**Susan Sarcevic**

# NEW APPROACH TO LEGAL TRANSLATION

## Chapter 2

## History of Legal Translation

### 2.1. Literal vs. Free Translation

Dating back to the wars between Egypt and Mesopotamia, the two dominant rivals of the early Eurasian world, the oldest known recorded evidence of legal translation is the Egyptian-Hittite Peace Treaty of 1271 B.C. Two versions of the Treaty were discovered, one in hieroglyphic inscriptions in several Egyptian temples and the other in cuneiform characters inscribed on tablets unearthed in the Hittite capital of Bogazköy. Both are believed to be translations; however, the original was never found (Hilf 1973:5).

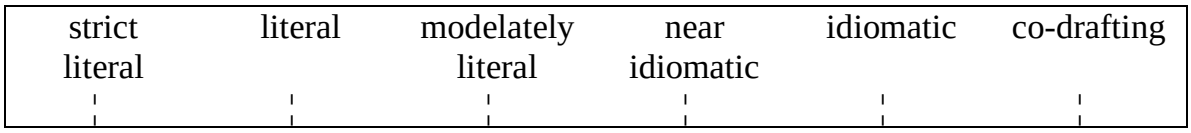
Despite its long tradition which surpasses even that of Bible translation,[1] the history of legal translation has remained more or less an enigma. To my knowledge, there have been no previous attempts to make a comprehensive study of its development. Nor are there any treatises on legal translation comparable to Martin Luther's *Sendbrief vom Dolmetschen* (1530), Pierre Daniet Huet's *De optimo genere interpretande* (expanded version of 1680) or to Alexander Fraser Tytler's *Essay on the Principles of Translation* (1791). Pieced together from information gathered from legal documents and statements made by legal translators, their critics, and legal historians, this historical survey is by no means complete. For practical reasons, it is based mainly on translations of statutes and codes, the primary sources of written law (*cf.* Hattenhauer 1987:5).

For over 2000 years, general translation studies were dominated by the debate whether a translation should be literal or free (*cf.* Steiner 1977:239). Due to the sensitive nature of legal texts, this issue has been particularly controversial in legal translation as it raises legal questions as well. Since both legal and religious texts are normative, it is not surprising that the early history of legal translation is most closely related to that of Bible translation, i.e., until the Middle Ages when the first moderately literal translations of the Bible were made into vernacular languages. Because of the authoritative status of legal texts, legal translation remained under the grip of tradition much longer than other areas of translation. In fact, the first real challenge to the literal translation of legal texts did not come un-

[1] When Nida (Nida and Taber 1974:vii) claims that Bible translation has a longer tradition than any comparable kind of translation, he fails to take account of legal translation. According to Nida, Bible translation dates back to the third century B.C.

til the twentieth century when translators of lesser used official languages finally began to demand equal language rights, thus setting the stage for the development from literal to near idiomatic and idiomatic or 'linguistically pure' translation, as Beaupré calls it (1986:179). This development is illustrated on the continuum in figure 1 below. Commencing with strict literal translation, the development moves gradually towards idiomatic translation and, thanks to the new methods of bilingual drafting in Canada (Chapter 4 at 4.4.1), ends with co-drafting at the far right:

**Figure 1: Phases in the Development of Legal Translation**




Although multilingualism is an outgrowth of the twentieth century, plurilingual communication in the law has a long and colorful history. Not only do the legal systems of the western world have their roots in Roman law, but the translation activities under Emperor Justinian also left their mark on the history of legal translation. Thus it is appropriate that this historical survey commences with Roman law.

## 2.2. Justinian's Directive: Strict Literal Translation

Despite the authoritative status of translations of legal instruments, written guidelines or directives prescribing translation techniques for such texts are extremely rare. To my knowledge, the first known codified rule on the translation of legislative texts is Emperor Justinian's directive set forth in the *Corpus juris civilis*. After the fall of the Western Roman Empire in 476, the Empire continued in the East with its seat at Constantinople (Byzantium). It was there that Justinian ordered the great compilation, systematization, and consolidation of Roman law later known as the *Corpus juris civilis*. Justinian's codification consists of the Institutes, the Digest (or pandects) and the Code, promulgated between 533 and 534. Thereafter Justinian continued to legislate by a series of Novels (*Novellae constitutiones*), promulgated between 535 and 556 (von Mehren and Gordley 1977:6; Krüger 1912:400). As a Roman Emperor, Justinian upheld the rights of the Latin language, as a result of which the *Corpus juris* was basically written in Latin. This also included the *Digest*, a compilation of the writings of great Roman jurists (Liebs 1975:96-103). The *Digest* is the most important part of the *Corpus juris* for the history of western law and legal translation as well. After ordering revisions in the original texts comprising the *Digest*, Justinian attempted to prevent 'distortions' of his monumental codification by issuing a directive prohibiting all commentaries on his enactments. As an additional means of preserving the letter of the

law, the directive explicitly permitted only translations into Greek that reproduced the Latin text word for word:

> Imperator Caesar Flavius Iustinianus... Augustus ad senatum et omnes populos... nemo neque eorum, qui in praesenti iuris peritiam habent, nec qui postea fuerint, audeat commentarios isdem legibus adnectere, nisi tantum si velit eas in Graecam vocem transformare sub eodem ordine eaque consequentia, sub qua et voces Romanae positae sunt, hoc quod Graeci dicunt (§ 21 *Constitutio Tanta* [Introductory Act to the *Digest*]).

In word-for-word translation, the words of the source text are translated literally into the target language and even the grammatical forms and word order of the source text are retained. In essence, word-for-word translation is strict literal translation or 'primitive interlineal translation,' as it was called by early translation theorists, thus distinguishing it from 'refined interlineal translation' or literal translation (in Kloepfer 1967:42-43). In literal translation, the basic unit of translation is still the word; however, basic transformations (changes in syntax) are permitted to respect the rules of grammar in the target language, thus increasing comprehensibility while following the source text as closely as possible (*see* Wilss 1977:105).

As it turns out, Justinian's directive requiring word-for-word translation was modelled on the practice of the Church. This is not surprising in view of the close relations between Church and State. At Rome the Church was initially a branch of the State and *ius sacrum* a part of *ius publicum*. When Christianity was established as the official religion of the Roman State in 313 A.D., the State recognized the Church and its spiritual authority and the Church acknowledged the submission of Christians to the Emperor's sovereignty. The peaceful co-existence of spiritual and temporal powers was later disturbed by competing claims of Empire and Papacy for superiority, eventually resulting in a contest between civil law and canon law (*see* Walker 1980:214).

In early Christianity the Emperor had a claim to divine inspiration, as a result of which imperial enactments were deemed sacrosanct. Thus it followed that, like the word of God in the Scriptures, the letter of the law also demanded strict literal translation to protect it from heterodoxy. Moreover, both biblical and legislative texts were attributed the quality of mysteriousness, i.e., they conveyed an assumed truth, not to be comprehended by the human mind but accepted on faith alone (*cf.* Werk 1933:18). Thus it was believed that the 'word power' of such texts could be retained only by word-for-word translation. This follows from Hieronymus' warning in his letter to Pammachius: 'Absque Scripturis sanctis, ubi et veraborum ordo mysterium est' (*De optimo genere interpretandi*, cited in Kloepfer 1967:28, *also* Vermeer 1992b:93).

According to the nineteenth-century German lexicographer Wölfflin, early Bible translations from Greek into Latin were characterized by an overabundance of

etymological equivalents of Greek words used without regard to context. This resulted in a large number of *faux amis* or, as Wölfflin put it, a large number of Latin words with the same stem as the Greek source words but with different meanings (1894:82-83). The same method of painstaking literalness was also found in Judaism, which had originally banned translation as blasphemy. In this context, Steiner refers to the belief recorded in the *Megillath Taanith* (Roll of Fasting) that 'three days of utter darkness fell on the world when the Law was translated into Greek' in the first century A.D. (1977:239). Even today translations of the Koran, the sacred book of Islam and primary source of Muslim law, are required to be as literal as possible (Preface to *The Quran*, Guildford and Surrey 1975:vii).

## 2.3. Preserving the Letter of the Law in the Middle Ages

Much of what is currently western Europe, including parts of England, had been romanized for some 400 years. After the shattering of the western Roman Empire by German tribes, the surviving elements of Roman law persisted mainly in memory or as custom and habit. Above all, it was the Roman Catholic Church that preserved in its canon law and culture much of Roman civilization, including the Latin language. In the early Middle Ages, national languages were still underdeveloped, as a result of which legal instruments and documents were recorded in Latin. In Germany, for example, there was no uniform spoken language and no written language. Since lawmakers and judges were not always versed in Latin, translation was essential in both the legislative and the judicial process. According to Philipp Heck, a legal historian, strict literal translation was the rule of the day for medieval translators of legislative texts. Convinced that historians could not objectively evaluate the sources of medieval law without taking account of the then practiced translation techniques, Heck took it upon himself to systematize the techniques used to translate legal instruments and documents in Germany in the early Middle Ages. His book *Übersetzungsprobleme im frühen Mittelalter* (1931)[2] is a noteworthy contribution not only to legal history but also to the history of translation.[3]

Heck speaks of *ad hoc* translation performed for the purpose of making or revising a particular law or deciding a court case. The translation operations were performed immediately without preparation, thus the designation *ad hoc*. Both written and oral discourse were involved, a process which Heck refers to as *Übersetzung zu Protokoll* and *Übersetzung nach Gehör* (1931:11). For example, between the fifth and ninth centuries, the laws of various German tribes (e.g., the *lex Salica, lex Alamanorum* and the *lex Baiuvariorum*) were formulated orally in

[2] Heck's first publication on translation problems was written in 1900; however, his articles were not published in book form until 1931.

[3] Instead of giving Heck credit for his efforts to systematize early translation techniques, Vermeer (1992b:100) criticizes the terminology used by Heck to describe various translation procedures, such as *Grundübersetzung, Rückübersetzung,* and *Vorübersetzung.*

vernacular German and recorded immediately by clerics in Latin. In order to avoid the necessity of convening for a second session, the lawmakers preferred to authenticate the Latin text with their signatures straight away, leaving the translator no time to revise his word-for-word translation. Moreover, from a technical point of view, revisions were practically impossible once the words had sunken into the papyrus (1931:7).

