

RESEARCH ARTICLE

# Comparative law outside the ivory tower: an interdisciplinary perspective

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## Abstract

Whereas legal comparisons tend to be concerned with legal systems, structures or rules, this paper focuses on a more fundamental element of law: a legal concept. From the semiotic point of view, a concept is an element of the tripartite construct of meaning, which – in the legal context – is derived from a particular legal system. Since effective communication in legal practice is predicated on the unity of meaning, issues are likely to arise when an act of communication spans disparate legal cultures. When the epistemic embedding of legal concepts fundamentally differs between the respective legal systems with which the participants to a communicative event are familiar, conceptual incommensurability will arise, impeding the communication process and, potentially, also having an impact on associated court proceedings.

Against this theoretical backdrop, the paper shifts its focus to globalised legal practice, which requires a broader legal skillset and comparative perspectives. As an illustration, the equivalence of selected substantive law concepts is explored across the common law/civil law divide, accurate comprehension of which is essential to intercultural provision of legal services. Drawing parallels between the functional method in comparative law and the functional approach recommended in legal translation, an overview is provided of techniques for remedying terminological incongruence and conveying intended meaning across legal cultures. The paper concludes by querying whether the law curriculum would be enhanced by inclusion of comparative and linguistic perspectives, with a view to equipping graduates with interdisciplinary tools for effective legal communication and global law practice.

**Keywords:** comparative law; global law practice; legal translation; legal communication; legal concept; legal term

## Introduction

International and transborder trends in the world economy, business transactions and regulation of global issues<sup>1</sup> have had an impact on the scope of legal services. Globalisation of legal services is, however, no longer limited to large law firms dealing with cross-border and multi-jurisdictional matters but it also regularly features in domestic law practice, where foreign language speakers are parties to the legal process or information is communicated between legal institutions based in different

<sup>†</sup>The author would like to thank the anonymous reviewers for their valuable feedback on an earlier draft of this paper.

<sup>1</sup>M Coper 'Reflections on the internationalisation of legal education: essay in honour of Professor Satoru Osanai's 70th birthday' (2013) 119 *The Chuo Law Review* 27.

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jurisdictions.<sup>2</sup> Considering the market requirements dictated by globalisation, it is only logical to propose that every law practitioner should now be prepared to deal with transnational legal issues.<sup>3</sup>

While, in light of globalisation trends in law practice, the importance of developing international and comparative perspectives on law has been recognised,<sup>4</sup> legal education remains domestic law-oriented in most jurisdictions.<sup>5</sup> In fact, legal education has been criticised for creating a mono-epistemic perception of one's domestic legal system as 'normal' in contrast to other systems,<sup>6</sup> which in the global context may potentially affect such aspects of law practice as interpretation of foreign legal concepts and rules, legal reasoning and communication with clients or other actors in the legal system(s) concerned. Against this background, the paper considers how interdisciplinary skills drawing on complementary elements of comparative law and legal translation would benefit law practice that transcends jurisdictional boundaries.

Section 1 of the paper considers the relationship between legal systems, legal concepts and the language of the law from the perspectives of comparative law and semiotics, highlighting linguistic difficulties inherent in global law practice. Section 2 is concerned with the search for conceptual equivalence in communication across legal cultures and begins by drawing parallels between the functional method used in comparative law and the functional approach recommended in legal translation. Next, two case studies are presented that compare English criminal and civil law terms (and corresponding concepts) with their Polish counterparts. The case studies aim to highlight conceptual variation between the legal systems and, in particular, the impact that its non- or miscommunication may have for the legal process. Suggesting that familiarity with translation techniques would enhance legal practice and communication, section 3 explains the pragmatic approach to legal translation and the factors that dictate the choice of translation strategy and orientation. Section 4 delves deeper into the art of translation and addresses the issue of lack of conceptual equivalence between jurisdictions, providing an overview of linguistic remedies available to achieve functional equivalence. The benefits of interdisciplinary methods and skills are then highlighted in section 5, which explores their application in law study and practice, including intra- and interlingual communication. The conclusion summarises the discussion and considers the ways in which interdisciplinary methods and skills could be developed both as part of legal education and post-qualification.

## 1. Interdisciplinary aspects of globalised law practice

Differences between legal systems originate from their distinct paths of evolution and not only do they subsist in legal rules, but also extend to legal cultures.<sup>7</sup> For instance, different societies have culturally embedded conceptions of the law and the law practitioner,<sup>8</sup> and, more fundamentally, different values may be attached to specific things within different societies.<sup>9</sup> Therefore, it is argued that, in addition to a broader understanding of how particular legal systems differ from a comparative law perspective, global law practice requires the ability to: (1) perceive nuances in how those systems construe fundamental concepts on the basis of which their domestic legal rules operate; and (2) convey such

<sup>2</sup>C Silver 'Getting real about globalization and legal education: potential and perspectives for the US' (2013) 24 *Stanford Law & Policy Review* 457 at 467–468; J Squelch and D Bentley 'Preparing law graduates for a globalised world' (2017) 51 *The Law Teacher* 2 at 4.

<sup>3</sup>M Bogdan 'Is there a curricular core for the transnational lawyer?' (2005) 55 *Journal of Legal Education* 484 at 484.

<sup>4</sup>See eg S Kift et al 'Learning and teaching academic standards project: Bachelor of Laws learning and teaching academic standards statement' at 10, <https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>.

<sup>5</sup>J Husa 'Turning the curriculum upside down: comparative law as an educational tool for constructing the pluralistic legal mind' (2009) 10 *German Law Journal* 913 at 918.

<sup>6</sup>*Ibid.*, at 914.

<sup>7</sup>See eg P Legrand 'European legal systems are not converging' (1996) 45 *International and Comparative Law Quarterly* 52 at 60; J Husa *A New Introduction to Comparative Law* (Oxford: Hart Publishing, 2015) pp 136–137.

<sup>8</sup>KP Lewinbuk 'Can successful lawyers think in different languages?: Incorporating critical strategies that support learning lawyering skills for the practice of law in a global environment' (2007) 41 *The Law Teacher* 275 at 276–277.

<sup>9</sup>JM Smits 'European legal education, or: how to prepare students for global citizenship' (2011) 45 *Law Teacher* 163 at 168.

conceptual differences in communication with clients or other law practitioners. In a global context, legal skills thus require a more in-depth understanding of the given laws, inclusive of – at least to a certain extent – their languages and cultures.

Effective communication, in a legal context or otherwise, is predicated on the unity of meaning between the parties involved, yet the inextricable link between law and language<sup>10</sup> appears to be largely ignored in legal education. Law is expressed through the medium of language in its sources, and legal practice necessarily involves the use of language. The language of the law derives its meaning from legal rules,<sup>11</sup> thus being specific to the jurisdiction in which it is used. Although the meaning of domestic legal terms is typically imparted to students in the course of their legal education, little weight appears to be attached to linguistic aspects of global law practice, which necessarily involves cross-cultural communication.

