Legal Translation

Author Bio

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Introduction

Legal translation theory brooks little interference with the source legal text. With few exceptions (Joseph 2005; Hammel 2008; Harvey 2002; Kahaner 2005; Kasirer 2001; Lawson 2006), lawyers and linguists tend to tether themselves to the pole of literalism. More a tight elastic band than an unyielding rope, this tether constrains — rather than prohibits — liberal legal translations. It can stretch to accommodate a degree of freedom by the legal translator however, should it go too far, it snaps back to the default position of linguistic fidelity. This 'stretch and snap' gives legal translation a unique place in general translation theory. In the general debate over the 'degree of freedom' the translator enjoys in conveying the meaning of the text, legal translation theory has reached its own settlement. Passivity is the default; creativity, the 'qualified' exception (Hammel 2008: 275).

So how far does legal translation theory stretch to accept liberal translation before snapping to strict linguistic fidelity? This theoretical elasticity should not be under- or over-stated. On the one hand, not all — or even most — translation theorists and practitioners explicitly advocate devotion to the letter of the law. Indeed, advances in general translation theory — such as those advocating communicative over semantic translation (Newmark 1981), dynamic over formal equivalence (Nida 1964) and covert rather than overt translation (Snell-Hornby 1988) — has made an impact in some fields of legal translation practice (eg, Kashiwagi 2007). Some theorists even suggest that '[l]ike other areas of translation, legal translation is (or ought to be) receiver oriented' (Sarcevic 2000: 329). This means that legal texts may be 'adapted' to achieve comprehensibility for the intended specialist audience (Stolze 2001: 302; Chroma 2002: 202). On the other hand, the claim that legal translation has been 'brought into line with other forms of translation' (Harvey 2002: 181) goes too far. The trend in the literature is that the range of translation creativity must be kept to a 'permissible' (Hammel 2008: 275) or 'relevant' (Hjort-

Pedersen 1996) minimum. This dynamic is neatly encapsulated in the title to Sarcevic's 1998 essay: 'Creativity in Legal Translation: How Much is Too Much?' Poon (2006: 316) provides the typical answer: 'Although today it is more liberal in style, the first consideration in legal translation is still fidelity to the original text.'

It might be tempting to attribute this general reluctance to embrace a creative role for the legal translator to a pervasive conservatism in law and the legal profession. Even if such a crude description of the legal system were fair — and, I would suggest, it is not — politics plays no part in this theoretical position. Paradoxically, *both* conservative *and* radical theorists criticise the impulse to achieve 'natural' legal translations. For both, a receiver-oriented, readable translation necessitates an unacceptable interference with the source text language or structure. For conservatives, this is because the language of the legal text is sacred. Legal translators accept that lawyers behold the source text with a 'trembling reverence' (Kasirer 2001: 332). Legal meaning is discoverable from the choice of words and their arrangement in the text. Legal translators, therefore, 'have to stay close to the source text by representing the exact or near exact meaning in [their] translation' (Hjort-Pedersen & Faber 2001: 379). For radicals, the problem with readable translations is that they constitute an unethical manipulation of the structure of the text (Berman 2005), inscribing in the process the 'values, beliefs and representations linked to historical moments and social positions in the receiving culture' (Venuti 1995: 204). A faithful translation should not efface the guest language (Legrand 2005: 38); it should forcefully convey the underlying language mechanisms and discursive structures of the text (Lewis 2004: 262). 'A translation must not aim to look so 'natural' within the host language as no longer to appear like a translation. Otherwise, it denies the entitlement of alterity to exist as alterity and, ultimately, refuses to grant it hospitality' (Legrand 2005: 38).

This chapter seeks to explore the descriptive and normative dimensions of the 'strech and snap' phenomena in legal translation theory. It argues that legal translation theory misconceives both the 'legal' and 'translation' aspects to the legal translation enterprise. On the 'translation' side, theorists overly emphasise the utilitarian rationale for legal translation as well as hyperbolise the distinctiveness of legal language which, they assert, sets legal translation apart from other forms of translation. On the legal aside, legal translation theorists are too heavily in the thrall to the positivist and Eurocentric trappings of comparative law. Positivism insists that all legal meaning stems from a strict and a-contextual reading of the letter of the law; European-based comparative law believes in the functional equivalence and convergent possibility of legal ideas across systems and cultures (Taylor 1997).

