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Stepping over linguistic and legal boundaries Creativity and discourse changes in legal translation

Summary

The topic of the paper is creativity in legal translation. Legal discourse is unique for every legal system and it evolves into a unique and inherent entity hand in hand with the legal system it serves as a vehicle for communication. Accordingly, translating legal discourse means transferring thought patterns into another legal culture and consequently into another legal discourse. So far, research in the field of legal translation has focused almost exclusively on the comparative and descriptive analysis of original and translated texts disregarding how and why the particular decisions were made. All of this has proven to be very valuable, but does not provide a deeper understanding of the mindset behind the decisions of translators. The cognitive processes behind the legal translators' decisions fueled by creative problem-solving remain undisclosed and leave us in the dark as to what links the translators' choices to their cognition. Scrutinizing excerpts from common law precedent cases and law books translated by the Cypriot judges and used in a court decision reveals us what links their creativity to the possible discourse changes.

Keywords: translation, creativity, language of the law, discourse, common law, Cyprus

1. Introduction

During the last ten years findings from research in creativity have been applied to provide insight into the process of translating literary texts. Thus, creativity has made its way into translation research and some scholars are speaking of a *creativity turn* in translation studies (*cf.* Loffredo and Perteghella 2006: 1). And, generally speaking, translation is considered to be creative (*cf.* Mackenzie 1998) and the notion of creativity in translation is usually associated with an elaboration or an adaptation of source language material to the communica-

tive norms in a target culture; in other words, it is most commonly perceived as an alternative to linearity; Robinson (2016: 282) relays that the translator employs two ways of linguistic creativity. First, at the very simplest level, the translator, by definition, transforms the source text into the target text producing something novel that did not exist. Secondly, at a more complex level, the impossibility of exact equivalence between languages and cultures means that the target text will never convey the same thing as the source text. Hence, at this more complex level the very fact that the translator is not the source text author contributes to the fact that the target text will reflect the translator's personal interpretive idiosyncrasies.

We would expect that any examination of the translation product through the lens of creativity would direct the attention onto that second, more complex level of a creative problem-solving process denoted by Robinson (see above) and thus onto the interplay between those interpretive idiosyncrasies, the target text and the management of discourse and knowledge provided by the source text and the communicational situatedness.

The aim of this paper is to explore the creative problem-solving that takes place behind the legal translators' decisions by presenting the links between the translator's creativity and the appreciation of legal discourse to the awareness of the cross-cultural differences of legal discourse, as well as the possible grounds behind the discourse changes in the translation.

The paper is divided into sections. Sections 2 and 3 are devoted to what creativity is, how it functions and how it correlates to language and translation. They further include a discussion of how discourse links to culture, knowledge and creativity in translation. Sections 4 and 5 encompass the methodology and the analysis; the paper examines a text of a court decision issued by a Cypriot court and scrutinizes the translations of the common law references used by the judges as to the changes in the discourse they made during translation. The last section 6 includes results and conclusions.

2. Creativity in translation

The notion *creativity* is usually associated with unusual achievements by great minds in the realm of fine arts, music, literature, etc. However, every individual has the capacity to become creative – others more, others less¹. Creativity researchers converge on the notion that creative problem-solving is a complex process that may include problem definition and redefinition, divergent think-

¹ For details see Sternberg and Lubart (1996) and Sternberg (2006).

ing, synthesis, reorganization, analysis, and evaluation, which is inherent to human nature and visible through the individual's interaction with the environment². Urban (1990: 104) defines creativity as the ability to create a new, unusual and surprising product, as a solution to an insightfully perceived problem or a given problem whose implications have been insightfully perceived so as to arrive at a solution-gestalt, which as a product or in a product becomes elaborated and through communication can be grasped and experienced by others as meaningful and significant.

For Langlotz (2016: 40-41) creativity points to the intelligent cognitive capacities that make it possible for human beings to shape new, original, unprecedented, or unconventional products that depart from familiar, established, predefined, and fully predictable outcomes. Langlotz further identifies two complementary ways in which creative cognition can be linked to language. First, the notion of linguistic creativity can be related to the original linguistic patterns that emerge when human creativity is applied to linguistic structures as such. Thus, in a broad sense, the fundamental human capacity to create regular, but new, linguistic patterns, such as new words, sentences, or texts, can be regarded as reflecting language-based creativity. Furthermore, linguistic creativity can be associated with more unconventional communicative products that are creatively produced through language (2016: 41).

