A Linguistic Analysis of Some Problems of Arabic-English Translation of Legal Texts, with Special Reference to Contracts

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INTRODUCTION

There is an inseparable relationship between language and law. In any society, rules of law are written rules. Law and language are closely related. Law needs language. Law may even be influenced by language. Lawyers are like any other users of language. Legal translation from one language to another cannot be performed without regard to the cultural differences between the two legal systems. The areas, in which issues arising from the drafting of legal language have attracted most attention to date, are the fields of legal translation.

By means of written language, constitutions come into existence, laws and statutes are enacted, and contractual agreements between contracting parties take effect. The legal implications of language continue to extend far beyond the courtroom – to interactions between police and suspects, to conversations between lawyers and their clients, to law enforcement's use of surreptitious recordings, and to such unlawful speech acts as offering a bribe, or issuing a threat, or making a defamatory statement. A little reflection suffices to reveal just how essential language is to the legal enterprise.

The approaches to legal translation have been mostly oriented towards the preservation of the letter rather than effective rendering in the target language, legal texts having always been accorded the status of "sensitive" texts and treated as such. A challenge to the unquestioned application of a "strictly literal" approach to legal translation came only in the nineteenth and early twentieth centuries (Sarcevic, 2000, p. 24).

This book aims to provide a relatively comprehensive description of legal language in general and an application was done to the main features of the language of contracts and how each translator approached problematic areas of legal translation in the two contracts.

PART 1

CHAPTER ONE

INTRODUCTION: THEORETICAL PRELIMINARIES

There has been growing attention paid to the interdisciplinary study of the language of law. This book explores the nature and features of this relatively new discipline, including its relationship to relevant areas such as law and linguistics, in addition to exploring the characteristics of legal English and Arabic within their legal contexts and the difficulties and problems of translation. Although the study of language and law has been advancing, it nonetheless remains a relatively marginal field.

There is an inseparable relationship between language and law. In any society, rules of law are written rules. Lawyers are like any other users of language. Accuracy of wording is a desirable and important attribute for a good lawyer. On the other hand, lawyers sometimes attract both distrust and derision for their supposed abuses of ordinary language, such as the deployment of archaic terms, over-elaborate syntax and high-sounding expressions. The areas in which problematic issues arise from the drafting of legal language are the field of legal translation.

Legal translation is considered by many writers to be extremely challenging. Particular challenges are posed by the specificity of legal language and, in particular, the system-bound nature of legal terminology and differences between the common law and civil law systems. Weston adds that "the basic translation difficulty of overcoming conceptual differences between languages becomes particularly acute due to cultural and more specifically institutional reasons" (1983, p. 207).

Legal language has a problem inherent in language, due to both its flexibility and vagueness or due to detecting a link with the mentality of lawyers who are always keen to identify an unintended ambiguity in words or a loophole in documentation.

Legal translators are obligated to not only speak the target and the source languages fluently, they must be closely familiar with the law and the legal system in the country where the translated text originated, and the country for which the translation is being prepared. Legal translation requires usage of methodology according to the challenges it poses;

challenges that are different from the ones connected to other types of specialized translation.

> 'Specialized translation can be divided into two categories: technical and institutional translation. Technical translation is non-cultural and therefore universal; therefore the terminology is not culture dependent; it is mostly known internationally. Institutional translation, which includes legal translation, is culture dependent; making it typical for particular culture' (Newmark, 1988, p. 151).

Legal translation is a specialized, culture dependent translation, and it is the legal translators" task to stay faithful to the intent, tone, and the format of the original, source legal document, yet make the text clear and understandable to the audience, without taking any creative liberty, which is considered unacceptable at all in the formal constraints of legal language.

Two areas in law and language are of interest. The first one is the interest in the use of language in law, while the second one is the interest in using philosophy of language to address problems of the nature of law. Some problems in each area will be outlined and the start is with a brief historical note on the linguistic preoccupations of legal philosophers.

1.1 Objective of the Study

This research aims to provide a description of legal language, including its development and its distinctive features. It also deals with the characteristics of legal text type in Arabic and in English with special reference to the language of contracts and the problems of translation between the two languages.

1.2 Research Questions

The research questions are focused primarily on the overall quality of the translations and specifically on the translational way-outs and solutions of some problematic points and the linguistic analysis of the two translated contracts, which are described when analyzing these two texts and in what ways have legal translators from Arabic into English and vice versa made deviations in meaning and the features of the legal language.

1.3 Significance of the Study

According to Jersy Wroblewski (1988) (cited in El Achkar et all., 2005), legal language comes from natural language to which specialized words and specific meanings corresponding to the legal nature of that discourse are added. The difference between natural language and legal language is mostly semantic, not syntactic. It depends on the words as well as on their specific meanings.

