LEGAL TRANSLATION AS AN INTERSPACE OF LANGUAGE AND LAW

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Abstract: Our paper explores the dimensions of legal translation being concerned primarily with the nature of equivalence in legal translation and the difficulties of attaining it. The paper argues that legal translation requires an interdisciplinary approach today on account of the manifold judicial contexts in which it occurs, the characteristics of legal language as a type of specialized language and the responsibility of the translator regarding the future interpretation(s) of the translated text. If translations are to produce the same legal effects as their originals, translators need to be familiar with the essential competences of the legal translator, the communicative purpose of the source text and the future status of the translated legal text.

Keywords: interdisciplinarity, (un)translatability, equivalence, ambiguity, receiver-orientation

Introduction

Legal texts represent one of the most translated types of texts in today's world as a result of the processes of unification of Europe and economic globalisation. However, it was not until very recently that researchers in Translation Studies started to give due attention to it.

Legal texts represent an instance of pragmatic texts since their aim is essentially to convey information without aiming to produce aesthetic effects as it is the case with literary translation. Legal texts are realized through the use of legal language, which is a special-purpose language or an LSP according to Cao (2007) and on this account legal translation can be termed an instance of specialized translation. It is at the same time the type of translation that has the closest affinities with general translation as reflected by this paper.

The title advances a widely held view in the literature today, namely that legal translation is halfway between language and law. In legal translation language is the tool, the process and the product. Both language and law are social phenomena; although legal language is a specialized language, it is also part of the common language since in legal language common words often acquire a legal or specialized meaning. This is called the parasitic (Shauer quoted in Cao 2007) or composite nature of legal language (Jean-Louis Sourioux and Pierre Lerat quoted in Sferle 2005). In other words, legal language, similarly to other specialized languages, is parasitic on ordinary language. According to Vinnai (2010) both language and law are stochastic systems unlike mathematics or physics, for example. This means that, although legal language is considered to be precise and clear, the truth value of a statement in language or in law can be ascertained only by reference to a given context or situation. The same author looks at the legal procedure in crimes as a continuous intralingual translation from ordinary language to common language and vice versa, thus, providing further evidence of the symbiotic relationship between language and law: the layperson relates their incident in ordinary language, which is put down in the minutes in legal language; throughout

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the trial the story is treated in the same legal language whereas in the final stage of verdict delivery it is backtranslated into the layperson' language.

As a recognition of this symbiotic relationship, legal translation is nowadays treated as an interdisciplinary field both by the profession and by theorists. The disciplines that can provide help to legal translation are jurilinguistics, comparative law and translation studies. Jurilinguistics was initiated in the French-speaking world by Gérard Cornu, Jean-Claude Gémar and Louis Jolicoeur having as its object of study legal terminology and legal discourse. Comparative law studies the individual legal systems, therefore, it can be an indispensable tool for legal translation in its search for equivalents across legal systems. The importance of translation studies cannot be overlooked either since being a linguist or a lawyer does not suffice as neither can successfully substitute the routine and special competences of a translator.

The Nature of Equivalence in Legal Translation

From the above considerations on the symbiosis between language and law it follows that the legal lexicon in any language contains culturally loaded words that reflect the history and traditions of that people (Gémar 2002). Since culturally marked texts present real translation difficulties for the translator and given that legal texts require equivalence on three levels – equivalence of meaning, effect and intent – this raises doubts about the translatability of legal texts and the degree and nature of equivalence in legal translation.

Gémar (2002) defines the legal text as 'un texte ***normatif*** disposant d'un ***style*** et d'un ***vocabulaire*** particuliers [emphasis in the original].' This means that legal texts have a normative-prescriptive nature being aimed at modifying the behaviour of the parties through the imposition of obligations, rights, permissions etc. This also means that they have a specific style which can be termed as formal, impersonal or even archaic at times. The third characteristic that marks them off from other specialized texts is, of course, vocabulary, which accounts for what Sferle (2005) calls the paradoxical nature of law: it is a social phenomenon but at the same time it is inaccessible to the average person. While it is expected that legal texts be precise and clear, they also need to correspond to the criterion of generality and necessary ambiguity or vagueness in order to fit possible future situations.

