Chapter 2
Cultural Transfer and Conceptualization in Legal Discourse

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Henceforth, my dear philosophers, let us be on guard against the dangerous old conceptual fiction that posited a “pure, will-less, painless, timeless knowing subject” [which] demand[s] that we should think of an eye that is completely unthinkable, an eye turned in no particular direction, in which the active and interpreting forces, through which alone seeing becomes seeing something, are supposed to be lacking. . . . There is only a perspective seeing, only a perspective “knowing”; and the more affects we allow to speak about one thing, the more eyes, different eyes, we can use to observe one thing, the more complete will our “concept” of this thing, our “objectivity,” be.

(Nietzsche 1967: 119)

It is neither the case that interpretation is constrained by what is obviously and unproblematically ‘there’, nor the case that interpreters, in the absence of such constraints, are free to read into a text whatever they like. . . . Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence in a given enterprise, and it is within those same constraints that they see and bring others to see the shape of the documents for whose interpretation they are committed.

(Fish 1982: 555)

1. The Translabiliting Process – Towards Hybridization

While law shapes social knowledge within a specific language and culture, the importance of evaluating and finding significant frameworks in legal discourse and legal translation has become a priority. Knowledge has been organized into different disciplines over a long period of time. Transferring concepts from one language to another has become a challenge. These concepts can sometimes be fully or partially transferred from the source language to the target language. Translabiliting (Wagner and Gémar 2013: 731) is an ‘act of cross-cultural communication, which implies matching cultural elements of two different languages rather than only considering the linguistic elements’. Conceptualizing knowledge in this way permits to evaluate the boundaries, the social control power from the source language and how concepts may expand into any other related knowledge from the target language. Therefore, ‘cognitive exclusiveness’ (Larson 1977) is a chimera. Indeed, the production of concept is itself bound up with societal consideration and law. Concepts cannot be abstracted from the social world (Gémar 1992: 377), and so their transferability into another linguistic framework
is susceptible to criticism. Foucault reveals the relationship between knowledge and power stating that power pervades the discourse:

> We must cease once and for all to describe the effects of power in negative terms: it ‘excludes’, it ‘represses’, it ‘censors’, it ‘abstracts’, it ‘masks’, it ‘conceals’. In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production. (Foucault 1991: 194)

Accordingly, creativity in law is crucial and permits the implementation of new concepts:

> When I use a word, Humpty Dumpty said, in a rather scornful tone, ‘it just means what I choose it to mean – neither more nor less’. The question is, said Alice, whether you can make words mean so many different things. (Carroll 1871)

Translators are thus subject to stringent constraints at all levels (Gémar 1992: 376–377), and the act of transferring the source knowledge into the target knowledge is far from being such an easy task. Conceiving law as a symbol allows us to understand how that process works and how we can connect our life to the text of the law (Kevelson 1988: 4):

1. All communication is a process of exchange of meaningful signs, and signs and signs systems such as natural language mediate between communicating persons and those objects in the phenomenal, physical world of experience to which they refer.

2. All human societies have developed complex systems of both verbal and nonverbal sign systems which are not static but which evolve continuously to correspond with and to represent changing social norms and the evolving, growing social consciousness of any given community.

Likewise transferring legal knowledge is a discursive struggle where competing meanings from the Source language and the Target language are contested:

> ‘The chief problem . . . will always be, not the individual état de langue, but the relationship between different stages of a single language and between different languages, their similarities and their differences’ (Hjelmslev 1970: 9).

By concentrating on the discursive element rather than on the term itself, the process of translabiliting becomes easier and this interdisciplinary discipline implies ‘an overlapping of segments of disciplines, a recombination of knowledge in new specialized fields’ (Dogan 1997: 435), ‘a hybrid discipline’ (Gémar 2002: 173), leading to ‘hybrid texts’ (McAuliffe 2011: 99):

> Intercultural communication gives rise to the development of new text types and genres. Particular stages of this development can be described as hybridisation. These are the stages at which the new text types and genres are not yet fully established themselves.

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1 Criticism often comes from those who can’t see the connection between the linguistic signs for the transferred concepts and the social world from which the concepts acquire their meaning. A case in point is the caustic criticisms of the Chinese version of Hong Kong laws prepared by way of translation in the run-up to 1997. Understandably, critics only saw the Chinese text of the law without seeing the social world from which the English common law derive its meaning. See Sin (1998).
as forms of communication in a sociocultural setting: they manifest linguistic and rhetorical features which are felt to be foreign.