The cumulative effect of all this is to fixate on *text*-oriented *meaning*: the phraseology, the 'discoverable' propositional content or the underlying values of the legal text. It ignores, however, the *contextual meaningfulness* of the text as a whole. A legal text, after all, is not dead letter. Although ripped from its institutional, political, social and economic context, a legal text is a living and breathing embodiment of a legal culture (Legrand 2005: 32). A wilful blindness to its socio-legal significance is to miss an essential component of the legal translation endeavour. Legal translation theory, in short, needs to break free of its 'stretch and snap' limitations. A liberal translation that respects the text's contextual foundations should become the new norm.

This chapter divides into four parts. Part One examines the rationale for legal translation. This part identifies the utilitarian emphasis translation theorists use in justifying the importance of legal translation and the skewing effect this has on theory-building. Part Two explores the definitional scope and linguistic properties of legal texts. This part highlights how theorists adopt an overly restrictive view of legal text types and exaggerate the uniqueness of their linguistic properties. This permits theorists to claim — wrongly — that legal translation has a 'special status' that places it outside the purview of general translation theory (Garzone 2000:

395). Part Three then analyses the underlying doctrinal approaches to legal translation. This part demonstrates the 'stretch and snap' theme within the legal translation theory; that is, the limited range of departure from a literal rendering of textual language or linguistic structures. This part explains how traditional comparative law — with its positivist, Eurocentric and functionalist accouterments — has constrained translation theorists from embracing a more liberal translation approach. The chapter concludes with a call for natural legal translations that better respect the socio-legal significance of the text rather than the 'dead letter' of the law.

1. Rationale: Why does legal translation matter?

The language of law is no longer spoken with a single tongue. Globalisation and advances in information technology are collapsing economic, cultural, political — and, therefore, juridical — boundaries. Markets are globally integrated. Political issues — whether they concern terrorism, climate change or human rights — increasingly require international collaboration. People study, work, travel and communicate with one another outside of their immediate communities and nation-states. Law has not been untouched by these developments.

Globalisation has been most dramatic in redrawing the economic map. World trade has created increasingly interdependent national economies as well as new regional and world markets. The rapid economic growth of the People's Republic of China, for example, has brought additional investment and trading opportunities for a number of different countries — Australia, for example, has benefitted from its insatiable demand for natural resources — as well as concern from other powerful economies (such as the United States and Japan) about the implications of its new-found economic power. As the global financial crisis of 2007-2009 has dramatically revealed, nation-states are enmeshed in financial networks. Commercial practices are adapting. Informal bargaining and contracting at the community level are giving way to cross-national contracts, foreign and multinational corporate vehicles, international joint venture agreements, export licensing and other forms of foreign investment.

Politics, too, now has international reach. The United Nations draws on the cooperation and participation of member states to solve world problems and settle international disputes. Non-Government Organisations (NGOs), such as Greenpeace and Doctors without Borders, are international in their advocacy and scope of activities. Terrorism and military networks are borderless (Berman 2005: 1).

Daily life has also been transformed. Waves of migration have transformed nation-states, and especially its urban centres, into 'global sites with multiplicities of languages and culture' (Berman 2005: 1). Vast diasporas exist outside the nation-state. Tourism is fostering new cross-cultural encounters. More people are working or studying outside of their country of birth. The spread of the internet means information is readily available instantaneously *from* anywhere in the world *about* anywhere in the world. Social networking media, online shopping services and multimedia sharing platforms allow individuals to stay in contact with relatives and friends, purchase goods and services, and consume entertainment unhindered by geographical location. As Ilan Stavans observes, modernity is not lived through nationality but 'translationality' (quoted in Sokol 2002: 554).

