

Translators and Legal Comparatists as Objective Mediators between Cultures?

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IN WESTERN EUROPEAN culture, there is a deep-level and intrinsic link between language and law, as law cannot be imagined without the use of language and, in particular, the use of written language. If we want to study how this particular link informs legal theory in general, and comparative law in particular, we need to ask three preliminary questions: what is language, what is law, and what is the nature of the point at which they cross. The present paper will explore the possibility of using linguistic disciplines as cognitive models for comparative law and of adopting some of the linguistic and translation studies methodologies to suggest a more 'objective' basis for research in comparative law, which will in turn also influence legal theory. The complex issues surrounding the activity of legal translation are outside the scope of this paper, though they may get touched upon in the discussion.

I. LANGUAGE

The term 'language' has two meanings: the general concept of language, on the one hand, and a specific linguistic system, on the other. It is not within the scope of this paper to discuss in detail all the definitions and theories that have been developed in relation to language as a concept. Three main theories will be mentioned briefly, but only the one relating to language as an act of communication will be discussed in detail.

A. Mental Faculty

Language as a mental faculty refers to the notion that human capacity for language is universal and altogether innate and a unique development of the human brain. Chomsky's theory of Universal Grammar is a prominent exponent of this school of thought.

B. System of Symbols

Language as a system of symbols is a structuralist view, which sees language as a closed system in which elements are held in balance and according to specific (grammatical) rules. First introduced by de Saussure,¹ it is a conception of language as a socially shared and real system of signs, each of which consists of the arbitrary conjunction of an abstract concept (*signifié*/signified) and an acoustic image (*signifiant*/signifier).² Hence, 'meaning' is not given in advance but is created with the formation of the sign itself and it is not rooted in some universal logic but is the result of entirely arbitrary decisions on the part of each linguistic community. Consequently, if two communities construct different meanings, there is no objective basis for deciding which one is better or right.

C. Act of Communication

Language as an act of communication is a pragmatic view which stresses the function, notably the social function, of the use of language when people interact with each other. This approach has been adopted mainly in the context of socio-linguistics and linguistic anthropology.

In the context of examining the use of language in relation to law and to comparative law more particularly, the view which emphasises usage, communicative function and the social context of language seems the most appropriate to adopt. The theory of language to be discussed here is generally known as systemic functional linguistics, or systemic functional grammar or just systemic linguistics and was first developed by Michael Halliday.³ It offers an account of language as it is used in actual social situations and is, in this sense, always concerned with the meaning, communicative functionality and rhetorical purposes of language. At the heart of systemic linguistics is the understanding of the communicative properties of written and spoken texts of all types (why a text means what it does and why it is valued as it is), as well as the understanding of the relation between language, on the one hand, and culture, community, social grouping and ideology, on the other.⁴

¹ F de Saussure, *Cours de linguistique générale* (first published 1916, Paris, Payot & Rivages, 2005).

² Developed in particular in his third course of lectures (1910–11).

³ The standard reference work for systemic theory is M Halliday, *An Introduction to Functional Grammar* (London, Edward Arnold, 1985/1994).

⁴ Ibid xxix.

For functional linguists, language appears to have developed and is being used for three main purposes, which Halliday has called metafunctions:

- (i) *Ideational metafunction*, encodes meanings of experience which realise field of discourse ('experiential meanings'). It refers to the use of language to represent experience and construct a view of reality with the various categories language offers to talk about real-world happenings. There are three main constituents: processes (typically expressed as verbs identifying happenings and state of affairs); participants (typically expressed as nouns identifying entities); and circumstances (typically expressed as adverbs or prepositional phrases acting to provide some context to the first two elements).
- (ii) *Interpersonal metafunction*, encodes meanings of attitudes and relationships which realise tenor of discourse ('interpersonal meanings'). It refers to the use of language to represent interaction between speakers, the way they construct and fill social roles, adopt and/or express attitudes/points of views, form relationships and alliances and so on. A speaker can adopt four basic interpersonal positions (which can be complicated, qualified and extended): it can be declarative (offering information), interrogative (demanding information), imperative (commands in relation to action or response rather than information) and offer (willingness to supply action and response).
- (iii) *Textual metafunction*, encodes meanings of text development which realise mode of discourse ('textual meanings'). It refers to the use of language to organise the experiential and interpersonal meanings into a coherent, connected and unified entity. The most prominent textual function in this context is what has been termed the 'theme', which indicates the angle or the point of departure adopted by the speaker.