Since the written law was in Latin, it was necessary to translate relevant sections of the Latin text back into German during legal proceedings before the court. According to Heck, this process of 'back translation' was not so much for the benefit of the parties as for the judges. The translation was done orally much the same as court interpretation today. At the end of the proceedings, the decision was rendered orally in German and 'recorded' by the translator in Latin (Heck 1931:4-19).

Heck describes the Latin target texts as word-for-word translations in which the German source words were simply replaced by Latin 'equivalents' without regard to context and text coherency. Heck refers to this as the 'equivalent method' (*Äquivalentmethode*) and the relation between a source term and its equivalent as 'equivalence' (*Äquivalenz*).[4] Furthermore, he notes that the use of the equivalent method encouraged the use of etymological equivalents, thus resulting in a large number of errors due to polysemy, which he calls 'multiple equivalence.' Heck attributes the poor quality of the translations mainly to the fact that the translators were clerics without legal training. Unfamiliar with technical terms of the law, they tended to translate words in isolation. Since the translation operations had to be performed immediately, the clerics did not have time to think in the target language and formulate the text in good Latin.

Under such conditions Heck defends the use of word-for-word translation. As he put it, it was necessary to preserve the letter of the law in Latin so as to enable it to be reproduced correctly when back translated into German:

> Bei Rechtsaufzeichnungen war nun schon durch den Zweck der Aufzeichnungen eine gewisse Worttreue gegeben, die Äquivalentmethode in gewissem Grade notwendig. Der Wortlaut des Gesetzes war ja wichtig, er sollte so aufgezeichnet werden, daß er bei der Rückübersetzung wieder herauskam (1931:9).

Nonetheless, Heck admits that back translations made during court sessions were often erroneous, thus causing a discrepancy between the written law and its application (1931:7, note 1). Despite inevitable errors, Heck again emphasizes the importance of using the equivalent method. Since different clerics performed the various translation operations, he presumes that there would have been even greater inconsistency if freer methods of translation had been used. More

[4] *See* 2.8.4 below on the equivalence discussion which dominated modern translation theory in the seventies and early eighties and has been revived in the nineties; on terminological equivalence, *see* Chapter 8 at 8.6.

important, however, is his comment that the equivalent method was used in glosses serving as translation aids. The original glosses were explanations of difficult words or phrases written in the margin or above individual words of the Latin text. Dating from the middle of the eleventh century,[5] the glosses mentioned by Heck contained passages from Latin texts with Old High German glosses in the margin to explain technical terms (Heck 1931:5, note 2, 146-151; *cf*. Kaufmann 1984:170). They also served as corpuses for medieval vocabularies (glossaries) which were essentially word lists of Latin terms and their equivalents extracted from glosses. As confirmed by Heck, word-for-word translation was the accepted method of producing such glosses and glossaries (Heck 1931:20, 149; *cf*. Vermeer 1992b:107).

The eleventh century marked the revival of the study of Roman law at universities in southern France and Italy (especially Bologna) where Justinian's *Corpus juris civilis* was taught by using monolingual glosses. Instead of explaining single words, these glosses were an exposition of the entire passage or principle concerned, in other words, a textual interpretation or commentary (von Mehren and Gordley 1977:9). The period of the so-called glossators is said to have extended from 1015 to 1250. The most famous glossator, Accursius (1182-1260), made a fairly comprehensive collection and synthesis of earlier glosses, summaries, and other works. After Accursius the use of the gloss declined as a method of study because it had essentially become a substitute for the actual text (Walker 1980:528).

## 2.4. Gradual Breakup of Latin Dominance

In England, the Latin monopoly in religion was weakened as early as the fourteenth century by Wycliff's translation of the Scriptures into English. Although the Reformation awakened popular interest in written English, the revolt against law Latin, as it was called, occurred long after England had cut herself off from the Church of Rome. This, however, was due to the presence of law French (Anglo--Norman law) and the argument that it was better to have Latin writs rather than unintelligible French ones (Mellinkoff 1963:82). Although the English courts never received Roman law, Latin had become the dominant written language for statutes, charters, and writs in England after the Norman conquest (1066). Even with the rise of law French, law Latin dominated the English statute books through the first half of the thirteenth century and some Latin could still be found in the statutes until 1461. With the advent of the printing press, the printing of statutes commenced in the 1480's, however, in Latin and French (Mellinkoff 1963:163). In 1527 the first glossary with a specialized vocabulary, a Latin/English glossary of

[5] The oldest known glosses – the Malberg Glosses – date from the middle of the eighth century. Among other things, they contained the original Latin text of the *Lex Salica* with explanatory glosses written in Frankish. *See* E.Erb, *Geschichte der deutschen Literatur von den Anfängen bis 1160*, Berlin Ost: Volk und Wissen (1965:230).

law terms was published by John Rastell for the purpose of expounding 'certeyn obscure & derke termys concernynge the lawes of thys realme' (*New Encyclopedia Britannica* 1985 VII:719). At that tirne one of the goals of the language reform was to make the statutes and pleadings available in English. Nonetheless, Latin remained the favored language of the pleadings until being outlawed, along with law French, during the Commonwealth language reform (1649-1660). Although the reform met with resistance and had to be reinstated by a new English-for-lawyers law in 1731, the main bulk of translation was performed in the seventeenth century (Mellinkoff 1963:126-135; *also* Koschaker 1947:12).

Whereas the goal of the language reform had formally been achieved, the real intention of making the law intelligible to the common people had not been. This was due in part to the poor quality of the English texts which, in accordance with tradition, were strict literal translations. In the words of a legal historian, the word-for-word translations of law French documents were 'difficult and obscure' (Collas 1953:xiv). At the same time, those of law Latin documents were regarded as considerably more unintelligible. Today it is generally accepted that strict literal translation can be used only if the source and target languages are very closely related and even then real success is rare (Wilss 1977:104; Larson 1984:10). The following translation of a pleading from law Latin (1654) shows what happens when a highly inflected language is reproduced word for word in a language dependent on syntax instead of inflection for intelligibility:

> And so being thereof possessed, the sayd Beasts out of his hands and possession casually lost, which Beasts afterwards; that is to say, the 19th. day of December then next following at C. aforesaid to the hands and possession of the foresaid Tho: by finding came, notwithstanding the sayd Tho: knowing the Beasts aforesaid to be the proper Beasts of the said Edw: and to the sayd Edw: of right to belong and appertain, craftily and fraudulently intending the sayd Edw: in that behalf craftily and subtley to deceive and defraud, the said sheep to the said Edward, though often thereunto requested, hath not delivered... (cited in Mellinkoff 1963:146).

Following Latin form proved not only to be clumsy but also wordy. Since English uses articles and prepositions to make up for what it lacks in inflection, the results were ostentatious wordiness and unclarity, or as a Scotchman put it in the eighteenth century:

> The luggage of particles, such as pronouns, prepositions, and auxiliary verbs, from which it is impossible for us entirely to disencumber ourselves, clogs the expression, and enervates the sentiment (*ibid.*).

As confirmed by Blackstone in his *Commentaries on the Laws of England* (1765-1769), such translations did little to achieve the goal of the reform:

> This was done, in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered, but am apt to suspect that the people are now, after many years' experience, altogether as ignorant in matters of law as before (*ibid*.: 135).

### 2.4.1. On the Continent

The final breakdown of Latin dominance occurred considerably later on the Continent as a result of the reception of Roman law. Not surprisingly, reception came about very early in Italy, where the *Corpus juris civilis* had a claim to direct authority as the law of the *imperius romanum*. In France, large-scale instruction in Roman law began in the thirteenth century (*see* von Mehren and Gordley 1977:10), and law was taught in Latin until the eighteenth century despite a declaration of 1680 requiring that ordinance law and customary law be taught in French. The movement to install French as the language of the legislature, the administration, and the judiciary was initiated in the sixteenth century, in particular by the Ordinances of Lyon (1510) and Villers-Cotterêts (1539) (*see* Didier 1990:7-8). As the major means of achieving the goals of the language reform, translation was deemed necessary to reduce the number and complexity of the glosses, to make the law accessible to the public, and to provide greater clarity, thereby reducing litigation and the number of interpretation errors by judges (Didier 1990:7).

In Germany the first serious challenge to law Latin dates back to the translation of the *Sachsenspiegel*, which was drafted in Latin in the thirteenth century but immediately translated and recorded in German as well (1220-1235). Thereafter, the *Landfriedengesetz* of Mainz (1235) was apparently drafted in both Latin and German (Hattenhauer 1987:5). Toward the middle of the thirteenth century private documents began to appear in German and instruments of city law were also germanized (Werk 1933:11). This development, however, succumbed with the advent of the Renaissance and, in particular, with the reception of Roman law. Latin was officially reinstated as the language of the law in Germany by the reception of the *jus commune* (*gemeines Recht* as Roman law was called) in a *Reichskammergerichtsordnung* of 1495.

Even the Reformation and Luther's monumental translations of the New and Old Testaments (1521, 1534) failed to threaten the dominance of law Latin in Germany. Recognizing the Bible, not Rome as the highest authority in religions matters, Luther was determined to make the Bible intelligible to the common peo-

ple. In so doing, he was not only among the first to translate the Bible into vernacular German, but his efforts to imitate the language of the common people also resulted in a relatively free translation of the Bible. As Luther wrote in his *Sendbrief vom Dolmetschen* (1530):

> Denn man muß nicht die Buchstaben in der lateinischen Sprache fragen, wie man soll deutsch reden,... sondern man muß die Mutter im Hause, die Kinder auf der Gassen, den gemeinen Mann auf dem Markt drum fragen und demselbigen auf das Maul sehen, wie sie reden, und darnach dolmetschen, da verstehen sie es denn und merken, daß man deutsch mit ihnen redet (cited in Störing 1973:21).

Luther's translations marked the end of the parallel development of the translation of biblical and legislative texts. It is said that, in the spirit of the Reformation, Sebastian Brant had originally intended to produce a counterpart to Luther's translations in the field of law by translating the *Corpus juris civilis* into German. Apparently, Brant's plan was dismissed by others as legal dilettantism and a foolish undertaking for a lawyer. In Wieacker's words, this was the plan of a dilettante who failed to realize that, contrary to the Bible, the *Corpus juris* was not literature for the common people (Wieacker 1952:90). Thereafter, a century passed before a national language reform was initiated in Germany and another century before New High German was finally accepted as the uniform written language in the first half of the seventeenth century (Werk 1933:25). It was not until the Enlightenment that Brant's foolish project would be taken seriously.