It is worth noting at this juncture that in linguistics or, more specifically, semiotics and lexical semantics, the notion of meaning is triadic<sup>12</sup> in that a sign,<sup>13</sup> ie a word or phrase, expresses its sense<sup>14</sup> (connotation), ie the conceptual aspect of meaning,<sup>15</sup> and designates its reference<sup>16</sup> (denotation), ie the object, which is extralinguistic in character.<sup>17</sup> The three aspects of meaning, ie the sign, and its sense and reference, as well as the relationship between them in the context of the language of the law are illustrated by Figure 1 below.<sup>18</sup>

Furthermore, the same word can be both part of ordinary language and technical language,<sup>19</sup> such as the language of the law. To illustrate, the definition ('sense') of the term ('sign') 'battery' in English criminal law is the intentional or reckless infliction of actual personal violence against the victim<sup>20</sup> without the victim's consent or a lawful excuse, which may amount to as little as unwanted touching. In order to secure a conviction, it must therefore be established that the act ('reference') committed by the defendant meets the conceptual criteria ('sense') of the criminal offence of battery. However, the term 'battery' also has non-legal denotations in ordinary language, such as 'a source of power' or 'an artillery subunit',<sup>21</sup> and even when it is used in a legal context, the term is likely to be associated by a layman with a higher degree of violence, due to the verb 'to batter' denoting, as per its dictionary definition, 'to strike repeatedly with hard blows'.<sup>22</sup> Therefore, in the course of their communication with a client who denies applying (excessive) force to the victim, the criminal lawyer will need to translate the legal term 'battery' into ordinary language to convey its technical (ie legal) meaning, and, in particular, the low threshold of violence required to satisfy the criteria of the offence.

<sup>10</sup>HLA Hart 'Definition and theory of jurisprudence' (1953) 70 *Law Quarterly Review* 37 at 42–43; HES Mattila *Comparative Legal Linguistics: Language of Law, Latin and Modern Lingua Francas* (Abingdon: Routledge, 2<sup>nd</sup> edn, 2016) p 137.

<sup>11</sup>MJ Morrison 'Excursions into the nature of legal language' (1989) 37 *Cleveland State Law Review* 271 at 295.

<sup>12</sup>The triadic character of meaning was represented as a triangle of significations in CK Ogden and IA Richards *The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism* (London: Routledge & Kegan Paul, 1923) p 11.

<sup>13</sup>G Frege 'Über Sinn und Bedeutung' (1892) 100 *Zeitschrift für Philosophie und Philosophische Kritik* 25.

<sup>14</sup>Ibid.

<sup>15</sup>JS Mill *A System of Logic Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (New York: Harper & Brothers Publishers, 1882).

<sup>16</sup>Frege, above n 13.

<sup>17</sup>Mill, above n 15.

<sup>18</sup>PE Wilson 'Interjurial incommensurability in criminal law: constructing a framework for micro-comparisons for translation purposes' in G Tessuto and R Salvi (eds) *Language and Law in Social Practice Research* (Mantova: Universitas Studiorum, 2015) p 209.

<sup>19</sup>Also referred to as a technolact or a special purpose language. See further in A Trosborg 'Introduction' (1995) 23 *Journal of Pragmatics* 1 at 2; A Trosborg *Rhetorical Strategies in Legal Language: Discourse Analysis of Statutes and Contracts* (Tübingen: Narr, 1997) p 20. See also J-C Gémard *Traduire ou l'art d'interpréter. Tome 1: Principes: fonctions, statut et esthétique de la traduction* (Saint Nicolas: Presses de l'Université du Québec, 1995) pp 116–122; Mattila, above n 10, p 1.

<sup>20</sup>*Collins v Willcock* [1984] 1 WLR 1172.

<sup>21</sup>For full definitions, see eg A Stevenson *Oxford Dictionary of English* (Oxford: Oxford University Press, 3<sup>rd</sup> edn, 2010).

<sup>22</sup>Ibid.

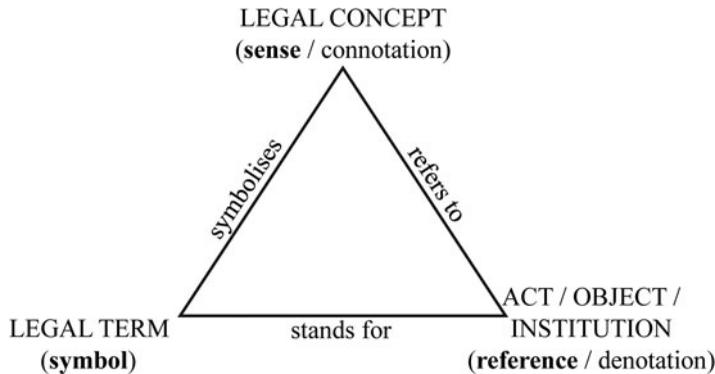


Figure 1. A modified semiotic triangle depicting the three aspects of meaning in law.

In the case of practising law across jurisdictions, communication is characterised by additional linguistic complexity inherent to communication across cultures, especially where the legal systems in question have evolved from different legal traditions. Besides the ordinary and technical dichotomy in meaning that may be encountered in monolingual communication, linguistic and cultural differences between the given jurisdictions are likely to affect both connotative ('sense') and denotative ('reference') aspects of the meaning of terms ('signs') that otherwise appear to be equivalent.<sup>23</sup> This variation in meaning may not be immediately obvious to the law practitioner, however, unless they are proficient<sup>24</sup> in the language used in the foreign jurisdiction and trained in the law applicable therein. Admittedly, it will be rare for the law practitioner to be fully bilingual and possess dual legal qualifications – is there, in light of this, any other way of enhancing the lawyer's ability to practise law and communicate across jurisdictions? It is suggested that complementary elements of comparative law and legal translation, adapted for the purposes of legal practice may be the answer to this question.

While elements of comparative law are sometimes incorporated in the law curriculum, the importance of its sister discipline, namely legal translation, does not seem to be recognised.<sup>25</sup> Paraphrasing de Groot, who stated that, '[t]ranslators of legal terminology are obliged to practise comparative law', it is argued that comparative lawyers, including lawyers practising at the interface of different legal systems, are obliged to practise legal translation – or at least be familiar with some translational intricacies when making legal comparisons. Legal translation in its all forms has been considered an act of comparative law,<sup>26</sup> and conducting legal comparisons, whether in theory or in practice, necessarily involves translation of legal concepts between the languages of the jurisdictions being compared.<sup>27</sup> In spite of the different knowledge interests of the two disciplines, it has been claimed that functional comparative law and legal translation are virtually the same in that they both aim at establishing (functional) equivalence.<sup>28</sup>

<sup>23</sup>For discussion of this issue in the context of the European Union, see eg K McAuliffe 'Translation at the Court of Justice of the European Communities' in F Olsen et al (eds) *Translation Issues in Language and Law* (Basingstoke: Palgrave Macmillan, 2009) p 106.

<sup>24</sup>A proficient user of a foreign language is one whose level of linguistic competence is C1 or C2, as defined by the Common European Framework of Reference for Languages (Council of Europe 'Common European Framework of Reference for Languages (CEFR)', <https://www.coe.int/en/web/common-european-framework-reference-languages/table-1-cefr-3.3-common-reference-levels-global-scale>).

