

The pitfalls of legal translations between legal systems from two different legal families: a focus on translations of French legal material into English

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The aim of this paper is to provide an overview of the main difficulties encountered by legal translators working from French to English and provide practical solutions. Though France and England are separated by only a narrow stretch of water and share a Judeo-Christian historical background, the task of providing an accurate translation from French to English is complicated by the fact that the two countries belong to different legal families. Different translation methodologies need to be used appropriately, bearing in mind that a certain harmonisation process has started to develop between the two legal systems, based essentially on a set of common European principles and values, under the influence of European law and the European Convention of Human Rights. It is hoped that this convergence process will efface some of the more pronounced differences in legal understanding between France and the UK, and thus facilitate, in the long term, legal translations.

1. Introduction

Providing an accurate legal translation is not an easy task. It has been described as the “ultimate linguistic challenge”.² Indeed, the path towards a perfect legal translation contains numerous pitfalls. A legal translator is expected to demonstrate a proficiency in both linguistics and law. While one has to make linguistic choices, such as the extent of the closeness in the syntax and style between the source language (hereafter ‘SL’) and target language (hereafter ‘TL’), an expertise in both the SL and TL legal systems is required in order to understand legal terms and concepts included in the source text and convey them in the most comprehensible way to readers of the target text.² For Harvey, such an endeavour combines “the inventiveness of literary translation with the terminological precision of technical translation.”³

The task of comprehending a legal system and its terminology is complicated in no small manner when two countries do not share the same language. This difficulty is explainable by the fact that law has always been influenced by national socio-cultural aspects and has

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² Harvey, M. (2002) What’s so Special about Legal Translation? *Meta: Translators’ Journal* 47, (2002), p.177.

² See Gémar, J.C. (1979) La traduction juridique et son enseignement: aspects théoriques et pratiques. *Meta : Translators’ Journal* 24, (1979), at 51; Lauzière, L. (1979) Un vocabulaire juridique bilingue canadien. *Meta: Translators’ Journal* 24, (1979) at 111; Bélanger, C. (2004) « Faut-il être juriste ou traducteur pour traduire le droit? » : contribution au débat. *Meta: Translators’ Journal* 49, (2004), p. 457.

³ Harvey, *supra* note 1, at 177. See also Weston, M. (1991) *An English Reader’s Guide to the French Legal System*, London: Berg.

traditionally been country-specific, that is to say, confined to a national boundary.⁴ Each legal system is based on ‘cultural principles, a method of organizing and attributing meanings, and a practice of cognitive mapping’.⁵ Thus, a legal system is developed according to a clearly defined, distinctive frame of mind and contains ‘irreducibly distinctive modes of legal perception’.⁶ Importantly for a translator, this leads to legal terminology varying from country to country and remaining specific to each society, which was founded on different socio-cultural elements. Just like the legal system in which it exists, a legal term or concept cannot be blindly transposed from one country to another. What has a specific meaning in one legal system can have a different meaning or be absent from another legal system. As Gutteridge puts it, “differences in the language of the law constitute not the least of the barriers which separate the various legal systems of the world.”⁷ As law distinctively lacks a common knowledge base, it has failed to become standardised.⁸ Clearly, the absence of a common denominator makes law stand out as a field as opposed to, for example, finance or science.⁹

Though the two countries are geographically separated by just a narrow stretch of water, a gulf separates France and England in terms of legal culture and history. The separation has had a definite influence on the shaping and style of their respective legal systems, which are based on very different legal traditions ideologically as well as in relation to legal technique.¹⁰ The stark differences between the legal systems is clearly evidenced by French and English law being part of two different legal families: René David and most legal comparatists consider the French legal system to be part of the Romano-Germanic family, which is essentially based on the principle of codification, and the English legal system to be part of the common law family, described as mainly casuistic law, with the law developing from decision to decision.¹¹ Both systems have developed distinct legal concepts as well as institutions that are alien to the other system. The distinction between law and equity, for instance, is essential in English law but has no counterpart in continental law.¹² Another example is the dichotomy between private and public law. In France, it is essential and is based on the idea that the same rule cannot apply both to the state and to ordinary citizens. Any interference of the state in people’s private lives is regulated by administrative law, a branch of public law, with a special set of courts, administrative courts, having jurisdiction in

⁴ Gémard, *supra* note 2, at 48. See also Gémard’s statement, on the same page : « [Pour la règle juridique] les frontières constituent souvent un obstacle infranchissable puisqu’elle ne s’applique que dans le cadre limité de l’Etat qui l’a conçue ».

⁵ Arditi, J. (1994) Geertz, Kuhn and the Idea of a Cultural Paradigm. *Brit. J Sociology*, (1994), at 614, in Legrand, P. (1996) European Legal Systems Are Not Converging. *ICLQ* 45, (1996), at 80.

⁶ *Ibid*, p. 81.

⁷ Gutteridge, H.C. (1938) The Comparative Aspects of Legal Terminology. *Tulane Law Review* 12, (1938), at 401.

⁸ Groffier in Harvey, *supra* note 1, p. 180.

⁹ Gémard, *supra* note 2, p. 48.

¹⁰ As Zweigert and Kötz highlight, the style of a legal system can be identified from its historical background, “its predominant and characteristic mode of thought in legal matters, its particularly distinctive concepts or institutions, which legal sources it uses and how it handles them, and its ideology”. Zweigert, K. & Kötz, H. (1998) *An Introduction to Comparative Law*. 3rd ed., Oxford: OUP, p. 36.

¹¹ David, René (1972) *French Law*. Baton Rouge: Louisiana State University Press, Preface, v-xv. Zweigert & Kötz have come up with a similar, though more detailed, classification of legal families by referring for France and the UK to the Romanistic and Anglo-American legal families, *Ibid*.

¹² *Ibid*, pp. x-xi.

these disputes.¹³ In English law the concept is fairly recent and has only limited practical consequences as there is not a separate court system for public law issues and the same general rules of common law apply to all disputes.¹⁴ One should, however, bear in mind the remarkable development of judicial review in English law as a public law remedy.¹⁵

The diversity between separate legal families, based on different understandings of the law, is one of the main reasons for the difficulty of legal terminology¹⁶. When translating a legal document from French into English, one is thus faced with the challenge of providing a translation that makes legal as well as linguistic sense. Consequently, a translator can provide an accurate translation only if he/she has an understanding of the SL and the TL legal systems.¹⁷

This paper aims to look at some of the issues that need to be taken into account for a successful legal translation from French (as the source language) into English (as the target language). After focusing on the spirit of both legal systems (Part I), this paper will discuss the different translation methodologies (Parts II & III) before analysing to what extent a possible harmonisation might be taking place between the legal systems, and the consequences for French-English legal translation (Part IV).

