

A Holistic Approach to Legal Translation

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Abstract

Legal translation constitutes one of the most important areas of specialized translation owing to its significance in making legal instruments and rules not only comprehensible, but also operational both nationally and internationally. To translate legal texts, various requirements have to be met and many criteria have to be taken into account. Šarčević (1997) correctly notes that there is a need for a theory of legal translation, which should observe both the translation issues often raised in general translation theory and the unique property, function and status of legal texts. In this paper, I am going to shed light on the various requirements that have to be satisfactorily met to translate legal texts conveniently. The basic requirements I am going to address include the different types of analysis the legal translator may resort to so that he can better understand the source text and render it properly, the translation methods and techniques that might be used in the rendition of legal texts- whether reproachably or irreproachably-, the different ways of drafting legal rules. The aim of presenting the reader with these requirements is to reveal the very complex nature of legal translation and how care should be taken in rendering legal texts, even when the situation looks at first easy and unchallenging.

Keywords: Analysis; Legal Interpretation; Legal Text; Legal Translation; Translation Methods; Translation Techniques.

1. Introduction

Specialized translation has been overlooked in the academic institutions in the Arab world for too long. However, interest in this increasingly developing area has been growing recently. The need for specialized translators in different specialized fields is dictating on us the necessity to care more about the curricula designed for specialized translation teaching and to ensure the development of the tools of research and means that might help improve the quality of translations rendered in different arenas. This paper attempts to approach one of the most important and crucial areas of specialized translation, namely legal translation, in a holistic way.

2. Legal Translation Defined

Legal translation is concerned with the transfer of legal instruments from one language into another. The transfer may take place either within the same legal system or between two different legal systems. An example of the first situation is the translation of the laws of France into Spanish or German because the Spanish- and German-speaking countries adopt the same legal system as France. An example of the second situation is the translation of the laws of England or the United States of America into French or Arabic because England and the United States of America adopt the Common-Law system whereas France and the Arab-speaking countries adopt the Civil Law System and occasionally Islamic Law (Shari' a).

Interestingly, even within the same country these two contrasting situations do exist. An example of the first situation is Switzerland which has three official

languages, namely, German, French and Italian and adopts one legal system, namely, the Civil-law System while Canada stands as the best example of the second situation due to its bilingual status (English and French are the country's official languages) and its adoption of two different legal systems, the Civil Law system in Québec and the Common Law System in the rest of Canada. Legal systems have always been linked to the languages within which they have evolved. Continental Europe was the birthplace of Civil law is still the flourishing centre of this legal system. Common Law can be found only in the English-Speaking world. Law is a social science whose primary aim is to organize relations in society and to regulate the behavior of individuals and the operations of institutions within society. It is a special area with its own concepts, academic and research interests, and scopes and methods of application and hence the translation of legal instruments, however they are structured and their aim is, must systematically be positioned within the realm of specialized translation. The next sections, which constitute the core of this paper, shed the light on the requirements for legal translation.

3. Requirements for Legal Translation

3.1. Analysis of the Legal Source Text

The analysis of the source texts is a prerequisite not only in legal translation, but also in all different types of translation. However, due to the nature of legal texts and the often peculiar status of legal translation, meticulous analysis of the legal source texts is particularly significant. The translation of legal texts is different from the translation of other texts in that it often

serves as a law or a legal instrument operating in another language and is not merely a rendition of the content of the source text as is the case of informative texts (news reports and textbooks of medicine, history, etc) and aesthetic texts (literary works, such as poetry, theater, stories and novels), and is different even from the translation of other instruction texts such as advertising, where the instructions are not binding and the text tends to persuade receivers more than to instruct them. The construction of legal texts is important for the understanding of their rules and norms, and systematically for their translation, too.

The reader of legal instruments, be he a lawyer or a translator, has to analyze the source legal text in order to correctly construe the text. According to, Jean Engberg (2002), the legal translator has to construe the legal text in a way similar to that of lawyers and should not confine his construction to the grasping of linguistic meaning; the legal meaning, which assumingly can only be detected by lawyers, has also to be contoured by the legal translator. Jean-Claude G  mar (1995), a well-known Canadian translation theorist, proposes five levels of analysis of the legal source text, namely the lexical analysis, the grammatical analysis, the structural analysis, the semantic analysis, and the stylistic analysis. At the lexical level, the legal translator looks in the target language for the equivalents of lexical items appearing in the legal source text. The equivalents here are mostly ordinary words as every legal instrument must contain ordinary lexical units besides a host of technical terms and semi-technical terms.

