

Chapter 2

Law, Language and Translation

Legal translation is a special and specialised area of translational activity. This is due to the fact that legal translation involves law, and such translation can and often does produce not just linguistic but also legal impact and consequence, and because of the special nature of law and legal language. Moreover, as is noted, the translation of legal texts of any kind, from statute laws to contracts to courtroom testimony, is a practice that stands at the crossroads of legal theory, language theory and translation theory (Joseph 1995: 14). Therefore, it is essential that the legal translator have a basic understanding of the nature of law and legal language and the impact it has on legal translation.

This chapter begins with a classification of legal translation. This is followed by an analysis of the nature of legal language in terms of its normative, performative and technical character and the tension between legal certainty and linguistic indeterminacy. A characterisation of legal language is also proposed in terms of legal lexicon, syntax, pragmatics and style. Then, the chapter elaborates on the three major sources of difficulty in legal translation, that is, the legal, linguistic and cultural complications. In particular, it offers a comparative analysis of the two major legal systems: the Common Law and the Civil Law. Lastly, the chapter contemplates the possibility and impossibility of legal translational equivalence and whether it is indeed achievable.

Legal Translation Typology

Translation is classifiable into various categories. It can be divided into two general categories of literary and non-literary translation or the categories of ideational (technical and non-technical) and interpersonal (non-fictional and fictional) translation (House 1977), and the translation of pragmatic texts and literary or artistic texts (Delisle 1988). Translation can

also be classified according to the division of natural and artificial language based on language use, and on the types of translation activities, literary or industrial (Sager 1993).¹ A commonly used typology is the classification of translation into general, literary and specialist or technical translation.

Relevant to translation typology is how we view the differences and similarities among the different types of translation. In this connection, the prototypology proposed by Snell-Hornby (1988: 27–36) is particularly constructive.² This is the so-called ‘natural categorisation’, that is, in the form of prototypes that have a hard core and blurred edges (Snell-Hornby 1988: 27). The prototypology is a dynamic, gestalt-like system of relationships that covers various types of translation ranging from literary to technical (Snell-Hornby 1988: 31). In the classification of general, specialist and literary translation, we need to recognise that these categories of translation involve different language uses that have their own peculiarities, but they also share common grounds. As Vermeer (1986: 35, cited in Snell-Hornby 1988: 51) points out, for instance, the differences between general and literary translation are one of degree, not of kind. It is not a polarised dichotomy, but a spectrum that admits blends and overlapping, a question of quality and intensity, not one of fundamental difference (Snell-Hornby 1988: 51). As Harvey (2002: 177) puts it, literary and scientific translations are not watertight and they may be in a hybrid form.

For our purpose, if we follow the general, literary and specialist classification of translation, legal translation falls under the specialist category, or technical translation. It is a type of the translational activity involving special language use, that is, language for special purpose (LSP) in the context of law, or language for legal purpose (LLP). Legal translation has the characteristics of technical translation and also shares some of the features of general translation.

Legal translation can be further classified according to different criteria. For instance, legal translation has been classified according to the subject matter of the SL texts into the following categories: (1) translating domestic statutes and international treaties; (2) translating private legal documents; (3) translating legal scholarly works; and (4) translating case law. Legal translation can also be divided according to the status of the original texts: (1) translating enforceable law, e.g. statutes; and (2) translating non-enforceable law, e.g. legal scholarly works.

According to Sarcevic (1997), legal translation can be classified according to the functions of the legal texts in the SL into the following categories: (1) primarily prescriptive, e.g. laws, regulations, codes, contracts, treaties and conventions. These are regulatory instruments containing rules of conduct or norms. They are normative texts; (2) primarily descriptive and also

prescriptive, e.g. judicial decisions and legal instruments that are used to carry on judicial and administrative proceedings such as actions, pleadings, briefs, appeals, requests, petitions etc.; and (3) purely descriptive, e.g. scholarly works written by legal scholars such as legal opinions, law textbooks, articles etc. They belong to legal scholarship, the authority of which varies in different legal systems (Sarcevic 1997: 11). Sarcevic (1997: 9) defines legal translation as special-purpose communication between specialists, excluding communication between lawyers and non-lawyers.

One major problem with the existing classifications of legal translation is that they are based on the function or use of the original legal texts in the SL, without due regard to the various TL factors, such as the functions or status of the translated texts. However, there is a need to distinguish the functions of the SL text from those of the TL text (cf. Roberts 1992). It is necessary to consider the TL variables, in addition to those of the SL. Another problem of the existing classifications is that many documents that are used in the legal process and translated as such are excluded from the classifications, e.g. documents used in court proceedings. A third major problem is that some of the classifications such as Sarcevic's exclude communications between lawyers and non-lawyers (clients). The restriction in Sarcevic's 'legal texts for specialists only' disqualifies some text types that make up a large part of the legal translator's workload in real life: private agreements and correspondence between lawyers and clients, for instance (see Harvey 2000).

Given these reasons, before we offer another classification of legal translation, let us first examine how legal texts may be classified.

In this study, legal language refers to the language of and related to law and legal process. This includes language of the law, language about law, and language used in other legal communicative situations (cf. Kurzon 1998, who distinguishes language of the law from legal language, i.e. language about law). Legal language is a type of register, that is, a variety of language appropriate to different occasions and situations of use, and in this case, a variety of language appropriate to the legal situations of use. Legal texts refer to the texts produced or used for legal purposes in legal settings.

We may distinguish four major variants or sub-varieties of legal texts in the written form: (1) legislative texts, e.g. domestic statutes and subordinate laws, international treaties and multilingual laws, and other laws produced by lawmaking authorities; (2) judicial texts produced in the judicial process by judicial officers and other legal authorities; (3) legal scholarly texts produced by academic lawyers or legal scholars in scholarly works and commentaries whose legal status depends on the legal systems in different

jurisdictions; and (4) private legal texts that include texts written by lawyers, e.g. contracts, leases, wills and litigation documents, and also texts written by non-lawyers, e.g. private agreements, witness statements and other documents produced by non-lawyers and used in litigation and other legal situations.³ These different sub-text types have their own peculiarities. As noted, legal language is not homogeneous, not just one legal discourse, but 'a set of related legal discourses' (Maley 1994: 13). Legal language does not just cover language of law alone, but all communications in legal settings.

Legal texts may have various communicative purposes. They can be for normative purpose as in the case of bilingual and multilingual statutes and other laws and documents that establish legal facts or create rights and obligations. These are mostly prescriptive. Legal texts can also be for informative purpose as in some legal scholarly works and commentaries, legal advice, correspondence between lawyers, between lawyers and clients, and documents used in court proceedings. These are mostly descriptive. For the translator, it is necessary to ascertain the legal status and communicative purpose of the original texts and the target texts as these may impact on translation. Also importantly for our purpose, the legal status and communicative purposes in the SL texts are not automatically transferred or carried over to the TL texts. They can be different.