2. The spirit of the French and English legal systems

«C'est un très grand hasard si [les lois] d'une nation peuvent convenir à une autre.»¹⁸

French and English lawyers do not reason or apply law in the same way. They display “irreducibly distinctive modes of legal perception”.¹⁹ The French favour a more principled, theoretical approach than the English by creating a rational order through a comprehensive set of rules that are applicable to every future situation.²⁰ On the other hand, the common law displays an aversion to explicit theory, often preferring common sense to logic.²¹

Thus, primary importance is given in French law to legislation. French law is, however, not just a system of written law, and a common law lawyer will be struck at how well the rules of French are organised through systematic, complete and principled codified law.²² Described by Lord McMillan as a “practical code”, the main characteristic of the common law is not to

¹³ Weston, *supra* note 3, at 47.

¹⁴ Brown, N. & Bell, J. (1998) *French Administrative Law*. 5th ed., Oxford: OUP, at 6. See also Kahn-Freund, O., Lévy, C. & Rudden, B. (1973) *A Source-book on French Law*. Oxford: Clarendon Press, pp. 2-3.

¹⁵ Weston, *supra* note 3, at 47; Brown & Bell, *ibid*, p. 6.

¹⁶ Gémar, *supra* note 2, p. 44.

¹⁷ Weston, *supra* note 3, p. 4.

¹⁸ “It is extremely rare that the legislation of one country is appropriate for another country”. Montesquieu, *De l'Esprit des Lois*, (1748), 1, 3 in Gémar, J.C. (1981) *Réflexions sur le langage du droit: problème de langue et de style*. *Meta: Translators' Journal* 26, (1981), p. 343.

¹⁹ Legrand, *supra* note 5, p. 81.

²⁰ Nicholas, in Bell, J. (2001) *French Legal Cultures*. London: Butterworths, at vii; David, *supra* note 11, p. xi.

²¹ Legrand, *supra* note 5, p. 66.

²² David, *supra* note 11, xi-xii; Bell, *supra* note 20, in vii; Zweigert & Kötz, *supra* note 10, p. 86.

be a body of well-organised rights.²³ “As a system of general rules, the Common Law is a thing merely imaginary” and, instead, consists of “almost infinite particulars”²⁴; Legrand refers to it as “the disorder of fragmented and dispersed facts”.²⁵

Lord Wilberforce famously explained in *Davy* that “English Law fastens not on principles but remedies.”²⁶ French law identifies rights and tries to work out appropriate protection, whereas English law, by contrast, focuses on whether a remedy is available to a new situation.²⁷ Accordingly, a common law lawyer will not ask whether a legal rule exists, but whether remedies are available to a claim. As a consequence, legal terminological difficulties are likely to arise between French and English law as they are “systems which do not go back to a common origin”.²⁸ Applying the appropriate translation methodology becomes essential in the comprehension of a legal document in the TL.

3. The use of different translation methodologies

Underlying any legal translation is the rule that the content of the source text should be imparted in the most comprehensible way into the SL document. In order to achieve this goal, a variety of translation methodologies are available.

3.1. *To trust or not to trust the word-for-word translation methodology... that is the question*

In legal translation, primary consideration should be given to the word-for-word translation methodology. It maintains the syntax of the original document and thus provides the least interference with the SL style and legal thinking, thereby conveying form as well as content.²⁹ In a way, it requires only minimal subjective input by the translator, who merely acts as a neutral channel between the SL and TL texts. Also known as formal equivalence, this methodology only works up to the point when information mentioned in the SL document stops being imparted clearly and starts being misleading or controversial.³⁰ Judgement whether or not to apply formal equivalence is made on a case-by-case basis. The translator’s experience and expertise are essential in determining the appropriateness of such a methodology.

Some legal concepts can be directly translated using the word-for-word methodology as they exist in the legal systems of both the SL and TL and have the same meaning. For instance, ‘*cour d’appel*’ can be translated as ‘Court of Appeal’, as can ‘*juge*’ by ‘judge’. This type of legal concept is the least controversial to translate, even between fundamentally different legal systems. Ultimately, what matters is that it makes sense in the TL.

²³ Lord McMillan, *Reads v Lyons & Co*, [1947] AC 156, 175 (HL), in Legrand, *supra* note 5, at 67.

²⁴ See Bentham, J. (1928) *A Comment on the Commentaries*, at 125, and Edward Coke, Preface to the first collection of reports published between 1600 and 1616, 1 Co. Rep. I at xxvii in Legrand, *supra* note 5, p. 68.

²⁵ *Ibid.*, p. 69.

²⁶ *Davy v. Spelthorne BC* [1983] 3 All ER 278 at 285, in Brown & Bell, *supra* note 14, p. 22.

²⁷ See David and Samuel, in Bell, J. (2001) *French Legal Cultures*. London: Butterworths, vi & ix.

²⁸ Gutteridge, *supra* note 7, p. 408.

²⁹ Weston, *supra* note 3, p. 24.

³⁰ *Ibid.*

In some cases, formal equivalence can be used to translate an SL term that is unfamiliar to the TL legal system. To translate ‘*Assemblée Nationale*’ as ‘National Assembly’, for instance, is perfectly clear, even though such a concept does not exist in English law, as it is commonly used to describe the lower house of parliament in a large number of countries in the world. This is not, however, always the case: a common law lawyer will not necessarily understand what is meant by ‘civil law’ when translating ‘*droit civil*’, as it is an unfamiliar concept in common law. On other occasions, word-for-word translation will become completely nonsensical: a ‘*Garde des Sceaux*’, a term specific to the French legal system, should not be translated as ‘Guardian (or Keeper) of the Seals’³¹, which would only leave an English reader clueless, but could instead be translated by ‘Justice Secretary’ or ‘French Minister of Justice’. By the same token, the ‘*Conseil d’Etat*’, the highest French administrative court and a government advisory body, has no direct equivalent in the common law system and should not be translated as ‘Council of State’, but rather the original SL term should be retained.

Another possible pitfall is the use of the formal equivalence methodology in relation to *faux amis*: words that look or sound the same in both SL and TL, and are commonly used in both languages, but do not have the same meaning. A literal translation may be misleading or only provide a partially correct picture.³² Take, for instance, ‘*un magistrat*’: in France, it is usually used to describe a professional judge, whereas a ‘magistrate’ in England is a lay judge, thus exactly the opposite.³³ One should also be mindful of the fact that being a professional judge is a career profession in France, but not in England.³⁴ ‘*Une juridiction*’ in France usually describes a court. In England, ‘jurisdiction’ refers to the issue of whether a court has the authority to hear a case. Nor is ‘*la rescision*’ the equivalent to ‘rescission’ in English law: in French law, it describes a remedy at the disposal of a party who suffers a financial prejudice as the result of a disequilibrium between the obligation provided and the one received in a contract³⁵; in English contract law, it is the main remedy available in case of misrepresentation.³⁶ Inversely, Common law will not be translated by ‘*droit commun*’ in French, as it refers to the applicable law unless stated differently by legislation, but the SL expression: ‘*la common law*’ should be retained.