<sup>25</sup>O Brand 'Language as a barrier to comparative law' in Olsen et al, above n 23, p 31.

<sup>26</sup>G-R de Groot 'Problems of legal translation from the point of view of a comparative lawyer' in *Netherlands Reports to the Twelfth International Congress of Comparative Law* (TMC Asser Institute 1987), following HC Gutteridge *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: The University Press, 1946).

<sup>27</sup>Husa recognises legal translation as '... one of the most significant questions in comparative law': Husa *A New Introduction to Comparative Law*, above n 7, p 125.

<sup>28</sup>*Ibid*, p 126.

## 2. Searching for conceptual equivalence: the functional method

One of the methods employed by comparative law is the functional method. As an approach to a micro-comparison,<sup>29</sup> the functional method focusses on the effects of legal rules in the context of society, with function serving as *tertium comparationis*,<sup>30</sup> i.e. an invariant element required in the comparison. From this perspective, functional equivalence of legal and non-legal institutions is predicated on them performing similar functions in their respective legal systems, regardless of any doctrinal differences.<sup>31</sup> A complementary approach in comparative law is that of universalism,<sup>32</sup> according to which certain legal concepts and rules are common to all humanity, with some proponents suggesting the existence of a shared unconscious legal mentality.<sup>33</sup> While there are likely to be some commonalities between any two legal systems and they may well feature legal concepts and rules that are functionally uniform, in that they are designed to address and seek solutions to the same socio-economic problems, differences may nevertheless lie in their details. A reductionist approach to a legal micro-comparison that focuses on the substance, i.e. a particular problem and solution(s) thereto,<sup>34</sup> but disregards doctrinal and conceptual differences, deprives a legal comparison of linguistic insight.<sup>35</sup> Therefore, it is argued that law practitioners ought to be prepared to challenge the presumption of similarity (*praesumptio similitudinis*<sup>36</sup>) and, instead, give consideration to the possibility of conceptual differences in their legal practice and communication across legal systems.

Coincidentally, the functional approach<sup>37</sup> is also recommended in legal translation. Differences in how legal concepts are construed in different legal systems give rise to difficulties in translation of legal terminology. A functional equivalent in translation is a term designating a concept or institution whose function in the target language is the same as in the source language.<sup>38</sup> In order to establish functional equivalence and assess whether the equivalent term in question is accurate and may be used in translation, the translator must compare the source and target concepts, which often involves consulting legal and reference materials, and, if required, consulting legal and/or language

<sup>29</sup>See eg H-J Bartels *Methode und Gegenstand intersystemarer Rechtsvergleichung* (Tübingen: JCB Mohr, 1982). cf Michaels' query as to the existence of the functional method in comparative law as such in R Michaels 'The functional method of comparative law' in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2<sup>nd</sup> edn, 2019) p 346.

<sup>30</sup>J Esser *Grundsatz und Norm in der richterlichen Rechtsfortbildung* (Tübingen: JCB Mohr, 1956) pp 31ff, 346ff; Michaels, above n 29, p 372; M Bogdan *Concise Introduction to Comparative Law* (Groningen: Europa Law Publishing, 2013) p 47.

<sup>31</sup>Michaels, above n 29, pp 347–348.

<sup>32</sup>M Siems *Comparative Law* (Cambridge: Cambridge University Press, 3<sup>rd</sup> edn, 2022) p 36.

<sup>33</sup>Y Noda 'Quelques Réflexions sur le Fondement du Droit Comparé: Essai d'une Recherche Anthropologique du Fondement du Droit Comparé' in R Cassin and M Rolland (eds) *Aspects Nouveaux de la Pensée Juridique Recueil d'Études en Hommage à Marc Ancel*, vol 1 (Paris: Pedone, 1975). See also M Bogdan *Comparative Law* (Stockholm: Kluwer, 1994) p 97.

<sup>34</sup>R Hyland 'Comparative law' in DM Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (Oxford: Wiley-Blackwell, 1999) p 188. See also K Zweigert and H Kötz *Introduction to Comparative Law* (Oxford: Oxford University Press, 3<sup>rd</sup> edn, 1998) p 44.

<sup>35</sup>Brand, above n 25, p 31.

<sup>36</sup>cf Samuel's proposition to approach legal comparison with the presumption of difference in G Samuel *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014) p 164.

<sup>37</sup>See also functional equivalence in general translation theory in K Reiß and HJ Vermeer *Grundlegung einer allgemeinen Translationstheorie* (Tübingen: Niemeyer, 1984) p 129; W Wills *Kognition und Übersetzen* (Tübingen: Max Niemeyer, 1988) p 56; K Reiß *Grundfragen der Übersetzungswissenschaft, Wiener Vorlesungen* (Wien: WUV-Universitätsverlag, 1995) p 113. Pieńkos considers functional equivalence as the most useful and effective type of equivalence in legal translation in J Pieńkos *Podstawy jurslingwistyki. Język w prawie – prawo w języku* (Warszawa: Oficyna Prawnicza Muza SA, 1999) p 119. Similarly, Weston regards it as 'the ideal method of translation' in M Weston *An English Reader's Guide to the French Legal System* (New York: Berg, 1991) p 23. See also BZ Kielar *Language of the Law in the Aspect of Translation* (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 1977); S Šarčević *New Approach to Legal Translation* (The Hague: Kluwer Law International, 1997) p 236.

<sup>38</sup>S Šarčević 'Terminological incongruency in legal dictionaries for translation' (BudaLEX '88 Proceedings of the Third International EURALEX Congress), [https://www.euralex.org/elx\\_proceedings/Euralex1988/056\\_Susan%20Sarcevic%20%28Rijeka%29%20-%20Terminological%20Incongruency%20in%20Legal%20Dictionaries%20for%20Translation.pdf](https://www.euralex.org/elx_proceedings/Euralex1988/056_Susan%20Sarcevic%20%28Rijeka%29%20-%20Terminological%20Incongruency%20in%20Legal%20Dictionaries%20for%20Translation.pdf).

professionals.<sup>39</sup> The comparison must consider the content of the legal concepts, the intent behind them and, importantly, their legal effect.<sup>40</sup> In addition, the similarity of the concepts' systemic and structural embedding must be assessed.<sup>41</sup> According to Šarčević, there are seven degrees of functional equivalence, ranging from full equivalence through partial equivalence to none, depending on the overlap of essential and accidental characteristics of the concepts compared or lack thereof.<sup>42</sup> A target term's acceptability as a functional equivalent of a source term requires at least partial equivalence, whereby most of the essential properties converge between the two.

Conducting a comparison between legal concepts originating from different legal systems should, in theory, be easier for the law practitioner than it would be for the translator, due to former's knowledge and understanding of the law, and, in particular, their ability to construe legal concepts according to the principles of statutory interpretation. However, the latter has the advantage of being able to conduct legal research in their two (or more) working languages and, due to their high level of linguistic competence and experience in interlingual communication, the translator is more skilled at using linguistic remedies to bridge semantic or cognitive<sup>43</sup> gaps in communication. It is therefore postulated that increasing the legal profession's awareness of (often inconspicuous) linguistic and cultural challenges in interjurisdictional law practice, and adding translation techniques to its skills repertoire in order to overcome such challenges would assist lawyers in differentiating between corresponding concepts that may be encountered in global law practice.