## 2.5. The Inevitable Shift to Literal Translation

Latin survived the Middle Ages as the dominant language of international law and remained the principal diplomatic language until its supremacy was challenged by the national languages of the new prestigious western States, especially France. As a result of the success of the armies of Louis XIV (1647-1715) and the growing importance of French literature and the arts, the French language gained such prestige and widespread recognition 'that it was adopted by the courts of Europe and diplomats came to rely on it at international conferences and in treaties' (Hardy 1962:72).

The struggle for the identity of national languages resulted in a new language consciousness which was bound to have an impact on translation as well. In the seventeenth century Pierre-Daniel Huet raised his voice and rejected strict literal translation as 'primitive,' insisting that interlineal translation requires no intellect on the part of the translator. In his opinion, the translator must respect the basic rules of grammar and syntax in the target language, yet not 'adulterate' the source text by producing a free translation. Thus Huet advocated a 'refined' form of

literal translation in which the words are translated in context, not in isolation (Kloepfer 1967:42-43). Although Huet was interested mainly in literary translation, the shift to literal translation was inevitable in the field of law as well.

The scientific knowledge of the seventeenth century bred new faith in reason and progress, ushering in the Enlightenment with its emphasis on the individual and the rights of man. Although the idea of codifying national laws dates back to Roman law, the codification movement in Europe did not commence until the Enlightenment. The first widely accepted legislative principles were established by Montesquieu in his work *L'Esprit des lois* (1748). Montesquieu did not explicitly state that legislation should be written in the national language(s) of a state; however, this followed from his emphasis on making the law intelligible to the public. To codify national legislation in Latin would not have been in keeping with the political policy of the Enlightenment.

Under Montesquieu's influence, Prussia's Frederick II ordered his chancellor (*Großkanzler*) Cocceji to abrogate the Roman codes in Latin and enact a new Prussian *Landrecht* in German. It appears, however, that his main motive in germanizing the law was not to produce a code which would be understood by the public but rather to facilitate the work of the judges and thus promote uniform interpretation (Hattenhauer 1987:40). In order to protect the codification from being misconstrued by false interpretations, Cocceji inserted a clause similar to Justinian's directive prohibiting scholars from writing commentaries on the law. Since much of the German text was itself a translation, the prohibitory clause contained no rule on translation as did Justinian's directive.[6]

Drafting a code in German which incorporated Roman concepts proved to be the Achilles heel of the legislative reform. Faced with the problem of expressing technical concepts in an underdeveloped language which was still 'concept deficient,' Cocceji had essentially three options: to borrow or naturalize the source terms into the target language, to use neutral terms to describe the concepts, or to create neologisms in the target language (*see* Chapter 8, 8.10). Instead of attempting to establish technical terms in German by creating neologisms, Cocceji resorted to the widespread use of Latin borrowings followed by an explanation in German. The term *de patria potestate*, for example, was recapitulated in a relative clause consisting of fourteen words, three of which were Latin. In Part I of the *Project des Corporis Juris Fridericiani* (1749), Cocceji argued that practitioners were accustomed to such terms and that to introduce others would cause confusion among attorneys and judges. Obviously lacking the language skills needed for such a task, Cocceji had to admit his failure. As a result of these and other lan-

[6] The prohibitory clause in the Preface to § 28.IX reads as follows: 'Und damit die Privati, insonderheit aber die Professores, keine Gelegenheit haben mögen, dieses Land-Recht durch eine eigenmächtige Interpretation zu corrumpiren, so haben Se. Königliche Majestät bei schwerer Strafe verboten, dass niemand, wer er auch sey, sich unterstehen solle, einen Commentarium über das gantze Land-Recht, oder einen Theil desselben zu schreiben; oder der Jugend Limitationes, Ampliationes Oder Exceptiones *contra verba legis* an die Hand zu geben, oder dergleichen *ex ratione legis* zu formiren...' (cited in Koschaker 1947:453).

guage problems (*see* Hattenhauer 1987:41-86), the *Allgemeines Landrecht für die Preußischen Staaten* was not completed until 1794, eighteen years after the death of Frederick the Great.

### 2.5.1. Signs of Progress

The ideas of the Enlightenment were directly or indirectly responsible for the social and political upheaval in the late eighteenth century. Although the civil rights movement that led to the French Revolution (1789) was silenced under Napoleon's autocratic rule (1799-1814), Napoleon did not contest the right of a people to use their own national language. One of Napoleon's greatest achievements was the codification of civil law which created a lasting basis for France's civil institutions. As a result of Napoleon's insistence that the *Code civil* of 1804, later known as the *Code Napoléon*, be adopted by all the conquered and sister territories, translation remained in high gear for the duration of his rule.

The newly acquired German-speaking territories were permitted to produce and authenticate their own translations of the *Code Napoléon*, thus giving rise to a number of authentic texts in German, each of which was in force in a given jurisdiction. A comparison of the French source text and two German translations (one in force in the Grand Duchy of Berg and the other in Baden) shows that literal translation had finally become the accepted method of translation for legislative texts. Produced independently, both German texts make allowances to observe the basic rules of syntax of the target language, yet follow the source text as closely as possible. This is reflected in Article 1014 which reads as follows in the original *Code Napoléon* and the two German translations:

> De legs particuliers.
> Tout legs pur et simple donnera au légataire, du jour du décès du testateur, un droit à la chose léguée, droit transmissible à ses héritiers on ayant-cause. Néaumoins le légataire particulier ne pourra se mettre en possession de la chose léguée, ni en prétendre les fruits ou intérêts, qu'à compter du jour des sa demande en délivrance, formée suivant l'ordre établi par l'article 1011, ou du jour auquel cette déliverance lui auroit été volontairement consentie.

German Text A (Berg):

> Von den Particularvermächtnissen.
> Jedes unbedingte Vermächtniß gibt dem Legatar von dem Todestage des Testators an, auf die vermachte Sache ein auf seine Erben oder Nachfolger übergehendes Recht. Dessen ungeachtet kann der Particularlegatar nicht eher sich in den Besitz der vermachten Sache setzen, oder auf deren Früchte oder Zinsen

> Anspruch machen, also von dem Tage an, wo er entweder, nach der im 1011 ten Artikel bestimmten Ordnung, das Gesuch um Auslieferung angebracht hat, oder wo ihm diese Auslieferung freyweillig zugesagt wurde.

German Text B (Baden):

> Von Stückvermächtnissen.
> Jedes unbedingte Vermächtnis gibt dem Vermächtnisnehmer von dem Tag an, da der Erblasser gestorben ist, ein Eigentum auf die vermachte Sache, das auf seine Erben oder Rechtsfolger übergeht. Der Erbstücknehmer kann jedoch weder den Besitz der vermachten Sache früher ergreifen, noch auf deren Früchte oder Zinsen Anspruch machen, also von dem Tag an, wo er das Gesuch um Auslieferung nach der Ordnung des 1011 ten Satzes angebracht hat, oder wo ihm eine solche freiwillig zugesagt worden ist. (Texts cited in Kaufmann 1984:175-176).

Briefly it can be said that, as far as the syntax is concerned, both translations read like the source text, Text B somewhat more than Text A. The use of the compositum *Todestag des Testators* and the participial phrase *auf die vermachte Sache ein auf seine Erben oder Nachfolger übergehendes Recht* in text A (first sentence) make it more fluent than the wordy clauses in text B. Despite its awkwardness in German, the basic structure of the second sentence of the French text (negation + *que*) is retained in both translations. This is in keeping with the widespread belief that unnecessary syntactic transformations might endanger the thought pattern of the original. Similarly, both translators take care to reproduce all the words of the French text, thus acknowledging the importance of the letter of the law. The most notable difference between the two German texts concerns terminology. Whereas the term *droit* (first sentence) is translated literally as *Recht* in text A, the translator of text B uses the more precise term *Eigentum*. Furthermore, the *termini technici* of Roman law are germanized in text B, while text A imitates the French terms by using naturalizations. A comparison of the Roman law terminology is shown below:

| **French source text** | **German text A** | **German text B** |
|---|---|---|
| legataire | Legatar | Vermächtnisnehmer |
| testateur | Testator | Erblasser |
| legataire particulier | Particularlegatar | Erbstücknehmer |

By germanizing the Roman law terms, translator B attempts to, establish corresponding technical terms in German, a task that the drafters of the Prussian *Allgemeines Landrecht* did not achieve with consistency. In fact, translator B avoids

the use of borrowings and naturalizations throughout the entire text. This accomplishment is accredited double significance in that it contributes to the development of the German legal language and, perhaps more important, hides the embarrassing fact that the Code is a foreign legal instrument intended to implement the conqueror's will over the conquered (Künssberg 1930:18, note 44), thus foreshadowing a new national consciousness that was bound to influence the development of legal translation.

## 2.6. Increased Concessions to the Target Language

Under the influence of German philosophers, hermeneutics was incorporated into translation theory in the nineteenth century. Above all it was Schleiermacher's essay *Über die verschiedenen Methoden des Übersetzens* (1813) that initiated the hermeneutic approach to translation, i.e., 'the investigation of what it means to understand a piece of oral or written speech, and the attempt to diagnose this process in terms of a general model of meaning' (Steiner 1977:237). In focusing the translator's attention on the dichotomy of word and sense, the hermeneutic approach raised the question whether the translator can convey the sense of a text by literal translation in which the basic unit of translation is the word.

Schleiermacher's hermeneutic considerations served as the basis for his distinction between the translation of works of art (literary translation) and worldly texts (later special-purpose or specialized translation). Legal texts belonged to Schleiermacher's group of worldly texts which could allegedly be translated by a mere mechanical process of interlingual substitution requiring neither hermeneutics nor creativity (*see* Chapter 1, 1.2). Schleiermacher's philosophical considerations about language and translation seemed irrelevant for legal translators, as did von Humboldt's beliefs that each language has its own structure and that no language can be a valid substitute for another. Most probably, legal translators were not even aware of such ideas. Under the firm grip of literal translation, translators of legislation continued to reproduce the words and syntax of the source text as closely as possible. The following statement by Künssberg confirms that literal translation still dominated the translation of legislative texts well into the twentieth century:

> Wenn man aus einer fremden Sprache überträgt, so such man ohnehin Wort für Wort die Entsprechungen in der Muttersprache (1930:18, note 44).