Some expressions may be *faux amis* only in certain circumstances: ‘*un crime*’ is a particularly serious offence in French criminal law, whereas ‘a crime’ is much more of a generic term in English criminal law.³⁷ One should also tread carefully when using the term ‘commercial law’ for ‘*droit commercial*’. Commercial law in France is a body of law distinct from Civil law. In English law, it is not a separate branch of law. It merely refers to those topics that are relevant to business and commercial practice.³⁸

³¹ *Ibid*, p. 25.

³² Markesinis, B. (1993) Bridging Legal Cultures. *Israel L.R.*, (1993), p. 369.

³³ Cairns, W. & McKeon, R. (1995) *Introduction to French Law*. London: Cavendish, p. 194.

³⁴ See Elliott, C. (2010) *English Legal System*. 11th ed., Harlow: Pearson Education, at 154; Elliott, C., Jeanpierre, E & Vernon, C. (2006) *French Legal System*. 2nd ed. Harlow: Pearson Education, pp. 260-264.

³⁵ Youngs, R. (2007) *English, French & German Comparative Law*. 2nd ed., Abingdon: Routledge-Cavendish, at 590. For an English version of art. 1118 of the French Civil Code, see the Légifrance website: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=439> [accessed 15 June 2010].

³⁶ Stone, R. (2008) *The Modern Law of Contract*. 7th ed., London: Routledge-Cavendish, p. 340.

³⁷ Elliott, Jeanpierre & Vernon, *supra* note 34, p. 108.

³⁸ Weston, *supra* note 3, p. 51.

In addition to socio-cultural peculiarities moulding each legal system differently, a legal translator faces the challenge of overcoming ambiguity in a legal document because of the existence of numerous polysemous words in the field of law.³⁹ It is therefore important to ensure understanding of the context of the source text in order to determine the relevant meaning to give to the SL polysemous term. The word ‘demandeur’, for instance, may be used to describe either ‘a plaintive’ or ‘an appellant on a point of law’, depending on the context. The French word ‘société’ also has two distinct meanings: it can be either a society or a company in a business sense. When the French President’s website provided in 2001 the English version of article 16 of the 1789 French Declaration of the Rights of Man and Citizen, it used this second way of translating ‘société’, and stated that: “Any company in which no provision is made for guaranteeing rights or for the separation of powers has no Constitution.”⁴⁰ The English version should have translated ‘société’ in this context as ‘society’. ‘Dol’ is another example of a polysemous word that necessitates a translator’s full attention. The first meaning of ‘dol’ refers to the formation of a contract and is the French equivalent of ‘misrepresentation’.⁴¹ The second meaning, on the other hand, refers to the extent of a debtor’s liability for failing to perform a contract.⁴² Finally, a translator should ensure that ambiguity is not created by being aware of the different TL polysemous words. A ‘convention’, for instance, has two distinct meanings in English law: it can be an international treaty or a non-legally enforceable source of the British constitution.⁴³

3.2. *The appropriate use of the equivalent term in the TL*

If the word-for-word methodology leads to confusion in the translated document because the term is unknown in the TL, a translator may prefer to use a TL equivalent term. Known as “functional equivalence”, this methodology is appropriate in cases where the SL and TL terms have a similar meaning.⁴⁴ A ‘*Conseil des ministres*’, for instance, if translated literally is ‘a council of ministers’, which has no meaning in English domestic law, but is the title given to a decision-making body of the EU. A better solution would surely be to translate it as ‘cabinet’.⁴⁵ This applies as well to ‘board of directors’, which is the English equivalent of the French ‘*conseil d’administration*’.⁴⁶

³⁹ See Gémard, who claims that: «De toutes les langues spécialisées, la langue juridique est peut-être celle où règne la plus grande polysémie.» In Gémard, *supra* note 18, at 342. See also Bélanger, *supra* note 2, p. 458.

⁴⁰ Official website of the President of the Republic: http://www.elysee.fr/ang/instit/text1_.htm [accessed in July 2001]. The original French version states: «Toute société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution.» <http://legifrance.com/html/constitution/const01.htm> [accessed 15 February 2010].

⁴¹ See article 1116 of the Civil Code. Bear in mind that while both are considered vitiating factors, the French term is not confined to representations as the English term is. See Youngs, *supra* note 36, p. 595.

⁴² Nicholas, B. (1992) *The French Law of Contract*. 2nd ed., Oxford: OUP, at 229. See also the French Civil Code, arts. 1150 & 1151, *Code civil* (2010) 109th ed., Paris: Dalloz.

⁴³ See the concept of constitutional conventions in Bradley, A.W. & Ewing, K.D. (2007) *Constitutional and Administrative Law*. 14th ed., Harlow: Pearson Education, p. 20.

⁴⁴ Weston, *supra* note 3, p. 21.

⁴⁵ *Ibid.* See also Elliott, Jeanpierre & Vernon, *supra* note 34, p. 36.

⁴⁶ Cairns & McKeon, *supra* note 33, p. 199.

Special attention should be paid if the concepts are slightly different in different legal systems, what Weston calls the “nearest equivalent term”.⁴⁷ But one should be mindful of the danger of misleading the reader, as the nearest equivalent term often leads to an imperfect translation: ‘*Avocat*’, for instance, may be translated as ‘barrister’ when related to court proceedings and court pleadings but will be more adequately translated as ‘solicitor’ when referring to legal advice or the drawing up of legal documents.⁴⁸ Alternatively, the safest solution might be to use the generic term ‘lawyer’ in case of uncertainty. The term ‘*commerçant*’ is only imperfectly translatable in English as ‘registered tradesman’ or ‘businessman’, as the legal consequences of the SL term vary from those of the TL term. The same is true for ‘*acte de commerce*’ if translated as ‘commercial transaction’.⁴⁹ It will be up to the translator to decide whether such a choice is suitable for the situation or not.

Sometimes the method of using the nearest equivalent term should clearly be set aside. The French ‘*Sénat*’, for instance, cannot be translated by the British ‘House of Lords’, though both are upper Houses of Parliament. Overall, the most important element to take into account when reverting to the functional equivalence methodology is the readership of the TL document: the more specialised it is, the less acceptable this methodology is.

3.3. Admitting defeat

It is sometimes impossible to provide a sufficiently accurate translation of an SL institutional term or concept that is unfamiliar in the TL legal system. As explained by Weston, it then becomes necessary for the translator to “admit defeat”, and the use of the original SL non-translatable term – including, if necessary, a TL explanation when the term is used for the first time – becomes the only alternative.⁵⁰ As a rule, the greater the degree of technicality and specificity of the SL term, the harder it is to translate.⁵¹ To make a culinary comparison, a ‘*pain au chocolat*’ is always associated with French and has no British equivalent, thus becoming non-translatable, just as a ‘Christmas pudding’ is always associated with Britain and is known in France as ‘*le christmas pudding*’.