Notably, regardless of sharing some political or ideological features, no two legal systems are identical.<sup>44</sup> Since legal terminology is specific to the respective legal system,<sup>45</sup> full equivalence<sup>46</sup> of terminology will occur only in the context of translation within a bi- or multilingual jurisdiction that is monojural, ie where terminology is translated between two or more languages used by the same legal system.<sup>47</sup> Approximation of source and target laws through their unification or harmonisation will also result in near full equivalence<sup>48</sup> of legal concepts and

<sup>39</sup>Such as terminologists, comparative lawyers or lawyer-linguists.

<sup>40</sup>S Šarčević 'Challenges to the legal translator' in PM Tiersma and LM Solan (eds) *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press, 2012) pp 192–193. See also Šarčević *New Approach to Legal Translation*, above n 37, pp 71–72.

<sup>41</sup>G-R de Groot 'Legal translation' in JM Smits (ed) *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2<sup>nd</sup> edn, 2012) p 540. See also A Jopek-Bosiacka *Przekład prawny i sądowy* (Warszawa: Wydawnictwo Naukowe PWN, 2008) p 136.

<sup>42</sup>Šarčević *New Approach to Legal Translation*, above n 37, pp 238–239, expanding on Lane's classification of the degrees of functional equivalence in translation in A Lane 'Legal and administrative terminology and translation problems' in J-C Gémard (ed) *Langage du droit et traduction* (Montréal: Linguatex/Conseil de la langue française, 1982).

<sup>43</sup>The term 'cognitive' is used here to refer to a speaker's cognitive capacity in a foreign language determined by their level of competence therein, rather than in its psychological or neurobiological sense.

<sup>44</sup>Pieńkos, above n 37, p 158.

<sup>45</sup>S Šarčević 'Translation of culture-bound terms in laws' (1985) 4 *Multilingua: Journal of Cross-Cultural and Interlanguage Communication* 127.

<sup>46</sup>Whether full equivalence can be achieved at all is a contested matter, both in the field of comparative law and legal translation (de Groot 'Legal translation', above n 41, pp 539–541).

<sup>47</sup>For instance, in Switzerland, Belgium or Finland. Notably, the language of EU legislation, which is currently translated into 24 languages (European Union 'Languages' (2022), [https://european-union.europa.eu/principles-countries-history/languages\\_en](https://european-union.europa.eu/principles-countries-history/languages_en)), is considered distinct from that of national legislation in that it undergoes a degree of deculturisation during the drafting process to convey the same meaning (ie legislative intent). Official language translations of EU law are also authoritative (ie prescriptive rather than descriptive) and have the status of authentic texts. See further in Ł Biel 'Translation of multilingual EU legislation as a sub-genre of legal translation' in D Kierzkowska *Court interpreting and legal translation in the enlarged Europe 2006: papers from the Warsaw International Forum held on 23–25 August 2006 in Warsaw* (Warszawa: Wydawnictwo Translegis, 2007) pp 149, 152.

<sup>48</sup>Building on Lane's model (above n 42), Šarčević defines near equivalence as the matching up of all essential and at least most accidental conceptual characteristics of the source and target terms. Essential characteristics are those that are essential for determining the overall characteristics of the concept, whereas accidental characteristics are those that are not. See further in S Šarčević *New Approach to Legal Translation*, above n 37, pp 238–239. Arguably, depending on the concept being translated, it may be unclear where the demarcation line between the two types of characteristics lies.

terminology,<sup>49</sup> as will adoption of source law by the target legal system.<sup>50</sup> Thus, the greater similarity in the concepts' systemic embedding, the greater the degree of functional equivalence of the respective legal terms is likely to be.

Considering the above, establishing functional equivalence is important. Miscommunicating a legal concept in the course of law practice may result in the provision of inaccurate or incorrect instructions, advice or evidence, and potentially lead to implications for case progression and associated court proceedings. To illustrate how nuances of legal meaning may be, as it is commonly described, 'lost in translation', two legal concepts from English criminal and civil law are considered below in comparison with their Polish<sup>51</sup> counterparts. The Polish language has been chosen as a comparator due to the fact that it is the most commonly spoken language after English in England and Wales, and Northern Ireland,<sup>52</sup> and the most common language after English, Scots and Gaelic in Scotland.<sup>53</sup> This is reflected in the use of language services in courts, with Polish being the most frequently requested language in criminal, civil and family courts.<sup>54</sup>

### (a) Example one: a 'road traffic accident'

An example of conceptual differences between jurisdictions is the definition of a 'road traffic accident' (RTA), which is a commonly used term in negligence claims against vehicle users and, arguably, not one to which much heed is paid meaning-wise. In ordinary language the term has connotations of consequential accidental damage, which may affect the perception of the parties' blameworthiness. As a matter of fact, according to the current legal guidance in England and Wales, the correct term to be used in criminal proceedings is a 'road traffic collision' (RTC), in particular where it has resulted in a serious injury or death of a person.<sup>55</sup> Comparing the English<sup>56</sup> and Polish<sup>57</sup> Road Traffic Acts, neither statute provides an explicit definition of an RTA, yet the concepts appear to be functionally equivalent in both legal systems in that they share essential characteristics, namely: (1) the presence/involvement of a vehicle (2) in an incident on a road, leading to (3) harm caused to a third party or their property. However, a more in-depth comparative analysis reveals subtle differences in the construction of the term between the two jurisdictions, with regard to the vehicle involved, the place where the accident occurred and the harm caused, which may be important to convey in communication.

<sup>49</sup>See eg J-C Gémar 'What legal translation is and is not – within or outside the EU' in B Pozzo and V Jacometti (eds) *Multilingualism and the Harmonisation of European Law* (Alphen aan den Rijn: Kluwer Law International, 2006) p 77.

<sup>50</sup>See further in de Groot 'Legal translation', above n 41, p 539. It must be conceded, however, that the interpretation and application of legal concepts that have been harmonised, adopted or transplanted may result in their divergence, unless their source culture-specific meaning is also transferred to the target legal system. Such integration of foreign culture-specific meaning in domestic legal culture is, nevertheless, considered unlikely to happen (see eg P Legrand 'The impossibility of legal transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111 at 117, 120; G Teubner 'Legal irritants: good faith in British law or how unifying law ends up in new divergences' (1998) 61 *Modern Law Review* 11 at 12–13, 31–32).

<sup>51</sup>The Polish legal system originates from the civil law tradition, and Polish law has been strongly influenced by French and, in particular, German legal cultures.

<sup>52</sup>Office for National Statistics 'Language, England and Wales: Census 2021' (2022), <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/language/bulletins/languageenglandandwales/census2021>; Northern Ireland Statistics and Research Agency 'Census 2021. Main Statistics for Northern Ireland. Statistical Bulletin – Language' (2022), <https://www.nisra.gov.uk/system/files/statistics/census-2021-main-statistics-for-northern-ireland-phase-1-statistical-bulletin-language.pdf>.

