently amended in 1976 (sl. list SFRJ 4/77). The rules adopted at the central level were also instrumental in building and nurturing the same legal culture among legal professionals who were not only bound to comply with the same rules, but were encouraged to share common values and attitudes towards the law.

4.2. The Impact of the Break-up of Former Yugoslavia on Legal Language and Culture

With the beginning of the ethnic conflicts in former Yugoslavia, especially in Croatia and Bosnia and Herzegovina, language became an important part of nation state formation and it was not surprising that each ethnic community strived to ensure the formal recognition of its own language. Greenberg gives a good example of the situation in Bosnia and Herzegovina, which was gravely torn by the ethnic conflict. As he explains, Bosniacs could accept neither the Croatian nor Serbian language as it would have “signalled the Bosniac assimilation into either the Croatian or Serbian spheres” (Greenberg, 2008: 15). It had to be a new language which would not be regarded as a mere mixture of Croatian and Serbian (Greenberg, 2008: 136). As for Serbs and Croats it was important to make a break with the appellation of Serbo-Croatian and affirm the individual status of their languages. Thus, the emergence of new standard languages was the only possible way forward for all these former Yugoslav republics.

It was expected that these historical and political changes would also have an impact on legal language and culture. As Friedman points out, legal culture can be extremely volatile (Friedman, 2006: 192), especially under the pressure of ethnic divisions and nation state formation. Despite these expectations and the emergence of new

¹⁵ It was drafted under the influence of the 1895 Austrian Act “Zivilprozessordnung”.

standard languages, legal languages and cultures were little affected by nation state formation. What is also remarkable is that uniformity of legal language and culture permeated all branches of law, regardless of the fact that legal culture is often diverse across different branches of law and “the boundaries between units of legal culture(s) are fluid” (Nelken, 2012: 487).

If we understand the concept of legal culture entailing legal rules and having a prescriptive character, several examples can be used to illustrate the common legal language and culture across the four states. The best evidence is the continuous application of Yugoslav federal laws adopted in the mid-1970s, which are still applicable laws in successor countries. A good example is the 1978 Law on Obligations which continued to be applicable law in all four former republics with no or little amendment after the dissolution of the former Yugoslavia. This law was merely renamed as a law of the new country and published in the respective official journals. Furthermore, no significant changes to the legal language can be identified within the new laws on obligations in the four successor countries.¹⁶

One of the opening provisions of this act subsequently enacted in all four countries prescribes equality between the contracting parties as one of the basic principles of contract law. If we look closely at the provisions in all four acts, we will see almost identical legal language. Serbian, Montenegrin and Bosnian provisions are identical (the Montenegrin version uses plural), while Croatian version uses words *sudionici* which is synonymous for the word *stranke* in the Serbian, Bosnian and Montenegrin versions.

EN: Contracting parties are equal.

SR: Strane u obligacionom odnosu su ravnopravne.¹⁷

MG: Strane u obligacionim odnosima su ravnopravne.¹⁸

CR: Sudionici u obveznom odnosima ravnopravni su.¹⁹

BiH: Strane u obligacionom odnosu su ravnopravne.²⁰

¹⁶ A break with tradition and the introduction of a new legal language can be identified in the Croatian Law on Obligations, which emphasises the need to adjust the legal language with the new standard language. To that effect, it introduces several new legal terms which will replace certain former legal terms that constituted part of the 1978 Federal Law on Obligations (See more at vlada.gov.hr/UserDocsImages/Sjednice/Arhiva/54-02.pdf). However, some of the new terms in the Croatian Law on Obligations already formed part of the legal language in former Yugoslavia and were used by legal scholars and practitioners interchangeably throughout the former Yugoslavia. The best example is the term *pecuniary and non-pecuniary losses* which was denoted in the 1978 Law on Obligations as *materijalna i nematerijalna šteta* while the new Croatian Law on Obligations uses the term *imovinska i neimovinska šteta*. For example, this new term was widely used in Serbia before the break-up of former Yugoslavia, as can be seen in the works of famous legal scholars, such as Obrad Stanković, who wrote a book on this subject titled *Novčana naknada neimovinske štete* (1968). Similarly, the new Croatian Law on Obligations uses the new term *trgovački ugovor* to denote a commercial contract, which was called *ugovor u privredi* in the old 1978 Federal Law on Obligations. This term is widely accepted in Serbia, which decided in 2008 to rename commercial courts as *trgovinski sudovi*, and those courts are responsible for resolving disputes deriving from commercial contracts (see sl. glasnik RS 116/2008, 104/2009, 101/2010, 31/2011 – dr. zakon, 78/2011, 101/2011, 101/2013, 106/2015, 40/2015 – dr. zakon, 13/2016 and 108/2016).

