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笔译实践指南丛书④

Deborah Cao

Translating Law

法律翻译

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导 读

翻译难，法律翻译更难。难之主要原因在于法律语言为非常独特的技术语言，其内在的精英性(inherent sophistication)是阻遏译者将一种法律语言翻译成另一种法律语言而非另一种语言的最大障碍。法律翻译属于交叉性学科(interdisciplinary subject)领域，适格法律翻译者(proper legal translator)至少需要掌握法学(不是一般的法而是比较法)、法律语言学(不是一种法律语言而是比较法律语言)以及译学的大量知识与技巧，其中(译者)所付的艰辛，外人难以想象。

然而法律毕竟具有可译性，即便是渊源和文化相差悬殊的法律也是如此。而更令人欣慰的是法律翻译还具有可教和可学性，非法律人(lay people)完全可以通过传授与学习深入到法律翻译神圣领地。黛博拉·曹(Deborah Cao)所著的《法律翻译》便是一本指导人们研究和演习法律翻译理论和技巧的力作。该书从语言学、译学以及法学的三维角度，对法律语言的词汇、语用、文体、文化等诸多特征、译者必备的知识技能、翻译过程中应当注意的事项等作了较为全面深入的阐释，且从语言和文化对比的视野，对法律翻译理论进行了一定的诠释。作为华裔澳大利亚人，该书作者所受的中国教育及其秉承的中华文化精髓使其思维范式和表现技法大有让读者似曾相识之感觉，因而该书非常适合国人之口味。更难能可贵的是该书作者用较为质朴的语言演绎出自己多年从事法律翻译的实践经验，使该书除了较高的理论研究价值外，还具有一定的文本指导效用。

全书共分七章。第一章为引言，除简要介绍其他各章的内容外，此部分概述了在当今全球化(globalization)过程中，以及在国与国和民族与民族之间的互动日益增强的趋势下法律翻译的必要性和重要性。从跨文化和语际交际行为(cross-cultural and interlingual communicative act)的视角上看，法律翻译是一种复杂的人类社会行为。在特殊的法律语境中，翻译行为受到来自源语(SL)以及目的语(TL)中所含的法律、文化、语言等多种变量(variable)的约束，其对法律翻译构成极大的挑战。作者依据自身经验，提

出应当对法律翻译“去神秘化”(demystify)，认为尽管法律翻译是一种特殊的有别于其他类别之翻译(special, different from other types of translation)，但法律翻译技巧最终是可以通过学习得以提高的。

第二章从法律、语言和译学角度对法律翻译进行较为全面的剖析。首先是法律翻译的分类，作者研究借鉴了诸多学者不同的观点，其中包括Sarcevic(1997)、Roberts(1992)、Kurzon(1998)、Maley(1994)等的著述，概要阐述了把法律翻译按SL文本的主体内容(subject matter)或功能(function)进行分类等理论。作者继而对法律语言的结构和特征予以分析，认为法律语言主要具有规范性(normative nature)、行为性(performative nature)、技术性(technical nature)和不确定性(indeterminative nature)四大特征。这些特征主要通过词汇、句法、语用以及语体(style)显现，由此使得法律语言成为可识别的一种语言现象(a recognizable linguistic phenomenon)。黛博拉·曹认为，法律翻译之难主要难在SL和TL所涉及的法律以及法律语言的特性差异上。这些差异包括法律体制和法律法规之间的差异、高度专业化的法律语言之间的差异、法律文化的差异等。鉴于差异之普遍存在，作者的结论是法律翻译，尤其是法律概念之翻译，追求绝对等值(absolute equivalence)是完全徒劳的。

第三章论及到法律翻译主体适格性，即法律翻译者究竟应当具备何种素质和掌握何种技术之问题。依作者所见，法律翻译主体适格性主要涉及到译者的翻译能力(translation competence)及翻译水平(translation proficiency)。事实上，所谓的法律翻译语言能力是指译者的语言知识(knowledge)，其包含许多因素。正如Weisflog(1987)所说，译者除具有法律语言和翻译等知识外，法律翻译者必须全面了解法律，包括外国法和内国法(national law)。相比之下，法律翻译水平则是译者在特定的法律语境中运用其认知知识的一种能力。作者在本章中对翻译能力的运行模式，即翻译语言能力(translational language competence)、翻译知识能力(translational knowledge competence)和翻译策略能力(translational strategic competence)在情景语境中(context of situation)互动的一种动态范式作了较为详尽的阐述。