<sup>53</sup>Scotland's Census 'Languages' (2021), <https://www.scotlandscensus.gov.uk/census-results/at-a-glance/languages/>.

<sup>54</sup>Ministry of Justice 'Statistics on the use of language interpreter and translation services in courts and tribunals. Statistical bulletin, 1 January 2013 to 31 December 2015' (2016), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/517814/bulletin.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517814/bulletin.pdf).

<sup>55</sup>Crown Prosecution Service 'Road Traffic – Charging (3 January 2019)' (2022), <https://www.cps.gov.uk/legal-guidance/road-traffic-charging>.

<sup>56</sup>Road Traffic Act 1988, s 170(1).

<sup>57</sup>Ustawa z dnia 20.06.1997 r - Prawo o ruchu drogowym (Dz U 1997 nr 98 poz 602) [The Road Traffic Act of 20.06.1997 (Journal od Laws 1997, no 98, item 602)], Art 44(1) and (2).

To begin with, where the duties of a vehicle user involved in an RTA are set out in the Polish statute,<sup>58</sup> the concept of a vehicle is construed more widely than it is in the English one,<sup>59</sup> including not only motor vehicles<sup>60</sup> but also other means of road transport that are not mechanically propelled.<sup>61</sup> Application of the provisions to the same set of facts may thus produce different results in the two jurisdictions, eg the duty to stop and exchange details under the RTA legislation will apply to users of electric bicycles in Poland but not in England, Wales or Scotland, where electronically assisted pedal cycles (or at least some classes thereof, as per current regulations of the Secretary of State) are not treated as motor vehicles.<sup>62</sup>

Scene-wise, the application of the Polish term RTA is limited to incidents on roads only, both public and private,<sup>63</sup> whereas the equivalent English statute applies to public roads as well as other public places.<sup>64</sup> Thus, a collision of a mobility scooter with an elderly woman in an aisle of a Tesco supermarket was held to constitute an RTA in England,<sup>65</sup> whereas it would not have been the case under Polish law.

Furthermore, the procedural distinction between the terms *wypadek* ('accident') and *kolizja* ('collision') made by the Polish police when recording incidents on the road seems to reflect the layman's understanding of the term RTA in Polish. The term *wypadek drogowy* ('a road traffic accident') is understood as an incident on the road that has resulted in a personal injury<sup>66</sup> or death,<sup>67</sup> whereas the term *kolizja drogowa* ('a road traffic collision') is limited to incidents resulting in property damage only.<sup>68</sup> The latter term is also informally referred to as *stłuczka* (literally: 'a bump'<sup>69</sup>), which suggests a minor collision or a shunt. Thus, while the terms 'accident' and 'collision' appear to be used synonymously in English, this is not the case in Polish, where the terms *wypadek* and *kolizja* have different connotations with regard to the type and severity of the harm caused or sustained.

While the concept of an RTA may be perceived as a universal one, misunderstandings arising from jurisdictional variation in its construction may have consequences for the conduct of the associated proceedings. To exemplify, when interviewed by a solicitor acting on their behalf or by a medical expert instructed to prepare a medico-legal report, a Polish claimant may deny having been previously involved in an RTA if the given incident would have been classed as a damage-only collision in their

<sup>58</sup>Ibid, Art 44.

<sup>59</sup>Road Traffic Act 1988, s 170.

<sup>60</sup>Section 185 of the Road Traffic Act 1988 defines a motor car as 'a mechanically propelled vehicle intended or adapted for use on roads', including a light or heavy locomotive, a motor car, a heavy motor car, an invalid carriage, a motor cycle and a motor tractor.

<sup>61</sup>Art 2(31) of the Polish Road Traffic Act (above n 57) defines a 'vehicle' as a means of transport designed to travel on a road and a machine or equipment adapted for these purposes, yet it does not state that the vehicle must be mechanically propelled.

<sup>62</sup>Road Traffic Act 1988, s 189(1)(c).

<sup>63</sup>Various types of roads and parts thereof are defined in Art 2(1)–(14) of the Polish Road Traffic Act (above n 57).

<sup>64</sup>Road Traffic Act 1988, s 170(1).

<sup>65</sup>*Scott v Malcolm* (Liverpool County Court, 5 April 2013).

<sup>66</sup>Note that a personal injury is normally understood in this context as one lasting over seven days, the causing of which is also criminalised by Arts 177(1) and 177(2) of the Polish Penal Code (Ustawa z dnia 06.06.1997 r - Kodeks karny (Dz U 1997 nr 88 poz 553) [The Penal Code Act of 06.06.1997 (Journal of Laws 1997, no 88, item 553)]). The two articles refer to the functional equivalents of the English 'actual bodily harm' and 'grievous bodily harm', respectively, and Art 177(2) also applies to deaths caused by accidents in land, water and air traffic.

<sup>67</sup>The Polish Supreme Court has defined an accident that resulted in a death or injury as an accident in which there was at least one casualty or at least one person 'suffered a major or minor bodily injury or a major or minor health disorder' (Judgment of the Supreme Court of the Republic of Poland dated 22.12.1992, III KRn 149/92, PiP 1993, no 5, item 113).

<sup>68</sup>Zarządzenie Nr 31 Komendanta Głównego Policji z dnia 22.10.2015 r w sprawie metod i form prowadzenia przez Policję statystyki zdarzeń drogowych (Dz Urz KGP 2015.85 ze zm) [Directive of the Chief Constable of 22.10.2015 on the methods and forms of collecting statistical data on road traffic incidents by the police (Official Journal of the General Police Headquarters in Poland, No 2015.85, as amended)].

<sup>69</sup>PWN-Oxford *Polish-English Dictionary* (Warszawa: Wydawnictwo Naukowe PWN, 2005).

native jurisdiction. If the previous RTA subsequently comes to light, it may lead to medical evidence having to be discarded at the client's cost and new evidence having to be obtained from an alternative consultant. Apart from potential financial consequences of miscommunicating this term, there may also be juridical impact if the medical evidence containing erroneous information (ie denying history of previous RTAs) has been inadvertently shared with the defendant's solicitor or if it transpires during examination or cross-examination in court that the claimant has been previously involved in an RTA, yet failed to disclose it. Understandably, in such a case the client's credibility as a witness will likely be undermined, which may damage their prospects of success in the proceedings.