¹⁷ Sl. list SFRJ 29/78, 39/85, 45/89 – odluka USJ and 57/89, Sl. list SRJ 31/93 and Sl. list SCG 1/2003 – Ustavna povelja.

¹⁸ Sl. list Crne Gore 47/2008.

¹⁹ NN 35/05, 41/08, 125/11, 78/15.

Similarly, the 1980 Property Law Act is still applicable law in these countries. Some countries such as Serbia and Bosnia and Herzegovina did not adopt any amendments but still apply the federal law in its entirety, while Montenegro and Croatia adopted new laws and added several new provisions on issues that were not initially prescribed by the 1980 Property Act. If we look at the legal language again we see no difference in the language denoting the main legal concepts and terms. A good illustration is the terms used for tangible and intangible property, which is denoted and understood in the same way. The following statutory provision explains that natural and legal persons can possess property rights over tangible and intangible property. To that effect, the provision uses identical legal concepts denoted by the legal language.

EN: Natural and legal persons can acquire property rights on tangible (*pokretnim*) and intangible (*nepokretnim*) property.

SR: Fizička i pravna lica mogu imati pravo svojine na *pokretnim* i *nepokretnim* stvarima.²¹

MG: Objekti prava svojine i drugih stvarnih prava su pojedinačno određene *pokretne* i *nepokretne* stvari.²²

BiH: Predmet prava vlasništva su *pokretne* i *nepokretne* stvari.²³

CR: Predmet prava vlasništva i drugih stvarnih prava može biti svaka *pokretna* stvar ili *nepokretna* stvar (nekretnina) osim onih koje nisu za to sposobne.²⁴

Equally, legal culture does not only have a prescriptive connotation by entailing the same legal rules and compliance with those rules. It also entails the same understanding of values, doctrines and principles about the law (Nelken, 2012). This shared understanding can be identified in all four countries after the break-up of Yugoslavia. Moreover, the legal profession has the same understanding and expectations with regard to the legal system, which is in line with Friedman's understanding of the internal legal culture of legal professionals (Friedman, 2006). This is evidenced throughout several branches of law. Good examples are testacy and intestacy rules which are based on the same underlying principles and identically applied in those four countries. For example, all countries recognise the same three main types of legal wills and have identical statutory provisions on making a will. In the absence of a will, the same intestacy rules apply whereby the spouse and the children (if any) are regarded as a first tier of legal successors.

Similarities are also evident in criminal law where laws in all four countries understand notions of *mens rea* and negligence in the same manner, unlike many other jurisdictions which have more restrictive interpretations or less precise definitions of these concepts.²⁵ To that effect, those laws contain the same legal formulations of those two notions. *Mens rea* is understood as an intention to cause the prohibited result when a

²⁰ Sl. list SFRJ 29/78, 39/85, 45/89 and 57/89; Sl. list RBiH 2/92, 13/93 and 13/94; Sl. glasnik RS 17/93 and 3/96.

²¹ Sl. list SFRJ 6/80 and 36/90, Sl. list SRJ 29/96 and Sl. glasnik RS 115/2005 – dr. zakon.

²² Sl. list Crne Gore 19/2009.

²³ Sl. novine Federacije BiH 66/13 and 100/13.

²⁴ NN 91/1996.

²⁵ See more about these notions in UK criminal law in Allen (2015).

person is aware that the result will occur and wants it to occur or when a person is aware that s/he can commit the prohibited act and consents to its commission.²⁶ Negligence also takes two forms including when a person is aware that his action can result in the prohibited act but s/he unreasonably concludes that it will not occur, or that s/he will be able to prevent it or when a person does not give any thought to the possibility of his action resulting in the prohibited result although a reasonable person should recognise this risk.

Several reasons can be put forward to explain why nation state formation did not have any significant impact on legal languages and legal cultures in the four countries that emerged from the former Yugoslavia. First, those countries shared almost half a century of a common legal history and culture. These states formed part of the same federal political system with a unified legal system. As this legal system was based on the same legal foundations, the successor countries had no incentive to make changes after the dissolution of the former Yugoslavia. Even if they chose to make changes, from a legal point of view it is not clear how this new system would look as the existing legal culture fits well within the existing political and institutional system in each of the four countries. Moreover, the legal culture underpinning the legal systems in each of the four countries embodies the same values, principles, rules and doctrines that are widely accepted by the legal profession. As discussed above, former federal laws that are still applicable are the best testament to the acceptance of the existing legal culture.

