

Language and Law

A resource book for students

Allan Durant
and Janny H.C. Leung

First published 2016

ISBN: 978-1-138-02558-5 (hbk)

ISBN: 978-1-138-02557-8 (pbk)

ISBN: 978-1-315-43625-8 (ebk)

Chapter A10

Legal Order and Linguistic Diversity

(CC BY-NC-ND 4.0)

DOI: 10.4324/9781315436258-11

cases are decided. Translation inaccuracies are not only semantic. It has been shown that by inadvertently skewing the tone of testimony, interpreters can make a witness appear less cooperative, less likeable and less credible.

The forensic linguistic contribution

Not all forensic linguistic work is concerned with evidence used in criminal investigation or submitted at trial. Other forensic linguistic contributions examine and may critique the wider conduct or performance of law, and seek to assist in refinement or reform of legal procedures. While investigative and courtroom work is often commissioned as a commercial service by authorities or parties to a case, this broader, second kind of work concerned with reform or enhancement of legal procedures is usually undertaken by linguists who are proactive, socially engaged researchers. This kind of work may still have an effect on a given case (e.g. demonstrating communication failure as a potential ground for appeal); but it is more likely, if it does have an effect, to prompt review of a relevant policy or form part of a campaign for greater public awareness of problems regarding the fitness for purpose of some aspect of the legal system. Where analysis of how language works (and sometimes fails to work) in law is the main aim, forensic linguistic analysis can be found at any meaningful interface between language and law. In such circumstances, the term *forensic linguistics* functions as an alternative term almost interchangeable with the broader expression 'language and law'.

LEGAL ORDER AND LINGUISTIC DIVERSITY

A10

This unit introduces a topic implicit throughout the book but not directly addressed in previous units: how legal systems deal with speakers of different languages who come into contact with law, without compromising consistency of legal interpretation or fairness in proceedings. We describe the interaction that takes place between the idea of legal order and linguistic diversity, in arrangements known as legal bilingualism or multilingualism: the organisation of legal systems to function in two or more languages. Complications and challenges associated with such legal-linguistic structures are examined.

Law and multilingualism

Although the exact figure is disputed, it is estimated that there are over 7,000 living languages today (www.ethnologue.com). This number is all the more striking given that there are fewer than 200 independent states in the world (193 of them member states of the United Nations). Although the number of languages is not distributed evenly geographically, **linguistic diversity** is a fundamental human condition that virtually all states have to deal with in one way or another. States manage their linguistic diversity differently, however. Some, such as Belgium and Switzerland, adopt two or

more languages as official languages for administration and in the courts; this gives rise to **bilingual and multilingual jurisdictions**. Others practise monolingualism, prioritising one national language as part of a nationalist identity or ideology and offering speakers who do not speak the **official language** only reduced rights (Pupavac 2012).

About one-third of sovereign states in the world now have two or more official languages. Some monolingual states also have two or more official languages in specific regions (Leung 2016). Due to the legacy of the British Empire and the rise of English as a global language, English is an official language in a significant number of these polities. To varying degrees, these polities may also have to function bilingually or multilingually in their law (a phenomenon known as legal bilingualism or legal multilingualism). This arrangement inevitably introduces additional complexity into all the language-and-law issues discussed in this book. Nor are the challenges confined to the bilingual or multilingual jurisdictions alone. All jurisdictions, whether multilingual or monolingual, need to deal with delivering justice to linguistically diverse communities, given the recently increased mobility of populations and frequency of transnational legal encounters.