Given the foregoing description of legal language and legal texts, legal translation refers to the rendering of legal texts from the SL into the TL. Legal translation can be classified into three categories in the light of the purposes of the TL texts.⁴

Firstly, there is legal translation for normative purpose. It refers to the production of equally authentic legal texts in bilingual and multilingual jurisdictions of domestic laws and international legal instruments and other laws. They are the translation of the law. Often such bilingual or multilingual texts are first drafted in one language and then translated into another language or languages. They may also be drafted simultaneously in both or all languages. In either case, the different language texts have equal legal force and one is not superior to another irrespective of their original status. Such legal texts in different languages are regarded as authoritative once they go through the authentication process in the manner prescribed by law. By virtue of this process, such texts are not mere translations of law, but the law itself (Sarcevic 1997: 20). Examples of these are the legislation in the bilingual jurisdictions of Canada and Hong Kong, the multilingual legal instruments of the UN, and the multilingual laws of the EU. In the case of the EU, the authentic language versions of EU laws, now twenty languages, are equivalent since they have the same legal force and value and can be invoked indiscriminately in appeals to the ECJ by EU

citizens or businesses, irrespective of their Member State of origin or that country's official language or languages (Correia 2003: 41). They are usually drafted in English or French first to be translated into the other official languages. Nevertheless, they all have equal legal force.

This category of legal translation may also include private documents such as contracts, the bilingual texts of which are equally authentic in a bilingual or monolingual jurisdiction. For instance, in a non-English speaking country, contracts sometimes may stipulate that the versions of the contract in the official language of the country and English are both authentic, even though the language of the court and the country does not include English. In this first category of legal translation, the communicative purposes of the SL and TL texts are identical.

Secondly, there is legal translation for informative purpose, with constative or descriptive functions. This includes the translation of statutes, court decisions, scholarly works and other types of legal documents if the translation is intended to provide information to the target readers. This is most often found in monolingual jurisdictions. Such translations are different from the first category where the translated law is legally binding. In this second category, the SL is the only legally enforceable language while the TL is not. For instance, a statute written in French from France translated into English for informative purpose for the benefit of foreign lawyers or other English readers is not legally enforceable. This is different from the first category where, for instance, a statute written in French in the bilingual jurisdiction of Canada is translated into English or vice versa and where both the French and English versions are equally authentic. Sometimes, publishers of translations of laws in the second category include a disclaimer to the effect that the translation of such and such a law is for reference only, and that in legal proceedings, the original language text of the law shall prevail. Another example is the translation of the legal instruments of the WTO, which has English, French and Spanish as its official languages. Here only the texts written in the official languages have legal force while their translations into other languages are not binding, but for information only. In this category, the SL and TL texts may have different communicative purposes.

Thirdly, there is legal translation for general legal or judicial purpose. Such translations are primarily for information, and are mostly descriptive. This type of translated document may be used in court proceedings as part of documentary evidence. Original SL texts of this type may include legal documents such as statements of claims or pleadings, contracts and agreements, and ordinary texts such as business or personal correspondence, records and certificates, witness statements and expert reports,

among many others. The translations of such documents are used by clients who do not speak the language of the court, e.g. statements of claims, or by lawyers and courts who otherwise may not be able to access the originals such as contracts, correspondence or other records and documents. Such translated texts have legal consequences attached to them due to their use in the legal process. In practice, for instance, in Australian courts, a sworn affidavit from the translator is normally required as to the quality of the translation and the competency of the translator. Sometimes, the translator is also called upon as a witness in court regarding the translation. For some of these, the otherwise ordinary non-legal documents written by non-lawyers are elevated to legal status because of the special use of the original and the translation. This is similar to court interpreting. Court interpreters in most cases interpret oral evidence of witnesses who may be retelling ordinary events and answering ordinary personal questions. These witnesses could say the same or similar things outside the courtroom in non-legal settings. The main difference is that interpreting the same story in a non-legal setting is ordinary interpreting while interpreting the same in court is legal interpreting as the interpreted words are used for a legal purpose under special circumstances and conditions. In these situations, the language use or translation use is contingent upon the existence of a legal order, which must be considered to be part of the communicative situation. The law's institutional character plays a major part in language use in legal settings (Madsen 1997b), thus, should be given prominent consideration in our classifications of legal texts and legal translation. Many parts of the court or litigation documents are the closest to resemble everyday language use in all the sub-types of legal texts.

The third type of translation is different from the second category described above in that the third category may include ordinary texts that are not written in legal language by legal professionals, but by the layperson. This type of legal translation is often left out in the discussion and classification of legal translation. However, in fact, in the practice of legal translation, it constitutes a major part of the translation work of the legal translator in real life, the 'bread and butter' activities (Harvey 2002: 178).

Thus, we can say that legal translation refers to the translation of texts used in law and legal settings. Legal translation is used as a general term to cover both the translation of law and other communications in the legal setting. For the legal translator, it is important to ascertain the status and communicative purposes of both the original text and the translation.

The Nature of Legal Language

As is commonly acknowledged, legal translation is complex and difficult. There are many reasons why this is the case. In general, the complexity and difficulty of legal translation is attributable to the nature of law and the language that law uses, and the associated differences found in intercultural and interlingual communication in translating legal texts. Prominently, legal language is identified and linked with the normative, performative and technical nature of language use, and the inherent indeterminate nature of language in general.

The normative nature of legal language

Legal philosophers agree that legal language is a normative language. It is related to norm creation, norm production and norm expression (Jori 1994). This means that the language used from law or legal sources is largely prescriptive.

The normative language of law derives from the fact that law has the basic function in society of guiding human behaviour and regulating human relations. Law is distinguished from most other types of human institutions. Law embodies the ideals and standards people have and seek to realise in such concepts as equity, justice, rights, liberty, equal protection and the general welfare that enter the body of law (Jenkins 1980: 98). In other words, law has a normative existence that is embodied in the ideals and principles that people cherish, the purposes and aspirations they pursue, and the notions they hold (Jenkins 1980: 103). These constitute the existential goals of law. Thus, law exists as a set of prescriptions having the form of imperatives, defining and enforcing the arrangements, relationships, procedures and patterns of behaviour that are to be followed in a society (Jenkins 1980: 98).

Consequently, the language used in law to achieve its purpose is predominantly prescriptive, directive and imperative. Laws are written in language the function of which is not just to express or convey knowledge and information, but also to direct, influence or modify people's behaviour, whether it be a legal enactment, judicial pronouncement or a contract. As is noted by Maley (1994: 11):

In all societies, law is formulated, interpreted and enforced . . . and the greater part of these different legal processes is realised primarily through language. Language is the medium, process and product in the various arenas of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour.

In the words of Olivecrona (1962: 177, quoted by Jackson 1985: 315),

... the purpose of all legal enactments, judicial pronouncements, contracts, and other legal acts is to influence men's behaviour and direct them in certain ways, thus, the legal language must be viewed primarily as a means to this end.

In short, the language of the law is a normative language. Its predominant function is to direct people's behaviour in society. It authoritatively posits legal norms.

The performative nature of legal language

Closely related to the normative nature of law and legal language is the notion that language is performative. Law depends upon language, in particular the normative and performative nature of language. In speech act theory as first proposed by J.L. Austin (1962, 1979, see also Searle 1969, 1976, 1979), speech is not just words, as people normally associate it with, but also actions. Words are not only something we use to say things, we also use them to do things. The performative use of language is not exclusive to law, but law relies heavily on performative utterances. Legal effects and legal consequences are commonly obtained by merely uttering certain words, for instance, 'You are guilty', or 'You are fined \$1000' as regularly pronounced in court. Language used in law can perform such acts as conferring rights, prescribing prohibition and granting permission. By merely uttering words, people accept public and private legal responsibilities, assume legal roles and qualities, transfer legal rights and impose or discharge obligations (Jori 1994: 2092). Thus, legal speech acts are said to be constitutive of their effects.