The second no less important reason is a level of inertia that is always linked to potential changes to the legal language and legal culture. Though the law is quite responsive to social change, there has to be some level of stability and permanence of law (Friedman, 2006). Likewise, the underlying principle of legal certainty should ensure some predictability in the application of law and, as such, is at odds with frequent changes of law. Equally, changing legal concepts is often a long-term process involving various members of the legal profession as well as representatives of civil society to reach an agreement and identify all implications of new legal rules. If we take any of the private law doctrines, such as the acquisition of a land title by prescription or adverse possession, it would take decades to design and implement new rules. Furthermore, the law and legal principles developed in former Yugoslavia stood the test of time due to the high intellectual quality of those laws. Finally, the existing legal culture is deeply rooted in the legal profession and there is always little appetite among its members to change the law, especially in regard to changes that are potentially politically motivated.

²⁶ Criminal Code of Serbia, Sl. glasnik RS 85/2005, 88/2005 - corrigendum, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016; Criminal Code of Montenegro, Sl. list RCG 70/2003, 13/2004, 47/2006 and Sl. list CG 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015 42/2015 and 58/2015; Criminal Code of BiH Federation Sl. novine FBiH 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14 and 76/14; Criminal Code of Croatia NN 125/11, 144/12, 56/15, 61/15, 101/17.

5. The EU's Approach to Legal Translation: A Neo-Functionalist Model of Regional Integration

This part will examine and evidence the EU's approach to legal translation in accession countries through a neo-functionalist lens, in particular how the process is driven by the European Commission and sub-national technocrats. This approach enabled the EU to act as a force for integration in the region and contribute to the further harmonisation of legal languages and cultures in the four countries in the Western Balkans. Both the Commission and sub-national technocrats have an interest in using legal translation as a means to ensure the incorporation of EU law into national legal systems and subsequent compliance with it.

The neo-functionalist model of EU integration offers an explanatory framework for understanding the EU's role in furthering the cohesiveness of legal languages and cultures in the four former Yugoslav republics. This approach focuses in particular on the role of non-state actors in enabling regional integration. Neo-functionalism identifies the consequences of the political spill-over in situations when states agree to transfer some powers to a supranational organisation to carry out entrusted tasks (Schmitter, 2002). In terms of EU enlargement policy, candidate countries accepted the terms and conditions of the accession process and embarked on the long journey of fulfilling the membership criteria. However, as Schmitter (2002) points out, neo-functionalists recognise that states, i.e. governments are not exclusive actors and over time they lose the predominant role in the integration process. This allows for a spill-over effect whereby the European Commission and regional technocrats responsible for accession exploit the process by deploying legal translation with the spill-over of furthering regional integration.

Taking advantage of the shared legal language and culture in four countries of the Western Balkans, coupled with identical accession processes, sub-national authorities in those countries display a willingness to cooperate and learn from each in the process of translating EU law. No less important is the European Commission which incentivises cooperation between sub-national authorities in the region by fostering the same accession process with all candidate countries. This leads to a greater harmonisation of legal languages and cultures in the Western Balkans. Though this is not part of the deliberate EU enlargement strategy it provides a spill-over effect of furthering regional integration between these four countries. This section will thus examine the Commission's and the sub-national technocrats' approach to legal translation.

5.1. The European Commission Creating An Environment for Legal Translation to Flourish

As Moravscik (1993) argues, neo-functionalist theory emphasises the political role of the Commission as the “archetype of an activist bureaucracy” in furthering EU integration. This is especially true in relation to enlargement policy where the Commission has a primary role in implementing this policy, overseeing the progress in candidate countries, providing technical assistance and giving the green light to opening negotiations with candidate countries based on their progress. By exercising its competences in this area, the Commission is well placed to create a strategy that relevant actors are likely to follow in pursuit of agreed objectives (Moravscik, 1993). To that effect, the Commission created an environment where the progress of each country is closely linked to its ability to fulfil the membership criteria.

This was achieved through the creation of a uniform and formulaic process for each candidate country to fulfil the membership criteria. In terms of the former Yugoslavia, candidate countries are expected to fulfil the usual Copenhagen membership criteria, including political, economic, legal and administrative criteria (EU Council, 1993). In addition, those countries have to strengthen regional cooperation as essential elements of the EU’s enlargement policy in the region (EU Council, 2005). To that end, the Commission’s approach to implementing the enlargement policy clearly reflects the main trajectories of the neo-functionalist model. The Commission recognised the importance of establishing close links with regional bureaucracies, exploited the guiding interests of national translation technocrats, identified areas of work and developed common enlargement strategies with the aim of ensuring a smooth and unified approach to enlargement.