The globalisation of economics, politics and citizenship finds expression in law. International law, for example, is burgeoning. The United Nations, for example, has a depository of over 500 major multilateral instruments covering topics as wide and diverse as human rights, commodities regulation, disarmament, refugees and the environment (see

www.treaties.un.org). The World Trade Organization enforces the international order for free trade in goods and services and settles trade disputes. The World Bank oversees development assistance programs to over 100 developing countries. Regional law is also of growing significance. The European Union is the advanced example, with the European Parliament empowered to make laws that bind all its Member States. These laws must be translated into one of more than 20 official languages (Cao, 2007b: 2; Correia 2003: 40; Wilson 2003: 2). Looser regional groupings such as the North America Free Trade Agreement, the United Arab Emirates and the Asia Pacific Economic Cooperation similarly provide for transnational agreement and regulation. Comparative law, too, is mattering more. Developing countries are borrowing legal ideas from other jurisdictions to solve specific problems or to modernize their economic and political institutions (Legrand 2005: 30; Wong 2006). Mature economies such as China and Japan are making their corporate, commercial and financial laws available in English to attract foreign investors (Cao 2007b: 2-3; Kashiwagi 2007). The appetite for law is now transnational.

Even within national boundaries, migration and colonisation have created multi-lingual and even multi-juridical legal systems. Canada and Switzerland, for instance, both require multi-lingual drafting and translation of laws to make them accessible to different language groups (Cao, 2007b: 2; Sarcevic 1998). Hong Kong routinely makes available its laws in both English and Chinese since sovereignty reverted to the People Republic's of China (Cao 2007b: 2). Malaysia, too, issues it laws in English — despite the Constitution declaring Bahasa Malaysia as the official language — because of its inherited legal tradition from the United Kingdom. (Bidin 1995). More generally, global citizenship is creating demand for equal language rights and universal access to legal and regulatory information. All this has attracted greater attention to the theory and practice of law (Garzone 2000).

As the influence of law seeps beyond language groups and national borders, a markedly utilitarian rationale for legal translation emerges from the literature. Legal translation is a pressing practical need. '[M]ediating legal information from one national legal system and language as precisely and fully as possible,' as Chroma (2004: 197) argues, has turned out to become of ultimate importance in our global world.' 'There has never been a time,' adds Berman (2005: 1), "when issues of nation, language and translation have been more important … than they are today.' Law without translation, concludes Cao (2007b: 2) has become 'inconceivable'.

This utilitarianism has had a skewing effect on legal translation theory. If the imperative to translate law is due to its wider power to determine people's rights and livelihoods (Harvey 2002: 179; Joseph 1995: 17), a moral panic about how to do so 'faithfully' and 'correctly' is a predictable impulse. As later sections will demonstrate, this leads to a doctrinaire approach to legal translation that relies on a close reading of the legal text — whether its linguistic elements, discursive properties or structural features — rather than a holistic analysis of the text's place in the legal system and culture. A better view is to locate a more *humanistic* rationale for legal translation: the power of legal translation to instruct, inspire, foster respect for and promote informed debate about diverse normative and regulatory regimes. Translation, after all, is essential to the 'living on' of texts and the 'continued flourishing of national and translational cultures' (Berman 2005: 6). To achieve this broader vision, legal translators cannot be anchored to a-contextual readings of legal texts.

2. Definition and scope: What constitutes a legal text?

So what constitutes a legal text according to legal translation theory? No one offers a comprehensive definition. Instead, theorists rely on two definitional shortcuts. The first is to catalogue a non-exhaustive list of 'prototypical' legal texts (Cao 2007b); the other is to determine the extent to which a text has a legal 'function' or 'setting' (Enberg 2002: 375). Although neither definitional strategy is intrinsically problematic, theorists tend to caricaturise the legal dimensions to a text's language or purpose and, as a result, deduce that legal translation is a 'special' category which falls outside the purview of general translation theory (Cao 2007b: 7; Garzone 2000: 395; Harvey 2002: 177). In the 'stretch and snap' trend in legal translation theory, the cousin to utilitarianism in rationale is stereotype in definition.

