

Legal Translation and Functionalist Approaches: a Contradiction in Terms?

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At a time when the 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 languages*, has been recognised, and legal translation is no longer regarded simply as a particular case within the general framework of LSP texts, a certain reluctance has emerged to accept the application of a general translation theory to include the translation of legal texts. A case in point is functionalism, whose advocates claim their theories to be comprehensive and suitable for application to all types of translations in all situations, which obviously implies applicability to legal translation. This has attracted serious objections by many scholars of different backgrounds.

In this paper I shall discuss whether it is legitimate to propose the application of functionalist theories to legal translation.¹ The question is of extreme importance: a positive answer would provide a good starting point for the construction of an all-embracing theoretical model applicable to all text-types and genres in legal translation, something all the more desirable if one considers that so far most studies have had their starting point in a specific experience in one area of this very broad field, so that the theoretical concepts proposed, however viable, have tended to be all but comprehensive in their scope of application. Incidentally, it has to be specified that this discussion will focus exclusively on authentic texts, i.e. texts that the philosopher Felix E. Oppenheim (1944: 60) has described as *sentences of law*, being endowed with performative and/or prescriptive force, while leaving out “statements about sentences of law,” i.e. *metatexts*, such as textbooks and specialised and non-specialised publishing, which, although dealing with juridical topics, have no legal validity.²

1. Functionalism and legal translation

In traditional translation theory, legal texts have been regarded simply as a special case within the general framework of LSP texts, which in turn were considered to fall within the scope of the general theory.

However, the past two decades or so have shown a growing consciousness of the diversity of diaphasic varieties subsumed under the general heading of “languages for special purposes” on the one hand, and on the other hand the emergence of a number of factors - an exponential increase in international contacts both on the individual and community level (international trade, communications, emigration, tourism etc.), and political and economic integration involving gradual integration between legal systems (e.g. EU); and in bilingual (and in some cases bi-juridical) countries there is an ever growing attention for equal language rights, which has contributed to attracting substantial theoretical attention on legal translation.

At the same time, a radical change in perspective has occurred in translation theory: with the emergence of approaches centred on communicative and pragmatic factors, growing emphasis is now placed on translation as a communicative and intercultural action, leaving behind all approaches focussing exclusively on linguistic aspects. The translator is no longer considered a passive mediator but rather an intercultural operator, whose choices are increasingly

recipient-oriented, being based not only on strictly linguistic criteria but also on extra-linguistic considerations, first and foremost the function of the translated text in the target culture. In this functionalist line of thought centred on the concepts of *skopos* and target-orientedness, the source text is no longer to be seen as the only standard for judging a translation, which is now also assessed on the basis of its adequacy to communicative purpose in the target culture (e.g. Reiss-Vermeer, 1984; Hönig-Kussmaul, 1982; Nord, 1991, 1997).

As for the applicability of this approach to legal translation, not only do its advocates claim their theories to be comprehensive and applicable to all text types in all situations (Vermeer, 1982: 99), which implies their applicability to legal translation as well, but Hans Vermeer himself, the founding father of this School of thought, extends the validity of his *Skopos* theory explicitly to legal translation (Reiss-Vermeer, 1984: 158), providing practical examples of its application to specific text types (Vermeer, 1986: 34: see 3.1 below).

But doubts have been raised by scholars of different backgrounds as to whether functional approaches can be legitimately applied to LSP texts (e.g. Fluck, 1985: 136) and in particular to legal texts (e.g. Soffritti, 1987; Trosborg, 1994; Madsen, 1997). The main objections are centred on the typical recipient-orientedness of functional approaches, which seems unacceptable for legal language, subject as it is to rigorous ‘rules of interpretation’. This comes to no surprise for a theory which in its most extreme statement proclaims the “dethronement” (*Entthronung*) of the ST, an idea which seems inadmissible in the perspective of legal translation where the ST is “sacred writ”. On the whole, functionalism and legal translation seem to be in glaring contradiction.

Yet, there are some extenuating factors to be taken into account. First of all, some of Vermeer’s statements are extremely categorical and provocative, as ground-breaking theoretical statements often are, but need not be taken literally. He himself has displayed a degree of moderation in illustrating and applying his theories. On the whole, for all its provocativeness, in perspective the advent of functional theories has had the effect of bringing home the idea that translatology should do away with the rigid prescriptiveness of the past and with the quest for rules of equivalence based only on the criterion of loyalty to the ST with no regard for the use to which the translated text is to be put.