**(b) Example two: 'going equipped (for stealing etc)'**

Another example of how legal concepts may differ between jurisdictions is the English inchoate offence of 'going equipped', contrary to section 25(1) of the Theft Act 1968, which criminalises an act preparatory to theft, burglary or taking and driving away a conveyance.<sup>70</sup> The seriousness of this offence is reflected by the fact that it may<sup>71</sup> be tried on indictment, ie by jury in the Crown Court. The offence has no equivalent in the Polish Penal (Criminal) Code, the nearest functional equivalent being a petty offence contrary to Article 129 of the Polish Code of Petty Offences,<sup>72</sup> which criminalises the possession of skeleton keys and similar tools. In addition to the considerable difference in the gravity of the offences,<sup>73</sup> there is a disparity in their criteria defining articles preparatory to theft, which under English law are construed broadly and include objects that may be as innocuous as a pair of gloves (to prevent leaving fingerprints) or a tin (to remove a pane of glass).<sup>74</sup> There is also a difference between the jurisdictions as to the nature of the activities prohibited by the provisions, such as possession, acquisition, making/adapting or supplying the articles for intended use, as well as their timing, ie before, during or after the planned burglary or theft.<sup>75</sup> Overall, different configurations of these variables may result in an act being criminal in one jurisdiction but not in the other.

Without sufficient comparative law awareness assisted by translation techniques, the accuracy and effectiveness of communicating a concept such as 'going equipped' across jurisdictions may be bilaterally impaired, specifically at the stages of – as referred to in communication studies – message encoding and decoding.<sup>76</sup> Message encoding in this context refers to conveying the meaning of a domestic term by the law practitioner to a foreign language-speaking defendant, while message decoding means the interpretation of the term by the defendant. The accuracy of message decoding is also pertinent in circumstances where lawyers interpret information received from foreign jurisdictions or otherwise engage in cross-border law practice.

From the human rights perspective, miscommunication of criminal charges entails the risk of infringement of the defendant's Article 6 rights. Where the defendant does not fully comprehend the nature and details of the offence charged, either due to its ineffective monolingual communication<sup>77</sup> or due to lack of provision of interpreting and/or translation services before and during the

<sup>70</sup>In other words, offences contrary to ss 1, 9 or 12 of the Theft Act 1968, respectively.

<sup>71</sup>This criminal offence is triable either way, ie it may be tried summarily or on indictment.

<sup>72</sup>Ustawa z dnia 20.05.1971 r - Kodeks wykroczeń (Dz U 1971 nr 12 poz 114) [The Code of Petty Offences Act of 20.05.1971 (Journal of Laws 1971, no 12, item 114)].

<sup>73</sup>The difference in the gravity of the offences is reflected in the maximum terms of custodial sentence prescribed by the legal provisions, which are three years for the English offence and 30 days for the Polish one.

<sup>74</sup>Armson [2005] EWCA Crim 2528.

<sup>75</sup>For a detailed comparative study of these criminal offences, see Wilson, above n 18.

<sup>76</sup>See eg the seminal model of communication in C Shannon and W Weaver *The Mathematical Theory of Communication* (Illinois: University of Illinois Press, 1949) and W Weaver 'The mathematics of communication' (1949) 181 *Scientific American* 11.

<sup>77</sup>For instance, when the intended message is received as distorted or is altogether incomprehensible from the foreign language speaker's perspective, due to their communication skills, knowledge of the language or legal system, social system and/or culture affecting how the message is decoded. See further in DK Berlo *The Process of Communication: An Introduction to*

trial,<sup>78</sup> their plea will be an answer to the charge(s) as construed within the parameters of their foreign language competence and any relevant experience they may have. Regarding the latter, if the defendant has some familiarity with criminal law in their country of origin or experience of criminal proceedings therein, this will affect their understanding of the scope and gravity of the English criminal offence with which they have been charged and they will likely interpret it as a comparable (albeit not necessarily equivalent) offence in their domestic jurisdiction, this presumption of similarity informing their plea. Without appropriate comparative law competence on the part of legal practitioners, such misunderstandings risk going unnoticed and if they *are* noticed, they may be difficult to remedy, unless appropriate (mono- or bilingual) translation techniques are used.

Likewise, the lawyer's lack of awareness of conceptual differences between domestic and foreign offences may result in their misinterpretation of the latter. For example, where previous convictions from foreign jurisdictions are adduced as bad character evidence, presumption of equivalence of criminal offences between the relevant jurisdictions where none exists or equivalence is only partial may have implications for the criminal process.<sup>79</sup> Misinterpretation of foreign criminal records may lead to the wrong assessment of the defendant's propensity to reoffend<sup>80</sup> and/or their credibility<sup>81</sup> by the prosecution, defence, probation service and the court, thus impacting on the value and relevance attached to such evidence and the parties' decision-making process. Ultimately, the fairness of the proceedings may be affected, particularly in relation to conviction and sentencing.<sup>82</sup>

### 3. Pragmatic approach to legal translation

It is in circumstances that focus on legal concepts like the ones exemplified above that translation methodology may be of assistance in legal communication and practice. Legal translation refers to translating texts in legal settings from a source language into a target language, encompassing both translation of sources of law and translation of communications in legal practice.<sup>83</sup> When used in reference to translation of the spoken word, the correct term is 'interpreting', however – for the sake of simplicity – the term 'translation' is used in this paper to refer to both written and oral interlingual communication. While legal translation normally takes place outside the practitioner-client relationship, ie it is a service provided by a third party in order to facilitate communication between parties to a communicative event who do not share a mother tongue, it is argued that the law practitioner's familiarity with techniques employed by translators would enhance their performance in a global context. Such techniques would be helpful not only when using legal terms that are prone to misunderstanding due to their misleading familiarity in a foreign language (ie where the terms exist in both languages, yet have different conceptual underpinnings) but also when using terms that refer to legal concepts unfamiliar to the other party or non-existent in their native legal system.

It is important to note at the outset that the rendition of source text or speech in the target language depends on the translation strategy and orientation used. A pragmatic approach to translation is

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*Theory and Practice* (New York: Holt, Rinehart and Winston, 1960). cf the notion of (semantic) noise in Shannon and Weaver, and Weaver, above n 76.

<sup>78</sup>Human Rights Act 1998, Sch 1, Art 6(3)(a) and (3)(e), respectively.

<sup>79</sup>While Council Decision 2009/316/JHA on the establishment of the European Criminal Records Information System aimed to facilitate the exchange of information between criminal record databases in the EU Member States, reduction of national criminal offences to a common denominator does not always result in functional equivalence in their translation (PE Wilson *Judicial cooperation in criminal matters: comparative, translational and evidential issues arising from substantive law variation* (PhD thesis, Queen's University Belfast, 2017)). In contrast, more serious criminal offences with a cross-border dimension have been subjected to approximation, pursuant to Art 83 of the Consolidated Version of the Treaty on the functioning of the European Union [2012] OJ C326/47.

<sup>80</sup>Criminal Justice Act 2003, s 103(1)(a) and (2).

<sup>81</sup>*Ibid*, s 103(1)(b).

<sup>82</sup>Human Rights Act 1998, Art 6(1).

<sup>83</sup>See D Cao *Translating Law* (Clevedon: Multilingual Matters Ltd, 2007) p 12.

generally recommended,<sup>84</sup> whereby the choice of translation strategy and orientation is influenced by such considerations as the type and function<sup>85</sup> of the text (in the case of translation), the purpose of the communicative event,<sup>86</sup> the influence of any extralinguistic aspects, the type of recipient, and the client's requirements, if any, with regard to terminology to be used when communicating their message in the target language.