These meanings are encoded in what linguists call 'text' which is a piece of language in use that can be of any length and in either written or spoken form. It is 'language that is functional'.⁵ A text, in this sense, is a coherent collection of meanings appropriate to its context. The way the text's meanings are combined together gives the text its texture and the text's structure rests on the mandatory structural elements used in the combination of these meanings.

The way these meanings are encoded depends on two surrounding contexts, illustrated in Figure 1 below. The 'context of culture' refers to the general outer cultural environment in which a text occurs. It includes elements such as conventions of address, politeness, discourse and so on, which shape meanings within a particular culture. The context of culture has been described 'as the sum of all the meanings it is possible to mean in that particular culture'.⁶

⁵ M Halliday and R Hasan, *Language, Context and Texts: Aspects of Language in a Social Semiotic Perspective* (Geelong, Deakin University Press, 1985).

⁶ D Butt, R Fahey, S Feez, S Spinks, C Yallop, *Using Functional Grammar: An Explorer's Guide* (Sydney, Macquarie University, 2000) 3.

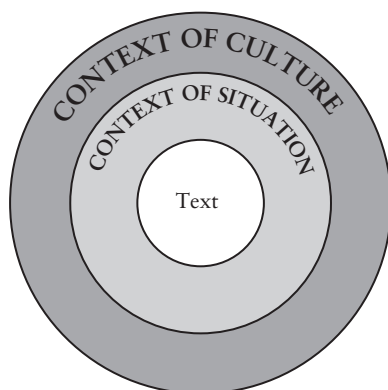


Figure 1: Text in context

Within that general context of culture, there is an inner context, which functional linguists have named the ‘context of situation’ and which refers, as the term indicates, to the specific situation in which a text occurs and in which meanings are formed. It includes ‘the things going on in the world outside the text that make the text what it is’.⁷ Linguists have identified three basic parameters of the situational differences within context of situation, namely field, tenor and mode. Field relates to experiential meanings, tenor to interpersonal meanings and mode to textual meanings, as described above in relation to the metafunctions of language (also illustrated in Figure 2 below).

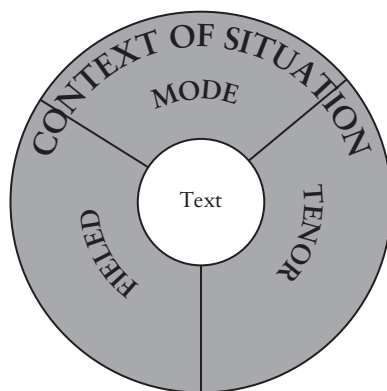


Figure 2: Parameters of context of situation⁸

⁷ Ibid 4.

⁸ Ibid 4.

To give an example, if you go into a corner shop in an English country village to buy some groceries, you will probably take a number of items off the shelf on which the exact price is marked and will proceed to the counter to pay and maybe chat with the shopkeeper and other customers about the weather. The text (spoken in this case) that accompanies this scene is likely to be very different if you go to a corner shop to do the grocery shopping in, let us say, Marrakech or Cairo or maybe even in Chinatown in London. The context of culture in the English village is that prices are clearly labelled and you are expected to pay at the counter what is written on the price ticket. Whereas in Marrakech or Cairo there are likely to be no price labels and the shopping is accompanied by barter and trading. And you would probably not talk about the weather with the shopkeeper but rather inquire about his health and family. Furthermore, the field, tenor and mode, as the parameters of the specific context of situation of the two texts will inform us how meanings are constructed in the two situations, such as, for example, the way you will address the shopkeeper or other customers, how you are going to introduce what you want to say and so on.