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At the grammatical level, the legal translator must master the grammar of both the source language and the target language. At the syntactic level, the legal translator must analyze the overlapping structures of the source legal texts and rephrase them properly in the final translatorial product. According to G mar (1995), the legal translator should concern himself with the macrostructures and the microstructures of the source text alike. While macrostructure refers to the overall structure of the legal instrument (preamble, preliminary part, core chapters, concluding part, etc), microstructure refers to the internal syntactic relationships within sentences. At the semantic level, the legal translator performs an analysis to understand not only the superficial, but also the deep underlying meaning. The legal translator has not to rely on the meaning of words in isolation (*sens*) but has to look at the overall meaning of the whole stretches of language (*signification*). At the stylistic level, the legal translator has to attach importance to stylistic nuances as far as they contribute to the legal effect that the legal instrument may have on receivers.

In this paper, I propose a review of the preceding five levels of analysis for the purpose to accommodate my holistic approach to the translation of legal texts. In my classification of the different types of analysis of legal source texts, I differentiate between linguistic analysis and legal analysis. Under linguistic analysis, the legal translator may analyze the legal source text in terms of lexis, syntax and grammar, and style. In my view the semantic analysis is entailed in all of the three as it is also entailed in the different components of the legal analysis.

Under the legal analysis, the legal translator applies the different canons of interpretation and construction rules as formulated by each legal system, reads analytically legal definitions and legal rules and norms, and consults the textual body of aids of interpretation.

3.1.1. Linguistic Analysis

Linguistic analysis, in this paper, is subdivided into lexical analysis, grammatical and syntactic analysis, and stylistic analysis.

3.1.1.1. Lexical Analysis of the Legal Source Text

In his lexical analysis of the ordinary words of legal source text, the legal translator's job is not different from that of translators of general texts, nor is it different from that of translators of other types of texts. It is legal terminology which makes the task of the legal translator different. Legal terminology abounds in legal instruments, and even those many words that might appear as having a general well-known meaning in the general language are often used in legal instruments in a legal meaning, which is either slightly, substantially or totally different from their ordinary meaning. It is important to note that even the slightest difference in meaning may have significant legal effects in the field of law, altering the status of persons, damaging their interest, or even endangering their own freedom and life. Another salient feature of legal terms is polysemy. In many instances, the legal translator encounters legal terms that have more than one legal meaning. The term *property* in legal English may refer to all types of property, including real property (immovable property), personal property (movable property), money in its cash

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and cashless forms or just to real property; the term *estate* may refer to real property or to all what a deceased leaves on his death, including personal and any other valuable owned property. Even the same legal instrument may give a term more than one meaning in different sections of the text, by defining it differently in each section. The legal translator has here to grasp the meaning intended by the lawmaker as the aim of the production of the legal instrument is to reach the intentions of the provisions contained in such an instrument and achieve the purposes as set forward by the lawmaker. In Connecticut's Family law, for instance, the term *child* is defined as "an individual who has not attained eighteen years of age" in subchapter 815p for child custody purposes and as "any person under sixteen years of age" in subchapter 815t for delinquency purposes. Not understanding the meaning given to the word "child" in the two preceding situations may be misleading and may have unintended legal effects. In another different context, even the core meaning of the word *child* may be intriguing as it may be used differently for legal purposes depending on how the law in question determines the family relationship between parents and children. While in Arab laws the word *child* would probably be used to refer just to one's own issue born naturally under the bond marriage, in the laws of western countries, such a word may also include adopted children, children born out of wedlock, and children born to a married couple via a surrogate mother as well.

3.1.1.2. Grammatical and Syntactic Analysis of the Legal Source Text

Grammar and structure are important in the analysis of legal texts. Legal language does not use a grammar completely different from that used by general language, but it uses the grammar of general language in a different way. The auxiliary *shall* in legal English does not indicate the future as it does in general English; rather, it expresses command. In turn, while the auxiliary *must* expresses obligations in general English, it expresses a condition precedent in legal English. Let us observe the following examples:

- The Tenant shall pay rent at the beginning of each calendar month.
- The candidate must sign the application.
- The Tenant may pay the rent in advance in full or in equal monthly installments.

In the first example, the Tenant is obliged to pay the rent at the beginning of each calendar month. His rental payment is not a condition precedent to something he will receive in return. In the second example, however, the candidate has to sign the application in order to have it admitted. The application will be rejected if the candidate fails to sign it, as its signature is a condition precedent that must be met for it to be admitted. In the third example, the Tenant is given discretion to pay the rent in advance, either in full or in equal monthly installments. The Tenant is free to use this discretion. If he chooses to pay the rent in advance in full he is complying with the law. If he chooses to pay the rent in equal monthly installments he is again in

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compliance with the law. If he does not choose either of the two discretionary powers, he is still in compliance with the law. While the first example constitutes a command and the second example a condition precedent, the third example provides for permission. An authorization is a sort of permission that not only allows the authorized person to do something, but that also grants him as well some power which other persons would lack in order to carry out the authorized act under similar circumstances. Only person with a particular status or in a particular position are given authorizations by the law or by their seniors compared to ordinary persons who are usually given mere permissions.