1. Contamination of Law – A Series of Influences

The law is a symbolic construction and therefore rests on a variety of undertakings. What gives law its meaning is, for some, ideology; for others, it corresponds to the welfare of the majority. However, what is manifest is a conception of the law as a material structure that carries symbols of everyday life. The analyzes that are made in the law and semiotics movements show that the law’s symbolism cannot be understood by reference only to itself, a strictly “legal” meaning. It is a symbol that conveys life, a symbol that in itself is contaminated with life, politics, morality, and so on.

1.1. Law Contaminated by Morality

In European jurisprudence, there is a concern with the relationship between the inside of the law and the outside of the law. In natural law theories, for instance, there is discussion about a distinction between law and morality. This might be viewed as an issue of sovereignty and the power to command. However, it is also a question of determining what can be placed within the law and what can be said to be the language of the law, that is, one of command and obedience (Fairclough 1989). In the natural law tradition, the law had to be read as governed by natural law with either religious values or secular values like the Universal Declaration of Human Rights. However, the relation was one in which law was part of morality, that is, law was contaminated by morality and was nothing else but morality (de Sousa Santos 1995; Unger 1977).

Positivism attempted to severe the relationship. In driving a wedge between law and morality, it took the fear of contamination to the extreme. Law, in the positivist tradition, is the command of the sovereign who has no sovereign to obey (Hart 1961). Its validity does not rest on an external measure.

The philosophical neo-Kantianism of the late nineteenth century, as well as the advent of positivism, was at the core of the development and systematization of language and law. The systematic determination of ideal speech (linguistics) and conduct (law) became the object of normative science. The studies of the time, especially those conducted by Saussure (1916: 118), showed the importance of using the prevailing philological and exegetical conceptions of language. The study of language was—and is still today—a unitarian science in which signs are elements of a code, subject to conventional regulations (Kevelson 1988).

There is a similar dualism in the advent of legal positivism. It can be found in the distinctions between legal system and judgment, legal validity and legal signifier, and norm and its practical application. These are always in conflict, the former being subjective and frequent, and the latter discretionary.

The linguistic theory of Saussure corresponds with the Kelsenian theory of the legal structure. For Kelsen (1953: 85), the grammar of law is the grammar of written text, and the formal limits of legal signifiers are the object of analysis. While Saussure wrote about langueur parole, Kelsen drew the distinction between validity/legal volition.

In summary, both studies—those of the linguist and those of the legal scholar—put an emphasis on abstract verification and on scientific description achieved with minimum normative requisites. Kelsen patently negates subjectivism, the social and the individual in
favour of formalism and positivism. He explained legal science as a pure and united logic of norms.

In French scholarship, we find the works of Francois Gény (1922: 235), whose analysis of the free interpretation of the law became the basis for some analyses in the Latin American and American traditions. Gény drew the distinction between legal science and legal technique, borrowed from ‘le donné’ and ‘le construit’ of Bergson’s philosophy (1930–1959). The former corresponds to natural law while the latter to positive law. Gény’s work was dedicated to translating the given notion into a constructed one; that is, to the translation of this latent and spontaneous normativity which comes from society as a more formal and wisely organized normativity (positive law).

After the Second World War, with the critique of positivism in Germany, several authors proposed a different approach, in order to show the danger of preserving purity in the law. In a discussion famous in continental criminal law, Hans Welzel and Gustav Radbruch each proposed different approaches to the analysis of the law as a response to the horrors brought about by the law of the Nazi Regime (Welzel 1985; Radbruch 1986). While Welzel (1985) proposed an approach to the law from an ontological point of view, Radbruch (1986) proposed one in which universal values were taken into account within the law. To Welzel (1985), the law had to incorporate what he called the ‘ontological structures’; in other words, reality had to be taken into account in the process of legislating about it. However, this approach did not say anything about the role of the law and the dangers of positivist approaches under a totalitarian regime (Muller 1901). Alternatively for Radbruch (1986), the law could not be analyzed as an autonomous structure, but should be analyzed with reference to external values. To Radbruch (1986) there was a supralegality that determine the status of the law. This supralegality was established in the values of the constitution or, in today’s context, in the Universal Declaration of Human Rights.