The analysis of language using methods that have been developed by linguistic disciplines such as functional grammar, allows us to show how meanings are encoded, including the consideration of the extra linguistic levels of context of culture and of situation.

II. LAW

It is not within the scope of this article to discuss the numerous theories on the definitions of law. For the purpose of this paper, law is to be understood not merely as a set of rules assembled in a coherent system that governs civil society, but in terms of a concept of legal culture which embeds the understanding of how law in a particular system is created, practised and interpreted in an understanding of the socio-political, cultural and historical context of the system in question.⁹

Culture is a rather vague concept,¹⁰ which has been defined in the literature in relation to similarly vague notions, such as 'states of mind and ideas'.¹¹ In some of Friedman's descriptions general (national) culture appears in terms of a residual category of a general environment of beliefs,

⁹ M Van Hoecke and M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (first published 1998) reprinted in M Del Mar, W Twining and M Giudice (eds), *Legal Theory and the Legal Academy*, The Library of Essays in Contemporary Legal Theory, vol III (Farnham, Ashgate, 2010) 291–332.

¹⁰ R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed), *Comparing Legal Cultures* (Aldershot, Dartmouth, 1997) 13. See also Jaakko Husa, in ch 10 in this volume.

¹¹ LM Friedman, 'The Concept of Legal Culture: A Reply' in D Nelken (ed), *Comparing Legal Cultures*, *ibid* 35.

ideas, and practices, 'a kind of aggregate, hard to compare with other aggregates'.¹² It is similarly difficult to identify the constitutive elements of the concept of legal culture. Van Hoecke describes the fabric of legal culture to lie in the combination and mutual interaction of a number of elements, such as 'world view', 'ideology' or 'habit'. 'Law thus starts from *general* values, worldviews and so on. In a second stage, however, law and practices *create* some *legal* values, worldviews, traditions and habits, in other words: a legal culture'.¹³ Hence, 'legal culture is as much the product of the system as it is its generator'.¹⁴ In other words, it appears difficult to define and delimit the elements that constitute legal culture beyond the use of a priori notions, often abstract or intuitive. Both in comparative law¹⁵ and in legal sociology,¹⁶ the concept of culture is used in this vague way apparently without much research in relation to proving the assumptions made about the notion of culture. Friedman concedes legal culture not to be 'one of these happy concepts ... that we can measure with some degree of precision'.¹⁷ And yet, a little later he admits that the states of mind for which legal culture is a generic term could, in principle, be 'discoverable empirically, but this is no easy task'.¹⁸ Indeed, it is no easy task, but that should not preclude any attempts to find some empirical basis for the concept of legal culture, even if only on a partial basis. Placing the search for what constitutes legal culture on a more objective footing, will allow for greater understanding of this vast concept and will inform research in legal theory and, in particular, in areas such as comparative law and legal sociology.

Language is a reliable indicator of a great number of underlying cultural elements that a text (written or spoken) may contain. The linguistic disciplines and translation studies are good guides for gaining deep-level and multi-layered understanding of the phenomena that surround us and which have been expressed using language. Contrastive linguistics, corpus linguistics, systemic functional grammar, socio-linguistics, discourse analysis and translations studies, just to name a few, have all developed methodologies

¹² LM Friedman, *The Legal System: A Social Science Perspective* (New York, Russell Sage Foundation, 1975) 209.

¹³ M Van Hoecke, *Law as Communication* (Oxford, Hart Publishing, 2002) 57.

¹⁴ E Blankenburg, 'Civil Litigation Rates as Indicators for Legal Cultures' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth, Aldershot, 1997) 65.

¹⁵ P Legrand, *Fragments on law-as-culture* (Deventer, WEJ Tjeenk Willink, 1999). P Legrand, 'The Same and the Different' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003). T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (The Hague, Kluwer Law International, 2007).

