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Introduction

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Article abstract

Les cinq textes qui suivent ont été présentés au 12e congrès de l'Académie internationale de droit comparé, tenu en août 1986 aux universités de Sydney et Monash en Australie.

Essayant de définir ce qu'est la traduction, ces textes font état de la variété de méthodes et de styles de la traduction, ainsi que de l'importance du contenu culturel de la langue juridique. Les embûches créées par la spécificité culturelle d'une langue juridique par rapport à une autre et par l'affinité relative des langues dans lesquelles un texte juridique doit s'exprimer sont analysées par rapport à un autre problème : celui de la réception de nouvelles institutions juridiques au sein du système juridique en place. Enfin, on propose un plus grand rôle pour les juristes et le droit comparé dans le processus d'élaboration des textes juridiques plurilingues, processus confié trop souvent aux seuls traducteurs.

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La traduction juridique

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Introduction

Michael BEAUPRÉ *

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The papers of the 12th International Congress of Comparative Law on "Problems of Juridical Translations in Legal Science" are of interest to jurists and jurilinguists, and in particular to comparativists, everywhere. The Australia Congress attracted nine substantial papers by scholars from Australia, Belgium, Canada, Italy, Japan, the Netherlands, Poland, the United Kingdom and the United States of America. The following is the general report on the papers received.

The role of the general reporter at a comparative law congress is to draw points of comparison and to point out differences where these exist in respect to common issues. Such a role is, however, complicated by the participation of scholars from several legal traditions, linguistic groups and socio-political cultures.

The topic itself was considered by some to be misleading in light of their national experience. Thus for purposes of this report, the word "translation" should be deemed to include the drafting of bilingual legal texts, irrespective of the process of its execution; the topic is thus viewed as covering the problems of bilingual and plurilingual drafting, without necessarily focusing on which text is the original and which the "translation" or subsquent version.

The papers have together addressed several questions.

1. Preliminary Questions

1.1. Is Legal Translation even Possible?

Beginning on a philosophical note, scholars were invited to discuss whether translation is even possible. While this question seemed no more than to reflect the artist's lament: *traduttore, traditore*, it was addressed seriously by a few scholars.

Professor G.R. de Groot of the Netherlands reminded us of the reflection of Spanish philosopher José Ortega y Gasset: "Translating is a utopia. Translating is essentially impossible because languages are entirely embedded in their own social-cultural-political context" [1].

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1. See the article of Professor G.R. de GROOT, "The point of view of a comparative lawyer", *infra*, Part 1. Se also his reference n° 1 to I. KISCH, who is more interested in substantial equivalence than in semantic perfection: "la question de l'équivalence est une question d'ordre pragmatique". See also professor I. KITAMURA's paper, "Un point de vue japonais", *infra*.

The Japanese Report [2] proves, however, that the question may be seen as a serious and practical one. In the extreme and unusual case, described below, of the reception into domestic law of substantial portions of foreign legal institutions, which must, *ipso facto*, be defined in the positive law, interpreted in the case-law and analysed in the doctrinal writings of the receiving country, the task is monumental, the chances for total success questionable and the consequences for the domestic body politic potentially disastrous [3].

One must nevertheless marvel at the miracle of reception by Japan of civil law institutions via the Dutch, the German and the French as described and illustrated by Professor Kitamura [4].

A much more pragmatic acceptance of translation and of its possibility was expressed or implied by those national reporters whose daily experience was that of a plurilingual society or of a society influenced by a diverse cultural history or its membership in or proximity to a family of nations speaking different languages but nevertheless sharing a common legal tradition.

The first question, then, led to a related one :

1.2. What is Legal Translation ?

On the philosophical side of the question, one might quote from the Italian Report by Professor Rodolfo Sacco who expressed deep concern for the possibility of translating in a manner compatible with a high standard of cultural integrity in a legal environment where the translator must compete with both legislator and judge who, one is led to believe, both exercise linguistic power out of all proportion to their cultural mandates or aptitudes :

> Le traducteur par excellence est le traducteur sans fonction publique, sans galon sur la manche, qui travaille (en pensée, ou par écrit) sans ajouter à son œuvre ni un timbre ni un serment, sans avoir été sollicité par n'importe qui.
>
> Le problème de la traduction juridique ne peut être réduit au problème de la réglementation de la traduction dans les procédures législatives, judiciaires ou administratives.
>
> Le problème se fait, en revanche, plus aigu, si le juriste d'une nation utilise de multiples modèles, exprimés en des langues étrangères différentes.
>
> La tâche du traducteur est plus délicate, si celui-ci est un théoricien, et que, dans son pays, la création de modèles soit confiée plutôt à la doctrine qu'à la pratique (légale ou jurisprudentielle).