Secondly, as we shall see (see 3. below), even in the legal field where the source text, in its meaning, its intention and its force, has to be scrupulously analysed and interpreted, in many situations more than one “translation project” is possible and the translator has to make her/his “strategic” decisions on the basis of a number of variables, thus leaving space for the application of functional criteria even in a context of absolute respect for ST meaning and values. This point will be illustrated by means of practical examples later on in the discussion.

Thirdly, one point against the acceptance of functionalism in this area has been the reluctance of experts to accept the idea that a theory which is general in nature and not tailor-made should be applied to legal translation. As a matter of fact, many distinguished scholars in the field have simply ignored functionalism altogether, an inattention which at least in part may also be connected with the desire to claim the uniqueness of the language of the law, even with respect to other LSPs.

2. Distinctive quality of legal discourse

The distinctive quality of legal texts, and hence of legal translation, now acknowledged in translatology, has long been recognised by jurists and jurilinguists (Gémar, 1995 I: 144) who have pointed out that the legal translator has to cope with problems that are different from those encountered in other sectors. This is why a general translation theory, albeit conceived for comprehensiveness and extensive application, seems to be somehow inadequate.

Legal translation is certainly among the varieties of translations where the translator is subject to the heaviest semiotic constraints at all levels: the language of the law is typically formulaic, obscure, archaic; legal discourse is culturally mediated; legal texts have a special pragmatic status. These features deserve a closer examination.

Under a purely formal perspective, legal writing is typically ritualistic and archaic, being subject to very strict stylistic conventions in terms of register and diction as well as highly codified genre structures. There are heavy constraints at all levels, from the macro-structure of texts, to paragraphs, sentences and phrases, with systematic resort to standardised forms, often archaic and uncommon in ordinary text practice, stock phrases, rigid collocations and specialised cohesive devices for anaphoric and cataphoric as well as homophoric and intertextual reference (Gotti, 1991: 105-110). These “frozen patterns of language which allow little or no variation in form” (Baker, 1992: 63), sometimes referred to as ‘routines’ (Hatim-Mason, 1997: 190), can be translated only by making resort to parallel routines in the target language. In addition, legal discourse, in contrast with other varieties of LSP is inherently intricate and obscure, reflecting the complexity of legal thought and reasoning, but also the verbosity and pompousness traditionally associated with the legal and judicial professions (Mellinkoff, 1963: 25). Although the one-sentence rule has officially been put aside today, too often the information load borne by each sentence is extremely heavy, thus giving rise to remarkable sentence length (Gustaffson, 1975; Hiltunen, 1984; Bhatia, 1987, 1994) as well as to very complex syntax, with a high incidence of embedded clauses, a high level of hypotaxis, frequent resort to left-branching subordinate clauses, recurrence of syntactic discontinuities.

For the translator, this complexity—often bordering on obscurity—not only makes the decoding task more arduous, but in many cases also requires a real hermeneutic effort on her/his part, far beyond the scope of the ordinary decoding and interpreting required for other kinds of translations. This is highly problematic. While legal professionals like lawyers, judges and jurists are competent in hermeneutics as part of their essential armoury of skills, it is usually not so for the translator who, in her/his interpreting efforts, is constantly at risk of overstepping the limits of her/his professional competence.

All this is further complicated by the culturally mediated nature of legal discourse, which determines profound differences in categories and concepts between legal systems, and in particular between English law and its Roman-Germanic continental counterparts, suggesting some degree of incommensurability between texts produced within the framework of common law and civil law systems respectively. As a matter of fact, there are juridical concepts in Roman law that simply do not exist in common law legal systems (e.g. *potestà dei genitori*, *puissance paternelle*; *dolo*, *dol*; *forza maggiore*, *force majeure*) and viceversa (e.g. *bail*, *estoppel*, *tresspass*); there are concepts that bear the same “name” but, not being correspondent, are simply false cognates, e.g. *contract/contratto*, *civil law/diritto civile*, *common law/diritto comune* (David-Brierly, 1985: 20ff; 308ff.); a substantial divergence exists even in the basic definition of the legal rule (*norma giuridica*, *règle de droit*). The translating procedures necessary to overcome these difficulties in actual translating practice usually go under the denomination *transposition juridique*, i.e. *legal transposition* (Didier, 1991: 9; Crépeau, 1995: 52-53; Sarcevic, 1997:12-13). This inherent difficulty of legal

translation has made it a good case in point in discussions of untranslatability. But, since in actual practice legal translations are produced and used every day, for a translator this suggestion of untranslatability is only an abstract concept that serves to highlight the remarkable degree of difficulty of her/his work.