The Commission’s approach was tested over time, initially with the accession countries of Central and Eastern Europe, and it was later modified to suit the Western Balkans, where countries had a different historical background of ethnic conflicts. An important part of establishing peace and security and enhancing regional cooperation was the implementation of the Stabilisation and Association process through the Stabilisation and Association Agreement (SAA) as a first step of the accession process for all four countries.²⁷ All agreements are formulaic and contain almost identical provisions regulating the initial areas of cooperation, mostly related to the internal market. As a result, the legal language of the agreement is identical in all countries that signed the SAA and imposes the same obligations on all accession countries.

A good illustration is the provision requiring a candidate country to approximate national laws to EU law, which is identically phrased in EU agreements signed with Serbia, Montenegro and Bosnia and Herzegovina. The provision in the agreement with Croatia imposes the same obligation:

²⁷ Available at ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap_en (accessed 6 February 2017).

SR, MN and BiH versions:²⁸ The Parties recognise the importance of the approximation of the existing legislation in Serbia/Montenegro/BiH to that of the Community and of its effective implementation. Serbia/Montenegro/BiH shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. Serbia/Montenegro/BiH shall ensure that existing and future legislation will be properly implemented and enforced.

CR:²⁹ The Parties recognise the importance of the approximation of Croatia's existing legislation to that of the Community. Croatia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*.

Similar provisions can be found in many other policy areas covered by the SAA. Cooperation in the field of agriculture is another example.

SR/MN/BiH: Cooperation between the Parties shall be developed in all priority areas related to the Community *acquis* in the field of agriculture, as well as veterinary and phytosanitary domains. Cooperation shall notably aim at modernising and restructuring the agriculture and agro-industrial sector, in particular to reach community sanitary requirements, *to improve water management and rural development as well as to develop the forestry sector in Montenegro* (wording in italics is missing in the SAA with BiH) and at supporting the gradual approximation of Montenegrin/Serbian legislation and practices (of Bosnia and Herzegovina) to the Community rules and standards.

If we then examine legal language once the SAA is translated in four different languages, we see how this formulaic approach facilitates legal translation, as countries are incentivised to use each other's translations in producing official translations of the agreement in their language. Consequently, the official legal language becomes the same upon translation and the SAA imposes equivalent substantive legal obligations on the four accession countries. Furthermore, this approach in designing the SAA strengthens the same legal culture as national authorities and members of the legal profession have the same understanding of the founding principles contained in the SAA and of the same legal rules that need to be enforced.

A good example are the translations of the aforementioned provisions of the approximation of national laws in line with EU law where we can identify almost identical translations between the countries, in particular between the following translations:

MN: Ugovorne strane potvrđuju važnost usklađivanja postojećeg zakonodavstva u Crnoj Gori sa zakonodavstvom Zajednice, kao i njegovog efikasnog sprovođenja. Crna Gora će nastojati da osigura postepeno usklađivanje svojih postojećih zakona i budućeg zakonodavstva s pravnim propisima Zajednice (*acquis*). Crna Gora će osigurati adekvatnu implementaciju i sprovođenje postojećeg i budućeg zakonodavstva.³⁰

BiH: Strane priznaju važnost usklađivanja postojećeg zakonodavstva Bosne i Hercegovine sa zakonodavstvom Zajednice, kao i njegovog efikasnog provođenja. Bosna i Hercegovina nastojat će osigurati postepeno usklađivanje svojih postojećih zakona i budućeg zakonodavstva s pravnom

²⁸ Available at www.mei.gov.rs/src/dokumenta/sporazumi-sa-eu/sporazum-o-stabilizaciji-i-pridruzivanju;www.dei.gov.ba/dei/bih_eu/sporazum/default.aspx?id=9812;ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=12781 (accessed 6 February 2017).

²⁹ Available at ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=584 (accessed 6 February 2017).

³⁰ Available at durbin.cdtmn.org/durbin/images/dokumenta/SSP_CC_i_EU.pdf (accessed 6 February 2017).

tečevinom (acquis-em) Zajednice. Bosna i Hercegovina osigurat će propisnu primjenu i provođenje postojećeg i budućeg zakonodavstva.³¹

The formulaic approach is also noticeable in the Commission's approach to the monitoring of all four countries' progress. For that purpose, the Commission publishes annual reports and assesses the progress of each candidate country in regard to each membership criterion. All progress reports are very similar and follow the same structure, including a summary of the accession process and a review of laws and regulations, as well as institutional changes adopted with the aim of fulfilling individual membership criteria. This process again relies on legal translation, this time of national laws into English, so as to enable the Commission to assess the level of advancement. In order to facilitate the building of national linguistic capacities for translation and exchange of knowledge, the Commission deploys various financial mechanisms such as TAIEX to enable the exchange of knowledge between sub-national technocrats responsible for translation. Moreover, the Commission provides funds for setting up national systems for translations. To that effect, the Commission financed a pilot project in Serbia to translate 16,000 pages of the EU *acquis* into Serbian, which are accessible to translators in other Western Balkans countries.³² In this way, the Commission incentivises sub-national technocrats to take advantage of the similar legal language.