¹⁶ LM Friedman, *The Legal System* (n 12) 15–16; also in D Nelken, *Comparing Legal Cultures* (Dartmouth, Aldershot, 1997): see Cotterrell, 'The Concept of Legal Culture' (n 10) 13 and Friedman, 'The Concept of Legal Culture: A Reply' (n 11) 33.

¹⁷ Friedman, *The Concept of Legal Culture* (n 11) 33.

¹⁸ *Ibid* 35.

that allow for analysis to move away from intuition and onto an altogether more objective and even empirical basis. So far, the objects of such studies have more often been literary, political or religious rather than legal texts.

III. LANGUAGE AND LAW: MEETING POINT

If we consider law as 'legal culture' relating the legal system to the culture of the society it governs and language beyond a narrow semantic meaning referring also to socio-cultural, political and historical contents, we discover there to be a parallel between language and law also on a conceptual level. To the extent that in our Western societies law cannot do without the use of language, that is the initial meeting point between the two concepts. There is, however, also an ongoing dynamic interaction between these two internally coherent systems in the sense that law creates language and language creates law. 'Language ... creates reality, a different legal language produces another kind of 'legal reality'.¹⁹

Law is institutionalised discourse, first and foremost within individual societies, but also in interaction with other (neighbouring) legal traditions. Legal systems, like languages, have always influenced each other across frontiers whether these were geographical, geo-political or cultural, whether in time or space. Hence, both legislation and languages are identifiable with a particular state/region/people/culture and are also the results of international/intercultural interaction and thus contain some borrowed, imported, transplanted elements and are always based on previous bodies of texts and discourses.²⁰ Interesting in this context is, for example, the position of Latin as the former lingua franca of law and its impact on the English, French and German legal languages, because legal terminology was frequently the result of the use of loanwords from Latin, the language of the *ius commune*.²¹ Another important historical example is the use of French as a language of law in some English common law courts, which used neither Latin nor English, but Law French, which by the time of its disappearance in the early eighteenth century had degenerated into a hybrid of bastardised French, Latin and English.²²

¹⁹ Van Hoecke and Warrington (n 9) 535.

²⁰ J Lambert, 'The Status and Position of Legal Translation: A Chapter in the Discursive Construction of Societies' in F Olsen, A Lorz and D Stein (eds), *Languages and Law: Key Perspectives* (New York, Palgrave Macmillan, 2009) 76–95.

²¹ There have been few studies on this. For an early example, see J Kabatek, *Bolognesische Renaissance und der Ausbau romanischer Sprachen. Juristische Diskurstraditionen und Sprachentwicklung in Südfrankreich und Spanien im 12. und 13. Jahrhundert* (Tübingen, Niemeyer, 2005).

²² J Baker, *Manual of Law French* (Letchworth, Avebury, 1979); K Kerber, *Sprachwandel im Englischen Recht. Vom Law French zum Englischen* (Münster, LIT Verlag, 1997).

IV. TRANSLATION STUDIES AND COMPARATIVE LAW: ANOTHER MEETING POINT

Having established an intrinsic link between law and language, we can now consider a similar link between comparative law and linguistic disciplines, such as translation studies and to some extent contrastive linguistics. In their respective fields of activities, comparatists and (legal) translators are bound to consider each other's disciplines. Comparative lawyers are regularly confronted with the difficulties of translating legal terminology, concepts and legal discourse. As contrastive linguists and translators, they develop *tertium comparationis* to make independent comparisons possible. Legal translators in their quest to find equivalents in the target language need to engage in comparative law (or legal history), especially when there is no equivalent in the target legal language and system. In other words, the undertaking of comparison as such is a part of the core work in these disciplines.²³ Furthermore, law can be seen in terms of translation to the extent that legislation and legal discourse are the result of prior legal-discursive traditions.²⁴ Historically, law has always been intertwined with translation, as practically no area covered by a particular law system has ever been monolingual.