The works on law of Robert Alexy (2002a; b) and Jurgen Habermas (1996) can be seen in this light, as an incorporation of non-legal elements in the discussion of the validity of law. Unlike Kelsen, Alexy and Habermas propose an argumentative theory of law in which the validity of law is given not only for the procedure of its production, but also for its position as a supralegal system underscoring the universal conception of human rights. However, what makes this approach different from the natural law tradition is the fact that these are not conceptual values but are incorporations of higher law in the spirit of democracy. To Alexy (2002: 127), ‘the law has to incorporate the argumentative and the institutional procedure of the law into a theory of the democratic constitutional state.’ In his interpretation of Habermas (Alexy 2002a), he shows that the law is a case of the general practical discourse, that is, it is related to a democratic ethos and to moral practices of modern democracies (Alexy 1988: 232). Unlike natural law theories, these approaches to the law do not claim that the law is just another way of describing morality, but that the law is permeated by non-legal discourses and practices.

Other authors, like Luhmann (1985), insist in the incorporation of the outside of the law into the language of the law. Outside elements can be incorporated as long as the language and the code of the law is preserved. To Luhmann (1985), law and legal discourse cannot be permeated or confused with the outside of law. On the contrary, law is a subsystem of the social system that has its own binary code, where lawful/unlawful (recht/unrecht) under this code and everything is incorporated into the law. Law and particularly the legal system are autopoietic systems but not, as in the traditional theory of systems, closed systems. To say that the legal system is autopoietic means that the law creates and recreates itself, that its code is auto-reproductive, and that law imposes its own language whenever there is a relation with its outside (Luhmann 1985; Gimenez 1993). The outside of the law is its surrounding but once within the law it has to adopt its binary code. As is clear, this particular approach to the law
is the result of the modern understanding of the state and society and, as Wallerstein (1999) would say, is the result of taking the nation-state as the unit of analysis.

1.2. Law as a Social Phenomenon

In the American tradition, perhaps the most important analysis of the law is that of the Realists. The works of Benjamin Cardozo and Oliver Holmes are seminal in the conception of the law as politics. Cardozo, whose work was based on the ideas of Francois Gény (1922), proposed that law is not the result of the written word in the statute but the result of real life. The law has to be interpreted in relation to everyday life, to capture its contamination by morality and politics.

This approach has been followed in the American tradition by critiques of the law like the Critical Legal Studies Movement, the Constitutive Approach, and the Legal Consciousness Studies. What makes these studies interesting for us is their understanding of the law as embedded in real life, as being something other than structure. But unlike the European tradition, this kind of analysis conceived of the law as being contaminated from outside and as being something else (politics, etc.). The European tradition, on the other hand, saw the outside of the law as a part of the law with proper codification.

The persistent conception of a legal order that is unified and definite excluded historical and sociological considerations. Law is a social phenomenon, and in order to be recognized by society, the statutes have to be intelligible and easy to understand (Hart 1953: 116). Hart’s main preoccupation (1963) was the opacity of legal language, due to his idea that law is a system of rules, interconnected lexically and only able to be understood by legal experts. Only the system is capable of interpreting the system.

Hart’s philosophy of language (1953) is based on a conventional view of the referent: this referent works as a function of the emitter’s intent, and one affirmation is valid only when taken into consideration with the external world. The meaning of words depends, not only on the communication being transmitted, but also on the act and intent of the speaker (1961). This idea is in complete contradiction to the traditional idea per genus et differentiam. When Hart (1961) considers the problems of interpretation, he remains in between formalism (core of settled meaning) and realism (the penumbra of uncertainty).

Hart (1961) was criticized because he adopted a theory of an ingenuous language where the signifier is a fixed entity with a central and peripheral clarity, independent from the context and from the use of concepts. However, in contradictory terms, Hart (1961) also proposed a theory of legal pragmatics where the signifier is purely conventional. Indeed, the existence of ‘core of settled meaning’ is based on the functioning of the legal system. This simply means that language does not have inherent qualities. Instead, its semantic characteristic is modified according to one’s perception of it. The rules and its content are clear but the contingent effect of its use is not so visible. Indeed, the penumbra reflects the indeterminate feature of the object. Moreover, from time to time and from one case to another, the idea of the meaning of some terms as being ‘settled’ is questionable.

According to McCormick, the structure of legal language is formed by legal institutions, which are governed by overarching rules. These are divided into three types of rules: institutive (the ones which create the institution); consequential (the consequences in law of the existence of such an institution); and terminative (those which lead to the disappearance of such institutions) rules. The legal system thus represented closely resembles the syntagmatic level described by Greimas (1967), where the legal subjects evolve within a vital history represented by legal states (or consequential rules) and its transformations (or institutive and terminative rules). Such transformations are finalized by means of acts, and the person who
carries them to an end is given qualification and obtains competence from them. This schema, in turn, parallels Hart’s rules of recognition: the institutive and terminative rules recognized the examples of these institutions as legal in the processes known by Greimas as vérification. McCormick’s point is without any doubt positivist, because it is based on the legal validity under which authority can be established. McCormick, however, explains that public and private institutions have the same structure with distinct contents, a matter, which Hart did not address.