Legal texts are myriad. They include authoritative statements of rights and duties, such as treaties and conventions (at the international level), constitutions, codes, statutes and regulations (at the national level), and circulars, administrative guidelines and delegated rules (at the sub-national and community level); documents used in or produced by formal dispute resolution processes, such as judicial opinions, pleadings, witness statements and affidavits; binding expressions of intent or agreement, such as contracts, wills and corporate articles of association; persuasive texts such as legal textbooks and other academic legal writing, law reform submissions, letters of advice and policy reports; and administrative forms such as tax filings, business registrations, licensing permits and citizenship applications. This is just a select sample. Even so, as this list suggests, legal texts have diverse purposes and impacts: prescriptive or informational; descriptive or persuasive; abstract or concrete; generally applicable or individually specific; binding or advisory; even formal or informal (Cao, 2007b: 8-11). Some legal texts are complex and demanding (tax legislation, for example); others are straightforward and direct (such as residential lease agreements).

Despite this variety, legal translation theorists make some 'bold claims' about legal texts and their 'special' nature and effect (Harvey 2002: 177). For example, as Garzone (2000: 395) argues, theorists point to a 'distinctive quality of the language of the law which marks it off from *ordinary* language and makes it a case apart even in the field of special language.' Legal language is archaic, complex, formulaic and obscure. Legal writing is subject to strict stylistic conventions in register and diction; contains stock phrases that are uncommon in general text practice; and is invariably intricate, verbose and pompous (Cao 2007b: 20-23). Sentence constructions are lengthy, abstract and complex, with embedded clauses, high level of hypotaxis and frequent resort to left-branching subordinate clauses (Garzone 2000; Stolze 2001: 305-7). Language patterns are 'frozen' with 'little or no variation in form' (Baker 1992: 63). The consequence of all this that, in a sliding scale of difficulty, legal translation is near the end-point of difficulty in translation practice (Harvey 2002: 177).

Other theorists focus less on legal language and more on legal impact or purpose in their definition of legal texts. For Enberg (2002: 375), a text is legal if it serves a legal purpose or functions in a legal setting: 'The most important consequence of this definition lies in the fact that not only prototypical legal texts like statutes and contracts, but also restaurant bills and other texts to be used as evidence, for example in a court case, might be subject to legal translation in this view.' For Sarcevic (1997: 9), a legal text operates as a 'special-purpose communication between specialists.' In both views, a legal text is epistemologically and culturally bound to its legal system (Gotti 2004: 10-11; Kahaner 2005; Sarcevic 2000: 13). The purpose of legal translation, therefore, is to create a text that will be *interpreted* in the same way by legal professionals in the target legal system as it would in the original legal system (Chroma 2004; Harvey 2002: 180-1; Jamieson 1996; Sarcevic 1989: 278; Sarcevic 2000: 332). This more functional definitional strategy assumes a limited discursive community that deals with legal texts (typically, lawyers and judges) and a litigation-centric view of the legal system.

Even if categories of translation are not a 'polarised dichotomy but a spectrum that admits blending and overlapping, the heightened 'quality and intensity' of legal translation suggests it occupies a privileged place outside of general translation practice (Cao 2007b: 8). So much is evident from the above definitions in the legal translation literature that stress the distinctive language and unique effects of legal texts. Yet these definitional claims demand critical scrutiny.

First, little empirical evidence is offered that legal text types are as convoluted and inaccessible as asserted. While arguable true of highly technical legislation (such as tax statutes) or complex court judgments (such as corporate takeover cases), it is an exaggeration to paint this as a universal trend. Indeed, with the advent of online depositories of legal information (Lawson 2007: 188, n2) and greater attention to plain language drafting (Hammel 2008: 275), there is worldwide efforts to improve the public accessibility and comprehensibility of law. Second, there is no reason to believe legal translation is particularly challenging translational activity. As Harvey (2002: 177) puts it, all translation assignments involve a 'combination of old routines and new challenges.' Legal texts are as much system-bound as political, religious, literary and other cultural texts (Harvey 2002: 180). Third, legal texts are not exclusively the preserve of legal specialists or court-based litigation: contracts, for example, record the agreement between parties to the contract; articles of association set out the aims of the company and the relationship between shareholders and the board of directors; wills express the intention of how a deceased's estate should be distributed. These documents are as much informational as prescriptive. And only a fraction ever become subject to formal legal proceedings. Fourth, it is tautological to insist that the legal effect of a text gives it special status (Joseph 1995: 17). Medical texts have medical effects; literary texts have literary effects; legal texts — of course — have legal effects. To be sure, the potential impact of a legal document on people's rights and livelihood create qualitatively different consequences than other forms of translation (Joseph 1995: 17). However, materiality of impact, maintains Harvey (2002: 179), should have no bearing on the essential task of the translator. A literary translation needs to bear in mind artistic flair; a technical translation needs to ensure the operability of a machine; so, too, a legal translation must weigh up the text's legal implications. Yet even then —apart from special cases such as the legal requirement for bilingual legislation in Canada (Sarcevic 1997) — many legal translations are expressly excluded from having operative legal effect (Chroma 2004; Kashiwagi 2007) or, at least, will not do so in the target legal culture (Garzone 2000).