It was not philosophical considerations but rather national language consciousness that finally aroused the interest of legal translators in the quality of the target text. No longer satisfied to produce a text that was only generally understandable to their fellow countrymen, translators began to make a conscious effort to produce a text in good German, French, Italian or whatever the target language happened to

be. Without openly rejecting the traditional method of literal translation, legal translators gradually began to make greater concessions to conform to the rules of the target language. This development can be shown by comparing corrected and revised texts with earlier versions of the same text.

### 2.6.1. Comprehension Finally Comes Into Play

After the defeat of Napoleon in 1815, Austria emerged as one of the great powers of Europe. Believing that any outbreaks of nationalism would be fatal to the Empire, Metternich imposed Austrian law in all the territories but permitted the various nationalities to retain their own official languages. As a result, legal translation continued to flourish in the nineteenth century. One of the greatest achievements was the translation of the Austrian Civil Code of 1811 (*Allgemeines Bürgerliches Gesetzbuch* = ABGB) into ten languages: Bohemian, Croatian, Hungarian, Italian, Polish, Russian, Rumanian, Serbian, Slovenian, and even Latin. According to a rule adopted in 1849, all the texts were equally authentic. This meant that the national courts of the non-German-speaking territories were able to apply the authenticated translation in their own language, consulting the German text only in the event of a discrepancy or ambiguity. In an attempt to harmonize the legal terminology in the various official languages and encourage uniform interpretation and application of the parallel texts, a commission of legal and language experts compiled several multilingual law dictionaries. For example, the first edition of the *Juridisch-politische Terminologie für die slawischen Sprachen Österreichs* (German-Bohemian-Polish-Russian-Slovenian-Serbian) was published in 1850 in Vienna. A separate edition of the Southern Slavic languages (German-Croatian-Serbian-Slovenian) followed in 1853, the year the Croatian text of the ABGB entered into force in the Kingdom of Croatia and Slavonia. Despite attempts to unify interpretation and application, the existence of eleven equally authentic parallel texts led to unsurmountable complications in practice, as a result of which the equal authenticity rule was repealed in 1869 (*see* Dölle 1961:6).

Although degraded to an official translation, the Croatian text, *Opci austrijanski gradanski zakonik*, was still used by the Croatian authorities. The text is of historical importance for the development of modern Croatian legal terminology as it represents the first attempt to express numerous civil law concepts in the Croatian language. This is because Latin remained the official language of the law in Croatia until 1847 (Mamic 1992:7, 15). It was hoped that the terms used in the Croatian version of the ABGB would set a precedence for judges and practicing lawyers in general; however, this was not always the case. Thus, by the end of the nineteenth century there were numerous discrepancies between the terms in the 1853 translation and those used in legal practice. In addition, after comparing the Croatian text with the original German text and the Czech (Bohemian) and Polish translations, F.J. Spevec, a practicing attorney, insisted that the number of discrepancies in the Croatian text was inexcusable and declared the text a threat to uni-

form interpretation. In his opinion, the quality of the Croatian text was at times so poor that it could be understood only by consulting the German source text. Maintaining that the translation could be written in correct Croatian and still be a precise rendering of the source text, Spevec and the Association of Croatian Lawyers requested the Croatian Government to prepare and adopt a new official translation. When the request was rejected, Spevec took it upon himself to correct and revise the old translation (Spevec 1899:iii). Although his text remained a private translation, Spevec's interventions and comments are relevant for this study.

Technically speaking, the majority of Spevec's interventions are not corrections of translation errors but rather revisions that improve the quality of the Croatian text, thus making it read more like natural Croatian. In particular, the translator took the liberty of improving the Croatian text by occasionally changing the word order and choosing more appropriate Croatian expressions. Although he notes that numerous expressions in the 1853 text were not used in the then current practice, he refrains from revising technical terms in the text itself, as this could be done only in an official text approved in due legislative process. Taking care not to overstep his authority, Spevec marks questionable technical terms with an asterisk and proposes corrections in footnotes that sometimes resemble a commentary. Other major revisions are made in the same way, thus enabling the reader to compare the old and new versions.

Emphasizing the importance of accuracy, the private translator carefully marks all places in the Croatian text where entire phrases and/or key terms were deleted or additional words added. Attributing such errors to carelessness (probably as a result of time pressure), he distinguishes between harmless and harmful deletions and additions, i.e., those which do and do not affect the sense. In regard to terminology, Spevec identifies terminological inconsistency as one of the major shortcomings of the official Croatian text: Different terms were used to express the same concept and sometimes the same term was used to express different concepts. For example, both *pogodba* and *ugovor* are used as equivalents for *Vertrag*. Adding to the inconsistency, *ugovor* is also used to express *Unterhandlungen*, *Verabredungen*, *Einverständnis*, *Pakt*, and *Bestimmung*. Although numerous German composita are rendered literally (e.g., *Grund-Eigenthum = zemljovlastnistvo*, *Allein-Gesetz = samoposjed*, *Geschäftsführung = poslovodstvo*), Spevec warns that the overuse of literal translation can render the text incomprehensible, as in the following word-for-word translation: 'Verwahrungsmittel des Inhabers gegen mehrere zusammentreffende Besitzwerber / ohranjiva sredstva drzaoca suprot vise sticueih se trazilaca posjeda.' To facilitate comprehension, Spevec uses explanatory phrases which render the sense of the original in natural Croatian: 'Kako da se osigura drzalac, kad vise njih trazi stvar od njega' (1899:v).

Although Spevec did not directly challenge the use of literal translation, his emphasis on improving the quality of the target language as a means of increasing comprehension is definitely a move in this direction. Since language is the standard criterion of national identity, it is not surprising that legal translators began to

insist that authenticated translations of legal texts be written in the spirit of the target language.

## 2.7. Letter vs. Spirit: The Swiss Debate

The debate on the dichotomy between 'letter' and 'spirit' was opened in legal translation long alter the pendulum had already swung to the right, i.e., to idiomatic translation in other genres of translation. In the field of law it was practitioners who finally raised the question whether legal translations must follow the letter of the source text, as was traditionally believed, or whether they can be written in the spirit of the target language. One of the best documentations on this subject is the Swiss debate published in the *Schweizerischen Juristen-Zeitung* in the early twentieth century.

The occasion was the translation of the German text of the Swiss Civil Code (*Schweizerisches Zivilgesetzbuch* = ZGB) into French (*Code civil suisse*) and Italian (*Codice civile svizzero*).

After long years of preparatory work headed by Professor Huber, the father of the ZGB, and the two translators, Professor Rossel and Judge Bertoni, the three texts were promulgated in December 1907. Since all the language versions of the Code are equally authentic, it was agreed that the translator's task was to express the substance of the original text as accurately as possible. According to traditionalists, this meant that the French and Italian versions must follow the German text as closely as possible. In other words, fidelity to the source text was to be achieved by literal translation. On the other hand, the insistence on language equality awakened in Professor Rossel the desire to produce a translation in the spirit of the French language, not merely one that reproduced the letter of the German source text. As a result, Rossel produced a 'revolutionary' French translation which decidedly broke with the tradition of literal translation. His translation was severely criticized, in particular by G. Cesana, attorney in Zurich (later Lugano and Milan), who accused Rossel of nothing short of heresy for having altered the letter of the law. In his opinion, Rossel's free translation in idiomatic French was radically inaccurate because it failed to reproduce the 'individual words and syntax' of the German original. As such, Cesana claimed it posed a threat to the uniform interpretation of the three authentic texts.

### 2.7.1. Cesana's Guidelines for Translators

Advocating the traditional literal approach to legal translation, Cesana proposed three guidelines for the translation of legislative texts: literalism, no paraphrases, and no deletions. Firmly believing that the individual words of a legislative text are sacrosanct, Cesana regarded the literal translation of statutes and codes as essential. In regard to the choice of equivalents, he emphasized the importance of creating neologisms to render the new, progressive concepts expressed in German

(*see also* Bocquet 1994:51). In his opinion, these should not be 'natural' French expressions but rather 'calques' or literal translations of the German original. In this sense, Cesana criticized Rossel's use of the French term *les autres droits réels* for *die beschränkten dinglichen Rechte* instead of the literal equivalent *les droits réels limités*, which was unknown in French law. Although the terms used by Rossel were already in use in the French-speaking part of Switzerland, Cesana proposed the literal equivalent *déclaration de majorité* as an equivalent for *Mündigerklärung* instead of *émancipation*, and *contrat successoral* as an equivalent for *Erbvertrag* instead of *pacte successoral*. Cesana's support of literalism was not confined to individual words but also included entire phrases and even idioms:

> Wenn also bei Gesetzesübertragungen schon der sinngetreuen, ganz deckenden Wiedergabe des *einzelnen* Wortes so hohe Bedeutung zukommt, wie viel mehr noch ist die Übereinstimmung und die wörtliche Reproduktion von Wendungen und ganzen Wortverbindungen nötig! (1910/10:151).

Although Cesana admitted that legal translation should not be mechanical or servile, he demanded strict observance of the syntax and grammar of the source language, allowing for exceptions only where absolutely necessary. As he put it, it is fidelity to the original which counts, not the beauty or elegance of the target language:

> Freilich klingt es so schöner und ist elegant ausgedrückt, aber hier kommt es nicht auf Schönheit und Eleganz an, sondern auf eine sich mit dem Urtext deckende sinngetreue Fassung (1910/12:188).