Before we look at the challenges posed by multiplicity of language to legal systems, we need briefly to review how and why such issues have arisen. Some states are bilingual or multilingual because of linguistic diversity that existed at the time of the state's formation, whether by peaceful or military means. But the major reason legal systems today have two or more languages relates to European expansion and colonisation between the sixteenth and nineteenth centuries. Political boundaries were imposed for reasons that did not always respect language differences. Following decolonisation, a large number of postcolonial countries and territories in Asia, Australia, Africa and the Americas have retained legal systems imposed by colonisers; these legal systems are embedded in the former colonial languages, which continue to compete for status with local languages and, according to some, amount to a form of linguistic recolonisation or **linguistic imperialism** (Phillipson 1997). Examples of such postcolonial jurisdictions include Canada, Cameroon, Hong Kong, New Zealand and South Africa. Such jurisdictions may operate at a substate or state level. A third category of jurisdictions that operate multilingually consists of regional or global organisations that have created new kinds of globalised legal order, drawing on international law. Supranational bodies such as the World Trade Organization and the United Nations have their own judiciaries, which use multiple languages (predominantly English and French, sometimes also Spanish). The European Union, a political model for a new kind of transnational democracy, has 24 official languages from among its members states, partly because its laws are applicable not only to the governments of the member states themselves but also have direct effect on individuals and organisations within them.

Notwithstanding the obvious challenges posed by multilingualism to how a justice system operates (which we review below and explore in greater detail in Unit B10), granting enhanced status to **regional languages** has become increasingly common in Western democracies. Although it is difficult to weigh benefits against obstacles, political philosophers Kymlicka and Patten (2003: 5) observe that 'countries that have

moved in this multilingual direction are amongst the most peaceful, prosperous, free, and democratic societies around’.

Representing law in more than one language

Legal translation is one of the first issues to arise when contemplating how to develop law in multiple languages. But translation is only one aspect of a more complex multilingual legal practice. Certainly, need for legal translation has increased, both nationally and internationally. But an important question beyond need or amount also arises: what status do translations have? In some jurisdictions, a translation of a law becomes more than a translation: it acquires the full force of law based on an **equal authenticity principle** that we consider below. In such circumstances, where both documents are operative, uniform application of law depends critically on quality of translation. If versions of law that are both deemed legally authoritative give rise to two or more different legal outcomes, then unfaithful or inaccurate translation of a legislative text may compromise the certainty of legal decision-making (a principle of consistency of legal effect known and valued as **legal determinacy**).

Problems with legal translation are particularly contentious in postcolonial jurisdictions. Many such jurisdictions retain their former colonial legal system, including foreign legal concepts and the former colonial language. Legal translation is a necessary step in introducing the local language(s) into the legal system and so elevating their status. In some countries, this was a legal imperative born in political struggle. But languages elevated in status this way are often criticised for lacking necessary vocabulary or the sophistication to function as a legal language, perpetuating a widespread colonial discourse of presumed superiority. Before inferring superiority or inferiority, it is, however, necessary to acknowledge that linguistic differences between a former colonial language and the native or so-called vernacular languages may contribute to difficulties in translation (for instance, as between English and Chinese in the former British colony of Hong Kong).

Translation problems extend beyond translation, if that practice is conceived narrowly. To translate is to interpret and to interpret is to translate. In this respect, the longstanding debate in translation studies as to whether a translation should be literal or free (idiomatic) runs in parallel with the ‘letter versus spirit’ debate in legal interpretation, which also concerns a choice between relying on a literal reading or construing the wider purposes of law (see Thread 6). Fidelity to a source text provides a guiding principle in general translation; but legal translation must be concerned ultimately with transfer of legal content rather than linguistic or cultural equivalence, so emphasis needs to be placed on equivalence of legal effect rather than on textual identity or similarity (Šarčević 1997). The legal translator must play the role of a comparative lawyer (Šarčević 2012) in their search for translation equivalents.

In recent years, methods of legal translation have undergone major transformation in order to ensure the quality of legislative texts written in different languages. Instead of translating law from one language into another, a number of advanced bilingual and multilingual legal systems have begun to employ **jurilinguists** (in Canada) or **lawyer-linguists** (in the EU): professionals who have a combination of language skills and legal knowledge, and who work together in drafting multilingual law. This method,

known as **parallel drafting**, allows the co-drafters (who are no longer seen as translators) to preserve the original intent to be conveyed by a given law by working directly with the legislature, without the mediation of a source text in one particular language (Šarčević 1997).