These criticisms weaken the claim of the 'special status' of legal texts and their translation. Legal texts — rather than betraying a unique legal language or a discernible legal impact — are better understood in cultural terms: documents that express the regulatory values of a legal system. As Lawson (2007: 187) observes, legal texts are maps of the city of the law. Any translation that fixates on linguistic fidelity or conceptual equivalence, denying a creative role for the legal translator to preserve the expressive integrity of the legal text as a whole, misses the overarching point of legal translation.

3. Doctrine and method: How to translate legal texts?

Yet the 'stretch and snap' dynamic in legal translation theory constrains such expressive freedom.

(a) Doctrine of textual fidelity

The starting point in legal translation is fidelity to the letter of the law. As Sarcevic (1997: 16) observes:

> Legal translators have traditionally been bound by the principle of fidelity. Convinced that the main goal of translation is to reproduce the content of the source text as accurately as possible, both lawyers and linguists agreed that legal texts had to be translated literally. For the sake of preserving the letter of the law, the main guideline for legal translation was fidelity to the source text.

In extreme cases, legal translation theorists and practitioners insist on a 'strict, literal' legal translation (Sarcevic 1997: 24). This view dates back to the days of the Roman Empire which decreed formal correspondence between source and target texts to preserve the meaning of Biblical and legal texts (Sarcevic 1997: 23-48). 'This was underpinned by belief in the magical properties of the *logos*: if the wording was changed, the incantatory force might be lost' (Harvey 2002: 180).

More usually, the call is to stay 'close' to the source text 'by representing the 'exact or near-exact' meaning in the translation (Hjort-Pedersen & Faber 2001: 379) rather engage in a 'literalist transcription' of the source legal text (Kasirer 2001: 340). The UN handbook for translators, for example, stipulates fidelity to the original source as the primary consideration in official translation (Harvey 2002: 181; Sarcevic 1997: 16). Scholars endorse this advice. Drawing on a structural theory of language, Poon (2005: 305-6) argues that translation of Chinese legal texts should fully reflect style and form of the source legal text. She rejects more functional approaches to translation that permit adaptation of the source legal text to achieve equivalent legal effect in the target culture. The courts, writes Poon, should determine legal purport; the translator should stay true to the underlying legal form. Beyer and Conradsen (1995: 164), in their practical guide to the translation of Japanese legal materials, instruct translators of Japanese legal documents not to alter sentence length. This is even though Japanese, as an agglutinative language, can sustain long, complex sentences which, in English, would strain comprehension. The reason, they argue, is to avoid imposing Westernised, common law interpretation on Japanese civil law texts.

Some theorists call for an even greater stretch from literalism. For Grutt (1991: 19), the decision to orient a legal translation towards the source or target language is not an inflexible directive but a discretionary choice. It is best left to expert intuition. Hjorte-Pedersen (1996) agrees. In an empirical study of Danish and English wills, Hjorte-Pedersen submits that legal translators need not 'play it safe' by adopting a source language oriented strategy and are entitled to invoke principles of natural language communication (1996: 370). However, such a departure is only permissible to the extent that it does 'violate the principles of relevance' (Hjorte-Pederson 1996: 364). Importantly, this test provides little room to move: a departure from adopting a source-oriented context-specific meaning is only allowed if the effort to process it is 'too great'. In a similar vein, Hammel (2008: 275) offers a 'qualified' endorsement of the application of plain legal language principles to improve target language readability and render more 'elegant and useful translations'. These principles may be invoked to achieve a 'permissible' degree of clarification. 'Of course,' he is quick to add, 'the translator must always convey the original's meaning fully and accurately.'