In French law, an example of such a non-translatable concept is ‘*cause*’ in the French law of obligations. It is mentioned in articles 1131 to 1133 of the French Civil Code and is the reason why a person enters into a contract. ‘Consideration’ is the nearest equivalent in English law and serves a similar purpose to *cause*. The scope and legal construct of ‘consideration’ is, however, very different to its French counterpart, as it mainly helps to determine which agreement is enforceable in English contract law.⁵² It should thus not be translated. The ‘*Conseil d’Etat*’ and the ‘*Cour de cassation*’, the highest ordinary court, are examples of non-translatable SL culture-specific institutions. Weston, however, has been

⁴⁷ Weston, *supra* note 3, p. 22.

⁴⁸ Elliott, Jeanpierre & Vernon, *supra* note 34, p. 243.

⁴⁹ The reader should bear in mind that *le commerçant* and *les actes de commerce* are the two essential cornerstones of French commercial law. The same is not the case in English commercial law.

⁵⁰ Weston, *supra*, note 3, p. 26. See also Pollard as an example of the frequent use of non-translatable terms, Pollard, D. (1998) *Sourcebook on French Law*. 2nd ed., London: Cavendish.

⁵¹ *Ibid*, p. 36.

⁵² For an extensive comparison of *cause* and ‘consideration’, see Nicholas, *supra* note 42, 144-149; and Markesinis, B.S. (1978) ‘*Cause and Consideration: A Study in Parallel*’. *CLJ* (1978), 53-75. For ‘consideration’, see also Peel, E. (2007) *Treitel – The Law of Contract*. 12th ed., London: Sweet & Maxwell, Chap. 3.

willing to accept the expression ‘Court of Cassation’ as, sometimes, the frequency of the use of an SL expression leads to its integration, or naturalisation, into the TL through the creation of a neologism.⁵³ Aside from Bridge, in his legal dictionary, I have not come across any other legal academic ready to accept this neologism, and would advise the continued use of the French version of the institution’s title.⁵⁴

There are few French institutions that have been proved to be so unfamiliar to common law lawyers as the ‘*Conseil constitutionnel*’. Linguists and lawyers alike have struggled to find the most appropriate translation of this institution created by the French Constitution of 1958. Pollard defines it as an “independent but non-judicial arbitrator”.⁵⁵ It mixes judicial with non-judicial features and has thus at times, usually unsatisfyingly, been called a ‘Constitutional Court’. Whereas Youngs calls it a constitutional court, the official website of the *Conseil constitutionnel* uses the term ‘Constitutional Council’, as do Bridge and Troper.⁵⁶ I agree, however, with the wider consensus among academics that the institution’s name should remain non-translated due to its distinctive Frenchness.⁵⁷ Its composition, as well as its multiple functions, genuinely make it *sui generis*. Interestingly, Bell prefers to keep the French term in most of his books except for the one he co-authored with Brown.⁵⁸ There might, however, be a case for using the term ‘Constitutional Court’ in future, as I will argue below.

Finally, when using the original French term in English, it is essential to have an understanding of the French rules regarding capitalised letters as non-translated terms should be re-transcribed correctly in the TL document. Terms taking a capital letter are strictly regulated in French, but much more informally in English. The rule is that a term is generally written in lower case, unless specified differently by a French grammatical rule. For example, the nouns, but not their accompanying adjectives, of the terms describing the main institutions are written in upper case: for example, ‘*Cour de cassation*’. In contrast, more widespread institutions take lower case: for example, ‘*tribunal de grande instance*’. Important written documents also take upper case: for example, ‘*la Constitution de 1958*’ and ‘*le Code civil*’.⁵⁹

⁵³ Weston, *supra* note 3, p. 30.

⁵⁴ Bridge, F.H.S. (1994) *The Council of Europe French-English Legal Dictionary*. Strasbourg: Council of Europe Press, at 57.

⁵⁵ Pollard, *supra* note 50, p. 31.

⁵⁶ *Conseil constitutionnel* official website, see pages in English: <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html>> (accessed 14 February 2010); Bridge, *supra* note 54, at 47; Troper in Bermann, G. & Picard, E. (eds.) (2008) *Introduction to French Law*. Alphen aan den Rijn: Kluwer Law International, p. 30.

⁵⁷ See e.g. Elliott, Jeanpierre & Vernon, *supra* note 34, at 130; and Boyron, S. in Bell, J., Boyron, S. & Whittaker, S. (2008) *Principles of French Law*. Oxford: OUP, p. 156. See also, *inter alia*, Pollard, *supra* note 50, and Dado, C. & Farran, S. (1996) *The French Legal System*. 2nd ed., London: Sweet & Maxwell.

⁵⁸ Contrast Bell, J. (1992) *French Constitutional Law*. Oxford: OUP, p. 29 and Bell, J. (2001) *French Legal Cultures*. London: Butterworths, at 33, with Brown, N. & Bell, J. (1998) *French Administrative Law*. 5th ed., Oxford: OUP, p. 14.

⁵⁹ For the best explanation, see: http://larevue.hammonds.fr/Post-it-Du-bon-emploi-de-la-majuscule-par-les-juristes_a246.html, a newsletter by the law firm Hammonds Hausmann [accessed 3 June 2010].

4. Issues relating to the type of translation to provide

The aim of any translator is to get the right mix between the different translation methodologies examined above in order to render the TL document as clear and idiomatic as possible. Thus, an awareness of the culture-bound aspects of the TL is essential. For example, ‘*droit international privé*’ can be translated as ‘private international law’, but the expression traditionally used in the UK is ‘conflict of laws’. This feel for the appropriate TL expression is what an experienced translator can provide. Determining the kind of translation to provide necessitates addressing a number of important issues, such as whether or not to stick to the style of the source document (Section III.A) or address the expected readers of the target document (Sections III.B and III.C).

4.1. How closely linked to the source text structure and style does the reader expect the information provided in the target text to be?