Though the language of law usually attempts to be precise in order to reach effective communication and enable the law to become successfully operational within the legal community, such preciseness is not always guaranteed. Language is inevitably indeterminate, and that of law is no exception. Being not only present but also pervasive in the various drafted legal instruments, ambiguity and vagueness are challenging to the legal translator. Structural ambiguity, like lexical ambiguity, include both intralingual ambiguity, that is, ambiguity found within a language, and interlingual ambiguity, that is, ambiguity that arises when two languages are compared or when one language is translated into another. Obviously, the legal translator has to concern himself not only with intralingual structural ambiguity, but also with interlingual structural ambiguity. Let us consider the following Arabic structure: الوثائق والعقود المدنية

The structure is ambiguous as it might be read in two different ways: either only the contracts are civil and the documents may either be civil, business, labor or any other sort of documents, or both documents and contracts are civil.

The translation of the structure in English, however, may either iron out the ambiguity, retains it, or even creates an ambiguity that did not originally occur in the source structure:

- 1- Civil documents and civil contracts
- 2- Documents and civil contracts
- 3- Civil contracts and documents
- 4- Civil documents and contracts

In the first rendition, ambiguity has been stemmed and both documents and contracts are meant to be civil. In the second rendition, too, the structure has been made unambiguous because one would understand that it is only the contracts that are civil. In the third rendition, ambiguity is retained by preserving the two preceding meanings present. It is the fourth rendition which creates a new ambiguity. While one of the two possible interpretations might be true, the second distorts the meaning completely. If we construe both documents and contracts as being civil, this is a plausible interpretation and, as can be clearly seen, conforms to the unambiguous meaning expressed in the first rendition. Had we, however, construed documents only as being civil and contracts as being any sort of contracts, then the translator would have erred in his reformulation of the original structure. Syntactically speaking, legal rules are formulated in a rigid and rigorous manner.

3.1.1.3. Stylistic Analysis of the Legal Source Text

Various practices have developed in the drafting of legal instruments in different jurisdictions due to both linguistic and cultural reasons. Common Law drafters tend to use the basic conditional sentence in the formulation of legal rules, following the pattern *if P, then Q*, which means that *Q* will be performed only in the situation meeting the conditions enumerated in *P*. Why Common Law drafters follow this rigid formula may be attributed to the fact that these drafters want to express commands and permissions more directly. Civil Law drafters, on the other hand, tend to express commands and permissions less directly refraining thus from using the rigid formula *if P, then Q* (Šarčević 1997). In order to do so, they have their own stylistic traditions in which they prefer to use modifying relative clauses. The legal translator has to analyze the different types of formulation in order to understand the underlying logical relations and deftly penetrate the thought process. Such an understanding enables the legal translator to reformulate the legal rules encountered in legal instruments more clearly in the target language.

3.1.2. Legal Analysis of the Legal Source Text

In his legal analysis of the legal source text, the legal translator has to think like a lawyer and to be aware of the rules of interpretation. Presumptions that translators do not think like lawyers are a confession that their translation of the legal source text would have legal effects differing from those of the text were it not translated. In this section the different rules of interpretation are to be addressed to show legal

translators why they are so important in the analysis of the legal source text.

Under the Common Law system three legal rules of interpretation are often resorted to in the construction of legal instruments. These are: the literal rule, the golden rule, and the mischief rule. These three main rules are supplemented by other rules, sometimes known as language rules, doctrines, or linguistic principles. These include the *ejusdem generis* rule, the *nocitur a sociis* rule, the *expressio unius est exclusio alterius* rule, rule of rank, the last antecedent doctrine, and the series qualifier rule. Though the latter list contains rules regarded as rules of language, they should be classed here in my view under legal analysis, not as linguistic analysis categories, for they are operative thanks to a legal system that endows them with particular usage that does not obey the rules of general language, and sometimes deliberately violate the traditional grammar rules known to everybody.