第四章论述的是法律术语的翻译。法律术语是表达法律科学与法律技术概念的载体，是法律语言中最具特色、最为重要和最值得研究的内容。每一种法律语言都有一套相对独立的术语体系，法律术语的最大特征是异质性(heterogeneity)，即便在同一法律语言中，因法制、政体、司法管辖区等不同也会导致法律术语的明显差异，此既是法律语言能成为专门技术语言的重要因素，也是法律翻译复杂与棘难之所在。作者在本章中将法律术语分类为法制关联词(legal system-bound words)、含法律专门意义的一般单词

以及法律同义词，较为详尽地阐述了它们相关的定义、翻译策略与技巧。作者最后还对语言和法律的不确定性对法律术语翻译的影响作了较为中肯的评价 。

第五、六、七章涉及到具体法律文本(legal text)之翻译技术和手段，属于翻译实践原理(doctrinal)而非纯理论研究(theoretical)范畴。事实上，法律文本可作多种分类，从文体学(stylistics)角度出发，法律文本可按语体(style)两分为“规范性法律语言类”(normative language of law)和“法学著述”(literature)。此外，法律文本还可三分为“论证性文件”(discoursive writing)、“诉讼类文件”(litigation writing)以及“规范性文件”。美国法律语言学家 Tiersma 则用另一种三分法将法律文本切分为“实施性文件”(operative documents)、“阐述性文件”(Expository documents)和“说服性文件”(persuasive documents)。

第五章则将法律文本四分为立法文本(statutory text)、司法文本(judicial text)、法学著述(legal scholarly works)和私人法律文件(private legal document)，并对最后一类文本的翻译作了详尽的论述。事实上，作者所谓的“私人法律文件”是指律师日常法律业务活动中所撰写或使用的各种法律文书和文件。作者关注的焦点集中在该类法律文件的语言特征、语篇特征(textual feature)、词汇特征、句法特征、翻译此种文件之目的和地位等方面。此外，普通法系(common law)和大陆法系(civil law)国家所用的私人法律文件在文体、遣词等方面之差异也是作者论证的重心。

与第七章相对，第六章内容涉及内国立法(national legislation)之翻译实践。在本章中，作者适用了许多范例，对官方语言为双语(甚至多语)的国家或地区，诸如加拿大、瑞士、中国的香港等之制定法(statute)的翻译技巧进行分析比较，其关注的焦点仍然是立法的语篇特征、语用特征中的言外力量(illocutionary force，即语句或书面文段所造成的影响)以及立法文本其他的一些常见特征。国内立法翻译最大的挑战在于原文本与译本必须等值(equivalence)，而翻译中的绝对等值却只能是一种理想性奢望。作者由此介绍了加拿大与中国香港为解决原文本与译本法律意思含混时所适用的一些法律诠释规则。在某种范畴，这些诠释规则也可被视为法律翻译实践规则。

第七章的主题是国际法律文件(international legal instruments)的翻译。大型国际组织，如 UN、EU、WTO 等的法律文件及其他国际公约、条约、协定、盟约(covenant)、议定书等之翻译涉及到许多考虑因素，包括概念术语的界定、不同的文本格式、文本涉及的主体事项、国际法律文本的语篇特征等。作者分别对这些问题进行了阐述，并对国际法律文本翻译中经常

使用的工具，包括多语词汇数据库(multilingual terminology database)、文本数据库、机器翻译等体系均作了概要介绍。

该书有较强的理论性，但涉及的具体方法和技巧不多。尤其是作者多从一般语言学或法学的角度进行阐述分析，没有更多地从对比法律语言学(contrastive legal linguistics)或比较法学(comparative law)的角度进行探讨研究，因而在某些方面稍欠深度。如在论证法律语言是技术性语言时，作者罗列出法律语言的“行为性”和“不确定性”，而事实上这两大特征更应是“语言”而非“法律语言”的属性：尽管无法完全达到但法律语言追求的理想境界却是“确定性”(certainty)，“不确定性”不应是法律语言的主流特征而是力求避免的情况；此外，在某些法律语境中，语言(speech)与行为(act)刚好相对，此时不能将语言视为“行为”，也就是说法律语言具有“非行为性”之例外。尽管如此，对于从事法律翻译及喜好法律语言的人而言，该书仍不失为一本难得的好书。

宋 雷
西南政法大学外语学院

Foreword

THE HON. JUSTICE MICHAEL KIRBY AC CMG

Like most judges and lawyers, I spend my life puzzling over the meaning of words. The words may exist in a national or sub-national constitution. They may appear in local legislation. Or they may emerge from judicial reasons, written over the centuries, in the exposition of the common law.