An important academic debate has revolved around the exact role of the translator and whether he/she should make his or her presence felt or stick scrupulously to the original text. In other words, should a translation remain true to the ‘letter’ or to the ‘spirit’ of an SL text?⁶⁰ Since the second half of the 20th century, the pendulum has clearly swung towards the latter: a successful translation should not, according to Sarcevic, be measured “in terms of formal correspondence between source and target text but of equivalent effects”.⁶¹ The main aim of a translator should be fidelity to the uniform intent and meaning of the translated document, rather than formal fidelity to the source text. According to Vinay and the theorists of the Paris School, a translation is done in order to convey a message in a manner that is clear and understandable to the receiver.⁶² This view is also espoused by Markesinis, who encourages legal translators to use a creative interpretation. In effect, it requires more than linguistic skills but a feeling for the TL legal system and a mastering of “intellectual juggling to allow the matching of different concepts and notions”.⁶³ In contrast, Newmark asserts that a “good translator abandons a literal version only when it is plainly inexact or badly written. A bad translator will always do his best to avoid translating word for word.”⁶⁴ Furthermore, in practice, linguistic fidelity to the source text, by using the word-for-word methodology and maintaining the same length of sentences, is often the first consideration required of legal translators.⁶⁵ In that way, translators do not impose their own interpretation of the SL text.⁶⁶ Often, a distinction is made between translations that have an aesthetic pretence and pragmatic ones whose purpose is purely to be informative.⁶⁷

Beyond the ideological debate, a practical question arises: what should be the extent of interpretation of a source text? There is in my mind no doubt that the answer to that question

⁶⁰ Harvey, *supra* note 1, p. 180.

⁶¹ Šarčević, S. (1997) *New Approach to Legal Translation*, The Hague/London/Boston: Kluwer Law International, *ibid*.

⁶² ‘Vinay: ‘le sens seul compte [...] on traduit pour faire comprendre’ in Gémard, *supra*, note 2, at 37. See also Weston, *supra* note 3, p. 24-25.

⁶³ Markesinis, *supra* note 32, p. 370.

⁶⁴ In Weston, *supra* note 3, p. 25.

⁶⁵ See Šarčević, 16, e.g., UN Instructions for translators: ‘fidelity to the original text must be the first consideration’, *supra* note 71, p. 181.

⁶⁶ *Ibid*.

⁶⁷ Brislin, R.W. (1976) *Translation. Applications and Research*, in Weston, *supra* note 3, p. 10.

is linked to the type of translator providing the translation. From my experience of teaching legal translation to both linguists and lawyers, I have noticed a clear tendency to find two types of legal translators:

The first type is the linguist-translator who has a linguistic background and was originally a general translator. When confronted with a legal document, the translator will tend to favour the word-for-word translation methodology and refrain from legal interpretation unless absolutely necessary in order to avoid any misunderstanding and retain the style of the source text. He/she remains overall as neutral as possible, and his/her personal imprint in the target text remains limited.

The second type is the lawyer-translator who has a legal background and has requalified as a translator. The aim of this kind of translator is to provide the exact meaning of the source text, and not necessarily stick to literal translation, and to convey legal terms and thoughts as precisely as possible. His/her excellent understanding of the law means that this kind of translator will provide more personal input into the translation, not hesitating to apply his/her personal legal interpretation of the source text.

As well as the translator's background, the style of a legal translation will also depend on the expected reader of the target text. After all, the ultimate aim of any translation should be that it makes sense to its reader(s) and that it serves a useful purpose. It is a juggling process between the information available in the source text and that expected by the reader of the target text.

4.2. *From which country is the potential reader?*

Since each legal system is based on a specific set of socio-cultural elements, it is important, in a French-English legal translation, to determine at which English-speaking legal system the target text is aimed. This will have important practical consequences, as the phraseology will depend on such an assessment. If it is aimed at a wider global audience, such as on a website, more generic terms might be used, whereas a target text aimed at a specific country might use that country's specific equivalent terms, so as to render the style more idiomatic and free-flowing. '*Un avocat*' may be translated using the more generic term 'lawyer' for a global audience, or the country-specific terms 'attorney' for North America or 'barrister/solicitor' for the UK. It is essential to bear in mind that important differences exist between the different common law legal systems in terms of legal concepts, institutions and legal terminology. The USA, for instance, has a federal system and a written constitution, unlike the UK. Whereas 'judicial review' refers to judicial control over acts of public administration in English law, it means the power of the courts to declare legislation unconstitutional in American law.⁶⁸ '*Droit du travail*' is known as 'labor law' in the USA and 'employment law' in the UK. It is probably because it is aimed at a wider audience that the French Government's official website *Légifrance* has translated '*Code pénal*' as 'Penal Code' instead of 'Criminal Code', the expression normally used in the UK.⁶⁹ In addition, in order to render the translated terms and concepts clear and idiomatic to their readers, British

⁶⁸ For a comparison, see Brown & Bell, *supra* note 14, p. 6. For a detailed explanation of English judicial review, see Bradley & Ewing, *supra* note 43, p. 725.

⁶⁹ Légifrance: <<http://195.83.177.9/code/liste.phtml?lang=uk&c=33>> [accessed 24 May 2010].

academics, will, for instance, refer to French cases by the names of the parties, which is usually not done in French law for decisions by ordinary courts.⁷⁰

4.3. How much legal expertise does the reader have?

The extent to which a technical term or concept needs to be explained depends on the reader's prior legal knowledge: does he/she have a good understanding of both the French and English legal systems? The degree of technicality and specificity of a TL text depends on the degree of legal expertise a reader is expected to have. In some cases, a translation might require fairly extensive explanation of a legal concept that is unfamiliar to the reader; in others, basic information is sufficient. If, for instance, reference is made to the French '*pourvoi en cassation*', a knowledgeable reader might merely need to be told that it is a 'system of *cassation*', whereas a reader who has no prior knowledge of the French legal system might need to be told that it is a review by the highest ordinary court of the legitimacy of a decision by a lower court.⁷¹

5. Increasing harmonisation between the English and French Legal Systems

An added complication in legal translations is the fact that legal concepts have a certain degree of instability.⁷² Just like living organisms, legal systems are constantly evolving and changing.

5.1. Legal systems do not remain immobile

At certain times in their history legal systems go through fundamental changes. In the process, new institutions are created, while old ones disappear. The French Constitution of 1958, for instance, introduced the *Conseil constitutionnel*. Even during ordinary times, it is normal that legal systems do not stand still. For instance, the UK Supreme Court was created in October 2009 to replace the defunct Law Lords.⁷³ In France, a new set of courts, the *juridictions de proximité*, or neighbourhood courts, were created in 2002 to relieve existing courts of some of their workload and be closer to the people.⁷⁴

In addition, as pointed out by Gutteridge, legal terms can take on different meanings with the passing of time.⁷⁵ In English law, the role of the Lord Chancellor is not what it used to be, after it was radically amended by the Constitutional Reform Act 2005. Some of the Lord Chancellor's traditional functions have been allocated to the Secretary of State for Justice,

⁷⁰ The reference method used in French law is to mention the court that provided the decision, accompanied by the exact date of the case. See Bell, J. (2001) *French Legal Cultures*, London: Butterworths, at IX; Marsh, P.D.V. (1994) *Comparative Contract Law*, Aldershot: Gower.

⁷¹ See, e.g., Bell, Boyron, & Whittaker, *supra* note 57, p. 3.

⁷² G mar, *supra* note 18, p. 343.