But one of the questions that remain in this discussion about the law is: ‘why do people obey the law?’ (Tyler 2006). To positivists, the law is obeyed because it is the law and the command of the sovereign. To those from a Marxist tradition, the law is obeyed because, as a form of ideology, people are cheated into obedience (Stone 1985; Spitzer 1983: 103). Under the concept of hegemony, some scholars have found that the law is obeyed because people see in the law a source of legitimacy for the state and is seen as an instrument to convey the claims of the oppressed.

2. Legal Discourse Across Disciplines

Legal norms are expressed in words. Words must be capable of expressing law in a clear and understandable manner using different disciplines. Combining generalization and precision is one of the most serious challenges in law. Law refers to the diversity of former and actual social and professional practices. Words should be used to guide lay people as well as professionals with a sufficient degree of clarity. The language of the law has the capacity of creating, innovating, and distilling new ideas into a word. This capacity of distilling new meanings into former words and/or of creating new ones is crucial. The practical usefulness in the creation and application of law address the fundamental role of language in law and in the society. Law is embodied in language and thus language is the instrument and foundation of law.

Legal language is in constant interaction with general language usage. Influences are mutual. Law serves as one of the essential references for the explanation of words. Law is the result of creativity and has at its foundation human skills that have developed in the course of history. Likewise, it reflects and consolidates as well as forms and transforms—directly and indirectly—value perceptions that exist in the society and are historically changing (Gény 1922; Wagner 2005). Yet, scholarship has acknowledged that constructing the meaning of legal language is not alone subject to many societal mutations as legal language itself can be slippery, fluid, and highly unpredictable (Solan 1993; Nerhot 1993; Tiersma 2000).

2.1. Legal Language – A Language of Class

The language of the law should be understood by anybody, from a specialist to a lay man, and avoid what Francis Bacon (in Mellinkoff 1963: 140) explained in his statement: ‘The peculiar language of our law […] a language wherein a man shall not be enticed to hunt after words, but matter.’

This is the natural conclusion from the fundamental presumption of law in the West that every person knows the law. Hence the legal principle, ‘Ignorance of the law is no excuse’. This in turn presupposes that the law is intelligible to every person; in other words, the law is written in a language comprehensible to every person, lay people and legal professionals alike. For a detailed discussion of the issues relating to this principle, see Morrison (1989).
Indeed, the plural reality, which forms part of the silent dimension of the legal language, can be better understood with Sherry’s (1996: 134) reflection: ‘The globalization of culture means that we all live in ‘translated’ worlds, that the spaces of knowledge we inhabit assemble ideas and styles of multiple origins, as transnational communications and frequent migrations make every culture site a crossroads and a meeting place.’

Consequently, the explicit linguistics (Goodrich 1990: 115) or linguistics of practice (Vogel 1997) is a meeting place (Mounin 1963: 3), a place of interference (Weinrich 1953: 33) and a mode of cultural production (Wagner 1999): It is ‘‘a transnational culture’ as part of the processes by which ‘newness enters the world’’ (Bhabha 1994: 212).

Likewise, legal language is considered a mere technicality, which is quite similar to a language of class. Indeed the legal technician uses terms, which ideally fit into the context he studies and draws a distinction between their different interpretations. He adds a procedure and/or a gradation with the terms he uses. He refers to a language for specific purposes in which behind each technical noun, a legal concept, a procedure, a (several) legislative or jurisprudential reference(s) can be found.

As Hungerford-Welch (1999: 123–124) explained, ‘words are very important to lawyers: they are the tools of our trade’. Consequently, guides have been written in order to express himself/herself or write with technical precision and accuracy (Conley 1998; Greene 1991). But does this mean that the legal discourse becomes more accessible to intelligent lay people? They simply provide a potential framework with which experienced people and law students have to comply in order to use the same standards in pleading and/or writing legal documents.

Given the causative link between law and technicality, we can talk about a language of class where lawyers and judges not only hunt after words but also after matter. From the lawyers’ viewpoints, such a terminology justifiably ‘increases the expense of lawyers who have to explain it to clients’ (Harrison 1999: 1491). Thus, this specific language uses specified meanings, which mainly affects legal writing and clearly shows ‘jargon of the worst sort’ (Harrison 1999: 1491).