As for the special pragmatic status of legal texts, it is connected essentially with their performativity: they not only describe, report, narrate and point out facts, information and arguments, but also have the property of performing legal actions and imposing obligations (Austin, 1962; Benveniste, 1990a; 1990b). This applies also to translated legal texts when they are authoritative: one of the reasons why legal translation is so problematic is that in many cases the new text will be as legally binding as the ST and have legal consequences.

In studies of the language of the law, it is thanks to the parallel development of the theory of speech acts and under the stimulus of Wittgenstein's "doctrine of the multiplicity and potential countlessness of sentence types and language games" (Carcattera, 1994: 225) that the idea has been brought home that the traditional classification of discourse found in legal language (based on Bühler, 1934), which included *descriptive* (informative) and *prescriptive* (vocative) discourse (*expressive* discourse hardly exists in legal texts), is inadequate to account for all of its aspects, as is evident from the above discussion. Therefore, a *performative* function has been added, which in its theoretical variety³ is called 'constitutive' by jurists (Carcattera, 1994: 225ff.).

Writers who have applied Bühler's classification of text functions to translation (e.g. Newmark, 1982; Reiss, 1989) have tended to ignore this addition, however. Sarcevic, (1997: 10) herself comes to the conclusion that authoritative legal texts, being regulatory, are essentially connotative in nature.⁴ In dealing with contracts Trosborg (1994: 312ff.), while correctly emphasising that legal speech acts cannot be translated literally, classifies them as *directive*, *commissive* and *constitutive* (using the word *constitutive*, quite oddly, not with the meaning of "performative" but rather to mean "sentences used to explain or define expressions and terms in the contract or to supply information concerning the application of the statute"), thus overlooking performativeness altogether. As a consequence, when discussing the meaning of verb forms in legal speech acts in a translation, she attributes a purely deontic meaning *shall*, while in legal texts, as I have shown elsewhere (Garzone, 1996: 68ff.; 1999a), this modal can also have a performative meaning depending on the context, with obvious implications for translation decisions.

These observations on the one hand shed light on the particularly 'sensitive' nature of legal texts, which contributes to making their translation especially critical and problematic, and on the other highlight the crucial role of pragmatic considerations in the choice of a correct translation strategy.

2.1. The notion of legal equivalence

The complexity of legal discourse and its pragmatic status help explain why approaches to legal translation have historically⁵ been focused mainly on the preservation of the letter rather than on the effective rendering in the target language; legal texts having always been accorded the status of 'sensitive' texts and been treated as such.

A real challenge to the unquestioned application of what Sarcevic, (1997: 24) calls a 'strict literal' approach to legal translation came only in the Nineteenth and early Twentieth century, when multi-ethnic countries (Austria, Switzerland, Belgium) endowed themselves with

multilingual legislation. Here by definition all the translations of a statute were supposed to have the same authentic status and this gave rise to the need to improve the quality of the parallel texts of legislative instruments: a slavishly translated document is totally subordinate to its original; rarely does it have the dignity of an authentic text.

Over time, a change in perspective occurred with a gradual shift towards a more flexible attitude, eventually giving rise to the need to define new criteria of equivalence specific to legal translation. Thus, the principle of *legal equivalence* emerged (Beaupré, 1986: 179; Herbots, 1987), which adds the consideration of the legal effects that a translated text will have in the target culture (Gémar, 1997: 81-85) to other criteria of equivalence. Of course, in literature on translation, the concept of equivalence is as recurrent as it is vague and controversial, and how to achieve it in actual practice has been one of the most widely debated issues, especially during the 1970s and early 1980s and among German scholars.⁶ Basically, the criterion of legal equivalence is akin to the concept of *functional equivalence*, endorsed in this specific field by a number of authors (e.g. Pigeon, 1995; Gémar, 1995, I: 148ff.; Scarpa, 1997: 103). In terms of general translation theory, both principles have their counterparts, *mutatis mutandis*, in other notions proposed by eminent theorists, e.g. Nida and Taber's *dynamic equivalence* (Nida-Taber, 1969: 22-24), Koller's *pragmatic equivalence* (1992: 187) and Newmark's *communicative translation* (Newmark, 1982: 38-56).