This commitment to literalism — whether a tight clinch or a more open-ended embrace — is consonant with the positivist tradition in law. Legal positivists hold that sacrificing 'precision and meaning at the altar of elegance' is not only a 'liberty' but also 'wrong in law' (Kasirer 2001: 331). Positivism derives from the canon of statutory interpretation which champions the legislature as the ultimate authority over the law and its meaning. Those engaged in legal interpretation — whether lawyers, judges or administrators — are engaged in a process of 'discovery' of meaning rather than its creative interpretation (Kasirer 2001: 332-3). This

positivist instinct has 'encouraged both readers and translators to imagine legal texts as authorial intention carved in stone; accordingly, the reader and translator receive the text in a manner befitting an oracle' (Kasirer 2001: 339). Legal translators, in this view, are reduced to the role of passive mediators of legal information — bilingual typists providing simple linguistic equivalence' (Harvey 2002: 180).

Passivity in legal translation also draws strength from a Eurocentric bias in translation theory. As Wakabayashi (1991) notes, most writing on translation draws on Indo-European languages. This is also true in legal translation where French (eg, Sarcevic 1998), Dutch (eg, Hjort-Pedersen 1996) or a comparative corpus of European languages (eg, Allori 2004) serves as the dataset. Asian languages are rarely considered (cf Beyer & Conraden 1995; Bidin 1995; Kashiwagi 2007; Poon 2005; Lawson 2007; Wong 2006). When they are, the literature is more concerned with highlighting the cultural uniqueness of the Asian legal system (Kitamaura 1993) or the practical complexities of the translation project under review (eg, Wong 2006) than with offering any contribution to or critical reflection on legal translation theory generally.

Positivism and Eurocentrism, however, lend little credibility to legal translation method that defends a careful tracking of the letter of the law. Positivism, for example, is an overly formalist conception of law. It assumes that legal rules have meanings detached from their social, political and economic context; that "law in the books" equates with the "law in action". Socio-legal research has dismissed these assumptions as myths: gaps exist between law and its implementation and formal laws compete — not always successfully – with informal legal regimes (Legrand 2005; Taylor 1997). Eurocentrism is even more problematic. Indo-European languages may be more amenable to formal equivalence since they 'share lexical and morphosyntactic features, with considerable etymological and phonological similarity, [as well as] cultural backgrounds' (Wakabayashi 1991: 415). However, where languages are linguistically and culturally unrelated — such as English and Japanese — it is largely impossible to render exact or near-exact translations without undermining comprehension (Tahara 2001; Wakabayashi 1991, 1992).

(b) Doctrine of equivalent effects

Another group of legal translation theorists — aware of the dangers of word-for-word legal translation yet still conscious of the authoritative command of legal texts — propose a more functional approach to legal translation. Led by Sarcevic (1985, 1989, 1997, 1998) and drawing on more liberal translation theory that recognizes communicative or covert translation (Nida 1964; Nida & Taber 1969; Newmark 1981; Snell-Hornby 1988), these theorists measure the success of a legal translation by equivalence of legal effects − rather than formal textual correspondence — in the source and target legal cultures (Harvey 2002: 180-1). Legal translators can adjust phrasing. They can change sentence length and structure. They can re-order paragraphs. They can even complement the text with additional facts to aid in comprehensibility (Chroma 2004: 202; Stolze 2001: 302). 'When selecting a translation strategy for legal texts,' writes Sarcevic (2000: 332), legal considerations must prevail.' The functional equivalence lies not in the linguistic term, she explains, but in its counterpart in comparative law (Sarcevic 1989: 278).

This more bold approach to legal translation suggests a break from the 'stretch and snap' tradition in legal tradition. After all, the translator enjoys greater freedom to intervene in the legal text to achieve a natural rendition in the target language. On closer inspection, however, this freedom is illusory. As Enberg (2002: 378) observes, this approach requires the translator to assess not only *one of the possible* contextual meanings of a text, but the *relevant legal*

meaning of the text.' In short, the translator needs to recreate the same 'meaning potential' of a legal text that a judge or legal practitioner in the source legal system would give it.