In relation to legal discourse, Danet (1980) classifies legal language use into different types of speech acts, based on Searle's (1976) general classification of speech acts. Thus, legal speech acts are said to consist of the following categories (Danet 1980: 457–461):

- (1) Representatives, which are utterances that commit the speaker to something being the case or assert the truth of a proposition, including testifying, swearing, asserting, claiming and stating.
- (2) Commissives, which commit the speaker to do something in the future, such as in contracts, marriage ceremonies and wills.
- (3) Expressives, which express the speakers' psychological state about or attitude to a proposition, including apologising, excusing, condemning, deploring, forgiving and blaming.

- (4) Declaratives, whose successful performance brings about a correspondence between their propositional content and reality, including marriage ceremonies, bills of sale, receipts, appointments, and nominations; and the legislative stipulation of rights and of definitions of concepts; lawyers' objections, sentences, and appellate opinions, indictments, confessions, pleas of guilty / not guilty, and verdicts. There is a sub-category of representative declarations for certain institutional situations, e.g. a judge making factual claims, requiring claims to be issued with the force of declaration, and this would require the speaker to have certain authority. This would cover marriage ceremony, bills of sale, appointment or nominations, legislative stipulation of rights and definition of concepts, indictments, confessions, pleas of guilty / not guilty, and verdicts.
- (5) Directives, which are future-oriented speech acts, seeking to change the world, to get someone to do something, most prominent in legislation that imposes obligations.

Hence, the performative nature of language is indispensable to law in achieving its purpose of regulating human behaviour and society and setting out obligation, prohibition and permission.

The technical nature of legal language

Legal language is a technical language and legal translation is technical translation involving special language texts, that is, texts written in LLP. But in fact, there have been debates as to the nature of legal language, whether legal language actually exists and whether it is a technical language.

There are two main positions regarding the nature of legal language. One view holds that legal language is a technical language while the opposite view is that there is no legal language, and, even if it exists, it is part of the ordinary language. For the latter view, some question whether it is scientifically correct to speak of the language of law. In this view, there is no law language. Legal language is no more than a specialised form of the ordinary language. It is a use of the ordinary language for particular purposes, and in this case, legal purpose. On the other hand, many believe that legal language is an identifiable technical language. They accept the validity of the designation 'legal language'. Some even argue that it is a separate language, a sub-language or a social dialect.⁵

If we accept, as has been mostly accepted now, that there is such a linguistic phenomenon as legal language, and that it is a technical language,

then, what kind of language is legal language? What makes it different from other types of language use?

Diverse views have been expressed over the years on the nature of legal language as a technical language. For instance, Charles Caton (1963), a linguistic philosopher, believes that legal language is a technical language, but 'technical language is always an adjunct of ordinary language' (Caton 1963: viii), whether ordinary English, ordinary French or ordinary Swahili. He argues that technical languages have the same syntax as ordinary language, and speech acts performable in ordinary discourse are performable in technical contexts, but only differ in vocabulary (Caton 1963). Caton counts languages of physics, mathematics, farming, chess and the law as among technical languages (see also Morrison 1989). Similarly, according to Schauer (1987: 571), a legal philosopher, legal language as a technical language often operates in a context that makes legal terms have meanings different from those they bear in non-legal contexts of use. Legal language is thus parasitic on ordinary language.

In contrast, others argue that legal language as a technical language differs from ordinary language. For instance, legal philosopher, H.L.A. Hart (1954, 1961/1994) argues that owing to the distinctive characteristics of legal language, 'legal language is *sui generis*', 'unique unto itself'. Fundamental to Hart's view is that legal language is distinctive because it presupposes the existence of a legal system and presupposes particular rules of law, against the background of which legal language obtains its meaningfulness and particular meaning, and because of the distinctive feature of rules of law as rules (see also Morrison 1989). Hart argues that technical terms affect the meaning of each other word used in connection with the technical word and that legal terms have meanings only in the context of the existence of a legal system and only through particular rules of law (Hart 1954).

Another important view is that of Bernard Jackson (1985), legal philosopher and legal semiotician, viewing legal language from a semiotic perspective. His theory has implications in particular for legal translation. For Jackson, legal language is a technical language. Legal lexicon and its structure display some of the characteristics of this technical language. He further argues that legal language is autonomous of the natural language. This can be seen in two aspects. Firstly, in Greimasian semiotics, the legal lexicon is autonomously constituted in the sense that legal institutions determine which semiotic objects enter the legal lexicon (Jackson 1985: 46). Secondly, the autonomy of legal language resides in the semantic relations of the lexicon as proposed by Carcaterra (Jackson 1985: 46). Once constituted as a system, the language of law represents an entire universe of legal meanings, the choice of any one of which reflects the exclusion or absence

of the other available legal meanings (Carcatterra 1972, cited in Jackson 1985: 46). Thus, the specificity of legal language resides in the legal system. Legal language, 'having a lexicon constituted in a manner different from that of the ordinary language, and involving terms related to each other in ways different from those of the ordinary language, must be autonomous of the ordinary language', although this does not exclude the possibility of historical influence from ordinary to legal language or of considerable factual correspondence (Jackson 1985: 47).

According to Jackson, it is true that legal language needs to draw upon the whole resources of the natural language for its intelligibility, but legal language may only, to the extent that it resembles ordinary language, appear to be intelligible to the layperson (Jackson 1985: 47). The layperson may read legal language as if it were natural language; he or she may be quite oblivious to those systematic differences that give the same words a different meaning to the lawyer (Jackson 1985: 47). Equally, we have to account for the occurrence of incomprehension of legal language even amongst those who have a sophisticated knowledge of the natural language concerned (Jackson 1985: 47). It is 'lack of knowledge of the system, rather than lack of knowledge of individual lexical items, which produces this effect' (Jackson 1985: 48). Although legal language depends upon the semantics of ordinary language as judges frequently invoke the ordinary meaning of language in legal interpretation, yet, according to Jackson, if ordinary language meanings are admitted, 'it is solely by virtue of the choice made within the legal system to admit such meanings' (Jackson 1985: 48). The 'non-legal sense of a word adopted into the legal lexicon provides the jurist with the source of one possible choice as to its particular meaning in law', but the choice can only be made from within the legal system, and 'does not occur automatically as a result of the semantic pull of the non-legal meaning' (Jackson 1985: 50). Thus, according to Jackson, the legal system is critical to understanding. The words make sense only within the context of the legal system itself. Understanding an item of the legal lexicon requires knowing the legal system. This is an important reminder for the legal translator.

Regarding the discussion above, as we know, language and language use, including legal language, consist of more than just the lexicon. Therefore, we can benefit the study of legal language and its nature by looking at legal language as a register. This will give an additional perspective to the foregoing discussion.

Register is a language variety according to use (Halliday and Hasan 1985: 41). Register is 'what you are speaking at the time, depending on what you are doing and the nature of the activity in which the language is functioning'

and it 'reflects the social order, the types of social activity' (Halliday and Hasan 1985: 41). Register is a functional language variation, a contextual category correlating groups of linguistic features with recurrent situational features (see Halliday *et al.* 1964).⁶ It is a variety of language use. Register comprises an open-ended set of varieties of language typical of occupational fields such as the language of religion, legal language and medical language. Furthermore, registers are differentiated from one another in their meaning, and therefore they differ in the vocabularies that express that meaning and in grammatical structure. Thus, register markers are firstly lexical, e.g. technical terms, and secondarily, structural, e.g. particular use of grammatical features (Halliday and Hasan 1985: 41).