The source text and target text relationship is fundamental to the concept of translation. It is this close relationship which leads to notions of translation as derivative or dependent – and therefore as not "creative" (Rogers 2011: 43). Langlotz's conclusions in line with Robinson's view mentioned earlier relay that linguistic creativity includes a wide range of phenomena that could be employed to transfer new meanings into other cultures by using language in a novel way.

Consolidating on the definitions of creativity, its connection with language and applying it to translation, it becomes evident that a translation could be assessed as a creative product that is new, meaningful and significant and whose production was triggered after an appropriate reaction of the translator to a prompt to translate a given source text purposefully.

The assessment of the translation as a creative product allows conclusions concerning the problem-solving process leading to the product and the appropriate use of data in the form of information and knowledge available to the translator³.

² See further Sternberg and Lubart (1996) as well as Sternberg (2006).

³ A single source text can yield more than one target text; that alone is a problem that needs to be solved intelligently by the translator. See further Vlachopoulos (2004).

Creativity has also been present explicitly in modern translation studies⁴; Mackenzie indicates that is has been discussed in the past and that translators resort to unexpected means to get the meaning across (1998: 201). The German translation scholar Kussmaul (2000) defines creativity in translation as the result of an obligatory change in the course of translating, which produces a solution that is conceived as new and appropriate by the expert in a given culture, at a given time, and in pursuit of a given goal (2000: 31).

Importantly, by denoting translation as an activity performed by an expert and in pursuit of a given goal under certain conditions, Kussmaul acknowledges that creativity in translation cannot be anything else than a problem-solving procedure intelligibly guided by information and knowledge management. Wilss (1988) and Stolze (2003) use the notion of creativity to denote problem-solving procedures; Wilss (1988: 108) believes that translation is creative, but he also maintains that knowledge on the creativity processes is still limited and that there is still much to be investigated. Stolze (2003: 221) agrees that translation is a creative process; she believes that linguistic creativity comes before linguistic standardization when it comes to translating. Both Wilss and Stolze agree also as to the point when the translator becomes creative. They believe that the translator resorts to creativity when standard procedures do not yield the expected result. For them creativity is the translator's way out of a dead end. Cho (2006: 381) supports this viewpoint by indicating that there is evidence that creative responses decrease with increasing subject knowledge and experience.

As for the translation of legal texts, scholars mostly advise translators to act with caution. Arntz (2010: 29) believes that in principle there is space for subjectivity and creativity in the translation of legal texts but he points out that in some cases and texts this space is very limited. Šarčević (1998: 291) suggests that the translator should proceed with caution and a creative approach should only be adopted when this enhances the clarity of the target text. Indeed, very interesting is Pommer's position who encourages translators to become creative within the restraints of the law (2008). She believes that the creativity debate is a unique incentive to further strengthen a transdisciplinary approach to the translation task and to develop creative strategies to adequately meet the many and difficult problems arising in legal translation. Concretizing the novel understanding of creative freedom in translating legal texts will make the modern legal translator increasingly aware of his creative potential and show him how to make the most of his opportunities to be creative (Pommer 2008: 367).

⁴ For a more detailed review of creativity in translation studies see Rogers (2011), Mackenzie (1998) and Robinson (2016).

Pommer actually speaks about the translator's courage to get creative in a field where any creativity is perceived as a possible source of distortion of the source text meaning; creative solutions given birth to in the course of the translation process are considered to veil the tracks of the original argument structure. Pommer further advocates that concretizing creative freedom from a translational perspective should improve the quality of legal texts by encouraging the translator to make the most out of the opportunities to be creative (2008: 367).

3. Creativity and discourse

Both Langlotz (2016) and Urban (1990) describe creativity as a knowledge and information driven process. When it comes to the creative problem-solving in communication, the knowledge of discourse and about discourse cannot be ignored.