As inappropriate translation of a text may lead to major problems or lawsuits or may also incur a loss of money, only professional translators specializing in translating legal texts are supposed to be competent enough to translate such documents from the source language (SL) to the target language (TL). Legal translators often consult bilingual law dictionaries, encyclopedias and/or websites. Most forms of legal texts require clearly and accurately defined rights and duties for all. It is very important to ensure precise correspondence of these rights and duties between the source text and the translated target text.

Legal translators must therefore be competent in at least three key areas: first, comparative law that requires the possession of a basic knowledge of the two legal systems for the SL and the TL. Secondly, specific terminology that requires the translator to be familiar with the specific and accurate term of the particular legal field dealt with in the SL and the TL texts. Thirdly, legal writing style which requires the professional translator to be highly competent in the specific legal writing style of the translated target language.

In the legal field, where legal terms are grounded in country-specific legal systems, legal translators face numerous factors that influence their ability to translate certain terms, which will inevitably lead to a major translation problem.

Most of the significant reference textbooks on legal translation are solely devoted to questions of terminology, while characteristic considerations tend to be ignored.

History is filled with examples where ideas have been lost in translation, and often with tragic consequences. Therefore, this research is important, as far as people who work in the field of legal translation and legal systems are concerned. In order to avoid unintentional consequences of inappropriate legal translation, it is essential to understand the features of legal language and how inaccuracies have occurred in the past, and how they can be avoided in the future.

1.4 Organization of the Study

This book consists of two parts. The first part consists of three chapters. Chapter one includes the introduction, historical background, significance of the study, research questions and related literature review. Chapter two introduces the language of law in general. Chapter three deals with the translation of legal texts and documents and the sources of difficulties in translating legal documents, as well as legal language features and characteristics. Chapter four defines the contract as a subfield of law and deals with the stylistic specifics of contracts in general. The second part of this book deals with contracts as a sub-genre of legal texts. Chapters five introduces and analyzes the empirical study. The empirical study is based on an analysis of two contract translations by two different legal translation agencies. It seeks to find out the main points of problems; whether it is the understanding of the SL, finding an appropriate translation way-out, or the style and understandability of the TL text. Conclusions and recommendations follow in Chapter six.

1.5 Review of Literature

Translating legal documents is regarded by many researchers as one of the most arduous endeavors; research on legal translation between English and Arabic is predominantly restricted to purely semantic or syntactic issues. For instance, AbuGhazal (1996) outlined a number of syntactic and semantic problems in legal translation from English into Arabic, by analyzing graduate students translations. He primarily aimed at detecting the linguistic and translation problems facing translators in general.

Bentham (1782) developed a radically empiricist theory of the meaning of words, which supported his utilitarianism and his legal theory. He wanted to abandon what he considered to be a nonsensical mythology of natural rights and duties. Linguistic acts struck him as respectable empirical phenomena, and he made them an essential element of his theory of law. He based his "legal positivism" on his claims about the meaning and use of words. Language had not been especially important to the natural law theorists whose views Bentham despised, so philosophy of language has no special role in explaining the nature of law. Bentham (1782), by contrast, needed the "sensible" phenomenon of a perceptible, intelligible linguistic act for his purpose of expounding the nature of law by reference to empirical phenomena.

In 1994, Hart's book "The Concept of Law" raised issues that have occupied legal philosophers ever since and at the same time; he borrowed

J.L. Austin's method of "using a sharpened awareness of words to sharpen our perception of the phenomena" (Hart, 1994, p. 14). That method sets the background for the two problems: "Language and the normativity of law", and "The Semantic Sting". Hart's observations about the use of language in law were the basis of an innovative approach to the challenge of explaining the normativity of law, a problem for legal theory that can be clearly seen, Hart claimed, in the faulty explanation of normative language that had captivated Bentham.

Ronald Dworkin (1968), has opposed Hart's theory of law on the basis that his whole approach to legal philosophy is undermined or "stung" by his approach to words, that he wrongly thought "that lawyers all follow certain linguistic criteria for judging propositions of law" (Dworkin, 1986, p. 45). That is Dworkin's "semantic sting" argument, an argument in the philosophy of language that has set an agenda for much recent debate in philosophy of law.

Mellinkoff (1963) was concerned with what the language of law is and investigated the history of legal language, and brought the language of law down into practice.

In their book, Crystal and Davy (1969) devoted one chapter to the language of legal documents, supported with examples taken from an insurance policy and a purchase agreement. They wrote that "of all the uses of language, it [legal language] is perhaps the least communicative, in that it is designed not so much to enlighten language-users at large as to allow one expert to register information for scrutiny by another" (p. 112). A legal text for them exhibits a high degree of linguistic conservation, included in written instruction such as court judgments, police reports, constitutions, charters, treaties, protocols and regulation (p. 205). They described legal texts as formulaic, predictable and almost mathematic.