There are other similarities between the disciplines of translation studies and comparative law. Both have a descriptive and normative branch (what is the best translation/what is the best law); both draw more or less on other disciplines due to an acute awareness that context is important; both mediate between cultures and try to grapple with the 'foreign' and the 'unfamiliar'; and both have suffered from the common culture syndrome of Herder and Savigny and the obsession of the incompatible difference. There is even some shared vocabulary, terms such as 'transplants' or 'inside/outside view' can be found in the academic writings of both disciplines.

Translation can be seen as a language contact point, while comparative law establishes contact points between different systems of law. Starting from the underlying assumption that all texts are acts of communication, we can use as a cognitive model for comparative law the way a translator, as a mediator between cultures, approaches a text for translation. In the words of Robinson 'a useful way of thinking about translation and language is that translators don't translate *words*; they translate *what people do with words*'.²⁵ It is a hermeneutical approach, but linguistic and translation studies have developed methodologies and tools that enable the contents of the different language levels to be exposed on an objective (linguistic and discourse analysis) and even empirical basis (using corpus

²³ J Husa, 'Understanding Legal Languages—Linguistics Concerns of the Comparative Lawyer' in J Baaij, *The Role of Legal Translation in Legal Harmonization* (The Hague, Kluwer Law International, 2012).

²⁴ J Lambert, *The Status and Position of Legal Translation* (n 20).

²⁵ D Robinson, *Becoming a Translator* (London, Routledge, 2003) 142.

linguistics techniques). Similarly, in comparative law, we need to look beyond mere juxtapositions of two sets of positive rules and take on board social, economic, historical ... aspects, what people *do with them*, to use Robinson's words by analogy.

V. COMPARATIVE LAW METHODOLOGIES

Comparative law has often been considered the poor cousin in the 'family' of law and legal theory. It is an area of law that is said to lack coherent theoretical basis and some have even argued that comparative law is not strictly law, but 'has by common consent the somewhat unusual characteristic that it does not exist'.²⁶ As the term suggests, we are dealing with a scholarly undertaking that involves law as its subject and comparison as its process. And immediately we are confronted with the question about what it is we are comparing and why, which in turn poses a number of epistemological and methodological issues that have been discussed extensively throughout the literature. Comparative law certainly appears as a kind of umbrella concept encompassing different kinds of activities that are being undertaken for diverse motives and goals.²⁷ To that extent, methodological pluralism is part and parcel of comparative law. It would be unrealistic to believe that one particular methodology can cover the entire spectrum of comparisons of a multi-layered concept, such as law, governing multi-dimensional and complex civil society.

If, for the purpose of comparative law, we regard law not merely as a textual, positive and authoritative phenomenon, but place it within its social realities, we need to embrace interdisciplinarity and also consider some of the social science methodologies.²⁸ 'An enquiry into methodology must ... look at reasoning methods, schemes of intelligibility, paradigms and approaches that have been fashioned to promote an understanding of the object under consideration.'²⁹ The complexities of human society cannot be *reduced* to a single equation, an abstract scheme to which inductive and deductive reasoning can be applied, but can be *represented* in terms of schemes of intelligibility,³⁰ which will thus reveal social reality only in parts

²⁶ O Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 *Law Quarterly Review* 40.

²⁷ M Van Hoecke, *Deep Level Comparative Law*, EUI Working Papers, Law No 2002/13.

²⁸ G Samuel, 'Taking Methods Seriously' (Part One) and (Part Two) (2007) 2 *Journal of Comparative Law* 94 and 210.

²⁹ *Ibid* 219.

³⁰ Berthelot has identified six schemes of intelligibility: causal, functional, structural, hermeneutical, actional, dialectical; see JM Berthelot, *L'intelligence du social* (Paris, Presses Universitaires de France, 1990) 43–85, JM Berthelot, 'Programmes, paradigms, disciplines: pluralité et unité des sciences sociales' in JM Berthelot (ed), *Epistémologie des sciences sociales* (Paris, Presses Universitaires de France, 2001) 484.

and according to the scheme or combination of schemes used. This type of model falls short of the mathematical ones used in the natural sciences. It does not provide a 'scientific model, but a number of schemes that underpin the *art* of interpretation'.³¹ This should, however, not preclude any efforts to ground the research in objectively and empirically ascertainable parameters, even if these can only provide a partial representation of social reality and the law it governs.