Incidentally, according to the principle of legal equivalence, the translation of a legal text will seek to achieve identity of meaning between original and translation, i.e. identity of propositional content as well as identity of legal effects (Sager, 1993: 180), while at the same time pursuing the objective of reflecting the intents of the person or body (legislator, lawyer, judge etc.) which produced the ST. In specifically linguistic and translational terms this corresponds to identity of propositional content, illocutionary and perlocutionary force, and intentionality (de Beaugrande-Dressler, 1981: 3-11; 113ff.) or "author intent" (Neubert-Shreve, 1992: 70-72).

The emergence of the concept of legal equivalence marked a turning point in the history of translation in this field. Although ultimately it still takes the source text as the yardstick against which the standard of a translation is assessed, being as yet based first and foremost on the criterion of *interlingual concordance*, i.e. *intertextual symmetry* or *intertextual correspondence* (Sarcevic, 1997: 202 ss.), its advent has sanctioned the definitive end of the traditional preference for an approach aimed at preserving the letter of the original as much as possible, and the shift to a more dynamic attitude.

3. Legal translation in practice: some examples

But the crucial point is whether the concept of legal equivalence is applicable to all text types, genres and sub-genres in legal translation. A brief review of some of the most common typologies of legal translations and the translational procedures routinely implemented in actual practice, based on pragmatic criteria, e.g. considering the legal force of the original and of the translated text respectively, will show that the concept of legal equivalence is not unconditionally suited to all situations and text types and confirms that in many cases the translator adopts a different approach: quite significantly, this criterion was originally formulated in a bilingual (and often bi-juridical) context, and finds its rationale in the necessity that the translated text should have autonomous force, i.e. independent legal validity. Other categories of legal texts may have different pragmatic characteristics (i.e. different felicity or validity conditions) thus requiring different translating procedures.

Let's first consider the texts generated within the framework of a single national legal system. Because of their lack of extraterritoriality, the validity of nationally-enacted legal documents is limited to the territory of the country where they are issued, their involvement in its legal system being part of the felicity conditions of the 'performative prefix' (Austin, 1962: 14-15; Levinson, 1983: 244ff.) that opens and "guarantees" each of them. The translation of these texts is aimed at informing the addressee about the original legal instrument, in certain cases (e.g. a divorce decree or an act of extradition) in view of its transcription and validation in the legal system of the target language; the TT is not in itself authoritative: it will become so after such transcription or validation has been effected. The approach adopted in the translation of this category of legal texts is usually literal since the translated version is a *Verständnishilfe*, having the status of a parallel text, a gloss or a commentary to be used as a key of access to the original, which has no legal validity of its own. Within this framework a special case is that of sworn translations for which in some countries a 'strict literal' approach, indeed bordering on interlinearity, is prescribed.

It is unquestionable that this first category of texts does not fall within the scope of legal equivalence, for reasons that are more than obvious; however, strict literal translation is not the only strategy that is possible. Given the absence of legal validity of the translated version, there may be situations where a 'free' approach can be taken, if the aim is only that of making the addressee of the target text aware of the function of the original in the source language culture, with no other institutional constraints. Italian jurist Sacco (1994, 490) gives the example of a thriller book, where the English word *attorney* can legitimately be translated into Italian with *pubblico ministero* and *executor* with *esecutore testamentario*, although these juridically inaccurate translations would hardly be acceptable in a specialised context.

A second category of texts consists in documents drawn up in bi-lingual and/or bi-juridical countries, of which probably the best known example is Canadian legislation. Both the ST and the translation have the status of official authentic texts. The criterion applied is that of legal equivalence, originally developed specifically for this category of texts, which is dynamic and often requires a degree of interpretation and sometimes *transposition juridique*: all texts should sound natural and effective, since each of them is independent and endowed with autonomous legal validity.