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2. Professor I. KITAMURA, *ibid.*
3. *Ibid.*
4. *Ibid.*

> Le législateur — et, moins visiblement, la jurisprudence — ont le pouvoir d'imposer un mot nouveau, ou la nouvelle signification d'un mot. (...) Le théoricien a autant plus d'obligations qu'il a moins de pouvoirs. Il ne peut utiliser un mot sans s'interroger sur la signification de celui-ci. S'il ne peut renvoyer à la définition explicite ou implicite (ou mettre en clair la définition implicite) que comporte ce mot dans un texte légal ou dans un jugement, il doit œuvrer avec ses seules forces. C'est-à-dire, il doit garantir à son lecteur la correspondance entre le mot imité, et l'expression imitatrice. [5]

Nevertheless, Sacco assumes a primary role for the jurist in legal translation :

> La traduction comporte sûrement la recherche de la signification d'une phrase juridique dans une première langue, et la recherche de la phrase qui est appropriée pour exprimer, dans une deuxième langue, cette signification. La première partie de l'opération est l'œuvre du juriste ; (...) l'œuvre toute entière appartient au comparatiste, qui est seul compétent à établir si deux idées, appartenant à deux systèmes juridiques différents, se correspondent ou non ; et si une différence des règles comporte une différence dans les catégories. [6]

Thus despite his expression of concern, Sacco appears to be in agreement with the majority view that legal translation is first and foremost the practice of comparative or interpretative law [7] and thus essentially too important to be left solely to non-jurists. It is, nevertheless, fair to note not only some tension between legal theorists and practitioners but also between jurists and linguists, which was quite to be expected. Certainly, the national reporters of Belgium, Canada and the Netherlands seem to agree that insofar as *legislative* translation (i.e. translation for legislative purposes) is concerned, linguistics must at times play second fiddle to jurisprudence, since legislative drafting and judicial interpretation are so inextricably linked [8].

The Canadian national reporter would perhaps be more emphatic: because of Canada's essentially common law interpretative methodology, linguistics has had, on occasion, to be subordinated to the efforts of the jurist in bilingual legislative drafting, in order to avoid "judicial wrecking" [9].

Professor Sacco of Italy recognizes the hegemony of the legislator and judge over the linguist-translator, but laments it in the following terms :

> La règle de droit relève du pouvoir.

5. Professor R. SACCO, "Un point de vue italien", *infra*, Part 8.
6. *Ibid.*, Part 2.
7. See G.R. de GROOT, "The point of view of a comparative lawyer", *infra* ; J.H. HERBOTS, "Un point de vue belge", *infra* ; R.M. BEAUPRÉ, "The Federal Legislative Drafting Process : Problems, Successes and Challenges", excerpt of Canadian Report now found in *Interpreting Bilingual Legislation*, 2nd edition, Carswell, Toronto, 1986, p. 170.
8. See J.H. HERBOTS, *supra*, note 7 ; R.M. BEAUPRÉ, *supra*, note 7, p. 190.
9. See Canadian Report, BEAUPRÉ, *supra*, note 7, p. 191.

> La définition des concepts qu'implique la règle du droit et leur classification sont l'œuvre, libre, de la doctrine.
>
> Mais, ici et là, nous pouvons trouver des classifications voulues par le pouvoir, notamment par le législateur. La doctrine peut contester, mais elle ne peut ignorer, cette volonté. Le traducteur ne doit pas cacher à ses lecteurs la présence d'une volonté politique qui déborde du terrain des règles de décision pour envahir le terrain des instruments de la connaissance (...). [10]

2. Translation Methods or Styles

The question of what constitutes the essence of translation was further informed by the question of methodology and style. The Australian report provided a useful summary of the most important methods:

1. formal equivalence (literal translation)
2. functional equivalence (non-literal translation)
3. borrowing or transcription
4. neologism [11].

