Language and Law

A resource book for students

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Chapter B10

Bilingual and Multilingual Legal Systems

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detectives and/or lawyers examine the language-related problem themselves, based on their own skills and professional experience. They may also express their observations (including in court) using words and concepts that reflect their investigative or legal approach and expectations; but usually such **folk linguistic** commentary takes place 'behind the scenes', during whatever investigation takes place.

Where legal procedures allow, however, investigators or lawyers have increasingly seen value in deepening or extending such understanding by commissioning specialist examination of the data and incorporating resulting insights into the ongoing investigative and possibly trial process. Where one or more linguistic experts are engaged, occasionally (but increasingly frequently) the linguist goes to court and participates as a consultant, or **expert witness** (Coulthard and Johnson 2007). The resulting expert evidence may or may not be admitted by the court, usually after legal argument and in the context of widespread reluctance in some legal systems to allow expert opinion where the possibility exists of doing without it. In particular, some judges are sceptical whether understanding language calls for anything more than a competent speaker's common sense. At present, submission of expert linguistic evidence also takes place very unevenly in different jurisdictions, with the greatest reported frequency in the USA and Australia. It remains to be seen, therefore, depending not only on linguistic but also legal factors, whether the recent development of this linguistic specialism continues its presently upward trajectory.

BILINGUAL AND MULTILINGUAL LEGAL SYSTEMS B10

In this unit, we examine a number of specific linguistic challenges involved in bilingual and multilingual legal systems. We consider, for example, what makes translation of legal texts particularly difficult, describe cross-cultural communication barriers that exist in the courtroom, and examine how legal meaning is decided for divergent language texts of the same law. Much of the research (and related policy thinking) on which our discussion in this unit is based comes from Canada and the European Union, two of the world's most developed bilingual and multilingual jurisdictions, as well as from international law. But we also show how researchers have become engaged with these topics in other bilingual postcolonial territories, including Malaysia and Hong Kong.

Overcoming obstacles in legal translation

Unit A10 notes the significance of legal translation in multilingual jurisdictions. Here, we analyse why legal translation is a particularly difficult, specialised subfield within translation.

The most widely discussed problem in **legal translation** is that of terminology: lack of equivalent terms and concepts in the target language and culture. As well as situations where concepts (e.g. common-law concepts such as *consideration* or *equity*) are not

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represented in the target language vocabulary, there are situations where seemingly equivalent terms do exist but have different meanings, leading to the phenomenon lexicographers call **false friends** (i.e. words that look deceptively similar but differ in meaning). The word *law*, for example, has complex historically developing and synchronically available meanings in English (clearly shown in the *OED* entry for the word). But closest equivalent words in other languages can carry a different mix of denotations and connotations. The French word for law, *droit*, also conveys the meaning of 'right' (especially in the plural; cf. 'les droits de l'homme'), whereas the Chinese word for law, *fa*, has a more punitive connotation (Liang 1989). To bridge such cross-cultural semantic gaps, techniques including paraphrase, borrowing or even coining new terms are sometimes needed if a foreign legal concept is to be represented in a way that avoids confusion. When such techniques are used, until the adopted or new term or terms gain currency, texts in the target language cannot be fully understood without reference to the source text, potentially reducing access to justice for monolingual speakers of the target language.

The dominant legal traditions in the world today have long histories. When common-law English is used as a source language for translation, accordingly, the translator is forced to address consequences of its history in three major source languages: Latin, Norman French and Anglo-Saxon. Many frequently used **doublets**, or word-pairs, in legal English (as described in Unit B2) are formed by juxtaposition of Anglo-Norman and Anglo-Saxon words, as in *fair and equitable* and *full and complete* (Varó 2008). Translation of such combined terms into a target language that does not share the same history is a challenge. Most importantly, there is the question of whether the two etymologically different synonyms or near-synonyms have to any significant extent diverged in meaning (as happened in some semantic fields, e.g. philosophy). Such semantic divergence would require translation of each word, but two words would not normally be required otherwise.

In terms of syntax, **ambiguity** and other effects created by complex structures, embedding, agentless passives, qualifiers and insertions pose further obstacles. Since legal certainty is of paramount importance, legal translators need to develop sensitivity to ambiguities in the original text, for example ambiguity between the technical and ordinary meaning of a word, and seek clarification where necessary. At the same time, **vagueness**, as we have seen, is sometimes retained in drafting in order to allow for development of a particular law in response to unforeseen fact-situations. Even apart from meaning, there is the question of whether translation should attempt to find equivalents for the distinctiveness of register, archaism, redundancy, and other features of legal English discussed in Unit B1 that play a part in law's symbolism. Finally, in practical terms, another feature of common-law systems that makes localisation difficult is their reliance on precedent, since the task of translating the whole body of case law is formidable and hugely expensive.

Overall, it is sensible to think of legal translation as a distinct practice (e.g. by comparison with translation of literary texts, scientific journals, meeting notes and instruction manuals). A systematic framework for legal translation is presented in Šarčević (1997); she emphasises that translators must pay attention both to different types of legal texts and to their respective communicative functions (e.g. are they

intended to be prescriptive, descriptive or some combination of the two?), and notes that source and target legal texts may perform different functions and carry different statuses. Arguing that translators must choose translation strategies based on legal criteria that will be used to interpret the translated legal text, Šarčević advocates a receiver-oriented approach.