Functionalism has been the word in the mouths of a great many comparative lawyers and this for many decades now, whether to express their appraisal,³² rejection³³ or redefinition³⁴ of the method. In terms of intelligibility, functionalism provides a representation of social reality that is based on the function of laws to be compared and, hence, enables the establishment of seemingly neutral facts for *tertium comparationis*. And yet, in the exercise of establishing facts, a number of other schemes of intelligibility may come into play, such as, for example, the hermeneutical scheme when facts have been subject to some prior selection, representation and interpretation, in which case the *tertium comparationis* is less of a neutral common denominator.

The issues surrounding the selection and presentation of facts for comparison is at the heart of some of the fiercest criticism of functionalism. Legrand contends that functional comparatists should not confuse resemblance with representation, indeed he believes representation to be *re*-presentation. 'The very fact of cognitive selection displays the contingent character of the product of that selection.' And 'it is impossible for the comparatist-as-observer ever to demonstrate sameness non-ethnocentrically because any understanding on his part assumes integration into his already-understood world, a world he cannot actually reflect himself out of'.³⁵ But what Legrand fails to recognise is that neither linguistic communities, nor legal systems, nor civil societies/communities live in isolation from each other. There has always been cross-fertilisation, whether geographical, geo-political or cultural, whether in time or space and these 'commonalities' need to be recognised as much as the differences Legrand advocates. Comparative law can only make sense if both these elements have been taken

³¹ Samuel, 'Taking Methods Seriously' (n 28) 109.

³² One prominent example: K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (Tübingen, Mohr Siebeck, 1996).

³³ Two prominent examples: G Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411–55. P Legrand, 'The Same and the Different' in P Legrand and R Munday, *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 240–311.

³⁴ Two prominent examples: J Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 *RabelZ* 419–77. R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 339–82.

³⁵ P Legrand, 'The Same and the Different' in P Legrand and R Munday, *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 254–55.

on board and grounded in some objective rather than vague parameters, and the baby has not been thrown out with the bath water in favour of one view over the other.

VI. LINGUISTIC AND TRANSLATION STUDIES METHODOLOGIES

While legal functionalists defend the common ground argument (the *raison d'être* of all legal systems is to solve same/similar problems) and difference theorists argue for the uniqueness of each legal system, neither side of the argument have come up with very convincing objective frameworks to sustain their theories.

In view of an intrinsic link between law and language in Western societies, this is precisely the point where some common ground may be established among the systems, namely that one of their basic constitutive features is the use of language. And if we can adopt as working hypothesis that the essence of language are communicative acts, then we can point to this as a further element in our common ground landscape. In other words, comparative lawyers can reasonably assume that texts³⁶ in law have used language and that their basic function is communication.

The comparatist now wants to establish the deep-level meanings and contents of the texts in order to get a better understanding of the extent to which they can be compared. For this purpose a text corpus will have to be collected and constructed. That is the very point when the comparatist will be plagued by the same question as so many before her: what texts should be selected? Is the selection not inevitably a biased *re*-presentation to use Legrand's term? The answer is indeed yes, and it is bound to constitute some partial revealing of the social reality, as discussed above. But attempts can be made to reduce to a minimum the elements of bias (dependent on the (financial) means one can dispose of). The selecting team should be multi-disciplinary and multi-lingual, especially if more than one language is involved. The corpus should be large and accessible electronically and according to the technical norms required by standard corpus linguistic research.³⁷ And legal comparatists could take a leaf out of the book of linguists and translators to the extent that the latter are less likely to be bound by an epistemological approach of *authority*, but by one of *inquiry*.³⁸

³⁶ This paper adopts Halliday and Hasan's definition of 'text' as a piece of language in use, independent of its length and which can either be spoken or written, see Halliday and Hasan, *Language, Context and Texts* (n 5).