Under the literal rule,
(...) the judge is required to consider what the legislation actually says rather than considering what it might mean. In order to achieve this end, the judge should give words in legislation their literal meaning- that is, their plain, ordinary, everyday meaning- even if the effect of this is to produce what might be considered an otherwise unjust or undesirable outcome. (Gary Slapper and David Kelly 2003:175)

The above definition elegantly shows what a judge should do in case the literal rule is invited in the interpretation of a piece of legislation. Since the legal

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translator is a receiver of the legal source text, he has to understand the piece of legislation in question in the same way as a judge or any other lawyer in order to convey the legislative intent of the lawmakers to the readers of the translation of such a piece of legislation. Where the literal rule applies, the legal translator has to give the words their ordinary, plain meaning, unless he reasonably believes that the legal instrument in question endows them with a particular meaning in the definitions section or elsewhere in the instrument. The readers of the translation are equally judges and lawyers in the first place, and may be non-specialists and laypeople as well in the second place in the target legal system.

As far as the golden rule is concerned, it is:

(...) generally considered to be an extension of the literal rule. In its general expression, it is applied in circumstances where the application of the literal rule is likely to result in what appears to the court to be an obviously absurd result. (Gary Slapper and David Kelly 2003:176)

I think that the recourse of the translator to the golden rule requires a lot of boldness, and before that, a perfect mastery of the legal system from which he translates, because to dare parting with the wording of the instrument and change it in a way to strike down the absurdity stemming from such a wording is a bold, and sometimes risky, step to take.

According to Gary Slapper and David Kelly:

At one level, the mischief rule is clearly the most flexible rule of interpretation, but in its traditional expansion it is limited by being restricted to using

previous common law rules in order to decide the operation of contemporary legislation. (2003:178)

In construing the meaning under this rule, the judge looks for the mischief which the legislator aimed to address and what sort of remedy he intended to provide. To do the same job, a translator should be very knowledgeable about legislative history and well versed in the intricacies of the legislative process. The mischief rule is the freest rule of the three as it parts completely with the actual wording of the piece of legislation, something that serves as a latent warning to legal translators who have to resort to this rule in their analysis of the legal source text only in situations where they manifestly master perfectly the application of the rule due to the considerations that have just been enumerated above.

3.2. Legal drafting techniques

The use of some legal drafting techniques is a prominent requirement for both the production and translation of legal instruments because every legal language has its own peculiar features of expression. Legal rules are among the most important components in any piece of legislation and in any other binding legal instruments as well.

George Coode was the most famous lawyer to have first conducted an analysis on legislation (Šarčević 1997). Though Coode's analysis focused on common law legislation, it also applies to legislation belonging to other legal systems (Dreidger 1982). Coode concluded that all legal rules contained four basic elements: legal

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subject, legal action, case, and condition. According to Coode, the legal subject is on whom the right or power is conferred or on whom the obligation is imposed. The legal action consists in the power or right itself. The case stands for the situations and circumstances under which the legal action is intended to take place, and the condition specifies what should be met as a requirement for the action to take place. Šarčević (1997), in her famous work *New Approach to Legal Translation*, simplified an example of Coode's, presenting the four elements of the legal rule in their mandatory order:

(Case) Where any Quaker refuses to pay any church rates,
(Condition) if any churchwarden complains thereof,
(Subject) one of the next Justices of the peace,
(Action) may summon such Quaker

The formula as proposed by Coode was too rigid to be followed strictly. Not always can we find the four elements altogether present at the same time in a legal rule and some critics believe that there is no much difference between Coode's condition and case. Nowadays, it is not uncommon to combine Coode's condition and case in what is called the *fact-situation* and his legal subject and legal action in what is called the *statement of law*.

<i>Fact Situation</i>	<i>Statement of law</i>
Where a churchwarden files a complaint against a Quaker for refusing to pay any church rates	one of the next justices of the peace may summon such Quaker

The fact situation includes the *descriptive elements* of the legal rules and the statement of law the *prescriptive ones* (Hans Kelsen). Weinberger (1988) calls the descriptive elements the *propositional content* and the prescriptive ones the *normative content*.

To translate the elements of legal rules the legal translator should distinguish between the propositional content and the normative content and when and where to depart from the basic structure of legal rules as proposed by Coode. Driedger (1982) experimented on a sample provision, which he reformulated in nine different ways to show that Coode's order of the elements of the legal rule needs not necessarily be followed.