Discourse has been defined as language use relative to social, political and cultural formations, as language reflecting social order, but also as language shaping social order individuals, and as interaction with society (Jaworski and Coupland 1999: 3). Analyzing this definition one cannot but agree with Trappes-Lomax (2004: 136) on the facets of the notion *discourse* as:

- 1. the linguistic, cognitive and social processes whereby meanings are expressed and intentions interpreted in human interaction;
- 2. the historically and culturally embedded sets of conventions which constitute and regulate such processes;
- 3. a particular event in which such processes are instantiated;
- 4. the product of such an event, especially in the form of visible text, whether originally spoken and subsequently transcribed or originally written.

Discourse reflects a mindset that exceeds the words or grammatical structures on the paper: Any examination of discourse invokes on the researcher the responsibility of viewing the translator's decision in line with the communicational events both in the source and the target culture.

Hence, any analysis of a legal translation has to focus on the (non-)appreciation of legal discourse by the translators, on their awareness of the crosscultural differences of legal discourse and the possible reasons - in terms of the legal outcome – for applied discourse changes.

An examination of the translation process through the lens of creativity would direct the attention onto the discourse of the translated text as a product of creative problem-solving and onto the interplay between the translators' mindset, the translated text, and the management of the available informa-

tion. Especially, the scrutiny of the discourse changes (not) made reveals if the system-inherent discourse particularities on both sides of the cultural rim had been fully appreciated as to their interplay within the system.

The discourse in the source text and the discourse of the (legal) target culture have to be examined in the light of communicational aspects or – in legal terms – in the light of the legal outcome; language has to be studied in both systems communicatively, or the communication has to be viewed linguistically. This implies a scrutiny of language in use, language above or beyond the sentence, language as meaning in interaction, and language in a situational and cultural context⁵.

4. Methodology

We will apply the concept of *Multidimensional Translation* developed by Gerzymisch-Arbogast (2008) to our analysis. It is a three-step approach based on Nida and Taber (1969) (Dogoriti and Vyzas 2015: 146-148). She proposes the following three steps to describe LSP translation (Gerzymisch-Arbogast 2008: 13):

- A bottom-up text analysis with text-individual 'salient' LSP features in the reception phase (identifiable on an atomistic, hol-atomistic and holistic level), i.e. a phase in which the LSP source text is 'understood' and its comprehension is secured and controlled.
- A contrastive analysis phase in which language and cultural LSP features, patterns and/or knowledge systems are compared for translation purposes (transfer phase) and which includes a comparative compatibility analysis of source and potential target text features from all three text perspectives: atomistic, holistic, and hol-atomistic.
- A reformulation phase in the target language and culture, in which the individual target text is produced ((re)production phase) against the language and cultural resources identified in the transfer phase. The reformulation process is governed by at least the target text purpose, applicable norms and assumed recipient or text type and interrelates atomistic, hol-atomistic and holistic levels or text perspectives.

In the analysis we will start from the assumption that in order to become socially relevant any meaning must be objectified in a way that can be understood by the actors. Its objectivation and its understanding constitute the basic aspect of communication and meaningfulness.

⁵ For a detailed analysis see Trappes-Lomax (2004).

Gerzymisch-Arbogast's perspective provides for a structured procedure beginning with a bottom-up description of the source text, considering the target text purpose and its correlation with the knowledge systems mirrored by the domain-specific discourse of both source and target text.

The translators' linguistic choices are examined against the available language and cultural resources, the purpose of the communication and the assumed recipient; in order to trace creative problem-solving in the transfer and reformulation phase we will look for original, unprecedented, or unconventional products in the target text that depart from familiar, established, predefined, and fully predictable outcome but can be objectified and are meaningful to the actors (Langlotz 2016).

5. The translation of Common Law precedent into Modern Greek (Republic of Cyprus)

We will study the translation of quotations in a Cypriot court decision, where the judges quote common law precedent cases and excerpts from legal literature. They translate the passages of interest from English into Modern Greek⁶.

This text was chosen because the legal professionals translate it themselves and we can assume safely that they are novices to translation without any relevant training. This information is of importance, since thus one can be sure that the solutions the translators came up with are novel for them as individuals – 'new' being an essential attribute of any creative solution? The Republic of Cyprus took over Common Law from Britain in 1935. The introduction of the Common Law to Cyprus meant that British case law would be applied by Cypriot courts. In order to overcome the difficulties that could arise from the introduction of case law to Cyprus, the British codified certain areas of the common law (Frantzeskakis, Evrigenis, Simeonidis 1978: 345-482). In 1959 the Law of Civil Wrongs was codified. After gaining the independence in 1963 the native languages of the major communities (Greek and Turkish) living on the island became the official languages of the Republic of Cyprus. Up to that time, English had been the language of the judiciary.