⁷³ "Institutions have to adapt and change to survive and maintain their legitimacy." Speech by Justice Secretary Jack Straw at the official opening of the Supreme Court, 16 Oct. 2009 - Ministry of Justice official website: < <http://www.justice.gov.uk/news/speech161009a.htm>> [accessed 4 June 2010].

⁷⁴ These courts have only been partially successful, and criticism of their existence is frequent. Elliott, Jeanpierre & Vernon, *supra* note 34, pp. 89-90.

⁷⁵ Gutteridge, *supra* note, 8, at 401.

who sits in the Cabinet and in Parliament, and some to the Lord Chief Justice, who has become the head of the judiciary. The Lord Chancellor has kept some of the traditional ceremonial functions. Furthermore, whereas the Lord Chancellor used to be the speaker of the House of Lords, the Secretary of State for Justice now sits in the House of Commons.⁷⁶ Another example is provided by the French Constitution of 1958, which limited the scope of parliamentary legislation (*loi*), which previously had unlimited jurisdiction, to subjects listed under its article 34.⁷⁷

Legal systems also go through various phases of legal terminological modernisation. In French law, a new version of the French Commercial Code came into force in 2000. One of the aims of this change was to modernise the style of the Commercial Code. Some of the vocabulary used in the original Code, dating back to the early 19th century, was amended and replaced by contemporary terms.⁷⁸ For instance, the term ‘*voiturier*’ (i.e., a carrier) was replaced by ‘*transporteur*’.⁷⁹ In English law, it is important to have an understanding of the Woolf Reforms as they not only fundamentally changed the civil justice system but also simplified the legal terminology after April 1999.⁸⁰ It is of course essential for a translator to have an awareness of this evolutionary process, as it will influence the accuracy of the translation.

5.2. An existing closeness and a trend towards rapprochement as a natural development in domestic legal systems

“[C]ontinental law tends to become [...] a law of remedies rather than a law of rights at a time when the common law [...] tends to become a law of rights instead of a law of remedies.” (René David)⁸¹

Undoubtedly, some of the characterisations of French law are extremely stereotypical and portray legal reality imperfectly. Even though they all have a family resemblance, the different branches of French law also have distinctive features. Bell argues that it is thus not helpful to talk about a single, uniform French legal culture.⁸² Whereas, for instance, *droit*

⁷⁶ UK Constitutional Reform Act 2005,

<http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1> [accessed 12 June 2010]. For more information, see Bradley & Ewing, *supra*, note 43, 405-407.

⁷⁷ Elliott, Jeanpierre & Vernon, *supra* note 34, at 70. For an up to date English version of the French Constitution, see: <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html>> [accessed 14 June 2010].

⁷⁸ *Ibid*, at 11.

⁷⁹ See, for instance, Article L132-9 of the French Commercial Code, *Code de commerce* (2009) 104th ed., Paris: Dalloz:

‘I. - La lettre de voiture doit être datée.

II. - Elle doit exprimer :

1° La nature et le poids ou la contenance des objets à transporter ;

2° Le délai dans lequel le transport doit être effectué.

III. - Elle indique :

1° Le nom et le domicile du commissionnaire par l'entremise duquel le transport s'opère, s'il y en a un;

2° Le nom de celui à qui la marchandise est adressée ;

3° Le nom et le domicile du **transporteur**. ...’ (emphasis added)

⁸⁰ Elliott, *supra* note 35, 531-537.

⁸¹ David, R. (1972) *French Law*, Baton Rouge: Louisiana State University Press, at 13.

⁸² Bell, *supra* note 80 p. 255.

civil and most of private law can rightly be described as codified law, the same cannot be said of all branches of French law.⁸³ French administrative law is mainly case-based and operates in a manner closer to the common law.⁸⁴ Though it now possesses a code that regulates some procedural and institutional aspects of administrative law⁸⁵, it has been rightly described as an uncodified branch of law in nature.⁸⁶ A further characteristic of French administrative law that is familiar to a common law lawyer, as pointed out by Bell, is its *modus operandi*: as in English law, it is a branch based on remedies as opposed to other branches of French law, which are based on rights.⁸⁷ Though ideologically different at its inception, French law is closer to common law than one might at first imagine.⁸⁸

A distinct trend towards rapprochement between the French and English legal systems is also clearly noticeable and has been analysed in detail by comparative lawyers. Markesinis has, for instance, described it as “gradual convergence” and refers to the idea of continental law as statutory and English common law as casuistic as more and more of a “myth”.⁸⁹ In effect, English law is being ‘continentalised’ and French law is becoming anglo-saxonised.⁹⁰ As a consequence, both legal systems appear to be moving towards a more standardised, global approach to law. One of the reasons for the convergence of the two legal systems is the fact that their distinctive characteristics are fading away: the traditional pre-eminent role of the *loi* is being eroded in France, with Parliament currently providing only minimal legislation. This has enabled judges to increase their role in helping to determine the cultural and ethical mood of the country. In a number of sensitive societal issues judges have not merely stuck to the letter of the law, but have instead often preceded the enactment of relevant legislation, and thus have become “more consciously activists”.⁹¹ French judges had, for instance, developed protection against breaches of privacy long before article 9 of the Civil Code introduced a right to privacy in 1970, and banned surrogacy agreements before the 1994 legislation on bioethics introduced an express ban in article 16-7 of the Civil Code.⁹² Furthermore, the idea that French law is based on broad principles organised in an orderly, methodical manner has

⁸³ Analysis put forward by Bell, *ibid*, p. 247.

⁸⁴ Bell, Boyron & Whittaker, *supra* note 57, p. 7.

⁸⁵ *Code de justice administrative*.

⁸⁶ Brown & Bell, *supra* note 14, p. 2.

⁸⁷ Bell, *supra* note 20, pp. 248-249.

⁸⁸ *Ibid*, pp. 243-252.

⁸⁹ Markesinis, *supra* note 32, at 380. See also Markesinis, B.S. (1994) *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*. Oxford: OUP.

⁹⁰ Glenn, P. (1993) ‘La civilisation de la *common law*’ (1993) *Rev. Int. Dr. Comp.* pp. 559-575.

⁹¹ Bingham, T.H., (1992) “There is a World Elsewhere”: the Changing Pattern of English Law. *ICLQ* 41, (1992), at 528. See also Rousseau in Bell, *supra* note 20, p. 257.