The method chosen with respect to any given concept was said to be "ultimately a function of understanding and therefore the likely readership of the translation" [12] bearing in mind, however, that the ultimate goal of legal translation is to be as precise as possible in meaning [13].

This point was emphasized by a number of other participants who also underlined differences between ordinary translation and legal translation [14]. Even under the heading of legal translation, styles were seen to differ according to whether the purpose of the target document was informational, doctrinal, jurisprudential, evidentiary, conventional or legislative. Even with one category of purpose, such as legislative, it was shown that the Statutes of Canada, for example, have varied between formal and functional equivalence of the two versions [15].

An extreme example of systematic neologism was documented by Professor Kitamura in his Japanese Report. The resultant mystification of the positive law, devaluation of the cultural content of Japanese law as a whole and confusion inserted into basic legal notions appear to have led to

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10. *Supra*, note 5, Part 6.
11. Dr. G.L. CERTOMÀ, "Problems of Juridical Translations in Legal Science", in *Law and Australian Legal Thinking in the 1980s*, Sydney, University of Sydney, 1986, p. 67, p. 70–72.
12. *Ibid.*, p. 71.
13. *Ibid.*, p. 72.
14. See, for example, G.R. de GROOT, *supra*, note 7; J.H. HERBOTS, *supra*, note 7.
15. R.M. BEAUPRÉ, *supra*, note 7, p. 168, 174.

excessive élitism in the expression of the law. The dramatic schism between ancient culture and modern legal institutions, which have been inadequately transposed and translated from abroad, seems inevitably destined to lead to popular disaffection with public institutions and the rule of law as we know it in the West [16].

3. Roadblocks to Effective Legal Translation

3.1. Culture Specificity and Affinity

In agreement with the Netherlands Report, the Australian national reporter, Professor Certoma, asserts :

> (...) The essential factor at the base of effective translation is "culture-specificity", that is, apart from linguistics, a cultural familiarity with the subject matter of the translation in both source and target societies. [17]

It is generally agreed as a fact of life that there may not exist precise analogues between legal cultures. This has meant in Canada, for example, that the use of a paraphrase in the French version of federal legislation to approximate a technical term of the common law in the English version has not always been sufficient to ensure uniform application of the legislation across the country. Nor has the use of a more or less equivalent technical term of the civil law. Interpretative methodologies have been devised by the courts over time to compensate for the linguistic limitations to achieving exact equivalence [18].

Thus to effectively translate legislation or to draft it in two official linguistic versions, one is required to be familiar with judicial methods of interpretation as well as with the general law behind the source and target texts.

Drafting legal instruments of any kind is not a culturally neutral exercise. Therein lies one of the dilemmas of legal translation : accompanying the use of technical legal terminology in a particular legal setting is a whole body of doctrine and case-law, which the translator or draftsman ignores at his peril.

It is the strength of the particular legal culture (the general system of the law) that permits the selective importation or "reception", as Professor Sacco

16. I. KITAMURA, *supra*, note 1.
17. G.L. CERTOMÀ, *supra*, note 11, p. 69.
18. R.M. BEAUPRÉ, *Interpreting Bilingual Legislation*, 2nd edition, Carswell, Toronto, 1986, p. 140, 188.

expresses it [19], of neologisms into the culture which, on a purely literal plane, may appear to subvert it.

Thus the importation of the civil law expression *hypothèque* into the legislation of the bilingual common law provinces of New Brunswick, Manitoba and Ontario does not, *ipso facto*, assume the substitution of the institution of the mortgage by that of the Québec *hypothèque*. The substantive equivalence is close enough to be meaningful without causing confusion, particularly since the word is consistent with common usage in all French-speaking communities in Canada.

The point is that, by adopting in a common law jurisdiction a civil law analogue without worrying too much about the interstitial differences in legal meaning, one is not about the introduce civil law institutions, notwithstanding some fear to the contrary in some Canadian quarters. It is simply common knowledge that, in Ontario, *hypothèque* is not the same instrument as a Québec *hypothèque*. This is essentially the same thing as the attribution by Québec of the meaning "trust" to the word *fiducie*. And why not? As Professor Sacco states : "les usagers de la langue peuvent modifier la signification des mots, car la langue dépend de ceux qui la parlent" [20].