2.2. Textual Culture of Law

Sir Francis Bacon explained the multi-cultural origins of these Laws of England through an analysis of the deep and complex English historical elaboration:

*It is true, they are mixt as our language, compounded of British, Roman, Saxon, Danish, Norman Customs. And as our language is so much the richer, so the laws are the more complete.* (Mellinkoff 1963: 158)

This quotation shows how close the link is between the development of English law and the various conquests on the English territory. Indeed within the English legal discourse, there remain visible vestiges of this past. The study of the historical circumstances therefore demonstrates how the discourse has evolved and enhanced itself over the centuries:

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3 It must be noted here that the technicality of legal language does not and should not turn the law into a discipline, like physics or medicine, comprehensible only to experts. As noted above, the language of the law should be understood by every person. Thus, the technical meaning of “promise” in law, for example, renders “promise” incomprehensible to lay people who understand what “promise” means in ordinary language. For a detailed discussion of whether legal language is a technical language, see Morrison (1989).
Scandinavian words were borrowed most freely between the ninth century and the twelfth, French words during the twelfth, thirteenth, and fourteenth centuries, but Latin words have been making their way into English, throughout almost the whole period of its history. (Serjeantson 1968: 9)

Moreover, when contemplating the legal circumstances of legal discourse development, Goodrich’s reflection (1990: 115) seems elemental:

To know the law is not to know the words of the law, but the force and property of the words. The textual culture of law, indeed, brings with it an explicit linguistics, a linguistics of fidelity to sources, to originals, to supposed first usages and all that those usages implied.

Consequently, a faithful analysis needs to be carried out by the discerning reader in order to fully understand the specific backgrounds of words within a specified context. This fragility in comprehension is all the more critical when people are confronted with cultural, legal or historical dimensions which they have not really fully mastered. So we need to invest in terminology, ‘for it is worthwhile if it is validated and informed homogeneously’ (Lebreton 1994: 87).

The language of the law is and always will be evolving in accordance with politics, social behaviours and historical circumstances. That is why we can say that each period of time contributed and continues to contribute to the construction of English legal architecture, leading to semantic variances. Owing to Peter Tiersma (1999: 1):

Our law is a law of words. Although there are several major sources of law in the Anglo-American tradition, all consist of words. Morality or custom may be embedded in human behavior, but law, virtually by definition, comes into being through language. Thus, the legal profession focuses intensely on the words that constitute the law, whether in the form of statutes, regulations or judicial opinions.

The more complex the culture, the more important the institutional body, and the more complex the language used to codify it. As previously mentioned, the features of the language of the law derive not only from the legal institution itself but also from history, from social functions, actors, goals of the law and eventually linguistic usage. If law has to be simultaneously fixed and flexible (Wagner 2002), several communicational and institutional strategies are necessary in order to organise the linguistic means to enhance its understanding within the sociolinguistic community.

2.3. Hidden Dimension

Legal words have a peculiar tenacity with an ability to achieve stability within changing social and economic conditions (Gény 1922: 42). However, the illusion is of conservatism, rigidity, and uniformity for the social structure penetrates into the architecture of the English language of the law (Carbonnier 1978). This is the reason why every past and present society has had its own knowledge of words, and many have created or influenced words in order to reflect their particular standards and expectations (Hobbes 1971: 35). The French lawyer Gény (1922: 149) considers that law has its own “living reality” which is highly dependent upon a context.

Consequently, the English legal discourse reveals a complex network of interactions between the individual and his environment. Furthermore, there comes a linguistic insecurity
as soon as someone is analyzing a former cultural notion. So, the legal discourse has to be construed within a specific period of time. The interpreter is then confronted with a web closely woven around production (Schauer 1992: 500–501; Aitchison 1991: 89–101), which Eco (1976: 86) describes as a multi-levelled maze, representing any legal situation. Historical knowledge can be gained only by seeing the past in its continuity with the present—which is exactly what the jurist does in his practical, normative work of ‘ensuring the unbroken continuance of law and preserving the tradition of the legal idea’ (Gadamer 1989: 327). Wittgenstein (1968: §129) reminds us:

The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something -- because it is always before one’s eyes.) The real foundations of his inquiry do not strike a man at all. Unless that fact has at some time struck him. -- And this means: we fail to be struck by what, once seen, is most striking and most powerful.

The legal language is, then, a complex and interesting melting pot of intrinsic and extrinsic influences, coming from cultural practices evolving within space-time and stamped with modernity. Wherever one turns, individuals have maintained a written and hidden proof of this inheritance. It is only possible to decipher the language through an analysis of the historical and the silent dimensions. Indeed, Hall (1984: 35) has introduced the concept of silent language:

Culture acts directly and profoundly upon behaviours, and the mechanisms, which link them, are often untold and located far beyond the voluntary control of an individual.