In monitoring the progress of each country, the Commission uses the same legal and policy language which is subsequently translated in all four countries. This includes not only technical and legal terms from the EU legislation but also general comments and statements about the progress of each country such as “administrative capacity at state level remains weak”; “country moderately prepared in the area of public administration reform”; “good progress has been achieved with the adoption of” and “a country needs to remain committed”. These expressions are subsequently translated in the same way in all national languages and even find their way into public and policy discourse in these four countries. Equally, in preparing information for the Commission on annual progress, civil servants and translators consult each other's progress reports and use translations of laws. A good illustration are the parts of the Commission's reports on the protection of human rights, where often one can identify identical translations on national provisions in reports prepared for the accession countries in the region.

5.2. The Response of Sub-National Technocrats to the Commission's Approach

As neo-functionalists argue, sub-national technocrats as actors “in league with a shifting set of self-organized interests” are also motivated to exploit the political spill-over

³¹ Available at dei.gov.ba/dei/bih_eu/sporazum/glavni_text/default.aspx?id=1172 (accessed 6 February 2017).

³² EuropeAid/120809/D/SER/YU; See latest IPA report for BiH at ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa_2016_39653_4_bih_eu_integration_facility.pdf (accessed 6 February 2017).

effect with the support of the European Commission (Schmitter, 2002). In a given context, sub-national actors are more likely to deploy their resources with the aim of directly influencing regional integration processes (Schmitter, 2002), despite the fact they are not regarded as key players in the accession process. Sub-national actors are able to achieve this in two main ways that will be examined in this section. First, they observe and learn from each other by introducing the same processes and guidelines to enable legal translation, both of the EU *acquis* in national languages and of national laws into English. This approach is sustainable as sub-national actors in the four countries share a common legal language and culture and follow an identical accession process and it fits well within the existing legal and political systems in all four countries. Second, as they are faced with the same membership criteria, they have to pass the same laws and make similar institutional adjustments. In that endeavour, the four countries tend to use each other's legal texts and their translations which additionally strengthens the commonality of legal language and culture in the region. Thus, the sub-national technocrats in those four countries are incentivised to cooperate and exchange best practices in light of the membership requirement to nurture regional cooperation.

5.3. Legal Translation Process and Guidelines

Croatia was the first of the four countries to start with legal translation of the EU *acquis* as a structured and organised process, though all four countries undertook translation of the EU *acquis* on an *ad hoc* basis. Croatia introduced two processes to ensure the fulfilment of the membership criteria, especially the legal one. Both processes were coordinated by the Ministry of European Integration of Croatia. The first process was to ensure the incorporation of the EU *acquis* into Croatian law. Even before signing the SAA, which obliged Croatia to start with the approximation of Croatian law with EU law, in 1999 the Croatian Government prepared a plan of integration activities with the aim of presenting work to this end (Ramljak, 2008). It also introduced an obligation for ministries and other bodies with the power of legislative initiative to use the form “Statement on the compliance of the proposal act with the EU law” when submitting an act to parliament.³³ This was followed by the regular enactment of the national programmes for the accession to the EU and plans for compliance with the *acquis*.³⁴

The second process was the introduction of a methodology and guidelines for legal translation of the EU *acquis*. Each translated text had to undergo a linguistic, expert and legal proofreading. A table of new legal terms or concepts, which may require the special attention of a legal expert, was attached to each translation. The Ministry of

³³ Available at mvep.hr/files/file/publikacije/Prirucnik_zapravnike.pdf (accessed 6 February 2017).

³⁴ Available at mvep.hr/files/file/2014/03-dodatak_2003.pdf; mvep.hr/custompages/static/hrv/files/Programme_of_the_Government_of_the_Republic_of_Croatia_for_the_adoption_and_implementation_of_the_acquis_for_2012.pdf (accessed 6 February 2017).