Herein lies the 'snap'. The legal translator is not tasked with preserving the pragmatic and sociolinguistic integrity of the legal text; his or her job is to preserve the 'legal intent' of the author of the source language document. As Sarcevic (1998: 289) puts it, creativity in legal translation is not acceptable if it 'poses a threat to the uniform interpretation and application' of the source and target texts in question.

This standard is a practical impossibility. It assumes that legal translators have a thorough acquaintance of law as a subject-matter. Even beyond facility with legal terminology, legal translators are also expected to replicate — even surpass — the skills of legal experts: they need a comprehensive awareness of legal reasoning, the ability to solve legal problems, the foresight to anticipate how courts will interpret and apply a legal text, and extensive understanding of statutory and contractual drafting. Such ideal legal translators are rare (Cao 2007b: 37-8).

More troubling, the doctrine of legal intent presumes that legal meanings are fixed and discoverable by reference to their parent legal system. Such assumptions are not sustainable. Language generally — and legal language specifically — is open-textured and indeterminate. Even if there might be a 'core' of settle meaning, there is always a 'penumbra of uncertainty' (Cao 2007b: 19). This includes intra-lingual as well as inter-lingual uncertainty. Indeed, one of the reasons for resort to litigation or alternative forms of dispute resolution is because parties (and their legal advisors) do not agree on how the law might apply to their case! Nor is legal meaning discoverable by reference to the 'family' to which the source legal system belongs. Although comparative law is fond of classifying legal systems — one of the more usual dichotomies is common law and civil law systems — these classificatory schemes are misleading, simplistic and 'fallacious' (Marfording 1997). Despite claims of cognitive dissonance between common law and civil law systems (Harvey 2000) or that court judgments are longer and more complex in common law than civil law systems (Cao 2007b: 29), inter-systemic difference and intra-systemic coherence are exaggerated. Even worse, the assumption locks legal systems into static, linear, totalizing, a-temporal and idealized traditions (Legrand 2005: 31-2; Taylor 1997); living legal systems, by contrast, are diverse, evolving, complex and internally pluralist.

(c) Doctrine of ethical intervention

In an emerging trend in general translation theory, postmodern theorists are recasting the translation enterprise to greater embrace the alterity of cultures. Although not yet the subject of detailed theoretical treatment in the legal translation literature, it has nonetheless attracted the interest of lawyers and legal language experts (eg, Gotti 2004; Legrand 2005).

The postmodern turn seeks to retain the 'otherness' of the source language and structure in translation. Drawing on the cultural philosophy of Foucault and Derrida, this radical position throws doubt on the distinction between signifier and signified. In literal or functional translation, the tendency of the translator is to 'privilege the capture of the signifieds, to give primacy to message, content, or concept over language structure.' In the postmodern re-imaging of the translation enterprise, fidelity should attach to 'modalities of expression and rhetorical strategies' (Lewis 2005: 262). The rationale for this move is that translation, as a rewriting of an original text, is 'manipulation' of a text 'in the service of power' (Bassnett & Lefevere 1995: vii). As Venuti explains (1995: 204; 2004: 498), a natural translation is an ideological solution to linguistic and cultural differences in the foreign text.

Postmodernism 'snaps back' legal translation to a source-oriented approach, even more strikingly when compared to the doctrine of intention. This is because any ideological intervention in a text — which a translation involves since it is an interpretation of a text — necessitates an ethical duty to respect (rather than erase) linguistic and cultural difference. As much as a translator works to build linguistic bridges, he or she is also ethically bound to be 'sensitive to each language's contexts, intertexts and intrinsic alterity' (Berman 2005: 4-5):

> Translators have long agreed that the effort to render one language system into another requires a keen awareness of broad cultural as well as specific linguistic values. It also requires existential choices that are bound to have wide-ranging repercussions for the text and its audience. How much of the 'otherness' of the 'foreign' should the translator highlight? How much of the foreign should be mute or erase in order to make texts easier for the 'home' (target) audience to assimilate? The problems posed demand judgment calls as ethical as they are practical or cognitive. (Berman 2005: 7)