If we consider legal language as a register, firstly, it spans a continuum from almost normal formal usage to highly complex varieties that differ substantially from normal formal usage (Danet 1980: 472).⁷ Secondly, even though legal register differs from other language use, different registers are not entirely discrete. Rather there is a common core that extends, not necessarily evenly, across all registers together with variations in each register (Ingram and Wylie 1991: 9). According to Ingram and Wylie:

A special purpose register is not so much a special language as one language used in special contexts, for special purposes, with numerous but potentially identifiable features emerging more or less frequently in each situation and differentiating the register as a sub-system of the language by the frequency of occurrence of the syntactic, lexical, semantic, functional, cohesive and other features. (Ingram and Wylie 1991: 9)

If such a view is adopted, then language should be perceived as 'a systematic whole which responds to situational requirements', with different language forms occurring more or less frequently in different situations, and registers are 'different manifestations of a total system' (Ingram and Wylie 1991: 9). For our purpose, this means that legal register shares common features with ordinary language. Thus, one may say that the relation between legal language as a special purpose register and the rest of the language is that of a part to the whole, a part in which the general features of the language occur even if in different frequencies of occurrence (Ingram and Wylie 1991: 11).

To sum up, we may say that legal language as a register is a variety of language use of the technical nature. It shares the common core of general language but is not identical to ordinary language. There are lexical, syntactical, textual and pragmatic features that are singular to legal language as a technical language.

The indeterminate nature of language

Language is inherently indeterminate.⁸ This linguistic nature is not often realised or appreciated. People are often guided by an ideal conception of language as precise, determinate, literal and univocal.⁹ As is often quoted, people tend to think that anything that can be said can be said clearly, and anything that can be thought can be thought clearly. Perhaps not! In actual use, language falls far short of such an ideal conception. Moreover and importantly, the universe and human behaviour are inherently uncertain and indeterminate, law included. Ambiguity, vagueness, generality and other such features are often pervasive as well as important. They are not the shortcomings of language use or a deficiency in the system of natural language, not 'the common cold of the pathology of language' (Kaplan 1950, cited in Kooij 1971: 1).¹⁰ Linguistic uncertainty should not be overrated as an insurmountable obstacle in communication because linguistic and pragmatic strategies often, although not always, overcome such obstacles to achieve effective or successful communication (see Kooij 1971: 3–4).

Relevant to law, language used in law as in other areas is characterised by indeterminacy, or 'open texture' as Hart (1961/1994) calls it, 'with a core of settled meaning' and 'a penumbra of uncertainty'.¹¹ The English legal language is full of imprecise and ambiguous expressions. English legal terms such as 'fair and reasonable' and 'due process of law' are vague and elusive. So are abstract legal expressions such as 'justice', 'due diligence' and 'reasonable endeavours'. As said before, linguistic uncertainty is inherent in language, and cannot be eliminated, thus is ineliminable from a legal system (Endicott 2000: 190). However, law demands exactness and precision. Ambiguity and imprecision of any kind are likely to lead to disagreement. Ambiguity in language, arising from the 'penumbra of uncertainty' is often points of legal contentions and disputes (see Chapter 4 for further discussion). As Schauer (1993: xi) says, legal systems are expected to resolve disputes that are sometimes created by the indeterminacies of language.

Linguistic uncertainty, whether it is ambiguity, generality or vagueness includes both intralingual uncertainty, that is, uncertainty found within a language, and interlingual uncertainty, that is, uncertainty arises when two languages are compared or when one language is translated into another language. In such cases, words, phrases and sentences in one language may or may not be uncertain, but additional ambiguity or other uncertainty may arise when they are considered across two languages. More complications may emerge as a result. The bilingual and multilingual jurisdictions of Canada and the EU have produced

sufficient case law for illustrations in this respect (see Chapters 4, 6 and 7 and also Cao 2007).

Characterising Legal Language

If we say that legal language is a recognisable linguistic phenomenon, we must demonstrate and determine what we mean by it. Are there any common characteristics found in legal language? Is legal language definable in terms of identifiable linguistic traits?

It is plainly clear that people find legal documents difficult to comprehend as compared with other professional expositions. There have been efforts in English speaking countries in the legal profession to simplify the language that law uses to make law more accessible to the average person. It is undeniable that certain idiosyncrasies are associated with the way lawyers speak and write. As discussed previously, law as a body of rules regulating the conduct of people, delineating the accepted social norms and human behaviour, is closely tied to the language that it uses and is constrained by language. Because of the nature and function of law, the language of the law has developed particular linguistic features, lexical, syntactical and pragmatic, to fulfil the demands of the law and accommodate the idiosyncrasies of law and its applications. Such linguistic characteristics of legal language have profound implications for legal translation.

If we examine legal language as a whole, common and singular linguistic features can be identified across different legal languages. They are manifested with respect to lexicon, syntax, pragmatics, and style.

Lexicon

In terms of legal lexicon, a distinctive feature of legal language is the complex and unique legal vocabulary found in different legal languages. This is a universal feature of legal language but different legal languages have their own unique legal vocabulary. It is the most visible and striking linguistic feature of legal language as a technical language. The legal vocabulary in each language is often extensive. It results from and reflects the law of the particular legal system concerned. In translation, due to the differences in legal systems, many of the legal terms in one language do not correspond to terms in another, the problem of non-equivalence, a major source of difficulty in translation.

Furthermore, within each legal lexicon, there are also peculiarities, and they do not always correspond in different legal languages. For instance,

studies have identified specific linguistic characteristics of the English legal language. The English legal lexicon is full of archaic words, formal and ritualistic usage, word strings, common words with uncommon meanings and words of over-precision, among others (see Mellinkoff 1963, Danet 1980, Bowers 1989, Tiersma 1999). In legal German, the terminology is often highly abstract, with a high frequency of the use of nouns (Smith 1995). In contrast, the language used in Chinese law is often ordinary, using the common vocabulary but with legal meanings. The Chinese legal language is replete with general, vague and ambiguous usage (see Cao 2004).

Syntax

A common feature of the syntax of legal language is the formal and impersonal written style coupled with considerable complexity and length. Generally speaking, sentences in legal texts are longer than in other text types (Salmi-Tolonen 2004: 1173), and they may serve various purposes. In statutes, often long and complex sentences are necessary due to the complexity of the subject matters and the prospective nature of legislative law. This is the case with most legal languages. Extensive use of conditions, qualifications and exceptions are the additional linguistic features of legislative language, commonly employed to express complex contingencies. These peculiar linguistic features, according to Bhatia (1997), often create barriers to the effective understanding of such writing for the ordinary reader including the translator. Thus, to be able to understand and translate legislative provisions, one is inevitably required to take into account the typical difficulties imposed by some of these factors (Bhatia 1997: 208).

Apart from long and complex sentence structures found in most legal languages, there are also syntactical peculiarities to each legal language. For instance, German legal texts commonly employ multiple attributive adjectives. In legal English, complex structures, passive voice, multiple negations, and prepositional phrases are extensively used.

Pragmatics

As stated earlier, law depends upon the performative nature of language. Legal utterances perform acts, creating facts, rights and institutions. Typically, legislation is a prime example of 'saying as doing'. A statute is a master speech act with each provision constituting individual speech acts. As pointed out, 'performativity and modality are the linguistic means which express the institutional ideology of the role relationships involved in

legislative rule-making' (Maley 1994: 21). Contracts and wills are other examples of legal speech acts in action. Words in legal language differ in meaning, import and effect depending on who utters them, where and when (Hart 1954). Of these speech acts, a prominent linguistic feature is the frequent use of performative markers. For instance, in English legal documents, 'may' and 'shall' are extensively employed. Performative verbs such as 'declare', 'announce', 'promise', 'undertake', 'enact', 'confer' and 'amend' are also common. Another pragmatic consideration in legal texts is ambiguity, vagueness and other uncertainties found in statutes and contracts, which are often points of legal contention. The courts often have to deal with such linguistic problems in the search for uniform interpretation and legal certainty.