The legislation of the Republic of Cyprus was drafted in Britain in English by non-Cypriots (most probably) ignorant of the culture of the people in Cyprus and having a British reality in mind. Its effect on a culture different from that of Britain combined with its remoteness from local customs was deemed

⁶ The main body of the court decision is written in Modern Greek.

⁷ The relationship of creativity and newity is explained in Boden (1998).

⁸ Neocleus provides a comprehensive introduction to the law in Cyprus as well as a detailed historical account in English. See further Neocleus (2000).

to create a legal conflict. What is more, the law of the Republic of Cyprus had been taught neither in Cyprus nor in Greece, or in Britain; a Law School was established at the University of Cyprus just a decade ago.

According to the report published in 1992 by the Office of the Law Commissioner, which translated and revised the laws, any incongruences were removed and the translated laws were adapted to the provisions of the Constitution⁹. The translators were forced to translate into a non-existent legal language; the codified English Common Law texts were translated into a culture void of a linguistic mechanism and created a new legal language fit to communicate Cypriot Common Law¹⁰.

The text under scrutiny is a court decision, where the judges quote English common law precedent cases and translate the passages of interest themselves into Modern Greek. We scrutinized the case *Republic of Cyprus versus Michalaki Pani*¹¹. The judges were confronted with the English common law discourse of the precedent cases, other Common Law Acts, and literature, which had to be transferred into the Modern Greek common law discourse used in the Republic of Cyprus. The translated passages have been integrated into the text of the court decision.

Interestingly, the judges marked the translated excerpts either as "free translation" or as "translation". This allows us:

- a. to establish that the translators analyzed the source texts and their discourse before translating them with a different purpose in mind, and
- b. to classify the translated excerpts into two categories for our study. First, we will examine the translated quotations described as "translation".

The analysis showed that the judges had rendered a number of the English common law terms in the translation of an excerpt from the Criminal Evidence Act 1898 by deviating from the laws in force in the Republic of Cyprus. For example, the term *hearsay* became $\varepsilon \xi$ $\alpha \kappa o \eta \zeta$ (from hearing) instead of $\varphi \eta \mu o \lambda o \gamma i \alpha$, which is the term used in the Cypriot law of civil wrongs.

The translation of the quotation is a linear reproduction mirroring exactly the wording of the English language source quotation: the judges did not deviate from the source text structure which leads to a symmetrical transfer of the source text structures into the target system:

⁹ Service for the Revision and Consolidation of Cypriot Legislation. *The revision of the Legislation in Cyprus 1987-1992* (YAEKN/Nicosia 1992) 326.

¹⁰ For a detailed review of the legal language situation in Cyprus see Vlachopoulos 2008.

 $^{^{11}}$ Δημοκρατία ν. Μιχαλάκη Ευσταθίου Πανή (available at http://www.cylaw.org/cgi-bin/open. pl?file=apofaseis/aad/meros_2/1999/rep/1999_2_0124.htm&qstring=%F0%E1%ED%E7) (Access: 25.08.2019).

Evidence is hearsay where the purpose of the party adducing it is to prove the truth of some fact asserted

(Murphy and Stockdale 1995)

Μαρτυρία είναι εξ ακοής όπου σκοπός του μέρους που την προσάγει είναι να αποδείξει την αλήθεια κάποιου γεγονότος που τελεί υπό ισχυρισμό.

The Greek translation is void of commas and the sentence structure is unusually complex as for a Greek sentence, which – on the other hand – is not uncommon for English common law discourse.