As yet another category is that of "hybrid" texts, i.e. texts "produced in a supranational multicultural discourse community where there is no linguistically neutral ground" (Trosborg, 1997: 145-146), including most international instruments. All translations in the official languages of the international agency or body issuing a convention, a treaty, a protocol etc. are equally authentic and are presumed to have the same meaning.⁷ Every version, after ratification on the part of the country involved, will have autonomous legal validity in its territory. Here again, as in the previous case, the principle of legal equivalence applies, at least in theory; but in actual practice international instruments, which most of the time are negotiated within commissions made up of members of different nationalities (Sarcevic, 1997: 204), are drawn up in a much more straightforward language so that quite often the pursuit of legal equivalence can go hand in hand with literal translation.

The terms of the problem are to a certain extent different when these same international legal instruments are translated into languages that are not the official ones of the issuing organisation, for instance the Italian version of a Convention issued by OECD, whose official languages are English and French. In line of principle its purpose is purely informative and has no legal validity, which means that a merely documentary rendering would suffice, but in practice this kind of translation is the main vehicle through which the provisions of an

international instrument are enforced after adoption and ratification by the national parliament of the country involved, even if formally it is one of the official versions that is adopted. Hence the danger that a slavish translation might give rise to incorrect enforcement⁸ and consequently the need to comply with the criterion of legal equivalence.⁹

Among hybrid texts a special case is that of European Union legislation, in spite of a widening margin of creativity in certain ('non-restricted') parts of European instruments¹⁰, mainly at lexical and terminological level, intertextual correspondence (i.e. interlingual concordance) still seems to predominate in substantive provisions (Sarcevic, 1997: 225), also due to uniformity of text formats across languages within the EU. At the same time, efforts are being made to find a common ground by introducing specific 'European' terminology into all languages, with new terms specially created for this purpose. When a 'European' term is not available, conceptual coincidence is forced upon terms that are not inherently equivalent across languages and legal systems. Thus, gradually, a special language that has been described as *Euro-legalese* is being generated, which in time will make the translators' task much easier.

The last category of texts which will be considered here includes international documents regulating the relationships between private subjects in different nations. In this case, the original text agreed between the parties is not necessarily authoritative; an international contract, for instance, will be interpreted according to the law governing it, regardless of the language in which it is written, and will be drawn up according to the rules and drafting conventions of the national law applicable to it.

This is the case to which Vermeer refers in his proposal to apply *Skopos* theory to legal translation and in fact it is that which seems to be best accounted for by such theory: the source text offers the input on the basis of which a new autonomous text is created in the translation language taking into account mainly the needs of the final users. In this connection Vermeer (1986: 34) proposes the example of an insurance contract which is translated differently depending on its intended function: target-language formulas are resorted to if the translation is for use in practice, for the stipulation of insurance policies in a foreign country, while a source-language oriented approach is taken if the translation is to be used only as court evidence. Similarly, in order to show that "the way the text is translated [is] dominated by the function of the translator in order to meet the client's needs", Obenaus (1995: 252) discusses the example of an original warranty statement drawn up by an American company: if the translation is to have legal validity in Germany, it will require a "legal equivalence" approach, while if it is commissioned by a German company willing to gain a better understanding of the type of warranties commonly granted in the USA, the translation will simply be a "footnoted explanation of the original".

3.1. Viability of a functional approach to legal translation

On the basis of the above discussion, it is evident that in actual practice the criterion of legal equivalence is followed by translators only for certain categories of texts, while for others different strategies are applied in order to guarantee adequacy to the function the TT is expected to fulfil in the target situation. Of course, a translator's behaviour is conditioned by rigidly codified linguistic practices, but for the overall translation "project" of any given text s/he has to make crucial choices that will govern her/his decisions down to the lower levels of the process. In this respect s/he will be guided prevalently by functional considerations.