Cross-cultural communication in the courtroom

Cross-cultural aspects of communication in the courtroom are mediated by court interpreters. However, in many jurisdictions access to an interpreter is not an unconditional right, but depends on whether the person who requests assistance can understand and speak the language of the court. In assessing need for an interpreter, the court decides whether a person can understand and speak the language used in court adequately; but as Eades (2003) shows, courts are generally not conversant with ways of assessing second-language proficiency or with the specificity of the competence required in a courtroom context. Even in a bilingual or multilingual jurisdiction, litigants or defendants do not usually have the right to choose which official language the trial will take place in (see Leung 2016).

Internationally, very many people assume that the United States is a monolingual, English-speaking country. But the country's linguistically diverse population means that the US legal system deals with large numbers of multilingual speakers on an everyday basis. Berk-Seligson (2002 [1990]) reports ethnographic work she conducted in bilingual American courtrooms involving English and Spanish (the most frequently used languages in US court-interpreted proceedings). She argues that the presence of a court interpreter transforms normal courtroom proceedings into bilingual events, and shows how the courtroom interpreter can alter a speaker's meaning even without misunderstanding the original testimony, especially at the pragmatic level. She challenges a common misperception on the part of courtroom personnel that court interpreters are like machines, converting speech from one language into another, and calls for deeper understanding of the multidimensional nature of the interpreter's role.

The highly distinctive situation of the bilingual jurisdiction of Hong Kong is examined in Leung (2008). In Hong Kong, courtroom interpretation is a service provided not, as is the case in most other jurisdictions, for linguistic minorities, but for the linguistic majority (i.e. Cantonese speakers). This situation, and the superior status of English, is a colonial legacy that arguably cannot provide optimal access to justice for the majority population. Examining data collected on rape trials in Hong Kong, Leung (2008: 203) argues that even 'high quality interpreters with the best intentions' face problems created by inherent linguistic differences between the languages involved. Her examples include not only legally relevant conceptual incongruity between source and target language words, but also grammatical categories that do not exist in English (such as **utterance finite particles** in Chinese, which can only be realised in English by intonation).

Finding legal meaning in multilingual law

Legal communication between nations and in international institutions is described in detail in Tabory (1980). This classic work surveys linguistic practices in diplomatic

affairs historically, discusses current problems in the preparation and interpretation of multilingual documents, and makes recommendations as regards how problems may be overcome. In the historical survey presented in the book, Tabory reminds us that for many centuries of human civilisation, international affairs were conducted in a small number of languages each functioning for a region or period as a lingua franca. Thanks to the doctrine of equality of nations popularised after World War I, many countries have more recently sought to have their languages accepted on an equal status with others, giving rise to now commonplace kinds of bilingual and multilingual treaty. Tabory also offers detailed analysis of the provisions of the 1969 Vienna Convention on the Law of Treaties, which embodies rules and principles regarding how multilingual treaties should be read.

Two important book-length publications exist in Canadian jurisprudence on how bilingual laws are interpreted at national level: Beaupré (1986) and Bastarache *et al.* (2008). Beaupré's *Interpreting Bilingual Legislation* was the first monograph to deal systematically with problems of interpreting equally authentic Canadian bilingual statutes. He describes the development of the rule of legal equality between French and English legislative texts, and traces how federal legislation has been interpreted in Canada, summarising methods adopted to resolve language versions in conflict. Based on his documentation of substantial differences between how legal meaning is constructed in unilingual and in bilingual jurisdictions, Beaupré (1986: 4) concludes that 'there is such a thing as a bilingual approach to the interpretation of legislation' and argues that classic canons of construction are not well-suited to the task of construing a bilingual statute. (We discuss specific strategies used in interpreting bilingual and multilingual law in Unit C10.) Bastarache *et al.*'s *The Law of Bilingual Interpretation* extends Beaupré's research, probing the legal tradition and legislative thinking behind the interpretation of bilingual laws in Canada. The authors have opened up new questions (e.g. whether a legislature has a mother tongue), and they assess theoretical implications of alternative answers to the questions they raise. Since Canada is not only bilingual (English and French), but also **bijural** (common law and civil law), Bastarache *et al.* are well placed to offer insights into how two legal cultures, as well as two legal languages, can function together.

Another region where multiplicity of languages has been a major concern is the European Union; and a substantial research literature has also been produced on the topic of multilingual law in Europe. In his quantitative analysis, for example, Baaij (2012) reports that between 1960 and 2010, the European Court of Justice (ECJ) delivered 246 judgments that involved comparison of language versions. Of these, 170 reported discrepancies between language versions of the provision in question. Baaij's data analysis suggests that combined teleological and literal interpretive methods are needed to ensure uniform interpretation and application of EU law. Presenting a qualitative analysis, Solan (2009) lists three goals that need to be met in the linguistic practices of a supranational legal regime: equality, fidelity and efficiency. Showing how equality and efficiency are often in tension with each other, Solan focuses on the issue of fidelity. He develops an argument that proliferation of languages has assisted rather than harmed statutory interpretation by the ECJ. He describes the approach adopted as 'Augustinian' (i.e. analogous to how St Augustine sought to understand biblical

scriptures by comparing the Latin version with Hebrew and Greek originals), and claims the approach is able to take advantage of multiple versions of the same law in discovering its intended meaning. Since the best evidence of legislative intent comes from the language in which law is expressed, additional language versions according to Solan provide a resource of unique cues that make it possible to triangulate legal meaning that are not available in a monolingual jurisdiction.