Style

Legal style refers to the linguistic aspects of the written legal language and also the way in which legal problems are approached, managed and solved (Smith 1995: 190). Legal style results from legal traditions, thought and culture (Smith 1995). Generally speaking, legal writing is characterised by an impersonal style, with the extensive use of declarative sentences pronouncing rights and obligations. But different legal languages also have their own styles. For instance, the style of German legal texts is distinct. German law has been developed in a systematic, logical, abstract and conceptual manner over the centuries, and German law thinks in terms of general principles rather than in pragmatic terms, conceptualising problems rather than working from case to case (de Cruz 1999: 91). The German legal terminology and central method of lawmaking distinguishes it from the Common Law approach (de Cruz 1999: 91). As a result, the German Civil Code, the *Bergerliches Gesetzbuch* (BGB), is not written for the layperson but the legal profession (de Cruz 1999: 86). It 'deliberately eschews easy comprehensibility and waives all claims to educate its reader', and it adopts an abstract conceptual language that the layperson and the foreign lawyer find largely 'incomprehensible', but for the trained legal experts, after many years of familiarity, they cannot help but admire 'for its precision and rigour of thought' (Zweigert and Kötz 1992: 150). It is written in a special format and structure with a peculiar judicial style. Its language is abstract and complex (de Cruz 1999: 88). To understand it, one needs to be familiar with the various concepts as interpreted by the courts and in practice, and with the technical legal German language. It is characterised by deference to accuracy, clarity, completeness and complex syntax (de Cruz 1999: 88). It has been described as 'the legal calculating machine par excellence', a

‘legal filigree work of extraordinary precision’ and ‘perhaps the code of private law with the most precise and logical legal language of all time’ (Zweigert and Kötz 1992: 151). In short, in language, method, structure and concepts, the BGB is the child of the deep, exact and abstract learning of the German Pandectist School (Zweigert and Kötz 1992: 150). It forms a contrast to another legislative style of writing in the Civil Law as embodied in the French Code. The latter was deliberately written in a manner designed to be easily comprehensible to the layperson. So, there are peculiar legal styles in different legal languages.¹²

To sum up, the foregoing characterisation of legal language is a general description of the linguistic markers believed to be common in most if not all legal languages in varying degrees. However, it is important to bear in mind that major differences also exist in different legal languages and such variations constitute a source of difficulty in legal translation.

Sources of Difficulty in Legal Translation

The nature of law and legal language contributes to the complexity and difficulty in legal translation. This is compounded by further complications arising from crossing two languages and legal systems in translation. Specifically, the sources of legal translation difficulty include the systemic differences in law, linguistic differences and cultural differences. All these are closely related.

Different legal systems and laws

Legal language is a technical language. Furthermore and importantly, legal language is not a universal technical language but one that is tied to a national legal system (Weisflog 1987: 203), very different from the language used in pure science, say mathematics or physics. Law and legal language are system-bound, that is, they reflect the history, evolution and culture of a specific legal system. As Justice Oliver Wendell Holmes famously said a long time ago:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained

only the axioms and corollaries of a book of mathematics. (Holmes 1881/1990: 1)

Law as an abstract concept is universal as it is reflected in written laws and customary norms of conduct in different countries. However, legal systems are peculiar to the societies in which they have been formulated. Each society has different cultural, social and linguistic structures developed separately according to its own conditioning. Legal concepts, legal norms and application of laws differ in each individual society reflecting the differences in that society. Legal translation involves translation from one legal system into another. Unlike pure science, law remains a national phenomenon. Each national law constitutes an independent legal system with its own terminological apparatus, underlying conceptual structure, rules of classification, sources of law, methodological approaches and socio-economic principles (Sarcevic 1997: 13). This has major implications for legal translation when communication is channelled across different languages, cultures and legal systems.

Firstly, law is culturally and jurisdictionally specific. In the study of comparative law, the major legal systems of the world have been classified into various categories. Here 'legal system' refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction (Tetley 2000). Such systems can also be described as legal families.

According to David and Brierley's classification of world legal systems or families, there are the Romano-Germanic Law (Continental Civil Law), the Common Law, Socialist Law, Hindu Law, Islamic Law, African Law and Far East Law (David and Brierley 1985: 20–31). According to Zweigert and Kötz (1992), there are eight major groups: Romanistic, Germanic, Nordic, Common Law, Socialist, Far Eastern law, Islamic and Hindu laws. The two most influential legal families in the world are the Common Law and the Civil Law (Romano-Germanic) families, and these are the focus of most of this book. About 80% of the countries in the world belong to these two systems. Here are some examples of the two groupings. For the Common Law jurisdictions, there are England and Wales, the United States of America, Australia, New Zealand, Canada, some of the former colonies of England in Africa and Asia such as Nigeria, Kenya, Singapore, Malaysia and Hong Kong. Civil Law countries include France, Germany, Italy, Switzerland, Austria, Latin American countries, Turkey, some Arab states, North African countries, Japan and South Korea.

There are also the mixed systems of law that derive from more than one legal family. They are hybrids and examples of such mixed jurisdictions

with the influence from the Common Law and the Civil Law include Israel, South Africa, the Province of Quebec in Canada, Louisiana in the US, Scotland, the Philippines and Greece. The law of the EU is also such a mixed jurisdiction. China may be considered another hybrid with influence from traditional Chinese law, the Civil Law and Socialist Law.

As David and Brierley state, each legal system or family has its own characteristics and,

... has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of law in that society. (David and Brierley 1985: 19)

Due to the differences in historical and cultural development, the elements of the source legal system cannot be simply transposed into the target legal system (Sarcevic 1997: 13). Thus, the main challenge to the legal translator is the incongruency of legal systems in the SL and TL.

Then, what are the distinguishing features of the major legal systems, specifically and for our purpose, the Common Law and the Civil Law, and what are the major differences between them?¹³

One set of criteria for the classification of legal systems or families in describing the characteristics or the 'juristic or legal style' of legal systems is that proposed by Zweigert and Kötz (1992: 68–73). They include (1) the historical development of a legal system; (2) the distinctive mode of legal thinking; (3) the distinctive legal institutions; (4) the sources of law and their treatment; and (5) the ideology.

If we use these criteria to compare the Common Law and the Civil Law, firstly, the Common Law is the legal tradition that evolved in England from the 11th century onwards. Its legal principles appear for the most part in reported judgments in relation to specific fact situations arising in disputes that courts have to adjudicate. Thus, the Common Law is predominantly founded on a system of case law or judicial precedent. The key features of the Common Law include a case-based system of law that functions through analogical reasoning and an hierarchical doctrine of precedent (de Cruz 1999: 102–103).