The problem is more difficult at the federal Canadian legislative level, where there is nothing to prevent (as often happens) civil law terms from being used in the French version alongside common law terms in the English version. Unfortunately, civil law Québec must in a sense share the single French version of federal statutes with several other French-speaking or bilingual (but common law) provinces. A purely civil law term in federal legislation may, therefore, not always receive the same treatment by the courts as it would if it appeared in a common law province's statute, where there should be no real problem of comparative law bijuralism [21].

The question of transferring a concept from one legal system to another raises questions of affinity. Depending on the case, the problem may vary. The two legal systems may be very similar or at least related, either wholely or partially. In such a case, the main problem may be linguistic. The languages through which the concepts of the two similar legal systems are expressed may belong to quite different families. In such a case, the search for legal

19. R. SACCO, *supra*, note 5 ; the wholesale importation of neologisms without concern for their historical or sociological content is, according to professor Kitamura, a recipe for disaster : *supra*, note 1.
20. R. SACCO, *supra*, note 5, part 21.
21. For some insight into the very real problem of maintaining legal equivalence between two versions of an enactment in a bijural and federal context, see the Canadian Report, *supra*, note 7, p. 188*ff*.

equivalence becomes a major exercise in lexicography. Where the two legal systems are substantially different in their classifications and concepts, the translation becomes rather an exercise in comparative law, and the search for legal equivalence may render a fairly descriptive text. Where a common legal system or two closely related systems are expressed in two languages, translation problems may become quite insidious, particularly as a result of several *faux amis*. If such a case is, in addition, grafted into a federal system, as in Canada, the problems may at times appear insurmountable [22].

It is interesting to note what may occur in the Québec courts when the English version of a federal Canadian statute is expressed in common law terms while its French version is expressed in civil law terms, without any linkage between them, other than the constitutional rule that "both language versions are equally authoritative" [23]. One case may serve to illustrate the important effect that the choice by translators of slightly unequal analogues has had on the legal result.

In an action for damages for breach of contract, a railway company, Canadian Pacific Ltd., invoked the provisions of an order made under the federal *National Transportation Act* and *Transport Act*, which stated that a carrier is not liable for loss caused by "act of God", according to the English version, or by *cas fortuit ou de force majeure*, according to the French version [24].

The Superior Court of Québec held that the act of a third party — the truck that hit the locomotive — albeit not an "act of God" as understood by the common law, was nevertheless considered by the civil law of Québec to be a *cas fortuit*. As a result, the defendant railway company was exonerated from liability in Québec, although it would not have been on the same facts under the same federal law provisions had the accident occurred in a common law province. Presumably, the decision would have been different, had the French version adopted more general words paraphrasing or describing the common law concept of "act of God", rather than a technical term of the civil law that was, structurally, the equivalent of the common law term.

The case is a useful illustration of the difficulty, in translation or bilingual drafting, of attaining two objects without making some sacrifices: the consistent application of a rule of law within two or more legal systems via

22. See the interesting discourse of G.R. de GROOT on this complication in his Report, *supra*, note 1.
23. *Constitution Act, 1982*, s. 18(1).
24. *Gulf Oil Canada Ltd.* c. *Canadien Pacifique Ltée*, [1979] C.S. 72, p. 73, 75. For more details, see R.M. BEAUPRÉ, *Interpreting Bilingual Legislation*, 2nd edition, Carswell, Toronto, 1986, p. 133-134.

two linguistic versions that strive to be faithful to the terminology, classifications and concepts of the two legal systems and linguistic families. Does one sacrifice the application of the rule of law in an interstitial way and the goal of absolute equivalence? Or does one rather sacrifice the expression of the rule and, with it, the classifications and concepts of one of the legal systems within which the federal rule must have its effect?

On a more philosophical level, one might ask whether it is in the public interest, in a federal bijural state, to neutralize the terminology, classifications and concepts of one system of the law in favour of those of the other system for the sake of attaining the goal of absolute equivalence in the legal effect of federal legislation throughout every part of the state.

3.2. The Problem of Reception

Italy, Canada and Japan have at least one interesting phenomenon in common: the reception and assimilation of foreign legal institutions into their domestic law and language. The process causes Professor Sacco to suggest that Italy has two diverse legal languages, one of which has begun to francicize accepted Italian legal terminology[25].