The same holds true for the following example, where the linear transfer results in an uncommon use of the punctuation and transfer of the wording *an implied assertion* and the impersonal pronoun *one*:

In some cases, there is no question of the applicability of the rule against hearsay because the statement tendered in evidence was not intended to be assertive, and there is no question of its being relied on as an implied assertion. Words are often the equivalent of acts which must be proved if in issue or relevant to the issue: "One asks another to attest a document, or to advance a sum of money, those are not merely words, but acts." (Shilling v. Accidental Death Insurance Co. [1858] 1 F. & F., 116 at p. 120, per Erle, J.). The speaking of such words may always be proved by a witness who heard them if they are relevant or in issue and they may conveniently be described as "operative" words.

"Σε μερικές περιπτώσεις, δεν τίθεται ζήτημα εφαρμογής του κανόνα αποκλεισμού εξ ακοής μαρτυρίας γιατί η προσφερόμενη σε μαρτυρία δήλωση δεν σκοπούσε σε ισχυρισμό για γεγονός, και ούτε τίθεται θέμα να θεωρηθεί σκοπούσα ως ανωτέρω, εξυπακουόμενα. Λέξεις είναι συχνά ισοδύναμες με πράξεις που πρέπει να αποδειχθούν εάν είναι επίδικες ή σχετικές με το επίδικο θέμα: "Ένας ζητά από κάποιο να υπογράψει ως μάρτυρας, ή να του δώσει ένα ποσό χρημάτων, αυτές δεν είναι απλές λέξεις, αλλά ενέργειες". Η εκφώνηση αυτών των λέξεων μπορεί πάντοτε να αποδεικνύεται από μάρτυρα που τις άκουσε αν αυτές είναι σχετικές ή επίδικες και μπορεί κατάλληλα να περιγραφούν ως "ενεργές" λέξεις".

In the first sentence the use of the comma is unusual for Modern Greek but the translators retained it without any obvious grammatical reason. Furthermore, the use of the participle $\varepsilon \xi v \pi \alpha \kappa o v \delta \mu e v \alpha$ as a translation of *implied assertion* is uncommon and the use of these participles is extremely rare (even) in Modern Greek (legal) usage; alternatively and stylistically more appropriate,

the Greek reader would expect a relative clause. Moreover, the translation of the pronoun One as Evac is also uncommon. Greek legal discourse would favor the passive voice.

In the following quote the judges translated again by mirroring the source text structure:

A question of hearsay only arises when the words are spoken 'testimonially' i.e. as establishing some fact narrated by the words.

Θέμα εξ ακοής μαρτυρίας εγείρεται μόνο όταν λέξεις ομιλούνται 'μαρτυρικά', δηλ. ως αποδεικνύουσες κάποιο γεγονός που περιγράφεται από τις λέξεις.

Especially the use of the participles αποδεικνύουσες for establishing is uncommon for Modern Greek usage. In Modern Greek a relative clause would be favored over an archaic participle.

On the other hand, in the quotation, whose translation is rendered into Greek and marked as "free translation" we observed the following:

Again, as my noble and learned friends, Lord Ackner and Lord Oliver of Aylmerton, point out, the recent decision of your Lordships' House in Reg. v. Blastland [1986] A.C. 41 clearly affirms the proposition that evidence of words spoken by a person not called as a witness which are said to assert a relevant fact by necessary implication are inadmissible as hearsay just as evidence of an express statement made by the speaker asserting the same fact would be.

Και πάλιν, όπως οι ευγενείς και ευπαίδευτοι φίλοι μου, ο Λόρδος Ackner και ο Λόρδος Oliver του Aylmerton, υποδεικνύουν, η πρόσφατη απόφαση της Βουλής των Λόρδων στη **Reg. v. Blastland** [1986] Α.C. 41 σαφώς επιβεβαιώνει την πρόταση ότι μαρτυρία για τα όσα λέγονται από πρόσωπο, το οποίο δεν καλείται ως μάρτυρας, τα οποία, όπως λέγεται, βεβαιώνουν ένα σχετικό γεγονός, είναι απαράδεκτα, για το λόγο ότι συνιστούν εξ ακοής μαρτυρία, κατά τον ίδιο τρόπο που θα συνιστούσε εξ ακοής μαρτυρία ρητή δήλωση από το πρόσωπο που προέβη σ' αυτή, με την οποία θα βεβαίωνε το ίδιο γεγονός.