Because of its 24 official languages, the EU has moved away from direct translation as a realistic approach. McAuliffe (2012) explains how instead an approach known as **pivot translation** has been developed in and for the European Court of Justice (ECJ), now usually known as the Court of Justice of the European Union, CJEU). Procedural texts such as written statements and oral submissions that are written in any one of the newer official languages are translated first into one of five 'pivot languages' (French, English, German, Spanish and Italian) and only then translated from that pivot language into other official EU languages.

Understanding legal texts written in two or more languages

Legal texts raise difficulties of interpretation as well as composition. Imagine a situation in which each language version of a particular law led to a different legal outcome. Lack of legal certainty would undermine public confidence. More importantly, the differing outcomes could result in chaos if implemented. Interpretation rules need to be devised specifically for multilingual situations.

Such rules raise once more the question of what status is to be accorded to each language version of a legal text. This issue needs to be clarified in interpreting multilingual legal texts before dealing with particular textual elements. Some jurisdictions, as we have seen (including Canada, Hong Kong and the EU), assign equal authority to different language versions, following the 'equal authenticity' principle introduced above (which is generally adopted in international law). Others specify that one language version will prevail where there are discrepancies (e.g. Maltese prevails over English in the laws of Malta; in Ireland, the Irish legislative text prevails over the English text). There is also a third possible relation between legal texts. In some circumstances, legal instruments are translated for informative purposes only, and have no legal authority. The German text of Belgian law is an example. One major difficulty associated with this treatment of two languages, however, is that citizens cannot rely fully on a version of the law that carries less authority than a version in another language. Whereas local discrepancy might not matter in many textual genres, with a legal text authority is perhaps the essential characteristic readers require.

Under the equal authenticity principle, all language texts of the law are presumed to carry the same meaning. Where discrepancies are found between texts, it is not permissible for an interpreter to assume that one language version better represents legislative intent, even if that version served at an earlier time as the source language for translation into other language texts (i.e. in a manner resembling appeal to legislative history in monolingual interpretation). Normally, interpretation of either text or both starts with **plain meaning**. If ambiguities are identified within a text (so-called intralingual indeterminacy), or if discrepancies are found between equally authentic texts (interlingual indeterminacy), then the putatively divergent language texts are compared for their respective levels of clarity and degree of meaning overlap. Sometimes

the shared meaning, or meaning with less ambiguity, will be adopted. Where this way of resolving the problem proves unsuccessful, the ultimate criterion is legislative intent. In other words, a literal approach may in interpreting multilingual legislation need to be supplemented by a **teleological (or purposive) approach**, at least in some circumstances.

Where a jurisdiction has many language versions of its law, such as the 24 language versions available for comparison in the EU, a meaning carried by the majority of language versions may be given more weight. From the perspective of this kind of linguistic-democratic procedure, having multiple language texts may be an asset: a means of clarifying ambiguities contained in one language text by multiway comparison. It appears, however, that use of this strategy is relatively infrequent in jurisdictions with only two or three possibly divergent versions. In such circumstances, the more limited number of texts might create legal uncertainty by introducing interlingual indeterminacy, rather than converging on a shared meaning.

The question arises whether legal predictability is compromised in such procedures. Legal meaning, for example, is sometimes extremely difficult to determine even by close reading of one single, authoritative text of a given law. Yet even what constitutes that ‘text’ to be interpreted in the practices described can be uncertain, appearing to consist of a **mega-text** made up of all coexisting official language versions. The very fact of their coexistence raises practical issues. Can an average citizen, for example, living in a jurisdiction whose law is embedded in an amalgam of multiple versions, be said to understand that law if he or she relies on only one version? The ‘mega-text’ concept presumes an interpreter of multilingual law – not only a drafter – who is multilingual, and familiar with the renderings of law in different languages. Another practical issue is that comparison between languages is not an unproblematic concept. Do comparisons between language texts need to be made continuously, or only monitored periodically? It may even be the case that other language texts are only scrutinised when one party sees a strategic opportunity in doing so, and not otherwise. Some jurisdictions attempt to overcome this difficulty by routinely comparing different language texts of the law, even in the absence of any alleged discrepancy.