³⁷ Corpus linguistic research is also preoccupied with the representation issue, see D Biber, 'Representativeness in Corpus Design' in *Literary and Linguistic Computing* (1993) 8 (4) 243–57 (staff.um.edu.mt/albert.gatt/teaching/dl/biber93.pdf).

³⁸ Samuel (n 28) 94.

‘In order to compare legal systems we have to know what it is that causes a number of legally relevant elements to form a “legal system”’³⁹ and by using the corpus to analyse the text both synchronically and diachronically, the terminology, the linguistic-discursive and translational elements of the language used in the laws to be compared, we can retrieve meanings on the different content levels and thus gain a deep-level understanding of the laws in question, including their development throughout time and space. It is beyond the scope of this paper to enumerate and discuss the vast array of possible analytical techniques. Instead, specific attention will be paid to two particular, though related aspects: the mediating role that translation plays and has played between different legal cultures, and the phenomenon of translational features in legal texts.

A. The Mediating Role of Translation

The epistemology of authority prominent in the study of law has a number of negative side effects on comparative work, which is much deplored by Samuel.⁴⁰ It leads to what he calls ‘intellectual conservatism’ not only in the sense of the difficulties to go beyond the textual authority of one system in relation to another, but also in the sense of the notion that national law is based on self-sufficient textual authority specific to one particular society. Legislation and legal discourse are always the results of prior legal-discursive traditions, which have, at some stage, made use of translation.⁴¹ In this way, legal texts have to some extent integrated intercultural features and interlinguistic/translational components as constitutive elements, and translation, as a major source of discourse shifts, has had a mediating role between the different legal cultures. To understand this mediating role of translation in the field of legal culture would enable a much better knowledge of the development of legislation and legal discourse.⁴²

The questions that need to be examined relate to whether the translation strategies are to any extent determined by the importance of the cultures involved, whether texts are indeed more often translated from dominant to peripheral cultures rather than the other way around and whether translators tend to be more attentive to the norms of the target culture if

³⁹ Van Hoecke and Warrington (n 9) at 497.

⁴⁰ Samuel (n 28) 235–37.

⁴¹ This has been particularly intensified throughout the last half century with the emergence of several forms of multilingual economic, political and military integration on the European and on the global level (EU, UNO, WTO, NATO etc).

⁴² The mediating role of translations is well-known in the field of culture and literature (S Bassnett, *Post-colonial Translation: Theory and Practice* (London, Routledge, 1998)) but has not been studied extensively in the field of legal culture.

that culture is a dominant one.⁴³ Of similar interest is to study the extent to which translation influences the discourse of the receiving culture, as it has been argued that specific discourse and sentence structures typical of the source language are adopted by the target language, even outside the framework of translation.⁴⁴ Methodological models such as terminological configurations and traditions, parallel or divergent priorities in discourse, their paradigmatic meaning from the perspective of dominant/peripheral tendencies will allow us to understand the reception, use and development of legal concepts and texts in national as well as in international (for example, EU) legal systems.

B. Translational Features

Related to the notion that intercultural features and interlinguistic/translational components are constitutive elements of legislation and legal discourse, is the idea that translations systematically present specific features, which make them identifiable as translations. This has been discussed particularly in the field of corpus-based translation studies, though not in relation to any specific corpus of legal texts.

The literature has identified three main translational features in translated discourse:

- (i) *explicitation*, which is the tendency of translated text to be more explicit than non-translated text,⁴⁵ that is, the tendency to express meanings left implicit both in source texts and in similar original texts of the target culture;
- (ii) *normalisation*, which is the tendency of translated text to conform to linguistic norms of the non-translated target discourse, sometimes even in an exaggerated way (for example, overuse of idiomatic expressions⁴⁶);
- (iii) *simplification*, which is the tendency for translated text to be usually syntactically and lexically poorer than source text.⁴⁷

⁴³ L Venuti, *The Translator's Invisibility* (London, Routledge, 1985). M Rudvin, 'Translation and Myth: Norwegian Children's Literature in English' (1994) *Perspectives: Studies in Translatology* 199–211.