Here are the nine examples:

- 1- *Where an applicant has passed the test, / if he pays the fee, / the Minister/shall grant him a licence.*
- 2- *Where an applicant pays the fee, / if he has passed the test/ the Minister/shall grant him a licence.*
- 3- *Where an applicant has passed the test/and paid the fee/ the Minister/shall grant him a licence.*
- 4- *The Minister/shall grant a licence to an applicant/ if he has passed the test/ and paid the fee.*
- 5- *Where an applicant who has passed the test / pays the fee, the Minister/shall grant him a licence.*

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- 6- *Where an applicant who has paid the fee/ has passed the test, the Minister/shall grant him a licence.*
- 7- *The Minister/shall grant a licence to an applicant/ who has passed the test/ if he pays the fee.*
- 8- *The Minister/shall grant a licence to an applicant/ who pays the fee/ if he has passed the test.*
- 9- *The Minister/shall grant a licence to an applicant/ who has passed the test/ and paid the fee.*

The first example reiterates Coode's order. In Examples 1, 2, 3, 5 and 6 the condition and case (propositional content) precede the legal subject and the legal action (the normative content). In the rest of sentences it is the normative content which precedes the propositional content. In example 2, Driedger interchanges the condition and the case because he believes they have the same basic function and are both adverbial modifiers. In the third example, he expresses the case and condition as cumulative circumstances in the same *where* clause. In example 4, besides ordering the propositional content after the normative content, he expresses the case and condition as cumulative conditions in a subordinate *if* clause. In example 5, the case is expressed in a relative clause embedded in a subordinate *where* clause containing the original condition. In example 6, the original condition is expressed in a relative clause embedded in the subordinate *where* clause containing the case. In Example 7, the case is expressed in a relative clause, the

condition in an *if* clause, which are then interchanged in example 8. According to Šarčević (1997: 163), the last example marks a complete departure from Coode's model. Driedger replaces the basic conditional sentence by a relative clause in which both the case and condition are expressed consecutively in a relative clause.

Driedger's exercise is not destined to translators, but to legal drafters. Legal translators, themselves doing legal drafting in a target language, would find the exercise, however, very useful as it allows them to vary the basic sentence structure of legal rules.

3.3. Methods of Legal Translation

Translation methods differ from translation techniques (procedures) in that they are transfer tools that apply to macrostructures (whole texts), not to microstructures (words, phrases, clauses, and sentences). It is important for the legal translator to adopt the suitable translation method depending on the type of the text, the purpose and status of the translation and the linguistic and legal features of the legal source text. The translation of law has long been associated with religious translation and this is due to the fact that both legal and religious texts are normative when it comes to instructions, guidance, and the regulation of human behavior. Another important point here that some may overlook is the fact that some religious texts are legal texts at the same time. Quranic verses that prescribe punishment for some crimes like fornication and theft are the law in Saudi Arabia and those verses that provide for marriage, divorce, inheritance and estate are indeed the law in most Islamic and Arab countries, though the texts referred to

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in the adjudication of disputes related to these matters are often the codified family laws in these respective countries. This explains why literal translation has been the norms in legal translation until very recently, the same as has been and is still religious translation sometimes. The fear of translators of religious and legal texts to deviate from the source text has thus kept practices in these two arenas very much under the grip of tradition and the assumingly faithful transmission of the source text into other languages and vernaculars under control. Šarčević (1997) traces the development of the methods of legal translation in the following figure:

strict literal	literal	moderately literal	near idiomatic
idiomatic	co-drafting		

As clearly shown in the figure, there has been a shift over time from the most radical method of literalness to the freest method of translation. Strict literal and literal translation are now abandoned as they do no longer help in ensuring efficient legal communication across the barriers of language and culture. With the creativity that legal translators have procured recently, even moderately literal translation is not invited in some instances, and near idiomatic and idiomatic translation are now much of options as methods of transfer. Co-drafting, being the freest method and standing as a rival to adaptation in literary translation, is nowadays used in bilingual jurisdictions, such as Canada and Belgium, and multilingual jurisdictions, such as Switzerland, and in the production of multilingual, multilateral instruments, such as legislation within the European Union and international treaties and conventions adopted under the

auspices of the United Nations. With its unique features, where the translator has come to participate in the production of the source text besides producing the translation and the target text has come to be produced concurrently with the source text, this method of translation (some even believe that it is more a drafting than a translation method) has brought about dramatic changes to the once commonly accepted concept of translation.

4. Conclusion

The present paper shows that legal translation is definitely a difficult task. Though the transfer of legal texts may appear easy to the novice legal translator, the reality is totally different. This is due to the nature of legal translation itself. Unlike other types of translation, the translation of normative legal instruments is the law itself operating in another language. This translation is referred to by judges to resolve disputes and lawyers to render services in order to do the litigants justice, and the slightest mistake may result in a different outcome of the trial. That is why the focus of the present paper has been on the requirements for legal translation, for without their being met adequately, the translator would face insurmountable transfer problems.

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