Unlike in the case of interpreting in legal settings, which typically occurs during legal consultations or court proceedings, when documents are translated for legal purposes, the function of the text and the purpose of the communication may be different in the source and target languages. This may occur when, for example, a court order is translated into another language for information purposes, rather than for the purpose of its enforcement, and thus lacks the force of law.

Similarly, the type of recipient of the target message and, in particular, their legal competence with regard to both the source and target legal systems, will have an impact on how the original message is conveyed. As mentioned above, the understanding of the English legal process by a foreign client may be affected by their own experience of how the law operates in their country of origin, or lack thereof. This is also true for the lawyer's interpretation of foreign law(s) encountered in their legal practice, which – without appropriate linguistic and cultural awareness – will be influenced by their legal education and the principles of interpretation applicable to their domestic law. Depending on the circumstances and requirements, translation can thus be oriented towards the source-language legal system, the target-language legal system, the client or international audience.<sup>87</sup>

Translation strategy, in turn, determines the degree of the translator's freedom in their choice of target language and encompasses such strategies as free translation, idiomatic translation, literal translation, word-for-word translation, and calqued translation.<sup>88</sup> Idiomatic<sup>89</sup> translation is normally recommended as part of the pragmatic approach to legal translation, since word-for-word translation could be conducive to misunderstanding<sup>90</sup> and may not reflect the intended, legal context-dependent meaning. Still, the latter may be acceptable at the word or phrase level in some circumstances,<sup>91</sup> with the caveat that technical or culture-specific meaning may not be conveyed.

#### 4. Linguistic remedies for lack of (full) equivalence of legal concepts

One of the issues translators face when rendering source language terms in the target language<sup>92</sup> is whether to use natural or linguistic equivalents. Natural equivalents are terms that already exist in the legal system into whose language a given text is being translated,<sup>93</sup> whereas linguistic equivalents, such as literal equivalents, borrowings and naturalisations,<sup>94</sup> are typically used in literal translation to

<sup>84</sup>See eg Reiß and Vermeer, above n 37; A Matulewska *Lingua Legis in Translation* (Frankfurt am Main: Peter Lang GmbH, 2007); D Kierzkowska *Tłumaczenie prawnicze* (Warszawa: Wydawnictwo Translegis, 2008) ch 3.

<sup>85</sup>Eg denotative, connotative, impressive, phatic, informative, communicative, ideational or normative. See further in Matulewska, above n 84, p 43.

<sup>86</sup>See the Skopos theory in Reiß and Vermeer, above n 37. See also Kierzkowska, above n 84, pp 78–79.

<sup>87</sup>Matulewska, above n 84, p 309.

<sup>88</sup>J Delisle et al (eds) *Translation Terminology* (Amsterdam: John Benjamins Publishing Company, 1999) pp 141, 144, 154, 200, and 123, respectively. A calque is a type of borrowing, whereby an expression is borrowed from a foreign language and its elements translated literally into the native language. See further in J Munday et al *Introducing Translation Studies: Theories and Applications* (Abingdon: Routledge, 5<sup>th</sup> edn, 2022) p 75.

<sup>89</sup>An idiom is a frozen pattern of language (ie group of words) established by usage, whose meaning is not deducible from its individual components. See further in M Baker *In Other Words. A Coursebook on Translation* (Abingdon: Routledge, 3<sup>rd</sup> edn, 2018) p 69.

<sup>90</sup>Hence, pragmatic equivalence is also referred to as 'communicative equivalence'. See further in Munday et al, above n 88, p 62.

<sup>91</sup>Kierzkowska, above n 84, p 81.

<sup>92</sup>Note that the terms 'source language' and 'target language' refer to the languages being translated from and into, respectively.

<sup>93</sup>Šarčević *New Approach to Legal Translation*, above n 37, pp 233–234.

<sup>94</sup>*Ibid.*

translate concepts foreign to the target legal system.<sup>95</sup> Although literal translation of legal texts was preferred until the late twentieth century, due to the potential implications of mistranslation<sup>96</sup> the functional approach is now recommended in translation of legal terminology, which requires partial equivalence of the source and target terms as a minimum.<sup>97</sup>

### (a) *Natural equivalents*

Natural equivalents are preferred in legal translation, yet one must beware of the so-called false cognates, which are also referred to as *faux amis* (literally: ‘false friends’). *Faux amis* are words or phrases that share etymological origin and thus look or sound similar, yet denote different legal concepts.<sup>98</sup> For instance, Latin phrases such as ‘prima facie’ or ‘in personam’ may refer to different concepts in legal systems that followed different paths of evolution. Likewise, the English term ‘(road traffic) collision’ and the Polish term *kolizja (drogowa)* discussed in more detail in section 2(a) above may be regarded as false cognates.

This category of equivalents also includes the so-called semi-natural equivalents,<sup>99</sup> which resemble natural equivalents but whose meaning is modified through addition or omission of elements specific to the source or target term. To provide an example, when the Polish term *prokurator* is literally translated as ‘prosecutor’, instead of a more appropriate phrase ‘public prosecutor’, the former translation is classed as a semi-natural equivalent.

Unless the law practitioner is proficient in both legal languages and cultures (ie bilingual and dually qualified), natural equivalents should be treated with caution, particularly when communication takes place without the assistance of a professional interpreter or translator, or when popular machine translation tools are used, which are likely to produce literal and non-technical translation. As the example of the term ‘road traffic accident’ intended to demonstrate, sometimes fundamental concepts underpinning a legal action differ between jurisdictions to such an extent that their misunderstanding may have implications for the outcome of legal proceedings.

### (b) *Linguistic equivalents*

When there is no overlap between the essential characteristics of the source and target terms, the latter cannot be used as a functional equivalent in translation due to conceptual incommensurability.<sup>100</sup> However, it may be possible to compensate for terminological incongruence<sup>101</sup> arising in such circumstances by modifying the sense of the target term, ie the conceptual aspect of its meaning. Verbatim (calque) translation is generally advised against, as, depending on the recipient’s legal competence, it is likely to be meaningless or misleading.<sup>102</sup> Similarly, although the sense of the target term can be artificially expanded or delimited by means of a lexical qualifier, ie a word or phrase, such non-natural equivalents should be avoided and only used as a last resort.<sup>103</sup> It appears that modifying the sense of a target term might be appropriate in translation of the English offence of ‘going equipped’, although it would ultimately depend on the circumstances in which the term is communicated. During a legal consultation, delimiting the term to reflect the facts of the case may be necessary to ensure the client’s understanding (eg ‘going equipped with a screwdriver with the intention of

<sup>95</sup>Ibid, pp 233–234, 256–261.

<sup>96</sup>Ibid, ch 2.

<sup>97</sup>Functional equivalence in legal translation is discussed further in section 2 above.

<sup>98</sup>See further in Šarčević *New Approach to Legal Translation*, above n 37, pp 252–255.

<sup>99</sup>Kierzkowska, above n 84, p 120.

<sup>100</sup>Wilson, above n 18.

<sup>101</sup>Šarčević ‘Terminological incongruency in legal dictionaries for translation’, above n 38.

