Law, legal language and legal system: reflexions on the problems of translating legal texts

one reason why F.W. Maitland could still devote his inaugural lecture as Downing Professor in Cambridge to the question of 'Why the History of English Law is not Written'. Not least thanks to impulses provided by Maitland himself, there now exists a vast array of tesserae which, when fitted together, reveal a picture quite unlike the traditional one. It is becoming ever clearer that in fact England was never fully cut off from continental legal culture. Instead, it remained in constant contact with the ideas and concepts, rules, institutions and fundamental philosophical trends of the *ius commune*, which thus inspired, shaped, or at least influenced many of its doctrines.

COMMONALITY AND MUTUAL UNTRANSLATABILITY OF LEGAL TERMINOLOGY

20 Law, Legal Language and the Legal System: Reflections on the Problems of Translating Legal Texts*

Gérard-René de Groot

LAW AND LEGAL LANGUAGE

The technical language of jurists is extremely system-bound. Since legal systems differ from state to state, each country has its own independent legal terminology. There are even states which have several distinct territory-based or person-based legal systems coexisting side by side, each of which in turn has its own legal terminology. An international legal technical language is almost wholly lacking. It only exists to the extent that certain legal areas have become 'internationalized': this is particularly true for international law and European Community law. An international (multilingual) terminology is gradually developing in these fields. But for legal areas such as constitutional law, administrative law, criminal law or civil law, an international terminology is fundamentally absent.

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From the foregoing it is already clear that there does not even exist a uniform Dutch, German, English or French legal terminology. With respect to the Dutch language, one finds that there are five, perhaps even six legal terminologies which are distinct from one another. Dutch is the legal language in the Kingdom of the Netherlands, in Surinam and in Belgium. In the Kingdom of the Netherlands there are in turn three different legal systems: the legal system of the European part of the Kingdom, the system of the Dutch Antilles, and the system of the island of Aruba. We can thus conclude that there is a Dutch–Dutch, a Belgian–Dutch, a Surinamese–Dutch, an Antillan–Dutch and an Aruban–Dutch legal terminology. One could perhaps even argue that there is also a special EC–Dutch legal terminology.

How greatly legal terminology is bound to systems can be illustrated with the example of the terminological differences between the earlier property law of the Dutch Civil Code from 1838 and the new Dutch Civil Code, which entered into effect on 1 January 1992. [...]

I would like to illustrate this with a simple example. S. 90 of the German *Bürgerliches Gesetzbuch* [Civil Code] states: '*Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände*' (Things within the meaning of the law are only physical objects.). Article 555 of the Dutch Civil Code from 1838 states that all objects *and rights* which can be the subject of a property right are characterized as '*zaken*' (things). The German concept *Sache* thus means something different than the Dutch word *zaak*, although these concepts could be regarded as equivalent at the level of colloquial speech. Consequently, it is fundamentally wrong in a legal context to translate the word *zaak* with *Sache*. In such a context, the German term *Sache* must be translated with *goed* (object) or with *stoffelijk voorwerp* (physical object).

After the third book of the new Dutch Civil Code took effect on 1 January 1992, however, another translation became necessary. Art. 1 of the new third book states: '*Goederen zijn alle zaken en alle vermogensrechten*' (German equivalent: '*Gegenstände sind alle Sachen und Vermögensrechte*' – 'Objects are all things and property rights'). As a result, the term *zaak* in the new Civil Code – just as in Germany – relates exclusively to physical objects. Consequently the translation of the German word *Sache* with the Dutch concept *zaak* is now unobjectionable even in a legal context, while translating it with *goed* would be wrong. [...]

We have already seen that a term can have different meanings within a single legal system. The same term can have even further, divergent meanings if the language in question is also used as a legal language within another legal system. We can illustrate this with the example of a concept that is used in both the Dutch–Dutch legal language and the Belgian–Dutch legal language. Both Belgium and the Netherlands have a judicial institution called the *arrondissementsrechtbank*. The Dutch *arrondissementsrechtbank* corresponds roughly to the German *Land-*

gericht (District court). In Belgium, however, the court corresponding to the district court is called the *rechtbank van eerste aanleg* (*tribunal de première instance* – court of first instance).[1] The Belgian *arrondissementsrechtbank*, by contrast, is composed of the presidents of the *rechtbank van eerste aanleg*, the *rechtbank van koophandel* (*tribunal de commerce* – commercial court)[2] and the *arbeidsrechtbank* (*tribunal de travail* – Labour Court).[3] This Belgian *arrondissementsrechtbank* is responsible for resolving jurisdictional disputes between the three judicial instances whose presidents constitute its members. Clearly, therefore, the terms *arrondissementsrechtbank* used in the two legal languages are not synonyms. Such differences require in many cases an 'intralinguistic translation', so that Belgian legal texts can be rendered genuinely understandable (and not just seemingly so) for Dutch jurists and vice versa.

Obviously, such an intralinguistic translation is not only necessary when the same concepts in both legal languages are used with different meanings, but especially when in one legal system concepts are used which are completely unknown in the other system. [...]