European Integration, in consultation with other line ministries, prepared and regularly updated a list of priorities for translation. As a tool for legal translation, Croatia prepared a Manual for Translation of the EU *acquis* followed by a series of general and specific glossaries and translation and term databases.³⁵

This two-pronged approach was followed by the remaining three countries, Serbia, Bosnia and Herzegovina and Montenegro, though the process became more sophisticated and reliable in time with new IT translation software. All of these three countries have identical processes, both in regard to the incorporation of the EU *acquis* into national law and translation of the EU *acquis*. This approach had an important impact on the further development of legal culture in the region. As Nelken (2012: 483) points out, legal culture can also be discerned in different approaches to regulation and administration. Thus, the decision to put in place the same processes in four countries certainly contributed to further embedding a similar legal culture. Moreover, in the case of the Western Balkan countries, the process of borrowing had a reverse impact on legal culture. It is usually the case that legal culture is susceptible to change as it may be affected by various processes of “borrowing, imitations and impositions” (Nelken, 2012: 486). However, in the case of Western Balkan countries, this was a reverse process whereby the process of borrowing becomes crucial in maintaining and consolidating the existing legal culture.

Not only do these countries follow the same processes, but they use the same legal terms and concepts within those processes. Several instances provide evidence, in particular the use of legal translation guidelines and their impact on legal language. Good examples are manuals for translation which are almost identical between the four countries both in terms of substance and form. Likewise, legal language shares the same terms. For example, the key term *acquis communautaire* is translated as *pravna tekovina* or *pravna stečevina* in all four countries.³⁶ Croatia was the first to introduce this translated term and it was unequivocally accepted by all three other countries. This was quite surprising as there were much better terms to choose from instead of simply replicating the same legal term, especially as the translated term denotes law of the past rather than law in force.

Manuals also reveal that all types of EU legal acts are translated by using the same legal terms in all four languages (treaty – *ugovor*; regulation – *uredba*; directive – *direktiva*; decision – *odluka*; recommendation – *preporuka*; opinion – *mišljenje*). In addition, the countries also instituted the same national legal drafting rules used to incorporate the EU *acquis*, which demonstrates that the same rules and processes underpin a shared legal culture. Serbia, Montenegro and Bosnia and Herzegovina decided to fol-

³⁵ Available at mvep.hr/hr/hrvatska-i-europska-unija/hrvatska-i-europska-unijaO/prirucnici-za-prevodenje (accessed 6 February 2017).

³⁶ Available at mvep.hr/files/file/prirucnici/MEI_PRIRUCNIK.pdf; mei.gov.rs/upload/documents/prevodjenje/prirucnik_prevodjenjem_2016.pdf; dei.gov.ba/dei/dokumenti/uskladjivanje/default.aspx?id=9675; mep.gov.me/organizacija/det/prirucnik (accessed 6 February 2017).

low the Croatian example by introducing an important phase in the decision-making processes whereby the ministry responsible for proposing legislation must provide evidence that any new legislation is in compliance with EU law. This is done by filling a “Statement on the compliance of regulations with the EU law” which is identical both in term of substance and form among these four countries.

5.4. Legal Language in Newly Adopted National Laws

All Western Balkan countries are faced with the same membership requirements and to that end have to adopt the same laws and regulations. In regard to the political requirements, they need to ensure stable and democratic institutions, the rule of law and to guarantee human rights and respect for and protection of minorities (EU Council, 1993). This would, *inter alia*, require the adoption of laws on courts, an ombudsman act, a prevention of discrimination act, a data protection act, etc. Similarly, the economic criteria entail a functioning market economy and the capacity to cope with competition and market forces in the EU (EU Council, 1993). Thus, the candidate countries have to adopt a number of laws, including a companies act, a competition act, a public procurement act, etc. Finally, in regard to legal criteria, which entail an obligation to “assume obligations of membership”, accession countries are obliged to translate and incorporate the entire EU *acquis* in all policy areas in which the EU exercises some competences. Accession countries negotiate 35 policy areas with the EU, which illustrates the scope and scale of the translation requirement.

Faced with demanding requirements and a shared legal language, it is not surprising that the fulfilment of these criteria leads to even greater uniformity of laws adopted in the four countries. The main burden is on the sub-national technocrats who are aware that legal translation is often regarded as a technical process. Thus, in a given context sub-national technocrats make a conscious decision to take advantage of the common legal language and culture in order to facilitate their own work. This in turn maximises the spill-over effects of the enlargement process. As Schmitter (2002) points out, in the light of a potentially cumbersome process and inevitable resource constraints, national bureaucrats will search alternative means to reaching their ultimate goal.