⁹² Articles 9 & 16-7, *Code civil* (2010), 109th ed., Paris: Dalloz. Another recent example demonstrates judges’ readiness to depart from the letter of the law when required: In a famous decision by the *Cour de cassation* on 17 November 2000 called the *Perruche* case, a doctor was sentenced to pay compensation for the birth of a disabled child after having failed to detect his disability during the pregnancy. This failure prevented the making of an informed decision whether to have an abortion or continue with the pregnancy. Surprisingly, the court decided that the disabled child, as well as his parents, was entitled to financial compensation. As the doctor had not contributed to his disability, this decision was based on flawed legal reasoning, as a child could clearly not be said to have suffered any damage from the mere fact of being born. Judges at the time, however, felt that it was the best solution to ensure that the financial means would be available for the child to receive the necessary medical treatment during his entire lifetime. The government intervened in 2002 by enacting legislation precluding any right to compensation for the birth of a child. See Elliott, Jeanpierre & Vernon, *supra*, note 35, p. 125.

lost some of its pertinence.⁹³ Some of the more modern codes, such as the Consumer Code, have been criticised as being mere compilations of texts lacking a proper order.⁹⁴ The codes also lack completeness, and it is frequently necessary to consult additional legislation (e.g., in commercial law) or resort to several codes at the same time (e.g., medical negligence) to gain an understanding of a specific branch of law.⁹⁵ Importantly for a translator, the drafting style of modern codes has changed. Once feted for their stylistic elegance⁹⁶, many modern codes lack the clarity of their predecessors and are often characterised by their redundancy and excessive emphasis on details. As a consequence, there is no doubt that French codification drafted by bureaucrats through the process of delegated legislation has replaced style by functionality.⁹⁷

In relation to English law, Glenn has noticed the opposite trend: the notion that case law is the essential source of English law is in decline.⁹⁸ While the role of case law is in stark decline, in importance if not in quantity, law is increasingly articulated in a rational manner, and statutory law is flourishing and plays an ever increasing role, with rights replacing remedies.⁹⁹ Indeed, important pieces of legislation define entire branches of law: with the noticeable exception of judicial review, many parts of English administrative law are nowadays precisely regulated by an Act of Parliament, such as, for instance, freedom of assembly by the Public Order Act 1986 and police powers by the Police and Criminal Evidence Act 1984.¹⁰⁰

5.3. *The role of common European values: a change in attitudes*

Both the French and English legal systems are becoming increasingly influenced by the way law is applied in other legal systems. The world is a small place. Through globalisation, lawyers have been able to encounter new foreign socio-legal ideas, values and solutions. As explained by Sir Thomas Bingham, French and English lawyers are finally looking beyond their borders.¹⁰¹ This is no mean feat, considering the insular mentality of British lawyers and the French aversion to communicate in any language other than their own. In a number of branches of law having an international focus, such as commercial law, France has experienced a noticeable common law influence and has directly transplanted a number of legal concepts: *leasing*, for instance, has become '*crédit-bail*' in French law just as 'lease-back' has become '*cession-bail*'.¹⁰² The judiciary, as well, has started to look across the English Channel, either implicitly, as in the Muammar Gaddafi case on 13 March 2001, when the *Cour de cassation* had to decide on the question of the Libyan leader's immunity from

⁹³ See Bell, Boyron & Whittaker, *supra*, note 57, p. 8.

⁹⁴ See *inter alia* Bell, *supra* note 20, p. 244.

⁹⁵ Elliott, Jeanpierre & Vernon, *supra* note 34, p. 11.

⁹⁶ *Ibid*, p. 9.

⁹⁷ Catherine, R. (1968) *Le Style Administratif*. Paris: Albin Michel, in Gémard, *supra* note 18, at 348. For delegated legislation, see article 38 of the Constitution previously mentioned.

⁹⁸ «Le juge de la common law n'est plus ce qu'il était.» in Glenn, *supra* note 90, at 570. See also an interesting discussion on the role of English judges on pp. 571-573.

⁹⁹ David, R. (1972) *French Law*, Baton Rouge: Louisiana State University Press, at 103; Glenn, *ibid*, p. 574.

¹⁰⁰ See Parpworth, N. (2008) *Constitutional and Administrative Law*. 5th ed., Oxford: OUP, Chaps. 18 and 19.

¹⁰¹ Bingham, *supra* note 91, p. 513.

¹⁰² Dekeuwer-Défossez, F. (2004) *Droit Commercial*, 8th ed., Paris: Montchrestien, 308.

prosecution in international law, mirroring the findings of the House of Lords decision concerning Pinochet, or even expressly, as when the *Conseil d'Etat* cited the English High Court in the *Techna* decision of 29 October 2003 on a question related to European law.¹⁰³ Such examples of direct influence between France and the UK, however, remain exceptional.

On the other hand, European law and the European Convention of Human Rights (ECHR) have become a privileged meeting place between common law and civil law,¹⁰⁴ with lawyers trained in a judge-made system frequenting those trained in codified systems. This has enabled a new awareness of the differences in legal cultures.¹⁰⁵ More than just a closer contact with others, however, it has also given rise to a receptiveness to other legal concepts.¹⁰⁶ I believe that a visible *rapprochement* between French and English law is taking place based on adherence to a broad commonality of principles through adherence to the fundamental principles of European Law and the ECHR.¹⁰⁷ Indeed, the rulings of the European Court of Human Rights have standardised a number of aspects of European domestic legal systems, as has the growing influence exercised by European law over domestic legislation, through preliminary questions and the supremacy of European Law.¹⁰⁸ Legal institutions and concepts are being standardised in both France and the UK to comply with common values based on democratic principles and fundamental rights. I will illustrate my point with several examples in France and the UK:

In France, concerned that the absence of an ordinary appeal following a decision of guilt by the *Cour d'assises*, the court which tries the most serious criminal offences, might breach the European Convention of Human Rights, the government introduced a right to appeal following an Act of 15 June 2000. Prior to 2000, the reason for preventing such a procedure was based on the argument that the *Cour d'assises'* verdicts were reached by a jury composed of ordinary citizens who were deemed to be sovereign.¹⁰⁹ Legal tradition was replaced in this case by European human rights values. Furthermore, following a constitutional amendment of 23 July 2008, the role of the *Conseil constitutionnel* was expanded so as to include the right of private individuals involved in legal proceedings to challenge the constitutionality of a statute which infringes fundamental rights protected by the Constitution.¹¹⁰ It was previously impossible to challenge the constitutionality of a statute after it had come into force. These reforms, added to previous constitutional amendments and creative case law mean that the *Conseil constitutionnel* increasingly resembles a proper Constitutional Court in terms of its role if not its composition, which remains heavily political.¹¹¹ From a legal terminological point of view, it signifies that it might become

¹⁰³ See Elliott, Jeanpierre & Vernon, *supra*, note 34, at 80.

¹⁰⁴ Marquesinis, *supra* note 32 at 365.

¹⁰⁵ Legrand, *supra* note 5, at 79.

¹⁰⁶ Bingham, *supra* note 91, at 526.

¹⁰⁷ Bell, Boyron & Whittaker, *supra* note 57, at 2.

¹⁰⁸ See Bell, *supra* note 20, at 252.

¹⁰⁹ Elliott, Jeanpierre & Vernon, *supra* note 34, at 112.