In the light of the above scholars unanimously agree that equivalence in legal translation is something 'aleatoric', a 'myth', a 'compromise' (Gémar 2002) or a futile search (Cao 2007). This implies that the kind of equivalence to be looked for in legal texts is necessarily a functional one. Functionalism presupposes that translators do not translate literally as this has already proved to be impossible on account of the incongruity of legal systems. From word meaning the emphasis is shifted to global meaning and this entails that the unit of translation is the text itself. Concepts are incongruous and unique to each legal system – a major obstacle to equivalence –, therefore, they need to be defined separately in a first phase of the translation process.

Fidelity is no more with the source text, though many lawyers still think even today that literal translation is the best approach. However, the urge for comprehensibility as well as the diversity of legal contexts and legal texts make it necessary for the translator to take into account the receiver, the purpose and the status of the target text. Monjean-Decaudin (2010) lists four possible contexts in which legal translation might occur: public international law, private international law, judicial context and scientific context.

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In the case of the first category legal translation takes place in international institutions and organisations (EU, UN etc.) and it refers to the translation of international instruments like treaties, agreements, conventions etc. In this case simultaneous drafting also exists alongside translation, which is part and parcel of the legislative process. Simultaneous drafting also occurs in bilingual and multilingual countries like Canada and Switzerland, where all language versions have the status of originals. Private international law refers to transnational private relations and it involves the translation of commercial contracts and authentic legal documents like marriage certificates etc. Translation is needed because the parties speak different languages and in order to guarantee equal treatment. The third type of legal translation is carried out for courts and tribunals as part of the civil, criminal or administrative procedure. It is primordial for the translator to be aware of the stakes and legal effects of this type of translation. Finally, the scientific context refers to the translation of both doctrinal and normative texts (constitutions, laws, codes etc.). In this case translation serves the purpose of promoting knowledge.

A diversity of legal texts can be related to the above-mentioned legal settings each employing a distinctive terminology and phrasing. As to the purpose of the translation, this can be informative, normative or both. The translation of a monolingual country's legislation serves mere descriptive functions whereas in a bilingual country the translation has a prescriptive function and the citizen has to abide by it. However, this same authoritative text can serve informative purposes for citizens of a third country.

Translation difficulty is related to the affinity of the legal systems first of all and then to linguistic differences as well. Cao (2007: 30–31) describes four possible situations:

> (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.

Once the text is translated equivalence is established arbitrarily in legal translation by an external authority, which can be the judge, a notary, the law or a convention. In the case of international instruments the 1969 Vienna Convention grants equal authenticity to all versions of a treaty. Therefore, it seems that in the case of legal translation equivalence is ultimately artificial. Naturally, the real test of the translation will be its ultimate interpretation and application in practice (Šarčević 2000).

Characteristics of Legal Language

Legal language is a hypernym or an umbrella term covering a more or less related set of legal discourses. It covers not only the language of law but all communications taking place in a legal setting (Cao 2007).

Damette (2010) conceives of legal discourse as legal acts realised through language,

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therefore, legal acts are legal language acts. They put into action the legal language-system and expose a particular logic and way of reasoning that is typical to law and lawyers. Given also the essential function of legal discourse to regulate, prescribe and set out obligation, prohibition and permission we can conclude that legal language has a performative character. This is evident in the extensive use of declarative sentences, modal verbs ('shall', 'may', 'shall not', 'may not') and performative verbs (declare, undertake, grant etc.).

Ambiguity, vagueness and indeterminacy characterize all the three disciplines involved in legal translation: linguistics, translation theory and law. Languages internalize more than they convey outwardly, argues Steiner (1977), therefore, translation is only an approximate operation, desirable and possible but never perfect. Language indeterminacies lead to legal indeterminacies in cases where the referent is not clearly defined in the text or when several interpretations are possible due to an error in punctuation, for example, the incorrect use of articles in English etc. To avoid misinterpretations, contracts usually contain a separate section where the meaning of each term is defined as it is being used throughout the document. Since total reading in the sense in which Steiner (1977) used this phrase is impossible as languages are subject to mutation all the time and no two people ever interpret a text in the same way because of differences in world and textual experiences, legal contentions arise which the law, an indeterminate system itself, is called upon to solve.

