

ASEJ

Scientific Journal

Bielsko-Biala School of Finance
and Law

Volume 26 | Number 1 | April 2022

ISSN2543-9103
eISSN2543-411X
www.asej.eu



Bielsko-Biala

S59803204552

Self-protective approaches to the translation of monolingual normative acts and their result

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Abstract— Translating monolithic normative acts is a common practice. Nevertheless, in the literature, it is not easy to find more extensive statements by the authors of such translations on the translation approach they used. This attitude results from the generally approved principle of maximum fidelity to the source text, which is guaranteed by a literal or source-like translation. This approach has many advantages. One of them is the self-protective function. In the opinion of many translators, the accusation of translation infidelity cannot be formulated in the case of literal translation, in which the connection with the legal culture of the source language is evident. In this sense, literal translation is preservative and cautious, as it protects the translator against the accusation of not being faithful to the original text. Moreover, it relieves the translator of the responsibility of understanding the translation, places lower competency requirements on translators, and does not require comparative tests. In spite of these advantages, preservative approaches to text translation are not free from serious disadvantages. They are often incoherent and incomprehensible. Such translations suggest the existence of the so-called non-equivalent terminology. Therefore, translations that are faithful to the original text and unfaithful in reception may constitute a serious legal threat to their addressees.

Keywords: legal texts, translation fidelity, translational approaches, preventive functions

I. INTRODUCTION

Contrary to expectations, the translation of monolingual normative acts *in toto* is a fairly common practice. The motives for making such translations may differ widely depending on the era and social needs. For example the translation of the medieval Saxon Mirror (Sachsen Spiegel), the Napoleonic Code, German, Austrian or Swiss Civil Code was motivated by their popularity outside the borders of the countries where they were created.

Translations are primarily used for comparative research and

to stimulate scientific discussion among lawyers from different countries on the improvement of law. They are also an important source of legal information for business people. In the era of widespread international mobility, knowledge of and compliance with the legislation of individual countries in various fields of law is an essential requirement. Undertaking translations is also inspired by specialized research centres dealing with the study of legal orders in other countries, such as Max-Planck-Institut für ausländisches und internationales Recht in Freiburg, publishing the series entitled "Sammlung außerdeutscher Strafgesetzbücher in deutscher Übersetzung". Similarly, the international legal turnover also increases, and with it the need to translate various regulations and documents. This need is also created by the relevant provisions of EU law (e.g. Framework Decision of the Council of Europe 2005/214 JHA, Art. 16 (1) and (2)).

It is generally assumed that the choice of a translation strategy is determined by the requirements of the and the purpose of the translation. In the case of legal texts, legal criteria are also an important factor (Kjær 1999: p.75), determining the primary addressees of translation as lawyers. Due to the special legal responsibility for the translation of legal acts, their translations are often extremely cautious, an issue widely discussed in the literature. However, it is our belief that this discussion does not take sufficient account of the legal act translators' statements on the translational approach taken and of lawyers as the final recipients of translated texts. There is clearly a need to investigate these aspects further.

This article aims to present the views of translators of selected legal acts on the translation principles applied and to relate them to the solutions discussed so far in the literature. As will be shown in the first part of this article, a preservative approach to translation results mainly from the translators' belief in the necessity of maintaining maximum fidelity to the source text (Weisflog 1966: p.33). In the first section, we will



discuss the concept of fidelity in translation and a number of factors determining the choice of preservative translation strategies. In the subsequent sections we will discuss the principle advantages and disadvantages of this approach from the perspective of translators and lawyers as recipients of translated texts.

We exclude from the analysis the issue of EU (multilingual) translations of normative acts because due to their status they require a specific translational approach. More on this can be found in Biel (2016).