Finding the meaning of these texts is often quite difficult, even when one is working entirely within a familiar legal paradigm, with a language learned at one's mother's knee and with concepts that are known and accepted.

We should not be surprised about such difficulties. There is such a variety of languages – there are hundreds of dialects in Papua New-Guinea alone. The sources to which language adapts are so diverse and their needs so different. Individual and group varieties are inescapable, so it is something of a miracle that human minds can ever convey meaning to each other. It is really astonishing that extremely complex concepts of morality, ethics, science and technology can somehow be put into verbal sounds and then cut up into little pieces known as words, sentences, paragraphs and chapters. It is also amazing that groups (sometimes intercontinental groups such as those who speak the English or Spanish languages) can communicate with a fair degree of ease or at least can get the general drift of what they are on about – linking brain synapses to those of others through the vehicle of language.

This miracle, known as communication, would probably go unremarked (and just be taken for granted from the experiences learned at infant school) were it not for the uncomfortable discovery, relatively early life, that other people speak languages different from one's own. To watch children try to communicate across the language barrier – to look at the expressions of puzzlement and the blank stares of incomprehension – is an eye-opener. How can it be that other human beings cannot understand perfectly simple things that we are saying to them? How is it that others do not speak the English language?

We should not laugh at these questions. I am old enough to remember a time when learned judges and bewigged advocates thought that it was sufficient to get their meaning across to the variety of people who had come to Australia from different lands, with different languages and cultures, simply by shouting at them. If we spoke loudly enough, they believed, these people would understand the English language, like everyone else who was civilised. Only slowly did Australians come to realise that more people speak languages other than English; indeed that English is not even the most commonly spoken language in the world – simply the most intercontinental and universal one of them.

Gradually, in about the 1960s in Australia, the fog began to lift. Judges and lawyers began to realise the necessities of translation. And also the perils. Those perils, and the difficulties and dangers, form the subjects of this book. As we learn, with growing experience of translation, the transfer of words, sentences and ideas from one language to another is no mechanical task. Language, not least the English language, is full of idioms and peasant expressions, figures of speech and brilliant metaphors that are difficult to translate exactly into other languages. To the demand of the trial judge or counsel 'just translate what the witness says' comes back the baleful stare of the translator. Occasionally, he or she would stand up to this insistence and point out that, without further questions and clarification, the exact nuance and refinement of meaning, necessary to accurate translation, could not be procured.

Just when we were congratulating ourselves on having understood the added peril of translating words in a legal context, we began to realise the additional complications that Dr Cao has collected in this excellent book. The last fifty years have seen a huge increase in international travel and communication, to a degree that would have seemed astonishing in 1950. In part, this was because of the rapid expansion of international physical travel following the development of civilian jet aircraft. But, in part, it also arose out of the remarkable growth of telecommunications, the invention of the Internet, the expansion of cyberspace and the electronic interconnection of human minds in every part of the world and far out into space.

So that this interconnection would not simply be a jabbering roar of incomprehensible static, it is necessary to bridge the gulf of linguistic differences. And so, the need for translating words in a legal context expanded far beyond the humble courtroom into the global economy, the international world of treaties and agreements and the dealings of different communities living in ever closer association with each other.

As Dr Cao points out, Canada, from the time of confederation and even before, had to accommodate its basically bilingual character with its law and

practice. Its statutes were written, accurately and succinctly, in English and French. The need to express words in the different languages was hard enough. But it was harder still when those words were addressed to a whole culture of legal assumptions compacted into a single sound bite. There is a good illustration in this book of the use in one Canadian federal statute of the English word 'court'. Did this connote a 'cour' or a 'tribunal' in the French language? Did it embrace the Human Rights Commission, which Anglophones might not think of as a 'court' but which Francophones might view as a 'tribunal', having regard to certain of its decision-making functions?