However, ambiguity can be intentional also as in the case of international instruments like agreements, for example, and in such cases it reflects a partial consensus. Ambiguity in this case is the result of a compromise that was eventually achieved after a lengthy process of negotiation. Therefore, any attempt on the part of the translator to clarify such ambiguities can endanger or destroy the agreement. The ability to differentiate intentional ambiguity from unintentional obscurities in the text is a measure of the translator's professional competence.

Ambiguity is supported by polysemy in legal texts. Sferle (2005) distinguishes external polysemy from internal polysemy. The former refers to words of ordinary language that have acquired a legal meaning ('amprentă', 'incident', 'parchet', 'a achita', in Romanian, or 'offer', 'consideration', 'remedy', 'performance', in English) whereas the latter relates to legal terms that have acquired more than one meaning in law. A relevant example in English taken over from Cao (2007) would be 'equity', which in legal usage can stand for one of the two main bodies of law, namely Common Law and Equity, but it can also refer to 'justice applied in circumstances covered by law yet influenced by principles of ethics and fairness.' In Romanian the term 'obligaţie' according to the Dictionary of Civil Law has the following meanings: 'civil judicial report', 'debt to be paid by the debtor', 'commercial paper' etc. (see Sferle 2005 for other examples). In the case of external polysemy priority should be given to the legal meaning whereas in the case of internal polysemy the context generally helps to establish the correct meaning.

It is probably clear by now that the translator should have some knowledge of the legal systems involved in the translation. Translation and negotiation phases being separate from each other, the text-producer cannot be consulted most of the time so it is the translator's task to deal with ambiguities in the most appropriate way. System-bound terms (Šarčević 1997) that legal language abounds in represent further arguments in favour of the necessity of acquiring this kind of knowledge. Telling examples are 'solicitor' and 'barrister' in Common Law, which have no equivalent in other languages.

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The two major divisions in law are Common Law and Civil Law. Common Law has developed in Anglo-Saxon countries and is inseparable from English language. Civil Law has its roots in Roman law and cannot be associated with one particular language. Common Law builds on analyzing previous cases and decisions by judges, which set a precedent, thus leaving less room to judges for interpretations than Civil Law, which builds on interpreting abstract principles that address unforeseen future situations, and applying them to concrete situations. This preoccupation with leaving as little room for interpretations as possible as well as the need for contracts to cover every foreseeable situation, event or contingency explains the presence and obligatory use of archaic, alliterative and often redundant expressions in English contracts. Examples include: 'made and entered into', 'by and between', 'null and void', 'terms and conditions'. Such expressions are often translated with a single word because the literal translation could be misleading. An example given by Gémar (1988) is 'terms and conditions', which refers to the conditions of a contract. The literal translation into French would be 'termes et conditions', a mistranslation because 'termes' means 'words' in French and not 'conditions'. However, a loss of emphasis can be noticed in these renderings as compared to the original.

The all-encompassing and self-contained nature of legal texts explains also the tendency for complex and long sentences. Sentences often have the logical structure of an if-clause, as noted by Cao (2007), conditional expressions and exceptions being frequently employed: 'except', 'unless', 'in the event', 'in the case', 'if and so far as', 'if, but only if', 'provided that', 'subject to' and 'notwithstanding'. Formal tone is supported by the extensive use of passive voice. This construction has the added advantage of allowing lawyers to avoid directly referring to the doer of the action. Of course, it is not obligatory to retain this construction in the TL if the given language does not use passives with predilection.

English legal language is by far not homogeneous and this is the natural consequence of the fact that English is official and officious language at the same time in several organizations (EU, UN, NATO etc.). An interesting parallel to draw concerns Common Law English and EU jargon. Although there are 23 other official languages currently in the EU, English is by far the most widely used. The principle of multilingualism presupposes that all legislative and non-legislative texts be translated into all the official languages of the EU. All these versions have equal status. Consequently, translation equals law-making in the EU and it often takes the form of simultaneous drafting. As a result translation mistakes in this context can be regarded as drafting errors.