Cesana's second guideline is a negative rule which can be regarded as an extension of the first guideline in that it advises translators to achieve fidelity to the original text by avoiding the use of paraphrases. In Cesana's opinion, using paraphrases cannot help but distort the meaning of the source concept, thus causing *Begriffsverschiebungen*, as he called them. In this context, Cesana insisted that a translator who paraphrases legal concepts of the source text is overstepping his/her authority and assuming the difficult task of interpretation (in the sense of *Gesetzesauslegung*), which is reserved strictly for judges. Accordingly, Cesana concluded that the translator is not authorized to produce free translations of legislative texts as this would be an act of interpretation (*see* Chapter 4 at 4.2.2). It should be noted that the methods of interpretation differ in various legal systems (Chapter 3, 3.4). At that time, however, it appears that the so-called literal method of interpretation (i.e., grammatical interpretation, as it is called in continental systems) was used by Swiss judges. According to this method, the judge's duty is to interpret statutes according to the letter of the law, unless such interpretation

would lead to unintended consequences. This was probably the strongest argument in favor of literal translation. Today, however, the literal method of interpretation is generally not used in multilingual interpretation, especially in Switzerland where judges tend to favor more liberal methods of interpretation.[7]

Cesana's third guideline requires that the source text be translated in full (*Vollständigkeit*). Whereas this guideline is generally acceptable as such, Cesana's explanation renders it unacceptable because he demands that each and every word be accounted for in the translation regardless of whether it is an information-carrying unit. As he put it, there should be no arbitrary deletion of words and phrases simply because they are difficult to translate or the translator considers them unimportant. Instead of leaving it to the discretion of the translator to delete any words that are superfluous in the target language, Cesana insists that the translator has no authority to make such deletions as he/she would be *de facto* altering the source text. As for the *Code civil suisse*, Rossel did make some deletions that affected the substance. For example, in Article 68, the German phrase *eine mit ihm in gerader Linie verwandten Person* was originally translated as *ses parents en ligne directe*. The deletion was obviously unintentional and the French text of the said article was corrected by the Swiss Federal Court in its decision of April 7, 1911 to read: *ses parents ou alliès en ligne directe* (*Recueil officiel des lois et ordonnances de la Confédération Suisse*, tome XXVII, 1911:200). Whereas this and a few other deletions were corrected by the Federal Court, the majority of Rossel's deletions were deemed acceptable because they had no effect on substance. The acceptable deletions included some of those singled out by Saleilles, the head French translator of the German Civil Code who joined Cesana in criticizing Rossel's idiomatic translation. For example, a good part of Saleilles' letter of December 22, 1910, to Cesana is voted to reprimanding Rossel for deleting the expletive *dabei* in Article 1(3) of the Code (cited in Cesana 1918:102), an omission that has no effect on substance.

In his conclusion, Cesana resolutely rejected Rossel's idiomatic translation, aiming that the translator had overstepped his authority by assuming responsibilities served exclusively for legislative drafters. According to Cesana, there was no legislative precedence for such action, i.e., producing two original texts of the same instrument in the same state:

> Nirgends treffen wir dieses legislative Unikum: *ein Gesetz für ein und dasselbe Land* bestimmt, mit zwei *ganz frei redigierten deutsch-französischen Gesetzestexten!* Denn der französische Text des ZGB darf füglich allen Anspruch erheben auf eine eigene redaktionelle Originalität, was gesetzgeberisch betrachtet

[7] *See* von Overbeck (1984:980-988) on methods of multilingual interpretation applied by Swiss courts. In regard to multilingual interpretation at the European Court of Justice (EU), Volman comments: 'Dans le droit communautaire, la méthode littérale a une importance nettement moins grande que dans le droit international en général' (1988:35).

> selbstverständlich und ganz in der Ordnung wäre, wenn die französische Schweiz eben nicht auch zur Eidgenossenschaft gehörte. So aber büßt diese Originalität nicht nur alles Verdienst ein, sondern sie fordert ernstlichen Tadel heraus (12/1910:187).

### 2.7.2. Rossel's Rebuttal

Rossel's rebuttal in the January 1911 issue of the *Schweizerischen Juristen-Zeitung* was brief but to the point. First and foremost he defended his idiomatic translation by arguing that the French-speaking population of Switzerland had the right to insist that their *Code civil suisse* be written neither in germanized French nor in gallicized German but rather in the spirit of the French language, thus upholding the principle of language equality:

> La Suisse romande avait le droit, selon moi, d'exiger que le texte français du Code civil suisse ne fût pas de l'allemand francisé avec une servile exactitude, ni même du français décalqué en quelque sorte sur l'allemand, mais du français suffisamment alerte et clair, pour qu'elle eût le sentiment de vivre sous l'empire d'une loi qui serait la sienne, et non pas d'une loi dans laquelle elle n'aurait retrouvé ni sa langue, ni son esprit (1911:201).

Rossel commented that he had attempted to convey the exact sense of the German text in idiomatic French, thus emphasizing the communicative aspect of translation. Defending his translation, he argued that the parallel texts of a single instrument do not have to correspond visually, nor do the terminology and syntax have to be modelled on the original; instead it is the virtuality that counts, i.e., the effect must be the same (1911:201). According to Rossel, upholding the principle of fidelity to the source text does not entail reproducing the source text word for word but rather producing a text that leads to the same results in practice. In Rossel's opinion, his own translation was by no means less precise than the literal translations of individual articles proposed by Cesana and, as far as the quality of the French language is concerned, his text was far superior to Cesana's.

In regard to terminology, Rossel rejected the literal equivalents proposed by Cesana as products of a mania for literal translation that only vulgarize the French language. Moreover, he claimed that mere substitution – the use of French words in German phrases – is no way to promote clarity. Long before Chomsky introduced the concept of native-speaker competence, Rossel made it clear that Cesana, a non-native speaker of French, was not fully competent to judge his French translation, let alone revise it. As Rossel put it, Cesana's translation is not French, he only uses French words (1911:203). Among other things, Cesana criticized Article 4 of Rossel's translation (*see* below). Insisting that the translation should follow the word formation of the German source text, Cesana 'corrected' the inver-

sion preferred by Rossel. In addition, since *Ermessen is* a single word, he proposed the equivalent *appréciation* instead of *pouvoir d'appréciation*, the French term already in usage:

> Richterliches Ermessen.
> Wo das Gesetz den Richter auf sein Ermessen oder auf die Würdigung der Umstände oder auf wichtige Gründe verweist, hat er seine Entscheidung nach Recht und Billigkeit zu treffen.

Rossel's translation:

> Pouvoir d'appréciation du juge.
> Le juge applique les règles du droit et de l'équité, lorsque la loi réserve son pouvoir d'appréciation ou qu'elle le charge de prononcer en tenant compte soit des circonstances, soit de justes motifs.

Cesana's proposal:

> Appréciation du juge.
> Lorsque la loi s'en remet à l'appréciation du juge, ou qu'elle l'invite à décider en tenant compte soit des circonstances, soit de justes motifs, il prononcera selon les règles du droit et de l'équité.

Concluding with the words: 'La lettre tue, l'esprit vivifie,' Rossel regretted that he had not made his translation even more idiomatic (1911:203).

### 2.7.3. Authentic Texts are Living Law

Although the debate continued, the basic issues had already been defined. Rossel conceded that in principle he had attempted to follow Cesana's guidelines; however, their views differed concerning the question of how closely a translation should follow the source text. According to Rossel, the translator's task is to convey the sense of the source text, not words in isolation. In his opinion, producing a literal translation is a craft, but it takes an artist to produce an idiomatic translation without altering the substance. As he sees it, the real challenge to the translator is to be an artist, not the master of a craft ( 1911:203).

Once again Rossel showed his *Feingefühl* for translation (years ahead of translation theorists) by recognizing that the same type of text can be translated differently depending on its communicative function. Emphasizing that his authentic translation was living law addressed to the people of the Suisse Romande, Rossel insisted that his translation had every right to be in idiomatic French, as opposed to non-authentic translations directed to a limited group of lawyers for information purposes (1911:202). He was referring to the French translation of the German

Civil Code prepared under Saleille's supervision in Paris, a non-authentic translation that upheld the tradition of literal translation. Years later Cesana continued to cite Saleilles' literal translation as a model of how to translate a piece of German legislation into French. He even went so far as to publish his correspondence with Saleilles in which he praises Saleilles as the greater authority of the two translators and, in return, receives support for his criticism of Rossel's idiomatic translation (1918:97-114).

The Rossel/Cesana debate aroused interest in other parts of Europe as well. For example, Cesana was praised by a law professor from Berlin who regarded all plurilingual legislation as a threat to the uniform interpretation and application of the law (Cesana 1918:114). On the other hand, the then head magistrate of the Belgian *Cour de cassation*, a bilingual institution since 1935, praised Rossel's translation as simple, clear and often elegant. As he put it, it was a commendable achievement in view of the difficulty of expressing the same thing in two languages as different as French and German (Terlinden 1912, in *Manuel de droit civil suisse* 1922:42).

In order to have the final word in the debate, Cesana published another article advocating literal translation. Defending the traditional belief that literal translation is the only acceptable method of translating legislative texts, Cesana insisted that form is essentially secondary to content and warned translators against taking on the role of drafters for the sake of elegance of form:

> Bei der Erstellung der dreisprachigen Texte muß also Hauptziel ins Auge gefaßt werden, nicht die Eleganz der Form, welche unwillkürlich und unbewußt zur Redaktions- und Ausschmückungsfreiheit führt, sondern die *klare, strenge sinngemässe* Wiedergabe des Urtextes, unter Befolgung möglichster *Wörtlichkeit*. Selbstverständlich hat das nicht die Meinung, es verdiene die Eleganz der Form überhaupt keine Berücksichtigung: sie soll nur zurücktreten und stets da weichen, wo sie nur auf Kosten der Übersetzungstreue erreicht werden kann (1918:98-99).

## 2.8. Equal Language Rights in Canada

Legal translators in Canada are in an even more precarious position than their Swiss colleagues: Canada is not only bilingual but also *bilegal*, i.e., it has two different systems – common law and civil law. At present, Canada consists of five English-speaking common law provinces, one bilingual civil law province (Quebec) and four common law provinces that are bilingual to varying degrees (New Brunswick, Manitoba, Ottawa, and Saskatchewan) (Reed 1993:79; Beaupré 1986:145, note 238; Richstone 1988:261, note 8). At the federal level, legislation follows the common law tradition and is officially bilingual as is that of the two

territories under federal jurisdiction (the Northwest Territories and the Yukon). Under the political and social pressures of English dominance in North America, the campaign for idiomatic translation in law did not find resonance in Canada until the struggle for equal language rights was launched as an outgrowth of the silent revolution of the 1960s.