Taking advantage of the common legal language and culture, one of the obvious choices for those involved in legal translation at the national level is to borrow legal translations from countries that already completed translating the EU *acquis* in the relevant policy area. In 2010 the Croatian Government passed its translation of the EU *acquis* to the Bosnian and Serbian governments.³⁷ Though the quality of these translations was at times questioned, they continue to provide a useful basis for further translations.

³⁷ Available at savjetministara.gov.ba/saopstenja/saopstenja_predsjedavajuceg/default.aspx?id=10179 (accessed 6 February 2017).

Borrowing legal translation from other countries in the region occurs when technocrats are faced with new legal terms that are not part of the existing legal language and culture. A noteworthy illustration was the translation of the Third Money Laundering Directive (2005/60/EC), when national authorities were faced with a new legal concept that derives from the common law equity doctrine. The directive introduces a term beneficial owner who is regarded as a genuine owner of the assets albeit “hidden behind the curtain”. As this is a new concept and is not part of the legal culture in Bosnia and Herzegovina, the national technocrats decided to migrate in its entirety the Croatian translation of the key words in the Directive. If we look at the provisions below, we will see that the key legal term “beneficial owner” is identically translated in Croatia and Bosnia and Herzegovina.

EN: “beneficial owner” means the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted.

CR: “stvarni vlasnik” označava fizičku osobu/osobe koja u konačnici posjeduje ili kontrolira stranku i/ili fizičku osobu u čije ime se provodi transakcija.

BiH: “stvarni vlasnik” klijenta je: stvarni vlasnik klijenta i/ili fizičko lice u čije se ime transakcija ili aktivnost obavlja.³⁸

Definitions were slightly amended in line with the legal drafting rules in Bosnia and Herzegovina and became part of the Act on the Prevention of Money Laundering and Financing of Terrorist Activities. Though the ultimate goal is to facilitate compliance with EU law, this approach of borrowing legal constructs and terms becomes instrumental in unifying the legal language and maintaining a common legal culture. This is especially important in instances when a technocrat is faced with a new legal concept which offers an opportunity to create new terms in legal language and depart from a common legal culture. However, the sub-national technocrats decided not to seize this opportunity and followed the examples of their colleagues in those four countries.

This is not only the case when national technocrats are faced with new legal constructs and terms. Surprisingly, this trend is present even with regard to terms that are already established within national legal systems and form part of the existing legal culture. These constructs and terms are often prescribed in EU directives that leave discretion to member states to implement EU norms, though in some cases this discretion can be quite limited. One illustrative example is the Directive on waste (2008/98/EC), which defines the concept of waste and introduces several new concepts. This new definition introduces the term *discard* which is essential in understanding the term waste as waste is by definition discarded. Here, we can again identify how sub-national technocrats seized the opportunity to facilitate this process and rely on each other’s existing translation. If, for example, we compare the Serbia Waste Act, Montenegrin Waste Act and the Waste Act of Bosnia and Herzegovina (in the enti-

³⁸ Sl. glasnik Bosne i Hercegovine 53/09.

ty with Croatian and Bosnian ethnic communities) we can identify almost identical legal formulations for defining the term *discard*:

EN: ‘waste’ means any substance or object which the holder discards or intends or is required to discard;

SR: otpad jeste svaka materija ili predmet koji držalac odbacuje, namerava ili je neophodno da odbaci³⁹

MN: otpad je svaka materija ili predmet koju je imalac odbacio, namjerava da odbaci ili je dužan da odbaci u skladu sa zakonom⁴⁰

BiH: otpad znači sve materije ili predmete koje vlasnik odlaže, namjerava odložiti ili se traži da budu odložene u skladu sa jednom od kategorija otpada navedenij u listi otpada utvrđenoj u provedbenom propisu⁴¹

The Montenegrin and Serbian definitions of waste are identical in defining the key term *discard*, though there is a slight difference in defining the holder of the waste. However, this does not affect the main understanding of the term *discard* which remains the same between the two language versions. The only difference with the Bosnian version is that the Serbian and Montenegrin statutes use the term that means *discard* while the Bosnian version uses the term *dispose*, which was used in French and German texts of the Directive on waste (European Commission, 2010). Equally, the same legal terms are used for concepts such as *operator*, *polluter-pays* and *household waste*, which are new to the legal system in Western Balkan countries.

Finally, the attitude towards law and its interpretation as a part of legal culture is also evidenced in the approach sub-national technocrats take in verifying the accuracy of translated EU legal texts. In this process, both the technocrats and external experts often have to interpret unclear or ambiguous provisions to ensure the correct translation. Led by the same understanding of key legal concepts, principles and doctrines, the sub-national technocrats use versions of EU legal texts in languages of civil law countries, especially French and German, to identify the meaning of the norm and to decide on the best translation. In addition, those technocrats also verify translations available in languages of those four countries in the region. At the moment, translations of all EU legal acts are available in Croatian and a significant number are available in Serbian.