Translators in all translation departments of the EU work to the highest quality standards on account of the responsibility attached to these documents, some of them being binding and directly applicable in all Member States, but also in order to fulfill the explicitly stated goal of 'helping citizens to *understand* EU policies'[1][italics added]. Binding documents are regulations, directives and decisions. Non-binding EU documents are recommendations and opinions. These two categories are known as secondary legislation being derived from treaties constituting primary legislation. The EU is a unique supranational body that needs its own unique tools that legitimate it and regulate its functioning. It is a federation of states each

[1] Directorate-General for Translation – European Union website, consulted at http://ec.europa.eu/dgs/translation/translating/index_en.htm on 23 November, 2013.

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having its own legal system. In order to make its discourse intelligible across its Member States the EU needed to create its own legal language through a process of generalization, simplification, standardization and necessary deculturalization that blurred the boundaries between national legislations. This attempt to harmonize legal systems to make the language of EU legislation easily understandable paradoxically risks to produce an opposite effect and to lead to ambiguity. Here again the incongruity of legal systems and the so-called system-bound terms represent the major translation difficulties. The most frequently used methods to overcome this barrier are literal translation or formal equivalence (Nida and Taber 1982), functional equivalence, descriptive equivalence or paraphrase, borrowing and calque. Literal translation is to be used cautiously as it may lead to denaturalized equivalents or mistranslations, especially in the case of false friends. Borrowing is taking over one word without translation, therefore, the borrowed word is generally italicized. Although it seems to be the most practical method, it cannot be used without taking into consideration the context, the receiver who may not be familiar with the meaning of the foreign word, the target culture and its conventions etc.

Finally, consistency is the order of the day in legal translation and it is especially so in EU translation where it is at the same time a principal means of consolidating a language and a terminology that is still in the making as each new Member State means an added challenge to legal harmonization. Consistency here refers to terminology (translating a term with the same word throughout the document), register and layout.

The legal translator and their competence

We have seen that behind each word there is the history and age-old (legal) customs of a people. Moreover, words in legal language represent acts that can lead to facts in real life. All this added to their social embeddedness and sanctification through use and custom explains why in our opinion any tendency to reform or, more precisely, to simplify legal language has limited chances of success. The binding nature of law implies that the legal translator has to weigh each and every word consciously and with responsibility. Receiver-orientation – the current tendency in present-day legal translation (Šarčević 2000) – means the translator must have linguistic creativity to avoid using ST-oriented methods in translation and to be able to achieve communicative equivalence in the TT. The requirement not to clarify intentional ambiguities in the ST entails that legal translators should have a solid textual competence, meaning familiarity with legal text-types including their terminology and format, the legislative process and last but not least the specific context in which it was produced. Irrespective of the genre of the legal text and the purpose of the translation we can claim that the translator should generally have a better understanding of legal texts than laypersons in order to be able to make other people understand as well. This double role of receiver and text producer obliges the translator to have some kind of background in law, more exactly to know the legal systems involved in the act of translation. However, as noted by Cao (2007), the translator does not need to be a specialist in law. On account of their responsibility for the later interpretation of the translated text, it is also important that translators dispose of legal reasoning competence. Apart from intense reading and practice in translation, this type of competence can be acquired through interaction with the judiciary (legislator, lawyer, scientist

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etc.), an opening-up which, as a matter of fact, is highly encouraged and acclaimed by scholars like Cao (2007), Šarčević (1997) or Monjean-Decaudin (2010). Isolation is indeed detrimental for any discipline in the 21st century. Interaction between translators and domain specialists is also motivated by the urge for accuracy, which is omnipresent in the field of specialized translation.

In sum, legal translation is a form of translation where routine, specialization and continuous training are not only welcome but highly recommended. This paper has sketched the major translation difficulties that have to do with the multiplicity of texts and contexts in legal translation as well as the characteristics of legal language. By exposing some of the major implications of translating legal texts it is our hope that we have managed to raise awareness of the most important pitfalls in this field.

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