II. THE REQUIREMENT OF THE SOURCE LANGUAGE FAITHFULNESS

A literal (source-like) translation of normative acts is deeply rooted in international translational practice. Cf. e.g. literal translation of legal acts is also a common translation practice in the international arena. Compare, for example, the translation of the Norwegian Code of Civil Procedure into English: “The translation was kept closely to the original wording of the Norwegian text.” (Simonaes 2013: p.218). The principle of literal translation has been in force for many decades in Swiss multilingual legislation (Šarčević, 2000: pp.37-39). For a literal translation in court proceedings, the obligation is, *inter alia*, judgment of the German Constitutional Court of May 17, 1983 (2BvR 731/80). This tradition stems from the conviction that it is necessary to keep the letter of the law in the translation of a normative act, which imposes on the translator the rigour of maintaining far-reaching fidelity to the source text. It is based, in our opinion, on the following assumptions:

- the translator’s primary task is to maintain maximum fidelity of the original text
- literal translation reduces the risk of misinterpretation of the original text
- other translation strategies run the risk of deviating from the wording of the original text
- the final recipient's understanding of the translation is not in the translator’s field of view

These assumptions result from three significant and historically conditioned premises:

- the translator does not have the competence and the right to interpret legal texts because this right is reserved only to lawyers and more precisely, to judges or law-applying authorities;
- the translator is not able to explain his/her translation choices on an ongoing basis and to explain the existing conceptual discrepancies in his/her translation;
- due to the consequences of incorrect translations, the translator should take all possible self-protective measures to avoid the accusation of translational infidelity.

III. THE CONCEPT OF "TRANSLATION FIDELITY"

The concept of fidelity to translation has fuzzy boundaries, and the category itself is evaluable and gradable. As such, it

requires clarification. Newmark (1988: p.46) defines a faithful translation as follows: „A faithful translation attempts to reproduce the precise contextual meaning of the original within the constraints of the TL grammatical structures. It 'transfers' cultural words and preserves the degree of grammatical and lexical 'abnormality' (deviation from SL norms) in the translation. It attempts to be completely faithful to the intentions and the text-realization of the SL writer”. Fidelity to the source text therefore means "strictly limiting oneself to the dictionary meaning of the linguistic expressions used in the source document, and making a translation based on rigidly understood formal and grammatical principles, i.e. making a literal translation" (Król 2019: p.289). Being faithful to the original text is equated then with a literal translation, in which the "the SL grammatical constructions are converted to their nearest TL equivalents but the lexical words are again translated singly, out of context" (Newmark 1988: p.46). In the case of legal texts, literal translation, according to de (Groot 1999b: p.210), is based on a colloquial understanding of the words appearing in the source text and their translation also by means of the colloquial vocabulary of the target language. Such an approach ignores the fact that the colloquial understanding of a particular word may differ in terms of the sense in which it is used in a particular normative act or interpreted in jurisprudence or dogma. In such situations, the terminological correctness of the literal translation is a matter of chance.

This choice of equivalents in TL does not refer to translational and legal thought; neither does it take into account the purpose of communication. The strings of words used in the literal translation distort the source message or happen to be completely meaningless (Kielar 2010: p.132). For this reason, (de Groot 1999a: p.29) believes that the use of a literal translation is permissible if the source language *calque* is understandable to a lawyer in the target legal system or it is a sensible neologism.

According to Šarčević (1990: p.161), literal translation is an adequate method of legal text translation if the terms in the source language have a transparent and logical motivational structure. Whereas Iluk (2014: p.121) defines the conditions for the acceptable use of a literal translation and its correctness in terms of the following factors:

- the identity of naming motives in the source and target languages,
- the number of naming components,
- the number of components of the name.

Table 1 shows that the literal translation of terms from SL into English are expressions with no currency because the corresponding terminological equivalents in this language have a different lexical motivation.

TABLE 1. EXAMPLES OF LEGAL TERMS IN SL TRANSLATED LITERAL AND FUNCTIONAL INTO ENGLISH.

Term in SL	The literal equivalent in TL	Functional equivalent in TL
majątek osobisty	*personal property	separate property
obowiązek alimentacyjny	duty of *alimony	duty of support
obrońca z urzędu	defender *ex officio	public defender
posiedzenie jawne	public *session	public hearing

Source: Own elaboration

In the case of legal names, the decisive factors, in addition to the semantic (reference / denotation) equivalence, are distribution and frequency. Literal translation is therefore acceptable if the said phrase and its formal equivalent are used in the same branches of law and show a similar frequency (Iluk / Iluk 2020). Accordingly, the Polish term *ojciec biologiczny* (*biological* or *natural father*) in a legal text should not be translated literally into German because it is formal counterpart *biologischer Vater* (= *biological father*) has zero frequency in legal texts. Thus, this name does not meet any of the above conditions of textual-normative equivalence in legal texts, even though it is used quite frequently in everyday language. Similarly, in English the correct terminological equivalent would be *biological father*, but *birth mother*.