This functional orientation is evident not only in the selection of the overall strategy applied in translation, as illustrated above, but also in the very fine distinctions translators make, in contrastive terms, between different text genres (*Textsorten*) and text types (*Texttypen*) (Reiss, 1989: 105; Nord, 1997: 37) as well as in the lower-level translating decisions made in drafting the TT with regard to the definitive text format, layout and microstructures (sentence organisation, terminology). It is evident even in the solutions customarily adopted for the problems that traditionally have attracted the most attention in this field, those associated with the translation of terminology. In the absence of complete identity of meaning between two terms in different legal systems (see 2 above), an essentially onomasiological approach is taken. Initially, the translator will draw upon her/his encyclopaedic knowledge of the subject or, more probably, conduct a thorough research in the literature and analyse parallel texts in order to become fully aware at a conceptual level of the notion it refers to and to ascertain to a high degree of accuracy the syntactic, semantic and pragmatic value of the term. On this basis, it will be possible to find a term in the TL that covers the same “superabstract” notion (Sacco, 1994: 490), i.e. broadly speaking a legal concept that is basically correspondent in the TL language and culture, albeit with differences due to the peculiarities of each legal system. At this point, the reasonable course usually taken¹¹ is to evaluate with great care the semantic features that differ in the original term and its potential translation respectively, in order to ascertain which discrepancies, if any, are actually relevant to the purpose of the text in question, and behave accordingly (Sacco, 1994: 490), i.e. either choose one of the near-equivalent terms available, making sure that the differences in meaning are not relevant to the case in point, or adopt a solution that makes up for conceptual incongruencies resorting to a descriptive paraphrase or adding an explanatory note (Sarcevic, 1991: 615; 1997: 231ff.; Smith, 1995: 188-189). Incidentally, the principle of relevance of semantic features to a given context is inherently functional and can be seen as the legal counterpart of the more general principle put forth by P. Kussmaul: “try to reproduce just that semantic feature or those semantic features which is/are relevant in a given context with regard to the function of your translation” (Kussmaul, 1995: 92), which in turn is acknowledged by the author himself to be the translatorial version of Grice’s maxim of quantity and maxim of relevance.

3.2. Priority of functional criteria in the practice of legal translation

The reason for this priority of functional considerations in the practice of legal translation, in spite of all theoretical objections, is certainly to be found in the fact that functionalism is so general in its theoretical formulations as to subsume all other criteria and so flexible as to enable the translator to take account of the distinctive nature of legal texts and in particular of their pragmatic characteristics, thanks to the absence of an absolute standard of equivalence. The translator’s “translation project” will vary depending on whether the TT is to be authoritative and, if so, whether it is to take its force from the same performative act as the original (as is the case in countries with a bi- or multi-lingual legislation) or from a new speech act to be performed within the legal system of the target language.

Of course, in theoretical terms, functional theories have attracted a lot of criticisms, with detractors focussing their attention on the most categorical and provocative assertions of their advocates. For instance, as already mentioned above, in the legal field Vermeer’s idea of a translation as an offer of information in the target language about an *offer of information in the source language* (Reiss-Vermeer, 1984: 76) has been rejected on the grounds that it is at odds with the nature itself of legal texts, since they are not only informative but are by definition endowed with special performative (constitutive) or deontic (prescriptive) force (e.g. Madsen, 1997:18). However, it is true that virtually in all categories of texts discussed in 3. above (with the exception of bilingual legislation) there are to be found translations that,

not being authoritative, actually are only offers of information about a SL original. It is also true that in spite of the reputation of functional approaches for being associated with ‘free’ translation and scarce consideration for the original text, which would make them incompatible with legal translation, it is part of the rationale underlying them that the *skopos* of a certain TT “may demand (or lead to) a literal translation” (Vermeer, 1996: 41-42); in other words, as C. Nord (1997: 29) makes clear, “the *Skopos* of a particular translation task may require a ‘free’ or a ‘faithful’ translation, or anything between these two extremes, depending on the purpose for which the translation is needed [...] There may be cases where relative literalism is precisely what the receiver (or the client or the user) needs...”

Intertextual correspondence between ST and TT (Vermeer's *fidelity*)¹² is still an issue, although it is seen as mainly determined by considerations dependent on the *skopos* of the translation rather than on the nature of the text to be translated: the criterion of concordance with the ST is combined with that of coherence with the receivers’ situation and with the TT’s intended use.

4. Conclusions

In conclusion, objections to the adoption of functional approaches in legal translation can be easily rejected, notwithstanding the elements which appear to conflict with principles traditionally applied in this field: most objections to functionalism can be refuted considering the high level of abstraction of its theoretical assumptions.

On the contrary, the application of a functional approach seems especially suitable for the translation of legal texts, on account of their diversity, although it does not circumvent the problem of equivalence, but rather poses it in different terms rejecting the idea that there should be one single universally applicable concept of equivalence. Instead, it rather brings home the notion that the degree of equivalence to be achieved in the translation of a given text is not absolute, but depends first and foremost on the TT intended function as well as on the nature of the ST: the whole process is governed by a principle located at a sufficiently high level of generalisation as to be suitable for virtually all types of legal texts.