Linguistic access to legal procedures and practices

The challenges associated with translation between legal languages are formidable. Beyond translating authoritative sources of law, however, multilingual jurisdictions also need to ensure linguistic access to other forms of legal communication.

Spoken communication in the courtroom is an obviously important area. While some bilingual and multilingual jurisdictions offer the defendant a right to be tried in an official language of his or her choice, more often the question of which official language is used in proceedings is left to the court’s discretion. For practical reasons, although many jurisdictions give official status to more than one language, few provide officially for use of more than one untranslated language in the same trial. Yet such *de facto* bilingualism does occur in the courtroom. A practice of **language alternation** in courtrooms in Botswana, Kenya and Malaysia is reported in Powell (2008), for example. Sometimes **code-switching** is also strategically employed by legal advocates, to foreground style shifting or in order to achieve calculated rhetorical effects.

Such bilingual discourse can be a source of significant difficulty for a court interpreter, and is rarely reflected in the court record.

Even in monolingual jurisdictions, it is usual for courtroom interpreters to be assigned to witnesses or litigants who speak a different language from the one used in the proceedings. Where this happens, original utterances rendered into the court language no longer have legal status. As we note in Unit A9, a sizeable research literature has documented the impact of court interpreters on the outcome of cases. But courtroom interpreting raises issues besides the quality of real-time interpreting itself: issues to do with **transcription** and recording. Where, as in many countries, no arrangement is made for audio and video recording of courtroom interaction, the written record captures only the interpreted, not the original, statements made by a witness. This makes it virtually impossible to retrace any injustice that may have occurred because of **misinterpretation**. An analogous problem arises when simultaneous rather than consecutive interpretation is used: words whispered by the interpreter into the witness's ear, for instance, are not normally picked up on the recording or heard by anyone else.

A further important but often neglected concern is access to legal materials. For a variety of reasons, multilingual jurisdictions tend to give more attention to translation of legislative texts than to making sure such texts are published, authenticated and disseminated in all the official languages. In common-law systems, there is also a further, substantial body of authoritative legal texts besides legislation: judgments communicated in law reports, which primarily declare but also contribute to developing the law. Making such reports available in multiple languages inevitably has a major cost implication that is not always taken into account alongside less tangible and sometimes abstract problems raised by language and law. But the extent to which such judgments and other legal reference materials are available also contributes to access to justice, especially given a recent, worldwide increase in unrepresented litigation.

Languages, law and policy

The complicated linguistic and legal situations discussed in this unit highlight important contemporary challenges in how language and law relate to one another. Some of those challenges are concerned with legal reasoning and judgment, informed by understanding of **cross-linguistic differences** and the rationale for the language policy adopted in a given jurisdiction. Other challenges involve practical issues of policy, education and investment. For example, legal education systems need to be planned and organised to deliver linguistically competent personnel. In Canada, fluency in both English and French is an essential requirement for appointment as a federal judge (except in the Supreme Court; Section 16 of the Official Languages Act 1988).

The issue of language competence applies to other courtroom roles, too, potentially including non-professional roles. Should language proficiency requirements be revised in relation to jury selection, for example, as has been debated in Wales (an issue we examine in detail in Unit D10)? Any such revision risks compromising a non-linguistic dimension of the fundamental rationale for jury trial: representativeness in the composition of a jury, based on random selection. Nor is training, in any obvious sense, an option. As yet, there appear no easy answers to many of the linguistic and legal



dilemmas that arise in multilingual jurisdictions. While some jurisdictions currently require jurors to be proficient in the language of the proceedings, others prefer to provide interpreter services also for jurors. Whatever the best way of resolving such dilemmas, however, they undoubtedly foreshadow major challenges in legal systems of the future.