Canada has, for over two centuries, been forced to seek a compromise between French civil law expression in its Québec private law and English common law expression in its general public law. The challenge to the integrity of French civil law institutions remains considerable for a number of reasons, and in particular: the insidious nature of common law incursions into Québec institutions via language imports or calques from the English; the natural desire for legislative uniformity on similar problems between all provinces; and the important impact of the legislative fiat exercised by the federal Parliament through the terminology by which it chooses to style the French version of its statutes.

The situation in Italy and Canada is, nevertheless, relatively stable compared to Japan's problems caused by the wholesale reception of European-style legal institutions in the nineteenth century[26], which appear still not to be entirely digested by the Japanese language and which therefore appear to remain inaccessible to all but a tiny élite of plurilingual jurists. Japanese legislation is thus translated law and seems doomed to be artificially expressed in a second Japanese language, which is isolated from the cultural content and history of classic Japanese and contemporary usage. The impoverishing effect on the Japanese[27] language and culture is obvious.

25. R. SACCO, *supra*, note 5.
26. I. KITAMURA, *supra*, note 1.
27. *Ibid.*

4. Improving Legal Translation

It was through the magic of translation and a great deal of inventiveness that the Japanese legal system was transformed to that of a western-style democracy. The fact that it was not done as a process of gradual evolution or by appropriate experts is the source of immense problems, according to Professor Kitamura [28].

All jurisdictions that must live with translation as a daily fact of their existence were sensitive to a number of practical problems in achieving an acceptable standard of quality. These included the dearth of qualified legal translators, and appropriate legal dictionaries, as well as an almost total absence or misapplication of administrative structures to oversee legal translators and to ensure functional equivalence between language versions of a legal text. Considerable concern was expressed with regard to the virtual abdication of the translation function to non-jurists. Canada was seen as somewhat of an exception, at the national level, in that it has developed some useful work instruments for legislative drafters and attempts to ensure a high quality of linguistic expression in both official versions of its legislation; nevertheless, doubt was expressed as to the adequacy of supervisory structures to ensure substantial equivalence between the two versions [29].

According to the Belgian suggestion, in cases where translators are not jurists:

> (...) il faudrait au moins que les deux versions du projet soient examinées par une commission de juristes bilingues pour contrôler si le texte traduit veut dire la même chose que le texte original. [30]

A full-scale revision of this kind appears to be required of the law of Japan, if only to bring their expression more into line, where possible, with classic cultural benchmarks.

On the people side of the translation equation, governments and the legal profession need to be more supportive of educational institutions by encouraging the study of comparative law and linguistics within a law school setting. Linguists must not be left out of legal drafting, and comparative law must be integrated with legal translation. On this point, the Belgian national reporter showed some interest in the Canadian federal legislative model of joint drafting teams assisted by jurilinguists [31].

28. *Ibid.*
29. R.M. Beaupré, *supra*, note 7, p. 191.
30. J.H. Herbots, *supra*, note 7, part 38.
31. *Ibid.*; for a description of the method, see R.M. Beaupré, *supra*, note 7, p. 174*ff.*

As far as work instruments are concerned, all national reporters appeared to agree that they are inadequate to the purpose. Legal glossaries and encyclopedias, comparative law texts, legal and jurilinguistic indices, legal data-banks (accessible universally) are all too rare or of mediocre quality.

Finally, some national reporters, including those of Japan and the Netherlands, expressed the desire, admittedly somewhat utopian in the absence of substantial funding, for concerted efforts to identify a "legal 'metalanguage'"[32] including *les universaux de droit*[33]. It would not be one artificially concocted and imposed, but one that is, in a sense, waiting to be discovered through joint research by linguists, translators, comparativists (in addition, presumably, to philosophers and psychologists) who would seek to unlock a legal prototype which, it may be argued, is already part of our "collective unconscious"[34].

32. G.R. de GROOT, *supra*, note 7, part 3.3.
33. I. KITAMURA, *supra*, note 1, part. 3.2.
34. *Ibid.*, part. 3.2., obviously drawing analogies from Jungian psychology; in this light, the tentative progress of Canada towards standardizing "common law French" as well as efforts towards the discovery of "neutral" common law — civil law terminology appear particularly important to pursue. See R.M. BEAUPRÉ, *supra*, note 7, p. 189-190.