Given this criterion, lay individuals are in a state of perplexity because the language of the law has developed without taking into account everybody’s personal background. And so, there is a clear-cut knock-on effect between non-practicing people and practitioners.

Let us examine the concept of dwelling house in various Acts. We can notice a shift in its definition. In compliance with the Burial Act 1854, s.9 a vault ‘means the building, so that the hundred yards therein mentioned have to be measured from the walls of the dwelling-house itself’; under the Public Health Act 1936, s.43 a dwelling-house could ‘either be private or not’; under the Housing Act 1957, s.189 ‘it includes any yard, garden, outhouses and appurtenances’; under the Rent Act 1968, s.1 ‘a dwelling-house means a house let as a separate dwelling or a part of a house being a part so let’.

Complainant is another example illustrating this trend. Indeed, under the Sexual Offences (Amendment) Act 1976, s.3 it means ‘a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed’. In other fields it simply means ‘one who makes a complaint to the justices’ (Burke 1977).

Even the simplest common word—night—can lead to semantic variances in legal documents and misunderstandings from a layperson’s viewpoint. Under the Night Poaching Act 1828, s.12 it is stated that ‘the night shall be considered and is hereby declared to commence at the expiration of the first hour of sunset, and to conclude at the beginning of the last hour before sunrise’; under the Customs and Excise Management Act 1979, s.1 ‘night means the period between 11 p.m. and 5 a.m.’; under the Highways Act 1980, s.329 (1) it ‘means the time between half an hour after sunset and half an hour before sunrise’.

Legal language roots meanings of words in relative stability—in a legal text. It strives for precision in language usage and in the context of the general polysemy of words it performs the tasks of explaining meanings of words. Although in law, the explanation of words is also part of the legal regulation that is endowed with the same legal force as any other part in the
specific legal text, the binding character of language in law is nonetheless still indirect in the sense that its usage is not a general requirement for human communication in daily life. It becomes binding in situations that should be resolved in legal terms when it is applied as an instrument to specific reality.

Words have the meanings they have in a language because of their relations to other words, because of their contrasts and affinities, and because of the dense historical and social vocabulary they help to constitute and to which they belong. But they also have the meanings they have because of their relations to contexts of possible action and social practice. At the same time, the meaning of these actions and practices themselves depend upon the availability of a certain vocabulary of concepts and ideas. (Warnke 1992: 17)

Likewise, if we consider the European perspective, legal communication is even more complex and needs to find out equivalences in meaning. Monjean-Decaudin (2010: 700) refers to the inevitable ‘équivalence uniformisante’ in the EU Legal order. MacAuliffe (2009: 107) points out that

EU law is a legal system built from approximations of law and language from different legal cultures and different legal languages, which come together to form a new supranational legal system with its own language.

Legal language is a specific legal genre and its peculiarities include force, sanctions and status. Legal language is a prominent testimony of legal history, a source of the study of the society and culture which, alongside the message about a legal order that has existed or exists, includes indications how things, phenomena, processes are designated by words, what terms have been used in the creativity of law, in the practice of applying law, and in the doctrine of law:

Les mots sont intelligibles seulement si l’on admet l’hypothèse d’un contexte de production de l’intention, d’une pré-décision déjà en place de la part de la personne qui est en train de parler ou d’écrire [. . .] les sens ne sont pas enfouis dans les mots mais surgissent et deviennent clairs à la lumière des conditions de fond et d’intelligibilité qui les entourent. (Fish 1989: 150)

3. Cultural Transfer of Concepts

Law is a social phenomenon having multiple (or comprehensive) philosophical, theoretical and historical roots. Meanings in law have cultural nuances according to the systems of lifestyle, values, traditions, and collective memory that are being examined. Law conveys testimony of the past but also an ongoing social process that could be adjusted within space and time. Likewise, law reflects human values, practices, and aspirations of changes as its boundaries are flexible and in constant evolution. As expressed by Cao (2007: 23), ‘law and legal language are system-bound, that is, they reflect the history, evolution and culture of a legal system’. The concepts of a particular legal system, however, are not language-dependent. That is to say, they can be transferred from one language to another when carried out within a semiotic framework that facilitates the bridging of conceptual gaps between terms in the source language and their counterparts in the target language (Sin 2002).
It therefore seems logical to make prospective translators “fit” for a wide range of technical producing activities, providing them not only with a solid text-based competence, but also with a solid societal knowledge of both the source and target languages (Gémar 1992; Wagner and Gémar 2013: 738–739).