On the contrary, it can be assumed that infidelity consists in an excessively arbitrary, imprecise or inaccurate translation of the source text, falsely implying the conceptual identity of names or legal institutions in two legal systems, or in the use of terms that in the target language do not meet the requirements of text-normative equivalence (Iluk 2014: pp.120-123; Iluk / Iluk 2020). Infidelity to the source text may also consist in intentionally omitting a fragment of the text or be the result of insufficient linguistic, domain or translation skills.

IV. ADVANTAGES OF A LITERAL (SOURCE-LIKE) TRANSLATION OF NORMATIVE ACTS

The tendency to resort to source oriented translations of legal texts results not only from the well-established tradition. It is also advocated by many contemporary translation theorists (Simonnæs 2005: p.67; Analogously Didier 1990: p.280 and p.285; Kjær 1995: pp.51-53). Also, even if and to a limited extent, such a recommendation can be found in official guidelines. Its preferential use is primarily determined by its undoubted advantages. We will return to this issue later (more on this in Iluk / Iluk 2019: pp.185-186).

IV.I Self-protective function of literal translation

As already shown above, an important reason for preferring a literal translation is a subjective fear of not being faithful to the source text. Insufficient fidelity to the original may disqualify a translation and be considered a translation tort, especially when it comes to a translation certified by a sworn translator. For some translators, the accusation of translation infidelity cannot be formulated against source oriented translation in which the connection with the legal culture of the source language is evident. On the other hand, the charge of infidelity and accuracy can be brought against functional translation (covered, dynamic and domesticating) because such translations of a legal act are more embedded in the legal culture of the final recipient. For this reason, there is a risk of blurring the conceptual differences between the source and target legal systems and suggesting a far-reaching legal identity or material equivalence. It is the main reason for the exclusion of

translations based on functional (pragmatic) equivalence (Stolze 1992: p.225).

The literal (exotic, documenting) translation is therefore self-protective and, as such, it explicitly signals to the recipient that the content concerns a foreign legal culture and its institutions. As a result, intentional exoticizing strategies used in such a translation are intended to prevent:

- a) identifying functional equivalents with concepts or institutions of the domestic legal order,
- b) presenting legal issues or legal concepts in the same way as in the translators' legal system,
- c) formulating inferential (interpretative) rules used in one's own legal system when interpreting the concepts of the original legal system (Šarcevič 1990: p.157).

It is not surprising then that the Kodeks tłumacza przysięgłego z komentarzem (Sworn translator's code with commentary) of 2005 (p. 95) obliged Polish translators of legal and law-related texts to use a source-oriented method of translation. It even imposed "the obligation to express in the target language a constant relationship between the content of the translation and the culture of the source language" and "not to blur the specificity of the source text". The latest version of the code of 2019 does no longer contain such a requirement.

All these factors undoubtedly strengthened the overriding principle of the translation of normative acts stipulating the utmost care to remain faithful to the original text, but often at the expense of clarity and comprehension.

IV.II Should the translator be responsible for the end-users'

misunderstanding of the translation?

According to Stolze (1992: p.224), the German author of many recognized textbooks on translation, the issue of understanding translation is not the translator's primary problem. In the literature, it is assumed that the translator of a specialist text has the right to assume that the recipient of the translation has a basic knowledge of a particular field and does not expect the translator to provide additional comments on specialist terms. Furthermore, it is expected that lawyers should be aware of the material incongruity resulting from different legal regulations in different legal orders (Dębski 2006: p.20). At the same time, non-lawyers should not blame the translator for their miscomprehension of legal texts.