### 2.8.1. Preserving the Status Quo in Translation

Prevailing for over two centuries, the tradition of literal translation in Canada dates back to the capitulation of New France (= Quebec) in 1760, which marked the unofficial beginning of legal translation in Canada. At that time the English governor appointed François-Joseph Cugnet as his bilingual secretary, entrusting him with the task of translating English proclamations into French for his fellow Québécois. Whereas Cugnet's translation of the Act of Quebec of 1774 is said to have been excellent, the quality of legal translation deteriorated after his death in 1789 (Gouin 1977:29). Cugnet's first successor, his son, was also a lawyer; however, thereafter Swiss officers of the British regiments took over the translation duties (Didier 1990:19). Respecting the authority of the English politicians, they produced strict literal translations, ushering in the so-called 'dark ages' of legal translation that contributed to the degradation of spoken and written French in Quebec (Gémar 1995-II:8; Gémar 1982:128; Horguelin 1977:21-25).

Under the Act of Quebec of 1774, private law based on the civil law of France remained in force; however, English public law was introduced. After initial efforts to completely anglicize the judicial system, a mixed system was finally accepted. Nominated by the governor and confirmed by England, the judges were predominantly anglophones, and even the francophone judges were in no position to play down the use of anglicizations. The mixed legal system resulted in a mixed legal terminology characterized by a large number of calques and borrowings. Generally speaking, it can be said that English terminology dominated the branches of law introduced from the common law: fiscal law, finance law, insurance law, maritime law, and commercial law. On the other hand, French terminology retained its priority in family law, contract law, property law, and other branches of private law (Didier 1990:20). As for the terminology of criminal law, it was anglicized to the point of being practically incomprehensible to a Frenchman (Gémar 1982:128). Criminal statutes were available only in English until 1841 when Black's laws on the reform of criminal law were adopted in Quebec and translated into French. As the following French translation of former Article 120 of the Criminal Code shows, the tradition of literal translation remained unshaken:

| | |
|---|---|
| Everyone commits perjury who, being a witness in a judicial proceeding, with intent to mislead, | Commet un parjure quiconque, étant témoin dans une procédure judiciaire, avec l'intention |

| | |
|---|---|
| gives false evidence, knowing that the evidence is false. | de tromper rend un faux témoignage, sachant que le témoignage est faux.<br>(cited in Didier 1990:20) |

The abuse of the French language at the federal level did not begin to subside until 1854 when Antoine Gérin-Lajoie reorganized the translation bureaus working for Parliament. With the emergence of the Confederation in 1867, Canada officially became a bilingual country, as a result of which the translation of federal legislation and other legal instruments became a public service. Section 133 of the British North America Act of 1871, the basic text of the Canadian Constitution, required that federal legislation be published in both English and French and that either English or French be used in both Houses of Parliament and in any federal court of Canada. This, however, did not alter the translation methods, nor did the establishment of the Bureau of Translation in 1934. Not only were the translators predominantly linguists without legal training, but it appears that for many years the translations were not even checked by a francophone lawyer with civil law training (Covacs 1980:3). According to Sussmann, the translators were so insecure that they refrained from making even slight language improvements, mostly out of fear that the intended meaning could be changed. Taking what they believed to be the safe way out, they resorted to literal translation although the results were sometimes misleading and potentially harmful:

> The difficulties (of the translation method used at the time) are very great, and lead to incongruous, not to say harmful, results. We may note generally that very often the insecure translator, no doubt for safety's sake, has clung to too literal a translation of the original version. This results, in the French version, in much clumsy and unFrench sentence structure and practically meaningless, sometimes misleading, French renditions of the English technical words or expressions… (1968, cited in Covacs 1980:3).

### 2.8.2. Demands for Equal Language Treatment Lead to Reform

In the 1960s a new wave of language consciousness triggered the so-called silent revolution in Quebec (*see* Gémar 1995-II:11;19). The Quebecers' demands for equal treatment of the French language had widespread effect not only in Quebec but also at the federal level and, in turn, in the common law provinces as well. Although bilingual interpretation at the federal level dates back to 1932 when the Supreme Court of Canada recognized the equal authenticity of the French text in *R. v. Dubois* (Beaupré 1986:17), the principle of equal authenticity did not become statute law until 1969. Among other things, the Canadian *Official Languages Act* of 1969 provided that English and French are to have 'equality of status and equal

rights and privileges' for all purposes of the Parliament and Government of Canada. As Gémar put it, the Act ended two centuries of bilingualism dictated by the terms of colonialism (1982:130). Equal authenticity became a constitutional principle in the new *Constitution Act* of 1982, which not only provides that 'statutes, records and journals of Parliament shall be printed and published in English and French' but also that 'both language versions are equally authoritative' (section 18(1)).

The growing emphasis on official bilingualism in federal legislation encouraged francophones in some of the common law provinces to demand equal language rights in provincial institutions as well. In particular, precedence was set in the *Forest* Case of 1979, as a result of which Manitoba is constitutionally required to enact and publish its laws in both English and French. In *Attorney-General of Manitoba v. Forest*, the Supreme Court of Canada upheld the plaintiff's request to have the *Official Language Act of Manitoba* (1970) declared inoperative because of its English only clause. The Court ruled that the clause violated section 23 of the Manitoba Act of 1870 which provided that either English or French may be used in debates of the Houses of the Legislature, that either language, may be used in any Court of Canada or any Court of the province, and that the Acts of the Legislature shall be published in both languages (101 *Dominion Law Reports* (3d) 1980, 387-390). The Court's ruling not only ended 90 years of unilingual legislation in Manitoba but also led to the development of what is now called 'Common law en français' (*see* Chapter 8 at 8.10.3). In New Brunswick, the only province that is officially bilingual (Reed 1993:79), legislation is legally required to be published in the two official languages and is authentic in both versions. The consolidated regulations were made available in March 1985. Ontario bas also begun publishing some legislation in both languages, and as of 1987 Saskatchewan courts are obliged to hear cases in either language. The latter is in response to the decision of the Saskatchewan Court of Appeal in a criminal case which turned on the French language rights of the accused who invoked the equal language rights clause in the Canadian Charter of Rights of Freedoms of 1982 ([1987] 4 *W.W.R.* 577 (C.A. Sask.) 577-588; *see* Richstone 1988:261, note 8).

Emboldened by new guarantees of language equality, Quebecers launched a campaign to correct the historic injustice that had resulted in the 'raping' of their language in the form of forced anglicization. Initiating a linguistic evolution to purify the French language, they began the so-called process of 'refrancization' (Gémar 1995-II:26 note 39, 40, 70) of legal French: the language of the legislature, the judiciary, and the administration.[8] As mentioned above, many of Quebec's laws were originally translations from English containing a large number of borrowings and calques, some of which were *faux amis* used without regard

[8] Although the *Charter of the French Language* (1977) declared French the 'official' language of Quebec, this did not abolish the equal authenticity of English language versions of legislation, a rule that had been in place in Quebec since the codification of private law in 1866 (*Act* [*sic*] *concernant la Codifcation* [*sic*] *des Lois du Bas-Canada, qui se rapportent aux matières civiles et à la procédure*) (*see* Brierley 1987:16).

to context (*see* Schwab 1984:19, 69-154). The most monumental achievement of the purification campaign was the total revision of the *Code civil*, which had been originally drafted in French and translated into English in 1866. In addition to modernizing the law, both the French and English language versions were refined. With the new emphasis on linguistic purity of their own language, the Quebecers were no longer in a position to force literal translation methods on their anglophone counterparts. Despite numerous revisions in the English text of the Code which had 'parroted the French original almost word for word,' Meredith blames his conservative colleagues for not having taken full advantage of the 'once-in-a-lifetime chance to get rid of those linguistic and terminological horrors which have plagued the English of [their] civil law for over one hundred years' (1979:55). While the traditionalists preferred to retain many of the neologisms that had been accepted by practitioners, they agreed more readily to changes in syntax. As Meredith points out, any translation should follow the syntax of the source text to a certain extent; however, 'this technique seems to be over-applied in legislation.' As an example he cites paragraph 1 of former Article 501 of the Civil Code:

| | | |
|---|---|---|
| | Les fonds inférieurs sont assujettis envers ceux qui sont plus élevés à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué. | Lands on a low level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. |

This example shows just how absurd a literal translation can be when the original word order is retained. Once it became clear that the thought sequence should be expressed logically in the target language, translators were permitted to revise the English text of the above provision as follows:

> Water must be allowed to flow naturally from higher land to lower land.

In regard to legislative style, Meredith comments:

> Style is in many cases sacrificed for accuracy whereas there is no reason at all why both cannot co-exist in any statute. Perhaps this exaggeration stems from a concern that other styles would leave open the door to *contresens*, however slight. While this concern is justified, what point is there in carrying it to extremes? (1979:60).

### 2.8.3. Federal Reforms Revolutionize Translation Methods

The explicit focus of the *Official Languages Act* of 1969 was the duty to serve the public in either language, subject to certain conditions. It was one thing, however, to declare English-French equality and another thing to achieve a more equal treatment of the two languages in practice. Moreover, there was disagreement among the parties as to the interpretation of the Act, thus resulting in a tension between 'a reductivist administrative reading of the Act' and 'a more generous projection of its political and philosophical assumptions' or, as Beaty concludes, 'between the letter and the spirit of the law' (1989:188). In 1973 a Parliamentary Resolution was adopted specifying measures 'to ensure the equitable use of English and French as federal languages of work and the full participation of members of both language groups in the federal service.' Moreover, the 1982 Canadian Constitution guarantees official language equality by recognizing 'the public's right to communicate with and be served by federal institutions in either language...' (Beaty 1989:186). Finally, a new *Official Languages Act* was adopted in 1988, bringing the Act into line with the new Constitution by taking a clearer and more proactive position on ways to achieve a more equal treatment of French in public service (*see* details in Beaty 1989:189-193).

Despite dissatisfaction. with the *Official Languages Act* of 1969, it served as the impulse that finally set the wheels of reform into motion as far as translation techniques are concerned. Among other things, the Act created the position of Commissioner of Official Languages, a senior official independent of the Government who heads the Royal Commission on Bilingualism and Biculturalism. It is the Commissioner's duty to oversee implementation of the Act, to investigate complaints brought under the Act, to conduct special studies and to report to Parliament on progress (Covacs 1980:5).