Concepts are part of the social phenomenon as they are units of meaning that can vary in their finality. Concepts serve as instruments for thinking and communication and allow expressing human thoughts, conclusions and suppositions in the source language. Consequently, the transfer process is not easy and translators have to distill a reasonable knowledge of the source language in the target language. Sin (1998: 136–137) points out:

“All large-scale cultural transfers begin in the absence of a readily usable language. The first, and most natural, response of the native culture is to make an attempt to naturalize the foreign culture. Where it has a close affinity to the native culture, naturalization or minor adjustment may be adequate. But where it is one of great complexity, or radically different, the native culture will find it necessary at some point to change and adjust its language so as to make it [suitable for effecting such transfer].

Cultural transfer, migration, or translatability is a priority and legal translators will have to fill the conceptual gap in the target language:

Translatability aims at comprehension, whereas encounters between cultures or interactions between levels of culture involve either assimilation or appropriation by making inroads into one another, trying to get out of a different culture or the different intra-cultural levels that seem attractive, useful, or is combated and suppressed for whatever reasons. (Iser 1994: 6)

Provided below are two examples of concepts and the way legal translators should fix the semantic source, adjust it for the target language and if necessary build metalinguistic devices to fill the conceptual gap for the target language:

[. . .] translators are aware of the decisive part they have always played, without leaving the shadows themselves, to enable others to overcome the barriers of language and culture by way of the translators’ skills as writers. (Correia 2003: 40)

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, specifically in the field of marital property law. [. . .] There is no absolute equivalence [. . .]. (De Groot 2006: 424)

There is no absolute equivalence but a textual adjustment. It creates a living notion (Gény 1922) where:

concepts are more like chess pieces. They can be maneuvered to produce certain results but the players have a choice as to the move. Similarly, lawyers and judges often have a choice as to how they will move the concepts. (Farrar and Dugdale 1990: 78)
Marriage is one of the most anchored concepts related to culture, society, and religion. It is considered as a cultural and Christian heritage. It is part of “cultural heritage”, highlighting a distinction on the criterion of the composition of a couple. The assessment of the novelty “marriage” requires the identification of the concept, a sequential analysis of its development, and the cultural experience this word has in French language.

Marriage comes from the verb marry, which meant, in the 12th century, ‘to bind women to men, and thus guarantee that a man’s children were truly his biological heirs. Through marriage, a woman became a man’s property’. “Marry” derives from the Latin maritus (husband). From a traditional etymology, maritus meant “male”, but Alain Rey (editor of the dictionary Petit Robert) traces this word back to an Indo-European root, in Sanskrit marya (young man in love) and from the Greek meirax. Besides, Benoit De Boysson (2011) indicated that the term mariage comes not only etymologically from maritare (which means “male”) but also from matrimonium, which means, in Latin, “marriage”, and comes from mater, the mother. Etymologically, De Boysson (2011) concludes, ‘marriage is a legal form by which a woman is preparing herself to become a mother by marrying a man’. Religion became involved in the institution of marriage when at the Council of Trent in 1563, the sacramental nature of marriage was written into canon law. However, same-sex couple marriage in history is rare, but known. The Roman emperor Nero, who ruled from AD 54 to 68, twice married men in formal wedding ceremonies, and forced the Imperial Court to treat them as his wives. In second and third century in Rome, homosexual weddings became common (Yalon 2002). Romans outlawed formal homosexual unions in the AD 342. But John Boswell’s (1995: 199–217) research found evidence of homosexual unions after that period, including some that were recognized by Catholic and Greek Orthodox churches.

The history of the development of French national law in the area of conceptualization of family and marriage has evolved significantly. Modern cultural evolutions introduced the concept of “Civil Partnership” both for heterosexual and same-sex couple in the middle of the 20th century. With the introduction of civil partnerships, boundaries were reconsidered in terms of family concept where significant developments were experienced to comply with Human Rights frameworks encompassing the notion of family. They focused, mostly on the individual rights of man to participate, to create their own cultural identity, and have a family irrespective of their sexual orientation insofar as it did not infringe upon human rights of other individuals; however they could not enjoy the same rights as heterosexual couples in terms of parentage and inheritance.