A relevant example of the use of legal terminology from civil law is the translation of the term *law and order*, which in the English language text of the treaty invokes a state’s powers to undertake measures for preventing any criminal activity or disorder (more examples in Čavoški, 2017). However, the EU treaty in French and German offers a better understanding of this concept, which is in line with the legal culture in civil law countries. This term is translated in French as the requirement of *l'ordre public* (public order) while in German as *öffentliche Ordnung* (public order), which entail a broader legal concept of compliance with the laws of a country. Moreover, the term *public order* is already widely accepted and well-known in countries of the Western Balkans.

³⁹ Sl. glasnik RS 36/2009, 88/2010 and 14/2016.

⁴⁰ Sl. list Crne Gore 64/11.

⁴¹ Available at mpz.ks.gov.ba/sites/mpz.ks.gov.ba/files/MPZ_Zakon_upravljenje_otpadom_33-03_o_o.pdf.

6. Conclusions:

Implications for EU Multilingualism and Integration

Throughout the ethnic and political conflicts in former Yugoslavia, language played a significant role in nation state formation. This was expected as language was often used as a political tool through the various stages of European history. After the break-up of Yugoslavia, former republics gained independence followed by the emergence of new standard languages in respective countries. One would assume that this phenomenon would be replicated in the construction of divergent legal languages and cultures in these countries.

In spite of divergent standard languages and national identities, shared legal language and legal translation played an important role in consolidating regionally coherent legal languages and cultures. This coherence existed due to the shared legal history of those four countries while they were constituent republics of the former Yugoslavia. In supporting legal translation in the region within the accession process, the EU further reinforced these consistent legal languages and cultures of the region. This is an important finding of this paper as, in effect, for the purposes of EU accession these four countries can be viewed as a legally coherent region.

The European Commission enabled the integration of legal language and culture in the region, not only through deliberate legal strategy of implementing the *acquis* but also through legal translation of that *acquis*. Moreover, sub-national technocrats provided a key impetus to EU integration by taking advantage of the identical accession process and the common legal language and culture as the best way to pursue their objectives within this process. They accordingly were motivated by their own interests to cooperate and learn from each other. The supranational European Commission engages directly with sub-national actors to incentivise activities that lead to further cooperation and regional integration. This conforms to the neo-functionalist model borrowed from the field of political science and put forward in this paper as a new way to investigate the development of legal language and culture.

Three important avenues of further research are opened up by this study. First, it establishes the value and original applicability of neo-functionalist theory to the growing area of law and language. Though this theory was predominantly applied in political science, this paper evidences its appropriateness in examining the role of legal language and translation within the EU accession process. This theory offers an explanatory model on how legal translation, both through the process and the language itself, can become a vehicle of further EU integration. The next step in the research could entail further testing of this theory by undertaking empirical research of translation practices within the Commission and sub-national regional authorities in the Western Balkans.

Second, as this study puts forward a contentious idea of similar legal languages and cultures in the four chosen countries, it provides an opportunity for lawyers and linguists to work together by applying various research methodologies such as corpus analysis and doctrinal black-letter legal approaches in testing this proposition further. This joint work would help in providing a greater understanding of legal language through an interdisciplinary lens and will assist in bridging the gap between various disciplines concerned with this issue.

Finally, the question of facilitating the future functioning of EU multilingualism policy is an important one. As this region can be viewed as possessing similar and consistent legal languages, this may have implications for the EU's multilingualism policy. This opens up other avenues for future research closely linked to an inquiry on the future of this policy. As discussed in chapter 2, there are different proposals on how to reduce the number of authentic languages, which increases with every new accession to the EU. Though policy of multilingualism is one of the founding principles of the EU, the Western Balkans region certainly provides an opportunity for the EU to rethink its approach to legal translation if and when remaining countries in the region accede. As it is likely that those countries may join at roughly the same time, this will mean that three additional languages will have to be added to the list of EU official languages – Serbian, Montenegrin and Bosnian. The fact that those countries, together with Croatia, have a common legal language and culture may be used as an opportunity to further greater regional linguistic and legal cooperation between lawyers and linguists in all four countries. This may involve joint translation teams in all EU institutions in the future, especially in the Court of Justice of the European Union where the recruitment of qualified lawyer linguists could be even more challenging. Thus, the coherence of legal languages and cultures in the region may lead to a more sustainable and improved EU multilingual policy.

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