From the perspective of the recipients of translation, this problem is seen in a completely different way. On the basis of his notarial practice, Król (2019: p.294) claims that "often a sworn translation imposes on the addressee of the translation, i.e. the recipients of the target text, the necessity to make a further – their own - interpretation of the translated text that allows for understanding its meaning, (and) without which the translation carries zero information for the addressee of the source text [...]". According to other lawyers, incomprehensible translations defeat their purpose, as they effectively hinder the correct interpretation of the content of the translation. In an incomprehensible translation it is not possible

to determine the meaning of legal expressions by referring to the terminology of national law or the national doctrine and jurisprudence (Dudek, Bohowicz 2016). Additionally, according to art. 3 sec. 9 of the Directive 2010/64/Eu of the European Parliament and of the Council of 20 October, 2010 on the right to interpretation and translation in criminal proceedings, "Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence". It follows from this provision that, at least in criminal proceedings, the translator cannot ignore the problem of the understanding of the translated text by suspects or the accused.

As can be seen, in literal translations the problem of loyalty to the recipient of the translation is ignored. According to Nord (1989: p.102), the principle of loyalty obliges the translators to pay special attention to the comprehensibility of their translation. Referring to the theory of relevance in translation, Kielar (2013: p.85) strongly advocates the communicative effectiveness of the translation, thus guarding the interests of the final recipient. For Kielar, translation should be "clear and sound natural in the sense that it should not be unnecessarily difficult to understand" (Ibid. 86). The exemption of the translators from liability for the recipient's failure to understand the translation can therefore be regarded as a favourable circumstance, but only for themselves, yet inconsistent with the principle of loyalty.

IV.III The lower level of requirements for translators'

qualifications

As shown elsewhere, a preservative approach to translation, based on formal equivalence, is also beneficial for the translator for other, no less important reasons set out below (cf. Ł. Iluk 2017: Iluk / Iluk 2019: pp.192-194):

- literal translation places relatively lower demands on the translator's level of knowledge of the source and target legal orders and their languages;
- it does not require a deeper analysis of the meanings of words and a search for conceptually and prescriptively adequate equivalents in the target legal system;
- it facilitates the translation process by resigning from the tedious search for functional equivalents using, for example, micro-comparisons;
- it perpetuates the habit of using lexicographic resources without in-depth reflection and analysis;
- it leaves room for using calques of the semantic patterns of terms in the source language, which results in an foreignizing translation;
- it can be verified by a retranslation, which ostensibly protects the translator against the accusation of incorrect translation.

IV. IV Negative effects of literal translation

A faulty understanding of "translation fidelity" prompts the translator to resort to syntactic and semantic patterns and schemes calqued on the terms typical of the source language. Such translational decisions ignore the unassailable presence of interlingual functional equivalents and suggest the existence of the so-called non-equivalent terminology. All this leads to incoherent translations, often incomprehensible and linguistically very poor, which confirms Kielar's (2003: p.131) observation that "excessive literalness may lead to false associations with secondary recipients as to the essence of the institutions functioning in source lingoculture".

V. CONCLUSIONS

Ensuring legal accuracy in translation is undoubtedly the basic condition for obtaining a similar legal effect. For this purpose, the translator, as an interpreter of the source text, should see that the expressions used be adequately understood. This activity should not be understood as an interpretation, but as a search for understanding legal and general expressions. It is a well-known fact that apart from the lack of sufficient domain knowledge, this task is hampered by the terms that differ in the conceptual capacity of two legal systems, their explicitness level (Iluk 2016), the strength of their connection with a legal system in which they operate, the way of conceptualizing legal concepts, and polysemy. In such cases, the comparative determination of the degree and extent of functional equivalence is a necessary pre-translational task.

Burkard (2004), a Swiss lawyer, having translated the Brazilian Civil Code into German, expresses the view that the translation of legal texts cannot be a mirror image of the source text in the target language. As he observes, a good translation is the result of information selection, interpretation, and far-reaching reconstruction of information.

In view of the above, it is difficult to uncritically accept the recommendations of those translatoologists who still categorically recommend a literal (source-like, documenting) translation, which in its essence does not solve basic translation problems. It should also be recognized that, in extreme cases, translations that are faithful to the original text and unfaithful in reception may pose a serious legal danger to their addressees.

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