In regard to the treatment of French in federal legislation, the Commissioner expressed 'extreme concern' in his 1971 report (Beaupré 1986:172). Although section 133 of the British North America Act had been observed, its compliance was essentially literal: all Acts of Parliament had been faithfully published in both English and French, however, without regard to quality. As the Commissioner saw it, the main problem was not in the legislative process itself but rather in the preparatory stage. Essentially the French texts were literal translations prepared by the Law Translation Branch of the Translation Bureau after the final English text had been approved by the Legislation Committee in the Department of Justice. Changes, however, did not come overnight. Dissatisfied with progress, the Commissioner made his point by condemning the federal drafting process in his *Special Study of the Department of Justice* in 1976. In his *Sixth Annual Report 1977*, the Commissioner acknowledged considerable improvement in the French versions of legislation. At the same time, however, he criticized the fact that they were 'still an embodiment of the Common Law approach,' making it clear that

they should 'also reflect the intrinsic qualities of the French language' (Beaupré 1986:172).

Under pressure to improve the quality of the French version of legislation, the Legislative Section of the Department of Justice finally took a decisive step and broke with tradition. More than half a century after Rossel had produced his revolutionary version of the Swiss Civil Code in idiomatic French, the Department acknowledged that literal translation violates the principle of equal language rights. In order to implement the principle of equal treatment, a new approach was necessary: instead of requiring translators to reproduce the source text as closely as possible, they were finally granted freedom to produce a new text in the spirit of the French language. To achieve this objective, Alexandre Covacs, a jurilinguist in the French division of the Legislative Section, proposed five methods of bilingual drafting which gradually convert translators into co-drafters by incorporating them into the drafting process and entrusting them with greater drafting responsibilities (1982:92; *see* Chapter 4 at 4.4.1). The new methods of bilingual drafting have succeeded in modernizing legal translation by swinging the pendulum to idiomatic translation and even beyond to co-drafting.[9]

### 2.8.4. The New Approach

While finally gaining the right to produce a text in the spirit of the French language, the translator's new freedom is not unrestricted. Accordingly, the new approach to legal translation is characterized by an inherent dualism: freedom and constraint. As Covacs puts it, the objective is to produce two versions which express the same message, each in its own way (1982:86). Supporting the new approach, Beaupré rejects the former 'slavishly literal French translations' as belonging to the 'dark ages' of translation and urges carefully selected teams of bilingual and, whenever possible, bilegal anglophones and francophones to formulate two 'equal' versions of the same instrument which strive not so much for 'verbal and grammatical parallelism' as for 'linguistic purity' within the confines of 'legal equivalence' (1986:179). When attempting to achieve a balance between 'linguistic purity' and 'legal equivalence,' the latter must always prevail. As a result, the translator must take account of legal criteria, even when making linguistic decisions. Hence, the decision-making process of the legal translator is based primarily on legal considerations.

Unfortunately, Beaupré does not define *legal equivalence*; nor does he explain how it can be achieved in translations of parallel legal texts.[10] This is reminiscent of the equivalence discussion that dominated translation theory during much of the seventies and eighties and has again experienced a revival of sorts in the nineties.

[9] Despite their importance for the development of legal translation in Canada and elsewhere, Gémar fails to mention the new bilingual drafting methods in his recent book (1995-II).

[10] In this context Beaupré merely mentions functional equivalence, referring the reader to an article by the late Justice Pigeon (1986:179).

At the offset it was generally agreed that the goal of all translation was to achieve equivalence by producing the closest possible equivalent text (Wilss 1977:72); yet theorists could not agree on what the term *equivalence* actually means. Convinced that *equivalence* represents an absolute that only needed to be qualified, theorists took it upon themselves to define the term by adding qualifying adjectives, such as dynamic, formal, communicative, stylistic, semantic, functional, etc. The result was a 'jungle of equivalence types,' as Snell-Hornby said in 1986, at which time she claimed to have accounted for as many as fifty-six equivalence types (1986:15). Most probably, legal equivalence was not on her list.

Despite the inflation of equivalence types, translators continued to be guided more or less by their own intuition. Without objective criteria, equivalence was whatever the translator wanted it to be (Wilss 1977:161). Agreeing that equivalence is a static absolute that cannot be attained in practice (Snell-Hornby 1986:15, *also* 1990a:80), theorists came to the conclusion that one should discard the term entirely or develop a new dynamic concept of equivalence. Opting for the second solution, Reiß attempted to explain equivalence in terms of adequacy. As she then put it, translators should strive to achieve adequacy, not equivalence. Nonetheless, Reiß admitted that equivalence is still relevant in translations in which there is no shift of function. In her words, two texts may be deemed equivalent if the target text is adequate to serve the same communicative function as the source text (Reiß and Vermeer 1984:140).

This, however, was by no means the final word on equivalence. Claiming that equivalence need not be conceived as a static absolute, Albrecht encourages translators to identify one or more factors which should remain constant in the target text, such as content, style, or receiver effect. The so-called mandatory invariants (*Invarianzforderungen*) differ in each case depending on the situational factors of production and reception. Not only do such invariants guide the translator in his/her selection of a translation strategy, they also serve as criteria for determining whether equivalence has been achieved in each particular situation. As for adequacy, Albrecht regards it as a pragmatic category describing the relation between the source text and the mandatory invariants in their order of priority. Like Reiß he regards adequacy as a dynamic relation subject to change depending on the invariants selected by the translator (1990:76-78). Still convinced that equivalence is the key to successful translation, Koller takes up the subject again in the fourth edition of his book *Einführung in die Übersetzungswissenschaft*. Similar to Albrecht, he speaks of *Äquivalenzforderungen*, widening the list of potential invariants to include content, text, factual matter, style, norms of the target text, communicative value of the source text, receivers, scenes of the source text, etc. (1992:94-95).

On the other hand, not all translation theorists are enthusiastic about the revival of the equivalence discussion. Remarking that 'the celebration and the brain racking about translation equivalence goes on forever,' Newmark renounces all attempts to define translation equivalence. Convinced that equivalence cannot be

defined, he insists that 'there are only degrees of translation equivalence.' Nonetheless, he admits that a notion of translation equivalence based on semantic aspects is an indispensable operational term. Without any explanation, he rejects the term 'adequacy,' claiming that it 'means different things in different languages' (1993:75).

Recognizing equivalence and adequacy as 'key terms' in the theory and practice of translation, Reiß insists that the terms cannot simply be discarded. Making it clear that equivalence and adequacy are not synonyms, as some theorists have claimed, she attempts to define each term and thus distinguish between them. According to Reiß, the adequacy of a translation depends on its function. Hence, adequacy is an operational term describing the relation between the means chosen by the translator and the function of the particular translation. For its part, equivalence describes the relation between two products: the source and target products, i.e., the source and target texts in their entirety or parts thereof (*see* Reiß 1995:106-123).[11]

The equivalence between individual lexical items of the source and target texts is known as terminological equivalence. Not surprisingly, terminological equivalence continues to play an important role in areas of specialized translation (*see* Arntz 1993:5-18) such as legal translation (*see* Chapter 8, 8.6). Lawyers also use the term 'legal equivalence' to describe a relationship at the level of the text. In such cases, one should note that it does not describe a quality of the translation but rather the relationship between the translation and the other parallel texts of that instrument. In accordance with the principle of equal authenticity, each of the authenticated texts of a single instrument has the force of law and can be used by courts for the purpose of interpretation. In order to be effective in the mechanism of the law, the principle of equal authenticity rests on the presumption that the authentic texts of the same instrument are equal not only in meaning but also in legal effect (Chapter 3, 3.3.3). Accordingly, legal equivalence is achieved if the parallel texts of a single instrument lead to the same legal effects. This is sometimes referred to as 'substantive equivalence' (Schroth 1986:57) or 'juridical concordance' (Rosenne 1983:784).

## 2.9. The Belgian Experience

In Belgium, a country where the linguistic boundary dividing the Flemish and Walloon communities dates back to the fifth century AD, it is the Dutch-speaking Flemish population that has had to exert its rights to equal treatment in areas of language and culture. Much of the legislation in Belgium and Holland dates back to French codes and statutes adopted at the beginning of the nineteenth century

[11] In her Vienna lectures Reiß acknowledges that equivalence can exist between the source and target texts. As she put it: 'Äquivalenz zwischen Ausgangs- und Zieltext besteht in der *gleichwertigen Relationierung von Inhalt(en) und Form(en) eines Textes in ihren Funktionen zur Erreichung des Textsinns*' [emphasis by author] (1995:123).

(van Dievoet 1987:18). At that time the territory of present day Belgium and Holland was under French rule until 1815 when it was declared a kingdom at the Vienna Congress. Following the Belgian Revolution in 1830, the provisional government adopted the first Belgian Constitution (1831). Although French, Dutch, and German were recognized as national languages, only French was declared an official language. In exchange for the recognition of its independence and neutrality in 1839, Belgium relinquished its territorial claims to some German-speaking regions (*see* Bergmans 1986:13). After World War I, the Versaille Peace Treaty placed the German-speaking regions of Eupen, Sankt-Vith and Moreset (now Kelmis) under Belgian sovereignty, thus raising the question of German language rights in Belgium.

Although the Flemish or Dutch-speaking population accounts for over fifty percent of the total population, the French language continued to dominate for almost a century after Belgian independence. This may be explained in part by the fact that the leaders of the revolution were homogeneously French-speaking. Moreover, the elite who retained political power were French-speaking, both in Wallonia and Flanders. Since French was the cultural and world language at the time, there was no resistance when French was declared the sole official language of Belgium in 1831. Even the language rights granted to the Flemish population were rarely practiced (Alen 1992:16). The first in a series of important victories for the Flemish Movement, the *Equal Treatment Law* of 1898 provided that legislation and regulations must be promulgated in Dutch as well as French and that both language versions are equally authentic. The introduction of Dutch into the judicial system was a slower process. While Dutch became optional as the language of criminal procedure in Dutch-speaking Flanders in 1873, it was not until 1935 that Dutch became the official language of procedure in all matters in Flanders. Moreover, Dutch did not gain complete control of the judiciary in Flanders until 1967 (Verrycken 1995:365). The slow evolution of legal Dutch in Belgium is probably due to the fact that Dutch-language secondary schools and universities did not open in Flanders until the 1920s.

Language rights in Belgium are based on the territorial principle adopted in linguistic legislation of 1931. The division of Belgium into four linguistic regions was enshrined in the 1970 Constitution: the French-speaking region, the Dutch-speaking region, the bilingual region of Brussels-Capital, and the German-speaking region. According to the 1990 census, 57.6 percent of the population lives in the Dutch-speaking region, 32.6 percent in the French-speaking region, and 9.8 percent in Brussels-Capital. There are about 70,000 German-speaking Belgians in the German region (Verrycken 1995:364).