¹¹⁰ Article 61-1 of the Constitution: "If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period." Official website of the French *Conseil constitutionnel*, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constiution_anglais_oct2009.pdf> [accessed 12 May 2010].

¹¹¹ Public Lecture by Sophie Boyron at UCL on 8 February 2010 for the Constitutional Law Group on 'the revised Constitution of the French Republic'.

increasingly acceptable to translate ‘*Conseil constitutionnel*’ as ‘constitutional court’. Here again, the concern to increase individuals’ fundamental rights signifies that France is slowly creating a Constitutional Court with similar features to those of its European counterparts.

In English law, the ECHR and its incorporation into English law through the 1998 Human Rights Act have had a major influence in the development of the law.¹¹² Not only has it led to the development of a proper right to privacy, but it has also transplanted into English law a novel safeguard against government action: proportionality. Proportionality is a principle that is present in a number of different legal systems and has been developed by the European Court of Human Rights and the European Court of Justice.¹¹³ It implies that “administrative action ought not go beyond what is necessary to achieve its desired result”.¹¹⁴ It was discussed in great detail by the House of Lords in the *Daly* case.¹¹⁵ Lord Steyn considered proportionality to be “more precise and sophisticated” than the traditional principle of unreasonableness, which is used in English administrative law for judicial review and which it might with time supplant.¹¹⁶ Another example of the influence of European values concerns the Supreme Court, which replaced the Appellate Committee of the House of Lords as the final court of appeal in October 2009.¹¹⁷ The Supreme Court was set up by the Constitutional Reform Act of 2005 as a clear indication of the separation of powers between the judiciary and the legislature, and to underline the independence of the judicial system.¹¹⁸ The same reason was given for amending the role of the Lord Chancellor and creating the position of Secretary of State for Justice.¹¹⁹ The examples mentioned above indicate a clear move in the UK towards a rigid constitutional structure based on parliamentary legislation, and thus similar to its European counterparts, and not merely on the quintessentially British concepts of constitutional conventions.

If this trend continues, it will greatly facilitate the task of the legal translator and the readers’ understanding of different legal systems, as there will be a noticeable reduction of non-translatable English and French *sui generis* terms and institutions. Consequently, translators will be able to focus more extensively on the linguistic aspects of a legal translation.

¹¹² This has led to what Lord Bingham called a “more sharply focused and long overdue attention to human rights.” Bingham, *supra* note 91, at 514.

¹¹³ Markesinis, *supra* note 32, at 382. The doctrine of proportionality was conceived in Germany and adopted by France and the EC, and first recognised by Lord Diplock as a possible future ground for reviewing administrative decisions in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, in Bingham, *supra* note 91, at 519.

¹¹⁴ Leyland & Anthony (2005) *Textbook on Administrative Law*. 5th ed., Oxford: OUP, at 331.

¹¹⁵ *R. (on the application of Daly) v. Secretary of State for the Home Department* [2001] UKHL 26.

¹¹⁶ *Ibid*, at 547. For the principle of unreasonableness, see *Associated Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

¹¹⁷ UK Supreme Court official website: <<http://www.supremecourt.gov.uk>> [accessed 7 June 2010] and UK Constitutional Reform Act 2005:

<http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1> [accessed 7 June 2010].

¹¹⁸ Speech by then Justice Secretary of State and Lord Chancellor Jack Straw at the official opening of the Supreme Court on 16 October 2009: <<http://www.justice.gov.uk/news/speech161009a.htm>> [accessed 4 June 2010].

¹¹⁹ See UK Ministry of Justice official website: <http://www.justice.gov.uk> and UK Constitutional Reform Act 2005 <http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1> [accessed 7 June 2010].

6. Conclusion - harmonisation can only go so far

I would like to finish where I started by stating that providing an accurate legal translation is not an easy task. It requires a good understanding of the SL's traditions and history and the TL. It is certainly easier if the two legal systems involved in a legal translation are part of the same legal family and thus display similar characteristics. On that basis, the translation of a legal document between French and Italian will certainly contain fewer pitfalls than translation between French and English.

As shown above, a certain degree of *rapprochement* is taking place between the French and English legal systems. This can only be a good thing as it will facilitate understanding between lawyers of both legal families and reduce legal and terminological ambiguities. The ECHR, through the development of a set of common values, and the European Court of Human Rights as the guardian of them, have an important role to play, but probably not as important as that of the European Union. The EU's role in people's lives is constantly increasing and will continue to do so, as it aims to further its legal reach into new branches of law. Some of the most recent ventures have been in Criminal Law, the European arrest warrant, and Human Rights Law, e.g., the European Charter of Fundamental Rights. The aim of an *ius commun Europeum* through the creation of a European Code is probably the most ambitious EU project. Its realisation would lead to a European legal *lingua franca*, which would revolutionise legal translation. I do not share, however, de Groot's optimism, at least not for the foreseeable future, that "legal systems of the European States will form one great legal family with uniform or strongly similar rules in many areas".¹²⁰ So far, just like the idea of a common European army, this project, more commonly known as the Von Bar project, which began more than twenty years ago, has remained a far-off dream.¹²¹

Although the process of convergence between French and English law, encouraged by common European values, will undoubtedly continue, it will only ever go so far. As pointed out by Legrand, full harmonisation between the two systems will probably never take place, as long as law remains country-specific and retains its historical foundations and does not become completely supra-national.¹²² It will always lack a common assumption, a shared legal tradition, and thus will only be superficially or imperfectly understood by a lawyer from a different legal family.¹²³ For that reason, in any legal translation, an understanding of the aim and socio-cultural context in which a document was drafted in the SL and will be received in the TL is of paramount importance. Each legal document to be translated has a life of its own, its own specificities. With each legal system having a specific vocabulary of 10,000 to 20,000 words, and the frequent use of ambiguous or polysemous terms, a translation is an extremely challenging task.¹²⁴ Ultimately, it is the translator's experience that will enable him/her to determine which translation methodology will most accurately

¹²⁰ G-R de Groot, 'European Education in the 21st Century', in De Witte and Forder (eds.) (1992) *The Common Law of Europe and the Future of Legal Education*, at 11, Kluwer Law International, cited in Legrand, *supra* note 5, at 54.

¹²¹ For the most recent development of a European restatement of contract law, see the official EU website:

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP%2F10%2F595&format=HTML&aged=0&language=EN&guiLanguage=en>> [accessed 10 June 2010].

¹²² Legrand, *supra* note 5, at 75.

¹²³ Legrand therefore claims that 'one can never step into the shoes of a lawyer from a different legal tradition, just imagine that one is [...] step[ping] into it'. Legrand, *ibid*, at 76.

¹²⁴ Figures provided by Auriel David, in G mar, *supra* note 2, at 42.

impart the information and the soul of the law from the SL to the TL. This state of affairs certainly means that the legal translator will retain a special place among linguists for a long time to come.

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