In contrast, the Civil Law originated in ancient Roman law as codified in the *Corpus Juris Civilis* of Justinian (AD 528–534). It was later developed through the Middle Ages by medieval legal scholars. It is the oldest legal tradition in the Western world. Originally, Civil Law was one common legal system in much of Europe, but with the development of nationalism in the 17th century Nordic countries and around the time of the French

Revolution, it became fractured into separate national systems. This change was brought about by the development of separate national codes. The French Napoleonic Code and the German and Swiss Codes were the most influential ones. The Civil Law was developed in Continental Europe and subsequently around the world, e.g. Latin America and Asia (see Merryman *et al.* 1994). Because of the rising power of Germany in the late 19th century, many Asian nations translated and introduced the Civil Law. For instance, the German Civil Code was the basis for the law of Japan and South Korea. In China, the German Civil Code was introduced in the late 1800s and early 1900s and formed the basis of the law of the Republic of China, which remains in force in Taiwan today. It has also greatly influenced the legal system of the People's Republic of China. Some authors also believe that the Civil Law later served as the foundation for Socialist Law in Communist countries.

In terms of legal thinking, the Civil Law family is marked by a tendency to use abstract legal norms, to have well-articulated system containing well-defined areas of law, and to think up and to think in juristic constructions (Zweigert and Kötz 1992: 70).

The function and style of legal doctrine are different in the Common Law and Civil Law. The Common Law jurists focus on fact patterns. They analyse cases presenting similar but not identical facts, distinguishing cases and extracting specific rules, and then, through deduction, determine the narrow scope of each rule, and sometimes propose new rules to cover facts that have not yet presented themselves (Tetley 2000: 701). In contrast, the Civil Law jurists focus on legal principles. They trace their history, identify their function, determine their domain of application, and explain their effects in terms of rights and obligations (Tetley 2000: 702, see also Vranken 1997).

In terms of case law, in the Common Law, specific rules are set out to specific sets of facts. Case law in the Common Law provides the principal source of law, whereas in the Civil Law system, case law applies general principles and is only a secondary source of law (Tetley 2000: 702). The English doctrine of *stare decisis* compels lower courts to follow decisions rendered in higher courts, hence establishing an order of priority of sources by 'reason of authority'. *Stare decisis* is unknown to the Civil Law, where judgments rendered by judges only enjoy the 'authority of reason' (Tetley 2000: 702).

In the Civil Law world, the general legal principles are embodied in codes and statutes, and legal doctrine provides guidance in their interpretation, leaving to judges the task of applying the law (Tetley 2000: 702). The Civil Law is highly systematised and structured and relies on declarations of

broad and general principles, often ignoring details (Tetley 2000). The key or primary sources of law in Civil Law are codes and enacted statutes. Secondary sources include court decisions (jurisprudence), learned annotations of academic lawyers or scholars' opinions or legal scholarship (*la doctrine*), textbooks and commentaries. Civil Law courts base their judgments on the provisions of codes and statutes, from which solutions in particular cases are to derive on the basis of the general principles of codes and statutes.

In terms of legal institutions, typical legal institutions of the Common Law include trust, tort law, estoppel and agency, and these are unique to the Common Law. The Common Law also has categories of law such as contract and tort as separate branches of law and two main bodies of law: common law and equity. There is no substantive or structural public/private law distinction as that which exists in the Civil Law system (de Cruz 1999). In contrast to the Common Law, the Civil Law has such unique legal institutions as *cause*, abuse of right, the direct action, the oblique action, the *action de in rem verso*, the extent of strict liability in tort, and *negotiorum gestio*, among others. These are foreign to the Common Law. In the Germanic family, there are also the *calusulae generales*, the theory of the abstract real contract, the concept of the legal act and liability based on *culpa in contrahendo*, the doctrine of the collapse of the foundations of a transaction, the entrenched position of the institution of unjust or unjustified enrichment, and the land register (for detailed discussions of these, see Zweigert and Kötz 1992).

In short, Zweigert and Kötz summarise the major differences between the Common Law and the Civil Law succinctly:

To the lawyers from the Continent of Europe, English law has always been something rich and strange. At every step he comes across legal institutions, procedures, and traditions which have no counterpart in the Continental legal world with which he is familiar. Contrariwise, he scans the English legal scene in vain for much that seemed to him to be an absolute necessity in any functioning system, such as a civil code, a commercial code, a code of civil procedure, and an integrated structure of legal concepts rationally ordered. He finds that legal technique, instead of being directed primarily in interpreting statutory texts or analysing concrete problems so as to 'fit them into the system' conceptually, is principally interested in precedents and types of case; it is devoted to the careful and realistic discussion of live problems and readier to deal in concrete and historical terms than think systematically or in the abstract. (Zweigert and Kötz 1992: 188)

Despite the differences, we need to recognise that the Common Law and the Civil Law families are not incompatible. We should not exaggerate the differences or believe that the translation between the two is somehow not possible. After all, both belong to the Western legal traditions and political cultures. Particularly, there has been convergence due to the mutual influence and cross-fertilisation between the two families (see Merryman *et al.* 1994). Statute laws have played an increasing role in Common Law countries, especially the US after the Second World War. More recently, the impact the EU laws on both the Common Law and Civil Law jurisdictions in Europe has also been felt (see Vranken 1997). Nevertheless, the systemic differences between different legal families are a major source of difficulty in translation.

Linguistic differences

In language for special purpose communication, the text is formulated in a special language or sub-language that is subject to special syntactic, semantic and pragmatic rules (Sager 1990b). In our present case, LLP is subject to the special rules of legal language. Legal language is used in communicative situations between legal specialists, such as judges, lawyers and law professors, and also in communications between lawyers and the layperson or the general public.

According to White (1982: 423), one of the most problematic features of legal discourse is that it is 'invisible'. He claims that 'the most serious obstacles to comprehensibility are not the vocabulary and sentence structure employed in law, but the unstated conventions by which language operates' (White 1982: 423). There are expectations about the way in which language operates in legal contexts. Such expectations are not explicitly stated anywhere but are assumed in such contexts (Bhatia 1997: 208).

Linguistic difficulties often arise in translation from the differences found in the different legal cultures in the Common Law and the Civil Law. The root of the problems lies in their varying legal histories, cultures and systems. Law and languages are closely related. Legal language has developed its characteristics to meet the demands of the legal system in which it is expressed. As said earlier, legal translation is distinguished from other types of technical translation that convey universal information. In this sense, legal translation is *sui generis*. Each legal language is the product of a special history and culture. It follows that the characteristics of the *la langue de droit* in French do not necessarily apply to legal English. Nor do those of the English language of the law necessarily apply to French.

A basic linguistic difficulty in legal translation is the absence of equivalent terminology across different languages. This requires constant comparison between the legal systems of the SL and TL. As David and Brierley state:

The absence of an exact correspondence between legal concepts and categories in different legal systems is one of the greatest difficulties encountered in comparative legal analysis. It is of course to be expected that one will meet rules with different content; but it may be disconcerting to discover that in some foreign law there is not even that system for classifying the rules with which we are familiar. But the reality must be faced that legal science has developed independently within each legal family, and that those categories and concepts which appear so elementary, so much a part of the natural order of things, to a jurist of one family may be wholly strange to another. (David and Brierley 1985: 16)

In terms of legal style, legal language is a highly specialised language use with its own style. The languages of the Common Law and Civil Law systems are fundamentally different in style. Legal traditions and legal culture has had a lasting impact on the way law is written. Written legal language thus reflects the essential elements of a legal culture and confronts the legal translator with its multi-faceted implications (Smith 1995: 190–191).