### 2.9.1. Development of Legal Dutch

From the offset, legal Dutch in Belgium was a language of translation in the literal tradition. As a result, the terminology, style and syntax of legal Dutch were more

French than Dutch for many years. As Verrycken put it, legal Dutch was 'contaminated' by French:

> L'influence du français a été telle que la langue juridique néerlandaise est littéralement 'contaminée' par le français non seulement quant au vocabulaire, mais également en ce qui concerne le style et la structure des phrases (1995:370).

Since the translation and authentication of legislation in Dutch did not begin until 1898, in most cases there were not even Dutch translations of legislation prior to that date. To fill this gap, the Van Dievoet Committee was established in 1923 to translate the Constitution, the Civil Code, the Penal Code, and other principal legislation. The translations, however, were never authenticated. Therefore, in 1954 the Van Dievoet Committee II began to prepare new Dutch translations that would be acceptable for authentication. Since then, most of the translations have been submitted as draft bills for approval by Parliament, thus completing the process of authentication. In 1967 the Flemish Community finally received the first authentic Dutch text of the Constitution (*see* van Dievoet 1980/81:2361-2368; 1987:94-98).

Unlike Canada and Switzerland, there is no central translation bureau for federal legislation in Belgium, as a result of which translations into Dutch are frequently plagued by terminological inconsistency. In order to promote the use of uniform terminology at the federal level, the Central Committee for the Dutch Legal and Administration Language was established in 1954, followed by a special terminology committee. Nonetheless, translators still honored literal translation by resorting to a large number of literal equivalents and borrowings. The real 'purification' of legal Dutch in Belgium did not get underway until much later. In particular, the Van Dievoet Committee II made conscious attempts to 'purify' the Dutch text by following, whenever possible, Dutch terminology in the laws of the Netherlands (*see* Dievoet 1987:95-98). Concerned about the poor quality of translations, the Minister of Justice mentioned the possibility of co-drafting legislative texts in both French and Dutch as early as 1961; however, no action was taken. In fact, until recently all legislation has been drafted exclusively in French and translated into Dutch. Although Verrycken currently recognizes the advantages of co-drafting legislation in plurilingual countries (1995:368), it appears that Belgium is still not ready to experiment with methods of bilingual drafting.

### 2.9.2. Translation at the Court of Cassation

Commenting on translation, Herbots remarks that legal translators should strive to produce a text that respects the genius of the target language (1987:814). Unfortunately, this approach to legal translation is very new in Belgium; for years both legislation and judgments were translated in the literal tradition. Although bilingualism was officially introduced into the judiciary in all matters in 1935, the lan-

guage of judges, attorneys and other lawyers remained French until the late 1950s. As a result, the translation of judgments at the Court of Cassation, the highest court of the land, was strictly one way: from French into Dutch. While lawyers sometimes blamed the poor quality of translations on the fact that the translators were linguists (Herbots 1987:817), today the majority of legal translators at the Court of Cassation are still linguists. Nonetheless, the quality of the translations has improved immensely. Translators at the Belgian Court of Cassation have generally been required to adhere to the original text as closely as possible in respect of both form and substance. Although this unwritten in-house rule still prevails, it is no longer interpreted to mean that all translations must be literal.

According to Leo Vande Velde,[12] translator at the Court of Cassation, legal Dutch in Belgium was still undeveloped in the fifties. In the absence of Dutch terms, translators frequently created gallicisms such as *Verantwoordelijkheid* (*buiten overeenkomst ontstaan*) for *responsabilité* (*hors contrat*) (Judgment No. 87 of December 11, 1950). Moreover, translations of judgments were often literal reproductions of the French to the extent that rules of Dutch grammar were ignored. Strict adherence to French word order was common place and often resulted in French-sounding sentences like the following: '*Dat, wijl hij het niet gedaan heeft, het middle niet ontvankelijk is*' (Judgment of March 17, 1952). Whereas French is known for its frequent use of participles, Dutch is not. Nevertheless, *dommages et intérêts dus* is translated as *schadevergoeding verschuldigd* and *juge du fond déduisant des éléments de la cause* as *rechter over de grond uit de elementen van de zaak afleidend* (Judgment of December 11, 1950).

According to Vande Velde, the quality of Dutch translations of judgments has improved considerably at the Court over the past twenty years. As the use of Dutch by the judiciary steadily increased, language consciousness gradually developed among Dutch-speaking judges, some of whom were also active in the Van Dievoet Committee II. Insisting that translations of cassation judgments can read like Dutch and still be faithful to the substance and standard form, translators began producing moderately literal and even near idiomatic translations. Despite the rigid form requirements of cassation judgments, which are formulated in a single sentence with each part indicated by an introductory conjunction (*see* Chapter 5, 5.3.1), the word order is now more or less natural Dutch. Compare, for example, the position of the subject *cour d'appel / het hof van beroep* in the following excerpt front judgment No. 87 of October 15, 1986:

| | |
|---|---|
| Attendu que, d'une part, par les considérations de l'arrêt reproduites dans le moyen, *la cour d'appel…* | Overwegende dat enerzijds *het hof van beroep*, door de in het middle weergegeven overwegingen van het arrest,… |

[12] Information on translation at the Belgian Court of Cassation in Brussels is based mainly on my interview and subsequent correspondence with Leo Vande Velde, who has been in the translation department for uniformity since 1974 and is currently head of that department.

Similar to the process of 'refrancization' in Quebec, legal Dutch finally freed itself of the many gallicisms that had cluttered the language for years. Thus, in later judgments one finds natural Dutch terms, such as *aansprakelijkheid buiten overeenkomst* for *responsabilité hors contrat* (Judgment No. 87 of October 15, 1986) and *vordering tot het instellen van een gerechtelijk onderzoek* for *réquisitoire d'informer* (Judgment No. 58 of September 30, 1986). Today judgments at the Court of Cassation are also rendered in Dutch and translated into French. Dutch judgments observe the abrupt style of French cassation judgments, which are known for their technical refinement and concision. As far as drafting cassation judgments is concerned, true craftsmanship is required to arrange the substance within the framework of a single sentence, grouping the reasons for each particular argument in a series of subordinate clauses so as to lead to the conclusion in a more concentrated fashion (Mimin 1978:185; Lashöfer 1992:42). In the same token, the hand of a true master is required to express the substance of the original while honoring the form requirements and respecting the genius of the Dutch language.

### 2.9.3. Legal German in Belgium

The constitutional revisions of 1970 resulted in the recognition of the German-speaking minority as a German-speaking region and a German Community. Although this raised German to an official language, by no means was it put on equal footing with French and Dutch. In accordance with the territorial principle, German became an official language only in the Eastern parts of Belgium constituting the German Community (Alen 1992:219). Founded in 1973, the Council of the German-speaking Community adopts regional laws and regulations in German, which are then translated into French. The *Ausschuß für die offizielle deutsche Übersetzung der Gesetze und Erlasse* was created in the seventies to translate national legislation; however, its work focused on translating the Constitution. After the Ausschuß was transferred to Brussels, the Central German Translation Service was established in Malmedy. Translations of national legislation are not authenticated and are frequently of inferior quality. As Bergmans puts it: 'Man sieht ein, daß die Qualität der Rechtstexte in deutscher Sprache oft zu wünschen übrig läßt' (1986:87).

An important step in the development of legal German in Belgium came in 1985 with the creation of a German-speaking judicial district (Kremer 1994:93). This set the translation mechanism in high gear to meet the demands of local courts which cannot administer justice effectively without German translations of national legislation. Currently the district commissioner is being allotted an annual budget for the translation of national legislation into German. Progress is slow and the translations have not yet been authenticated; hence, they do not have the force

of law.[13] The German text of the Constitution was finally authenticated in 1991 (Alen 1992:219).

The small German-speaking Community of Belgium has made considerable progress over the past twenty years (*see* Kremer 1994:86-95). In fact, today it is regarded as one of the best protected minorities in Europe (Bergmans 1986:105). Having learned from the past mistakes of their older Flemish colleagues, German-speaking translators of Belgium attempt to produce translations that read like German. Legal German in Belgium, however, is still in the phase of development, thus making this task extremely difficult. Since most areas of Belgian law have not yet been translated into German, the Belgian German legal lexicon is still small. Moreover, the existing terminology has not been unified in the few areas of Belgian law where translations have been made. Therefore, the main task facing Belgian lawyers of the German Community is to create a uniform German legal lexicon. Whenever a new legal lexicon is created for concepts which already exist, terminologies must agree on a strategy for naming the concepts. Realizing the importance of creating a uniform terminology, German-speaking lawyers founded the *Belgisch-Deutsche Juristenvereinigung* which held its first meeting in October of 1986 to discuss, among other things, a strategy for creating a German legal lexicon for Belgium. While the members regard this as a unique opportunity, they are also aware of the great responsibility involved. Since corresponding terms already exist in French and Dutch, they viewed the task essentially as one of translation, i.e., translating the existing terms into German. In a report on translation strategy, Bergmans proposed two possibilities: to use borrowings and literal equivalents, preferably of French terms of Belgian law, or to borrow existing German terms from German or Swiss law. In the latter case, one would follow either the German or Swiss model and borrow only terms whose content approximately corresponds with the Belgian concepts (Bergmans 1987b:15) (*see* Chapter 8, 8.10).

When selecting a translation strategy for terminology, the text as a whole, or parts thereof, the translator must keep in mind that translation techniques developed in one jurisdiction are not necessarily adequate elsewhere (*cf.* Sarcevic 1990:156-163). In other words, techniques used in Switzerland or Canada might not be adequate in Belgium and vice versa. As in other areas of translation, legal translators must always take account of the situational factors of the particular communication process or, as Vermeer would say, the text-in-situation (1986:38). In regard to the translation of institutional texts, it is safe to say that the situational factors of production vary from institution to institution. But what about the situational factors of reception? In the end, it is these considerations which often have the greatest impact on the translator's decision-making process. The next Chapter deals with the communicative aspects of legal translation.

[13] As a rule, subsequent translations can be authenticated by Royal Decree in Belgium; however, Dutch and French are the sole official languages for statutes, codes, and Royal Decrees.

Reference: *New Approach to Legal Translation*, chapter 2 “History of Legal Translation”, The Hague, Kluwer Law International, 1997, p. 23-53.