Interestingly, in the case the judges used the descriptor "free translation" they did not adhere to the structure of the source text as they did in the cases marked as "translation". The target text version is stylistically compatible to Modern Greek usage: The participle in the English language excerpt (that evidence of words spoken by a person not called as a witness) was rendered as a relative clause (για τα όσα λέγονται από πρόσωπο, το οποίο δεν καλείται ως μάρτυρας) making use of a referential structure (το οποίο) commonly used in Modern Greek legal usage.

Moreover, the next sentence (which are said to assert a relevant fact by necessary implication are inadmissible as hearsay), is also rendered with relative clauses (τα οποία, όπως λέγεται, βεβαιώνουν ένα σχετικό γεγονός, είναι απαράδεκτα, για το λόγο ότι συνιστούν εξ ακοής μαρτυρία,) and not by participles as in the first two quotations described as "translation".

6. Was creativity involved? Discussion of the findings and conclusions

In translation, the source text and target text relationship is crucial. For Robinson (2016: 282) the translator employs two ways of linguistic creativity, both connecting a source and a target text. First, the translator transforms the source text into the target text giving thus birth to an entirely new text; secondly, the impossibility to find exact equivalence between languages and cultures means that the target text will never convey the same meaning or have the same impact as the source text. Hence, the very fact that the translator is not the source text author implies that the target text will reflect the translator's personal interpretive idiosyncrasies.

The translators worked on all levels described above and produced novel material on the basis of available information and knowledge that was managed purposefully to yield a meaningful and significant outcome as proposed by Urban (1990) and Langlotz (2016).

The three judges who translated the English language common law material into Modern Greek in the frame of the legal system of the Republic of Cyprus relay great importance to the source text and target text relationship. The translators used qualitative descriptors as an instrument¹². First, so as to communicate to the recipient how they regard the relationship of the source text and the translations of the quotations (i.e. either as "translation" or as "free translation", unfortunately, without any further explanation; and secondly, to communicate to the recipients that the translational approach has been purposeful and meaningful.

In the cases marked as "translation" they "created" an uncommon, yet transparent, target language structure. Their linguistic choices when examined against available language and cultural resources are uncommon, their fidelity to the source text structure and the particular descriptor indicate transparency as far as the rendering of the source text meaning and structure is concerned.

¹² The examined text is a rare sample of legal text, where the source and target version are juxtaposed and the translators provide any kind of rationale for their choices.

In the case marked as "free translation" the translators seem to be confident that either an alternative third party interpretation is of no importance or that it is impossible to construe the source text wording differently. The translators, in our case three Cypriot judges, worked on both levels of creative problem-solving put forward by Robinson (2016). They not only created a new linguistic and cultural entity appreciated by the recipient, but also, on the more complex level, they tackled the cultural discrepancies by bending the source system's discourse so as to prevent a different third party interpretation. Most importantly, the qualitative descriptors used provide ample evidence that the translators performed a source text analysis and were aware of alternative solutions in the target discourse. They made intelligent choices appreciating the system-inherent, knowledge-bearing discourse particularities, their interplay within the involved systems and chose accordingly against the available language and cultural resources.

Both the linear transfer of the syntax into the target system and the linear translation of the English common law terminology into Greek using vocabulary of a non-terminological nature are new linguistic items created – assumably - under the pressure to communicate both purposefully and meaningfully to shape a particular legal outcome.

The availability and correct use of information filtered through the interpretive idiosyncrasies generated creative problem-solving procedures, which resulted in appropriate translation products.

These translations show that the servants of the law, who have the reputation to adhere to proven language patterns, are perfectly aware of discourse particularities and that they do not hesitate to use language purposefully. The translators appreciated the source system discourse and also revealed sensitivity for the target discourse's system inherence but used its dynamics to ensure a certain legal outcome.

The text we examined has revealed numerous facets regarding the creative problem-solving behind choices the legal translator can make; we realize that the range of the presented project is limited and thus further research into the creativity of the (legal) translator has to be encouraged. Surely, other empirical studies looking into statistical data from corpora, neurophysiological, psycholinguistic and psychological approaches of larger numbers of translators will shed more light on the creative problem-solving in legal translation.

A better understanding of how communicative idiosyncrasies and envisaged legal outcome interact with the awareness of discourse are crucial for assessing translated legal texts and could prove invaluable for the training of translators.

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