As said earlier, there are major differences in the order of priority in Civil Law and Common Law regarding case law and legal doctrine. The functions of case law have had an apparent influence on the writing style and language of court decisions. Common Law judicial opinions are usually long and contain elaborate reasoning, whereas the legal opinions in Civil Law countries are usually short and more formal in nature and style. For instance, in France, judges normally cite only legislation, not prior case law. Such judgments are normally separated into two parts – the *motifs* (reasons) and the *dispositif* (order). The method of writing judgments is also different. Common Law judgments extensively expose the facts, compare or distinguish them from the facts of previous cases, and decide the specific legal rule relevant to the facts. In contrast, Civil Law decisions first identify the legal principles that may be relevant, then verify if the facts support their application (Tetley 2000: 702). In Civil Law countries, there are mainly two styles in presenting judicial decisions (David and Brierley 1985: 142, see also de Cruz 1999). There is the French technique of ‘whereas-es’ (*attendus*). Such judgment is formulated in a single sentence and is concise and concentrated. This style is mostly found in France, Belgium, Luxembourg, the Netherlands, Spain, Portugal and most of the Nordic countries. The other style of judicial decision is found in other Civil Law countries such as

Germany, Greece, Italy, Switzerland and Sweden, where the judgment is presented in the form of a dissertation that varies in length and in its organisation (David and Brierley 1985: 142). Normally, they are lengthy and discuss prior cases and academic writing extensively.

In terms of the style of legislative drafting, Civil Law codes and statutes are concise (*le style français*), while Common Law statutes are precise (*le style anglais*) (Tetley 2000: 703). Civil Law statutes generally provide no definitions, and state principles in broad, general phrases. In contrast, Common Law statutes provide detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions, preceded by a catch-all phrase and followed by qualifications (Tetley 2000: 703, see also Chapter 6).

To be more specific, if we compare the Common Law with German law, the legal traditions of the Anglo-American and German Civil Law systems underscore the different styles of the two legal cultures. Common Law in English is forensic whereas Civil Law in German is scholastic (Smith 1995). In the Civil Law system, interpretation of the legal norm entails determining unforeseen and future problems. The thinking is abstract and system-oriented while the method is deductive. In contrast, in the Anglo-American system, the method of legal thinking is inductive. US judges and lawyers are deeply sceptical of abstract norms. The approach to legal problems is empirical. Consequently, in the Anglo-American context, legal writing reflects the necessity to leave the judge as little room for interpretation as possible. This is most obvious in contracts between business partners (Smith 1995). They result in wordy, lengthy texts, listing a seemingly endless array of terms with seemingly similar meanings (see Chapter 5). Typically, in an American contract, one finds phrases such as 'any right, interest, title, property, ownership, entitlement and/or any other claim . . .'. The equivalent in German would be one word *rechtsanspruch* meaning 'legal claim' (Smith 1995). In short, there are stylistic differences between the two systems.

When we translate legal texts between different legal systems or families and languages, the degrees of difficulty may vary. There are the following scenarios depending upon the affinity of the legal systems and languages according to de Groot (1988: 409–410): (1) when the two legal systems and the languages concerned are closely related, e.g. between Spain and France, or between Denmark and Norway, the task of translation is relatively easy; (2) when the legal systems are closely related, but the languages are not, this will not raise extreme difficulties, e.g. translating between Dutch laws in the Netherlands and French laws; (3) when the legal systems are different but the languages are related, the difficulty is still considerable, and the main

difficulty lies in *faux amis*, e.g. translating German legal texts into Dutch, and vice versa; and (4) when the two legal systems and languages are unrelated, the difficulty increases considerably, e.g. translating the Common Law in English into Chinese. In short, the degree of difficulty of legal translation is related to the degree of affinity of the legal systems and languages in question (de Groot 1988: 410). An a priori argument of the disparity in legal systems is that variations exist in the different legal languages of individual societies using language to communicate law (Weisflog 1987). The 'system gap' (Weisflog 1987) between one national legal system and another results in linguistic differences. Generally speaking, the wider the 'system gap', the wider the legal language gap.

In short, the differences in the Common Law and Civil Law systems and the consequent differences in the language used in law in the two systems as described above have an impact on legal translation. The diverse range of linguistic differences is one of most challenging aspects that confront the legal translator irrespective of which legal language is involved. It is a major source of difficulty in legal translation.

Cultural differences

Another source of difficulty in legal translation is cultural differences. Language and culture or social contexts are closely integrated and inter-dependent. Halliday (1975: 66) has defined 'culture' as 'a semiotic system' and 'a system of meanings' or information that is encoded in the behaviour potential of the members. Snell-Hornby (1988: 39) argues that, in translation, language should not be seen as an isolated phenomenon suspended in a vacuum but as an integral part of culture, and that the text is embedded in a given situation, which is itself conditioned by its socio-cultural background (Snell-Hornby 1988: 42, quoting Hönig and Kubmaul 1982). The concept of culture as a totality of knowledge, proficiency and perception is fundamental to the integrated approach to translation as advanced by Snell-Hornby (1988: 42), an approach adopted in this study.

In this connection, a legal culture is meant those 'historically conditioned attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society' (Merryman *et al.* 1994: 51). Law is an expression of the culture, and it is expressed through legal language. Legal language, like other language use, is a social practice and legal texts necessarily bear the imprint of such practice or organisational background (Goodrich 1987: 2). 'Each country has its own legal language representing the social reality of its specific legal order' (Sarcevic 1985: 127). Legal translators must overcome cultural barriers between the SL and TL

societies when reproducing a TL version of a law originally written for the SL reader. In this connection, Weston writes (1983: 207) that the most important general characteristic of any legal translation is that an unusually large proportion of the text is culture-specific. The existence of different legal cultures and traditions is a major reason why legal languages are different from one another, and will remain so. It is also a reason why legal language within each national legal order is not and will not be the same as ordinary language.

Legal Translational Equivalence: Possibility and Impossibility

Given the complexity and difficulty of legal translation, one may wonder whether law is translatable and whether true equivalence can be achieved in legal translation.

If one believes that no two historical epochs, no two social classes and no two localities use words and syntax to signify exactly the same things and to send identical signals of valuation and inference (Steiner 1998: 47), then one may question whether translation attempting to achieve equivalence is indeed possible. It is a fact that one major and frequently encountered difficulty in legal translation is the translation of foreign legal concepts. It has often been claimed that legal concepts alien or non-existent in the target system are untranslatable (see Sarcevic 1997: 233). For instance, there are those who believe that no Chinese vocabulary can be found to express the full meaning of Common Law concepts, and hence the Common Law is not translatable into Chinese. Some have contended that, because of the conceptual gaps between English and Chinese laws, difficulties inherent in translating Common Law terms into Chinese are insurmountable.¹⁴ But are such claims true or exaggerations?

We can look at this issue from several perspectives. Firstly, it is a fact that we translate law between different legal families and legal traditions, and we have been doing so for the last few centuries. In fact, the laws and legal systems in many countries and continents have been developed on the basis of legal transplant from other legal systems (see Watson 1974) assisted to a large extent by the process of translation. Legal concepts, practices and entire legal systems have been introduced to new political, social, cultural and legal environments this way. So, real life experience, and successful experience at that, tells us that translating law, irrespective of what systems and families are involved, is not only possible, but also highly productive. This does not mean that there are no problems or the job is easy.