Dr Cao points out that other bilingual or multilingual societies are now treading the same path that Canada has done for more than a century. In Hong Kong, for example, statutes are now expressed both in English and Chinese, with each text having equivalent authenticity. Inevitably, differences emerge over meaning. The reconciliation of the texts is an important legal function. On Canadian experience, the problem will rarely be so trivial as a dispute over the meaning of a particular word, as such. In the legal context, the disputes will commonly arise because many words have specialised meanings.

Even within the comfortable confines of the English language, we can see illustrations of this in court decisions. Recently, in the High Court of Australia, the question arose as to the meaning of the word 'pawn' when appearing in a State statute. Was the word to be given its popular meaning, so as to address the mischief of unregulated pawnshops to which Parliament seemed to be addressing itself? Or was the word to be given a different, specialised and 'technical' meaning, because it was used by the lawmaker in a legal context? The majority took the latter view. I took the former view. See *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 264-266 [35]-[41]. Parliament promptly amended the act to overcome the majority opinion. But how much more difficult are issues of this kind when a translator is seeking to comprehend meaning from the standpoint of an entire legal culture, looking from the outside at expressions used by another?

Dr Cao, who has personal reasons to have grown up with these issues in her own family, is an excellent expositor of the complexities and challenges that are involved in translating legal notions. In fact, she has spent a lifetime thinking about this problem. We are most fortunate that she has now collected and explained her analysis of it. She has offered countless intriguing illustrations of the difficulties of translation of legal texts. She has done so by reference to private legal documents, domestic legislation and international legal instruments. Because the world of regional and

global commerce and culture will continue to expand, the need for bridges of language will necessarily proliferate. Those bridges will be needed in and outside the legal sphere. Unless the bridges can be built, a culture of peace, understanding and mutual respect will be difficult to secure.

Law has a vital part to play in reinforcing communication between nations and peoples. Building the international rule of law is a mighty challenge for the 21st century. We cannot achieve this goal by simply talking away to ourselves, being confined within our own legal jurisdictions and linguistic groups. We must cross the barriers of language. For this we need expert translators of language. And, as Dr Cao points out, we must also be ready to cross the barriers erected by history, culture and institutions. We must hope that when the bridges of understanding are built, there will yet be sufficient commonality to bind humanity together. Law has a part to play in the achievement of this goal. That is why this book addresses a problem of great importance for the future of law and life on this planet.

I therefore welcome Dr Cao's text. There must be no more judicial shouting at translators. We must look at them with appreciation and awe for theirs is a subtle and challenging role as the pages of this book reveal and illustratJe.

Michael Kirby
High Court of Australia
Canberra
7 February 2007

Preface

Is translation art or science? This question has been asked over the years and there is still no answer. We may never have a definitive answer to it, but that hardly matters as translators around the world and over the centuries have carried out the tasks of translation in an artful and scientific manner. Perhaps translation is both art and science. It may defy a strict delineation as translation involves so many facets and both artistic and scientific efforts. Of translation work, translating law, I believe, is the most intriguing and challenging, the focus of this book.

The book reflects part of the directions of my research in the past ten years or so. In this work, I hope to make use of my training and background in linguistics and law and my experience as a legal translator and court interpreter to look at legal translation from an interdisciplinary perspective, exploring the linguistic and legal aspects of translating law, and examining the interpretive interaction between various languages and legal cultures.

This book is also a tribute to all the legal translators and court interpreters working in different corners of the globe, tirelessly and admirably, whose work is vital but often unappreciated or under-appreciated. It pays tribute too to the linguistic and cultural diversity that constitutes our world and so much of our contemporary lives. On a personal note, I am Chinese by birth and a naturalised Australian. Some years ago I married into a Jewish Italian family from New York whose family name is Tedesco (which in Italian means 'German'). So, it is only fitting that I make occasional reference to all of these languages and laws in this book – Jewish/Hebrew, Italian, American/Australian/English and German, plus French and Chinese. Before I left China, life had always involved Chinese and Chinese only, even though I was trained and qualified as a United Nations interpreter. But since then, my personal and professional life has taught me much about the diversity of human as well as non-human lives, the life of the Other, and of many. So, in a way, the book is a tribute to the Tedescos and Fuchs of my extended family that is a miniature reflection of our civilised society today.

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