⁴⁴ V Becher, J House and S Kranich, 'Convergence and divergence of communication norms through language contact in translation' in K Braunmüller and J House, *Convergence and Divergence in Language Contact Situations* (Amsterdam, John Benjamins Publishing Company, 2009).

⁴⁵ S Blum-Kulka, 'Shifts of Cohesion and Coherence in Translation' in J House and S Blum-Kulka (eds), *Interlingual and Intercultural Communication* (Tübingen, Günter Narr, 1986) 17–35.

⁴⁶ G Toury, *In Search of a Theory of Translation* (Tel Aviv, The Porter Institute for Poetics and Semiotics, 1980).

⁴⁷ R Vanderauwera, *Dutch Novels translated into English: The Transformation of a 'Minority' Literature* (Amsterdam, Rodopi, 1985).

Given the special nature of legal discourse and, in particular, of legislation, the analysis of translational features in legal translated texts may add to a better understanding of the development of such texts. In view of the fact that legal concepts can differ from one legal culture to another, explicitation is likely to play an important role in translated legal discourse. It has been argued that in legislation adequacy in translation has priority over acceptability.⁴⁸ Adequacy refers to the intertextual equivalence between the source text and the target text, whereas acceptability refers to the intralingual relationship between target texts and other kinds of text in one language. In multi-lingual legislative environments such as the EU, for example, equally authentic legislation in different languages is expected to produce the same legal effects. It may be hypothesised that translational features, which could diminish adequacy are expected to be absent, whereas ones that could favour adequacy are likely to be present. As far as normalisation is concerned, no research has as yet studied this issue. Finally, simplification is less likely to be found in translated legal texts than in other fields, due to the extreme importance of accuracy in legal translation.

Corpus-based research on legislation and legal discourse to examine the presence of translational features would enable the identification of areas of legal discrepancy due to the translation process itself rather than to lexical or grammatical mismatch between versions. Combined with a comparative law approach such research would allow for some deep-level understanding of how legal concepts and cultures have developed and will, therefore, inform us on what elements of law are culturally determined and how, and what elements are less connected to culture. These in turn are essential elements for legal comparative work.

VII. CONCLUSIONS

This paper has explored some of the possibilities of using linguistic disciplines as cognitive models for comparative law and of adopting some of the linguistic and translation studies methodologies to suggest a more 'objective' and even empirical basis for research in comparative law. The working hypothesis has been that there is a deep-level and intrinsic link between language and law, as law (in Western culture) cannot be conceptualised and practiced without the use of language. To the extent that language is a reliable indicator of a great number of underlying notions that a text (written or spoken) may contain, the linguistic disciplines and translation studies are good guides for gaining deep-level and multi-layered understanding

⁴⁸ S Sarcevic, *New Approach to Legal Translation* (The Hague, Kluwer Law International, 1997).

of the phenomena that surround us and which have been expressed using language. Legislation and legal discourse are no exceptions to this.

Linguistic and translation studies have developed methodologies and tools that enable contents on the different language levels to be exposed on an objective (linguistic and discourse analysis) and even empirical basis (using corpus linguistics techniques). The analysis of language using methods that have been developed by linguistic disciplines such as functional grammar, allows us to show how meanings are encoded, including the consideration of the extralinguistic levels of context of culture and of situation.

Similarly, in comparative law, we need to look beyond mere juxtapositions of two sets of positive rules and take on board socio-political, economic, historical aspects, in other words the legal culture. Comparatists may establish *tertium comparationis* among the systems to be compared on the basis that a constitutive feature is the use of language and that the essence of language are communicative acts. Studying the language of legislation and legal discourse as a carrier of culture will provide some evidence on what constitutes and determines elements of legal culture. More specifically, examining the influence of prior legal-discursive traditions and translational features will allow for some deep-level understanding of how legal concepts and cultures have developed and will, therefore, inform us on what elements of law are culturally determined and how, and what elements are less connected to culture. These sorts of findings will help the legal comparatist to steer her little boat through the troubled water of vague and a priori notions and paradigms.