Secondly, if we look at this from the angle of translational equivalence, a number of factors need to be taken into account when foreign laws, legal concepts and practices are translated that have no existing equivalents in the TL. Naturally, there needs to be a link that establishes a degree of equivalent relationship between the SL and TL for translation to take place. But what kind of equivalent relationship? As Toury observes, translation is a series of operation or procedures,

... whereby one semiotic entity, which is a constituent element of a certain cultural subsystem, is transformed into another semiotic entity, which forms at least a potential element of another cultural subsystem, providing that some informational core is retained 'invariant under transformation', and on its basis a relationship known as 'equivalence' is established between the resultant and initial entities. (Toury 1986: 1112–1113)

According to Toury, equivalence is a combination of, or compromise between, the two basic types of constraints that draw from the incompatible poles of the target system and the source text and system (Toury 1986: 1123). It can be argued that, conceptually and pragmatically, translation, including the legal kind, is not solely the question of crossing languages or the question of identity or synonymy. This is because the validity of a translation is independent of whether an element in one code is synonymous with a correlated element in another code (Frawley 1984: 161). Translation always takes place in a continuum and there are many kinds of textual and extratextual constraints upon the translator (Bassnett and Lefevere 1998: 123). Recodification occurs irrespective of the exact status of identity across the codes (Frawley 1984: 161). Translational equivalence is a relative notion (see Koller 1995, Henderson 1997). As pointed out, translators decide on the specific degree of equivalence they can realistically aim for in a specific text (Bassnett and Lefevere 1998: 2). Thus, translating legal texts is a relative affair.

Take legal concepts for example. Legal concepts from different countries are seldom, if ever, identical, because, firstly, the nature of language dictates that two words are rarely identical between two languages and even within the same language (for instance, the English legal language in the US, UK and Australia; the Chinese legal language used in China, Hong Kong and Taiwan; German in Germany, Austria and Switzerland, and French in France and Canada). Secondly, human societies with their own cultural, political and social conditions and circumstances are never duplicate. Law is a human and social institution, established on the basis of the diverse moral and cultural values of individual societies. Moreover, conceptually,

added to this is the individual mediating process as described by Peirce within the semiotic process that impacts on the interpretive outcome (see Cao 2004). Nevertheless, the other side of the same coin is that common sense tells us human societies share many things in common. More things combine than divide us, our differences notwithstanding. Some legal concepts may overlap in different societies but seldom identical. Therefore, it is futile to search for absolute equivalence when translating legal concepts.

Thirdly, in this connection, the issue of comprehending translated law, after the initial linguistic transfer, is also a related consideration. In people's understanding of translated texts originally written for different audiences in different languages, inevitably, sometimes there are confusions and misunderstandings. Such confusion may have something to do with the often invisible crossover in translation. Words may be written and read in the same language but people's interpretations in the SL and TL differ due to the differences in language use. Others' horizons that are encoded in the original language but now represented in the translated language may not be so readily obvious as to place one's own horizons in relief (cf. Gadamer 1975, 1976), simply because the other horizons are now expressed in a deceptively familiar language, one's own language. Nevertheless, the 'fusion of horizons' is possible and experienceable in translation and understanding translated texts.

According to Gadamer (1975: 350, 1976: 59–68), language is the universal medium in which understanding is realised, and language is a social phenomenon and, as such, it is formally directed towards intersubjectivity. It is capable of opening a person to other horizons. Horizon, says Gadamer, is the range of vision that includes everything that can be seen from a particular vantage point. Horizon is used to characterise the way in which thought is tied to its finite determination, and the nature of the law of the expansion of the range of vision. According to Gadamer (1975, 1976), understanding transcends the limits of any particular language, and mediates between the familiar and the alien. The particular language with which we live is not closed off against what is foreign to it. Instead it is porous and open to expansion and absorption of ever new mediated content (Gadamer 1976: xxxi). In short, we can transcend our interpretive horizons. The event of understanding culminates in a fusion of horizons when the horizon of the self's experienceable world is transformed through contact with another (Gadamer 1975, 1976). This description of understanding applies to both situations within one language and across two languages.

In translation, including legal translation, one may say that a 'fusion of horizons' can be achieved and mediated in the transmission of meaning, creating new interpretive horizons on the part of the reader of translation.

Despite the seemingly insurmountable conceptual and linguistic gulf, alleged and real, between different laws and languages, translating law is possible, and cross-cultural understanding in law can be realised, although such understanding is always subjective and may not be identical in all languages at all time. However, one may say that no exact equivalence or complete identity of understanding can be expected or is really necessary.

Notes

1. For further reference for the characteristics of pragmatic, general and literary texts, see Delisle (1988: 8–18).
2. The term *prototypologie* was first used by Neubert (1984) as cited in Snell-Hornby (1988: 37).
3. Cf. Gémard (1995, cited in Sarcevic 1997: 11) who identifies six subdivisions of legal language: there are the language of the legislator, judges, the administration, commerce, private law, and scholarly writings.
4. Despite the importance given to the purpose of translated texts in this study, I do not agree with many aspects of the skopos theory and have doubts as to whether it is suitable for legal translation. For instance, Hönl (1998) gave an example of court interpreting where he argued that the phrase ‘closing time’ used by the witnesses in court should be translated into a specific time by the interpreter, say ‘10 p.m.’. It is a fundamental misunderstanding by Hönl of the nature of legal interpreting and of the legal process, and by extension, legal translation. For criticisms of the skopos theory in relation to legal translation, see Madsen (1997b) where it was pointed out that the skopos theory is inadequate for the description of legal texts due to the fact that it does not take into account the conventionalisation and institutionalisation of the communicative activities of the legal universe.
5. According to O’Barr (undated) and Charrow and Crandall (1978), both as cited by Danet (1980: 470), the linguistic differentiation of legal English may be great enough to warrant calling it a separate language or dialect.
6. According to Halliday *et al.* (1964), register is use-related language variety and is to be distinguished from user-related language varieties, e.g. geographical, temporal, social or idiolectal dialects.
7. Jackson (1988: 138) lists several types of legal discourse: litigation, legislative discourse, doctrine, solicitor–client relations, discourse between practitioners, media communication of the law to the general public, and communication of legal messages in advisory agencies.
8. See, for instance, Otto Jespersen (1964) who regards ambiguity as an inherent property of any natural language, cited in Kooij (1971: 3).
9. For a philosophical analysis of ambiguity and vagueness, see Scheffler (1979), and the differences between ambiguity, vagueness and generality.
10. For a linguistic discussion and description of ambiguity in natural language, for instance, ambiguity and phonology, grammar and lexicon, and related concepts of homonymy and polysemy, see Kooij (1971).
11. Hart is said to have borrowed the phrase ‘open texture’ from Friedrich Waismann (1968). Waismann states that regarding certain kinds of terms,

particularly nouns denoting physical objects, there is a virtually inexhaustible source of vagueness. When they form a concept, we only have some situations in mind. As a result, the concept is armed only against certain contingencies. This is the feature of open texture or possibility of vagueness. Waismann believes that this kind of vagueness can never be eliminated completely, and there will always be a penumbra of indeterminacy attaching to physical object terms as opposed to arithmetical terms.

12. For a discussion of the legal language and style in Hebrew in Israel, see Fassberg (2003). Interestingly, modern Hebrew legal language has been influenced by both the Common Law and Civil Law, and has some of the linguistic characteristics of both systems.
13. For a detailed comparative analysis of the Common Law and the Civil Law and other legal systems, see David and Brierley (1985), Zweigert and Kötz (1992), and de Cruz (1999).
14. See Sin and Roebuck (1996) for their discussion of legal conceptual problems in creating Common Law Chinese and their argument against the proposition that English Common Law is untranslatable into Chinese. It is also noted that untranslatability and incommensurability of concepts are different and should not be confused.