The most recent evolution of the concept of marriage dates from November 2012, when the French government decided to vote a bill “mariage pour tous”—marriage for everybody irrespective of their sex. This text relies on the principle of equality before the law and permits same-sex couple to marry and enjoy the same rights and duties as heterosexual couples. This bill was passed and changes were made in the French civil code to replace the words “father and mother” with “parents”, and “husband and wife” with “spouses” (Art. 4 of the French civil code).

An evolution of the concept of marriage also occurred in Hong Kong, a common law jurisdiction, when the Court of Final Appeal decided in 2013 (FACV No. 4 of 2012 on appeal from CACV No. 266 of 2010) that a post-operative male-to-female transsexual person who had undergone sex reassignment surgery (SRS) at hospitals be allowed to marry her male partner. Previously, she was refused to do so by the Registrar of Marriages on the ground that she did not qualify as a “woman” under Hong Kong’s marriage law which solely adopted the biological criteria for assessing the sex of a person for the purposes of marriage as ‘procreative intercourse was an essential constituent of a marriage at common law’ (Corbett v. Corbett). Three points are worth noting in the decision of the Court of Final Appeal. First, as the right to marry is protected by the Basic Law of Hong Kong and the Hong Kong Bill of Rights, it must
not be taken away by any marriage law. Second, the nature of marriage has undergone drastic changes in Hong Kong, so much so that procreation is no longer regarded as an essential constituent of marriage. Third, the biological status of a person’s sex should not be fixed at birth and regarded as immutable. To put it in a nutshell, the decision has given new meaning to the common law concept of marriage and modified the conventional concept of sex as something inborn and immutable. Yet, unlike the latest French concept, marriage under Hong Kong laws remains marriage of opposite sexes. The two concepts, though close, are not equivalent.

Accordingly, legal language is bound to culture. In terms of translation, the translation of the concept “marriage”, and for that matter, the concepts of sex (male, female, man, woman), might seem straightforward, but in terms of cultural transfer and in reference to the Christian or common law history, ‘there cannot be equivalence of meaning between the law-in-translation and the original law’ (Legrand 2005: 30). Translators will use a semi-equivalent in terms of linguistic word, but will not be in the capacity of ‘translatability’ the full load of the concept into the target language, which can only be achieved through meta-translational devices (Sin 2013). The same idea was further developed (see Cheng and Sin 2008; Cheng, Sin and Cheng 2014), now labelled “the semiotic approach”. They reiterated the simple truisms that a sign has no inherent meaning, that its meaning is given by the sign user, which can only be understood with reference to a particular sign system, and that meaning equivalence between different signs is established by certain linguistic devices at a meta-linguistic level (Cheng and Sin 2008: 33–45). Moreover, the choice of equivalence is not merely a linguistic and translational decision but a sociosemiotic and cultural mediation (Cheng, Sin and Cheng 2014; Wagner and Gémar 2013).

4. Conclusion

Translation is often seen as a mere process of transferring the source language to the target language. However, jurilinguistics is a more globalized transfer, which ‘brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact. It also influences what legal professionals want and need to know about foreign law, how they transfer, acquire and process information, and how decisions are made’ (Gerber 2001: 950).

In this regard, the migration from one language to another is essential as it deals with the intrinsic value of the concept under consideration. This “migration”, “transfer”, “translatability”, or “transplant” for others is a conscious adaptation process of the concept in the target language. There are recognized patterns of weakness in this process, as legal translators cannot consider only the social rule of the source language, but need also to consider its equivalence, semi-equivalence, or non-equivalence in the target language. Cultural transfer is a key element in legal language because ‘the relationship between the inscribed words that constitutes the rule in its bare propositional form and the idea to which they are connected is largely arbitrary in the sense that it is culturally determined’ (Legrand 2005: 36).

If no equivalence exists in the target language, the role of the legal translator becomes even more crucial. He will have to adapt the target language to make room for the source concept. Therefore a more comprehensive research agenda in the translation process will have to be established based on two criteria:

1. In the light of different legal cultures, research should be carried out regarding the way the concept has been transplanted in the target language. In terms of migration process, transfer process or adjustment process, accounts will be based on social and technical circumstances prevalent in each country’s legal culture and legal system.
2. In the light of the fertilization of this translatability, with notions of power and prestige that have incubated in their new environment (the target language) should also be investigated. Sacco (1999: 398) rightly pointed out that ‘every culture that has faith in itself tends to spread its own institutions. Anyone with the power to do so tends to impose his own upon others [. . .]. The desire arises because this work has a quality one can only describe as prestige’.

References

Muller, I. 1901. Hitler’s Justice, the Courts of the Third Reich. Cambridge, Mass.: Harvard University Press.