This postmodern approach to structural fidelity, however, has dangerous ramifications for comparative legal understanding. If the ethical imperative of a legal translator is to preserve some of the 'foreigness' of the source legal text — to faithfully render 'cultural … associations, overtones and echoes' (Kasirer 2001: 349) — the translation product can overly assert the cultural uniqueness of the source legal system at the expense of its logical coherence and any values that it may express which are of universal appeal (Marfording 1997; Port 2001). This is a real danger in the case of Asian legal texts and legal systems, feeding directly into Orientalist assumptions that Asian law is invariably servile, weak, inferior and eccentric (Taylor 1997). In the eyes of Lawson (2008: 187), such 'ethical' translations are a disservice to comparative law:

> Quality translations of Japanese legal materials have, as a rule, been rare. Imagine a city with orderly streets broad and wide and buildings proud. It is not without shady corners and questionable precincts but it has weathered storms, absorbed distant learning and adapted to the winds of change. Its great failing is that it is unknown, shrouded by myth, rumoured to be a ramshackle wreck, governed by whim, or uninhabited... this is the lost city of Japanese law. If translations serve as maps, this city was almost uncharted; the few publicly available maps were illegible….
>
> The costs of failure in the translation of a legal system are serious. Ignorance breeds contempt; a dearth of translations implies there is little of value to translate; a corpus of bad translations serves only to confirm the outsider's worst suspicions; superficial encounters with bad texts suggest that the 'Other' legal system is indeed irrelevant.

4. Conclusion and Implications

Legal translation theory is in an elastic bind. Bound to 'semantic and syntactic' literalism, legal translation theory seeks to influence practice by charging legal translators with a duty to render 'a faithful translation closest to the meaning of the source text'; 'to produce a semantically and syntactically literal translation so as not to affect the substance of the source text' (Poon 2005: 322-3). This, so the argument goes, is a practical must. The reach of international law is broadening beyond national borders and its regulatory power over people's lives is widening. Legal texts — with their distinctive style, complex linguistic patterns and significant qualitative impacts — deserve close reproduction into the target language.

To be sure, this elastic bind permits some wriggle room. Although historically legal translation insisted on strict literalism, this position is now relaxing. But the elastic 'stretch' only goes so far before 'snapping' back to literalist first principles. Liberal translations are subject to constraints of relevance or permissible clarification. Creative impulses must be kept in check (Sarcevic 1998). Even in functional legal translation, where the aim is to achieve legal equivalence, legal translators must search for one — and only one— possible legal meaning. This is even if the translator lacks the legal training to make this judgment; even if legal

professionals in the source legal system may disagree over the text's real legal intent; and even if tensions, contradictions, ongoing evolution and ambiguity in the law — natural states for all legal systems — renders this a hopeless search. Where a 'discoverable' meaning is undiscoverable, of course, the instinct is to return to the source language. Even radicals who call for 'forceful' legal translators insist upon close adherence to distinctive linguistic structural properties of the source text, regardless of whether this results in awkward prose or perpetrates stereotypes about the legal system as alien and inscrutable.

The time is ripe to scissor-snip the 'stretch and snap' tradition in legal translation. To do so will rescue legal translation from the worst excesses of comparative law: positivism, Eurocentrism, Orientalism and utilitarianism. Legal translation needs to accept the broader lessons of general translation and legal theory— that perfect (or even adequate) equivalence is a myth (Chesterman 1993: 3); that meaning and interpretation are not carved in stone (Joseph 1995: 14); and that legal systems are not frozen-packed into distinct and definable legal families.

The challenge, instead, is to convey the legal text as a fragment of a living legal system. The legal translator does not need a law degree; he or she needs sufficient research skills of contrastive genre analysis (Chroma 2002: 202) and an awareness of how the text functions in the source country's institutional, political and economic context. Legal translation theory of the future may very well require a post-linguistic theory that looks beyond *textuality* to embrace *contextuality*. In the immediate future, however, legal translators should be driven by one overarching objective: 'to provide *literate* rather than *literal* translations' (Kahaner 2005).

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