Of course, for application in the field of the law some of the most controversial corollaries of functionalism have to be modified or even discarded, due largely to the particular pragmatic status (i.e. legal force and validity) of legal texts, which is the overriding factor in determining the *skopos* of the translation.

There can be no doubt, however, that on the whole in legal translation a functional approach is not only viable, but recommendable as well as effective in consideration of its comprehensiveness and flexibility. All the more so since an examination of translators’ behaviour in the legal field (*supra* 4.) shows that actual translating practice is routinely based on functional criteria. Thus, if one single unifying principle to guide the choices of legal translators is to be set out, a functional model seems to be the only viable alternative, mainly on account of its high level of abstraction.

¹ Some of the arguments put forth in this paper are also discussed in Garzone, 1999b.

² See also Kurzon (1991: 284), who considers only the *sentences of law* worthy of the name “language of the law” and proposes the denomination “legal language” for metatexts, a distinction which is meaningful but too subtle to be adopted

consistently. For an analytic classification of the different text genres to be included in each of Oppenheim's two categories see Bhatia, 1987: 227, modified (specifically for written texts) in Garzone, 1997: 216.

³ *Thetic performatives* are those that not only *perform an action* for the mere fact of being uttered, as *athetic* performatives do, but also give rise instantaneously to a new state of things or new legal relationships or a new legal status. The terms *thetic* and *athetic* have been introduced by Italian scholar A.G. Conte (see for instance, 1994: 248-249). Austin's examples E.a; E.b and (E.c) ("I do [take this woman to be my lawful wedded wife]"; "I name this ship the Queen Elisabeth"; "I give and bequeath my watch to my brother") are typically thetic; ("I bet you sixpence that it will rain tomorrow") is athetic, like "I thank you" or "I apologise". See also Garzone, 1996: 47ff.

⁴ "[...] conative texts include not only persuasive but also regulatory texts... Legal instruments ... are primarily regulatory in nature... Thus it follows that regulatory instruments are conative texts..." (Sarcevic, 1997: 10). Sarcevic, recalls that also Newmark (1982: 13-15) originally classified them as 'directive' and 'imperative', while later he curiously reclassified them as 'expressive' texts (Newmark, 1988: 39). Also Reiss who had originally classified legal texts as essentially conative in her, 1977 paper (English translation: 1989), later, with Vermeer, proposed to classify them as essentially informative (Reiss-Vermeer, 1984: 208-209). Similarly, in Sager's view (1993: 70) legal texts have either an informative or a directive purpose, depending on their readers.

⁵ For a detailed history of legal translation from Justinian to the present day see Sarcevic, (1997: 23ff.).

⁶ On the debate about the concept of equivalence see for instance Snell-Hornby, 1995: 20-22. For some other definitions of the concept see, among German scholars, Reiss, 1989, Wills, 1977; see also Nida, 1964 and Catford, 1965: 27.

⁷ Article 33(3) of the *Convention on the Law of Treaties* (1969) states that the terms of a Treaty "are presumed to have the same meaning in each authentic text".

⁸ This was the case for the Italian translation of the *United Nations Convention for the International Sales of Goods* (Vienna, 11.4.1980): see Garzone, 1998, where the problems concerning the translation of "hybrid texts" is discussed in detail.

⁹ A similar case, dealt with by Soffritti (1995) with regard to the North Italian province of South Tyrol, is that of legislation in bi-lingual regions where laws are translated in order to make them intelligible for minority-language speaking citizens but have no official legal validity.

¹⁰ Sarcevic, (1997: 224-225) borrows the distinction between restricted and non-restricted or free parts of EU instruments from: V Koutsivitis V., *La traduction juridique, étude d'un cas: la traduction des textes législatifs des Communautés européennes, et en particulier à partir du français vers le grec*, thèse de doctorat, Université de la Sorbonne nouvelle Paris III, 1988.

¹¹ Her account is not taken of 'emergency' courses of action, like resorting to an *ad hoc* neologism or to a borrowing or a loan-translation or even acknowledging impossibility of translation.

¹² See Reiss-Vermeer, 1984: 114.

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