THE EQUIVALENCY PROBLEM

[...] When the target language and the source language relate to different legal systems, absolute equivalence is impossible. For example, can the German word *Ehescheidung* be translated into French with *divorce* or into Italian with *divorzio*? We know that the grounds for divorce are different in Germany, France and Italy and, further, that there are essential differences regarding the nature of the marriage which is dissolved through the divorce, specifically in the field of marital property law. There is thus no absolute equivalence. And yet one generally accepts that the concepts mentioned are used as translations of the German word *Ehescheidung*. In a renowned essay, Isaac Kisch stressed that such a translation was admissible, because the concepts involved corresponded to one another '*quant à la substance*'. Thus we need only establish that there is an 'approximate equivalence' of concepts in order to be able to conclude that we can use one concept as a translation of another. But under what circumstances can one say that such an 'approximate equivalence' exists? Here Kisch writes '*C'est une question d'ordre pragmatique*' – which is hardly a satisfactory answer. What goal must one keep in mind when making such a practical decision?

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1 See Art. 76, 568 ff. of the *Gerechtlijke Wetboek* (Judicial Code).
2 Ibid., Art. 73, 573 ff.
3 Ibid., Art. 73, 578 ff.

In my judgement, the context and the goal of the translation are factors of fundamental importance. The character of the document to be translated can be of additional importance. It is possible that certain words are acceptable equivalents in one particular context, but not in another. It is also of considerable importance whether a translation is being made merely in order to give those who do not understand a particular source language a rough idea of the contents of a document written in that language, or whether the translation will receive the status of an 'authentic text' standing alongside the source text. In the latter case, it is extraordinarily important that the concepts in the target text have neither a narrower nor a broader content than that of the source text. From this perspective, we can already state that the conclusion that certain concepts are 'acceptable equivalents' is a highly relative one.

Sometimes it is emphasized that a *functional* equivalent must be found. A concept from the source text must be translated with a word that, in the legal system linked with the target language, has a function similar to that which the concept to be translated has in its own legal system. It sounds very tempting, but I nevertheless doubt whether this method always leads to good results. It regularly occurs that legal problems in different legal systems are resolved in very different ways – through very different legal institutions. In such cases, from the perspective of comparative law we can see a context-bound functional equivalence. But it would be highly misleading to use such context-bound equivalents as reciprocal translations. I will attempt to clarify this with an example. Some problems which are resolved in Germany through the conclusion that a certain behaviour violates *Treu und Glauben* (good faith) are resolved under Dutch or French law via the institution of *dwaling* or *erreur* (error or mistake). But even in a corresponding context I would reject a translation of the German *Treu und Glauben* with *dwaling* or *erreur*. The technical positions of *Treu und Glauben* on the one hand, and *dwaling* or *erreur* on the other, in their respective legal systems are simply too different to allow for it. A context-bound translation of *Treu und Glauben* with *dwaling* or *erreur* would seriously mislead jurists from these legal systems. This example teaches us that the required equivalence must not only be a *functional* one, but also must be well founded in terms of the technical structure of the legal system.

SUBSTITUTE SOLUTIONS IN CASE OF INSUFFICIENT EQUIVALENCE

[...] The translation of legal texts between unrelated legal systems is very difficult, even when the technical legal languages are linguistically closely related. For example, problems frequently arise when translating legal texts from Anglo-American countries into Dutch, because of the well known fact that there are fundamental systemic differences between the common law and the civil law. [...]

The last category that I wish to mention is the translation of legal texts between two legal systems which differ from one another in their systems and contents, while the legal languages used are closely related to one another. An example from this category is the translation of legal texts from German into Dutch. Precisely because these two languages are so closely related linguistically, it is widely believed to be relatively easy to translate even legal texts from one into the other. However, this view frequently overlooks differences of system and detail. As a result of these differences, dangerous mistakes can easily find their way into translations, since there are extraordinarily many legal 'false friends' between Dutch and German. [...]

The main difficulty in translating terms obviously does not lie in linguistic problems, but instead is due to the fact that the concepts have different meanings in the German and Dutch legal systems. However, such differences only become clear when examined in detail.

A similar problem arises when translating the Dutch word *moord*. German legal language also has the concept *Mord* (murder) which at first sight is equivalent to the Dutch concept. The definition of the word *Mord* in s. 211, para. 2 of the German Criminal Code states:

> *Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebs, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet.*
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> (A murderer is someone who, out of a desire to kill, or in order to satisfy the sex drive, or for reasons of greed or other base motives, maliciously or cruelly or with dangerous means or in order to make possible or conceal some other criminal offence, kills a human being.)

Decisive for the qualification of *Mord* are thus the *motives* for the killing and the *manner* of killing. When someone kills another person, but there is no question of it being *Mord*, it is defined as *Totschlag* (manslaughter). In Dutch law, however, *moord* (which – as their spellings indeed suggest – is etymologically closely related to the German word *Mord*) is defined entirely differently. S. 287 of the Dutch Criminal Code defines *doodslag* (etymologically closely related to the German word *Totschlag*) as an intentional killing. Article 289 then says: 'Whoever intentionally and after prior planning kills another person shall be punished for murder with lifelong imprisonment or with a punishment of at most twenty years.' In the Netherlands, therefore, *prior planning* is decisive. The motives and the manner in which someone kills is irrelevant for this qualification. This example shows that many Dutch *moordenaars* (murderers) could 'only' be sentenced under German law for manslaughter, while under Dutch law various German *Mörder* could only be punished for *doodslag*. Thus, once again, we see systemic differ-

ences that are not evident at first sight. The 'colloquial words', *Mord (moord)* and *Totschlag (doodslag)*, are defined completely differently in the Netherlands and Germany.