Newmark (1982) is another theorist of general translation to comment on legal translation. He noted a difference in the translation of legal documents for information purposes and those which are "concurrently valid in the TL [target language] community." Concerning "foreign laws, wills, and conveyancing" translated for information purpose only, Newmark suggested that literal or semantic translation, in his own term, is necessary. On the other hand, he stressed that "the formal register of the TL must be respected in dealing with documents that are to be concurrently valid in the TL community." In Newmark's view, such translations require the communicative approach that is target language-oriented (Newmark, 1982, p. 47). In this regard, Newmark is one of the few linguists to recognize that the status of a legal text is instrumental in determining its use in practice.

Emery (1989) explored the linguistic features of Arabic legal documentary texts and compared them with their English counterparts. Emery ended up recommending that trainee translators should develop a sense of appreciation of the structural and stylistic differences between English and Arabic discourse to help produce acceptable translations of legal documents. Though he only made limited inroads into the area of legal translation theory or practice, Emery's article is actually one of the very few works that investigated general features of Arabic legal language, an area of research that has inexplicably been disregarded by Arab translators and theorists.

Al-Bitar (1995) illustrated how legal language differs from other common-core English varieties. In her study, she studied twelve bilateral legal agreements and contracts signed during the years 1962-1993. She investigated two main areas of nominal group in addition to other grammatical units: complexity of the noun phrase and type of modification. Her main conclusions were that the differences lay in the heavy use of complex noun phrases and the high frequency of whrelative clauses and prepositional relative clauses as post-nominal modifiers of the finite in legal texts (pp. 47- 62).

House (1997) distinguished between two basic types of translation strategies: overt translation in which the target text receivers are overtly not the same as the source text receivers, and covert translation in which the target text receivers are the same as the source text receivers. According to House, the latter group includes texts that are not addressed exclusively to the source texts receivers, such as commercial texts, scientific texts, journalistic articles … etc. (pp. 1997-194). Although House does not mention parallel legal texts, which would also belong to this group; in fact all special purpose texts would fall under her category of covert translation.

Hickey (1998) argued that any translation of a legal text must be able to affect its readers the way the ST was able of doing to its readers. She states that the translator must ask herself how the original text reader would have been affected and ensure an analogical TT[1] reader will be affected similarly by his reading of the text but not by any other means (pp. 224-225). Hickey failed to see that a TT might be directed towards different readers in a different context. In this case, it is pointless to pursue a similar effect on the part of the translator.

Hatim, Shunnaq and Buckley (1995) occupied themselves with listing legal texts and their model translations, without setting foot in the field of legal translation theory.

The above studies ignored the pragmatic factors related to legal discourse. Such an approach, which extensively stresses the sensitivity of legal texts, may contribute to the creation of misconceptions about legal translation. In other words, it helps depict it as a process of interlingual transfer (Sarcevic, 2000, p. 2) within an array of restrictions.

Sarcevic (2000), in her book which has a comprehensive survey of legal translation, wrote in connection with parallel legal texts, "While lawyers cannot expect translators to produce parallel texts which are equal in meaning, they do expect them to produce parallel texts which are equal in legal effect. Thus the translator's main task is to produce a text that will lead to the same legal effects in practice" (p. 71).

As Sarcevic (2000) indicated, "the basic unit of legal translation is the text, not the word" (p. 5). Terminological equivalence has an important role to play, but "legal equivalence" used to describe a relationship at the level of the text may have an even greater importance" (p. 48). The translator must be able "to understand not only what the words mean and what a sentence means, but also what legal effect it is supposed to have, and how to achieve that legal effect in the other language" (pp. 70-71).

Dickins et al (2003) offered a progressive representation of various translation problems, accompanied by lots of practical work in developing underlying principles for solving the problems. Theoretical issues were discussed only in so far as they relate to developing proficiency in method. Although a wide range of texts were dealt with in this book, little attention was directed towards legal texts in the form of pedagogic practice within a framework of more general linguistic issues ignoring the peculiarity of legal texts.

Butt and Castle (2006) burrowed into the roots of traditional legal language and its peculiar characteristics that make legal documents aloof from its users. They proposed a step-by-step guide to drafting in the modern style, using examples from four types of legal documents: leases, company constitutions, wills and conveyances. Moreover, they emphasized the benefits of drafting in plain language and confirming the fruitfulness of its use. Like Mellinkoff (1982), they surveyed the reasons for the current alarming state of legal drafting, as well as provided guidance on how to draft well. Their book is the most recent addition to the Plain English Movement that is discussed in the next chapter. It argues that it is actually "safe" and constructive to break away from old ways of legal drafting into simpler, more communicative ones.

Making use of the available literature on pragmatics, the concept of legal equivalence, and the changing role of the translator, the study