<sup>102</sup>Eg verbatim translation of the phrase ‘King’s Counsel’ into a language used in a civil law system will not convey its true meaning. See further in Mattila, above n 10, pp 360–362.

<sup>103</sup>Šarčević *New Approach to Legal Translation*, above n 37, pp 250–251.

using it to break into and steal a car'), although the lexical qualifier may naturally undergo reduction with the repeated use of the term and the law practitioner being satisfied that their client fully comprehends the term and the corresponding concept.

A legal term that cannot be easily translated into the target language due to lack of conceptual equivalence between the given legal systems can be nonetheless clarified by means of a paraphrase or description. To illustrate by expanding on the first case study above, in the context of a personal injury claim following an RTA, the English tort of negligence can be explained to a foreign defendant (in whose domestic legal system a cause of action may be framed differently) as causing harm to the claimant by the defendant driver breaching a duty of care owed to them as another road user. While this can be an effective solution to lack of terminological congruence, a number of issues must be considered when using a paraphrase or description to convey the meaning of a source legal term. First of all, since providing the descriptive definition of a legal term entails its interpretation, a lawyer involved in cross-border practice who has not been trained in the respective foreign law risks its misinterpretation – not only by themselves but also by other lay parties with whom they are communicating. Secondly, linguistic considerations must be taken into account, such as whether the definition is provided in a neutral language comprehensible to the recipient(s),<sup>104</sup> and whether it is concise and capable of repetition. Descriptive equivalents that are long and complex are not recommended,<sup>105</sup> as they are not manageable in legal communication and may in fact impede it.

### (c) *Alternative equivalents*

If terminological incongruence cannot be compensated for, as a last resort an alternative equivalent may be considered that conveys the general meaning of the source term.<sup>106</sup> In such circumstances three solutions have been proposed: neutral terms, borrowings and naturalisations, and neologisms.<sup>107</sup>

Neutral terms are non-technical terms that may be used as alternative equivalents in legal translation. However, neutral terms are likely to have a broader meaning than that of the source term and therefore may require clarification. In the case of translation, as opposed to interpreting, clarification typically takes the form of explanatory footnotes or a foreword.<sup>108</sup> While target-language orientation of neutral terms is generally preferred in translation,<sup>109</sup> arguably, this may not be the case when communication takes place between two speakers of the same language in the context of a foreign legal system, or when the lawyer discusses with a foreign client a matter to which domestic, rather than foreign, law applies. It is postulated that in such cases orientation should always be towards the language of the law applicable to the given case, regardless of the translation direction (ie from or into the foreign language), as it will help establish and preserve the construction of the legal concept in the corresponding legal system.

As an alternative to using a neutral term, the source term may be retained in its original (ie untranslated) form as a borrowing,<sup>110</sup> or it may be adapted to the target language conventions to form a naturalisation.<sup>111</sup> Using a source term will alert the recipient to the foreign nature of the

<sup>104</sup>Šarčević 'Terminological incongruency in legal dictionaries for translation', above n 38; Šarčević *New Approach to Legal Translation*, above n 37, pp 252–254.

<sup>105</sup>De Groot 'Legal translation', above n 41, p 542.

<sup>106</sup>Šarčević *New Approach to Legal Translation*, above n 37, p 277.

<sup>107</sup>De Groot 'Legal translation', above n 41, pp 542–545.

<sup>108</sup>Šarčević *New Approach to Legal Translation*, above n 37, p 277.

<sup>109</sup>Ibid.

<sup>110</sup>Eg the Polish term *Sejm*, which denotes the lower house of the Polish parliament.

<sup>111</sup>Eg the English naturalisation of the Polish term *Sejm* as 'Seym' in order to comply with the English phonological conventions. Naturalisations are sometimes classed as neologisms: see eg G-R de Groot *Het vertalen van juridische informatie, Preadvies uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking*, no 53 (Deventer: Kluwer, 1996) p 21; G-R de Groot 'Das Übersetzen juristischer Terminologie' in G-R de Groot and R Schulze (eds) *Recht und Übersetzen* (Baden-Baden: Nomos, 1999) p 29; de Groot 'Legal translation', above n 41, p 426.

term<sup>112</sup> and thus the fact that its interpretation requires reference to the foreign law in question. In order to convey the meaning of the source term, a borrowing or naturalisation should be supplemented by an explanation, which, in the case of document translation, may be placed in footnotes or brackets. Although borrowings seem to be preferred by law practitioners,<sup>113</sup> their use is recommended only in cases where no acceptable functional equivalents or naturalisations with the same meaning already exist in the target language<sup>114</sup> – otherwise, the recipient will be faced with non-natural phrases that may be difficult to pronounce or remember,<sup>115</sup> and the flow of communication may be affected. Furthermore, parallels may be drawn between the concepts of ‘borrowings’ in translation and ‘legal transplants’, ie the transfer of rules from one legal system to another, in comparative law. In both contexts, success depends on the transfer of the term’s or rule’s meaning from the culture in which it was originally embedded and lack of divergence therefrom in the course of its use in the target culture, which are likely to be problematic, if not impossible.<sup>116</sup> Considering these potential difficulties, the use of linguistically complex borrowings is therefore advised against in communication with clients whose foreign language competence is non-existent or low, ie those who can only speak it at a basic or conversational level.

As a last resort, a neologism may be used to remedy lack of a functional equivalent in the target language. A neologism is a new lexical item that has been coined for specific purposes, in a manner that complies with the grammatical rules of the target language.<sup>117</sup> A neologism may take the form of a source term with a particular meaning assigned to it, a borrowing from another legal system, a revived archaism or a newly created term. A neologism used in translation should be transparent,<sup>118</sup> it should not form part of the existent target language terminology,<sup>119</sup> and, when used in writing, it may be accompanied by footnotes, especially when there is no parallel legal concept in the target legal system. As with other linguistic remedies, a neologism should not be used where other acceptable functional equivalents exist in the target language.<sup>120</sup> It must be noted, too, that coining a neologism when communicating orally may cause subsequent difficulties due to the impermanence of the communicative act, while its spontaneous creation in written communication (translated or otherwise) may lead to lack of consistency or inaccurate translation of the term if its legal construction has not been researched. Furthermore, the use of a neologism in formal settings, such court proceedings, is not advisable, as it may detract from the decorum and gravity that characterise them. Instead, the use of a borrowing may be preferable in such circumstances, as not only will it be associated with the foreign legal meaning of the term and understood by any parties originating from the respective foreign jurisdiction, but it will also assist in maintaining accurate records of the proceedings.

#### **(d) Selecting a functional equivalent in legal communication**

Overall, the choice of methods used to compensate for loss of information in the process of interlingual communication will require the law practitioner (or the translator or interpreter) to balance the form and content of the equivalent. While ensuring translation accuracy, on the one hand, oversimplifying the definition of the term must be avoided, as it might lead the recipient to believe that the two

<sup>112</sup>VG Curran ‘Comparative law and language’ in Reimann and Zimmermann, above n 29, p 684.

<sup>113</sup>W Minck ‘Die Problematik von Recht und Sprache in der Übersetzung von Rechtstexten’ (1991) 77 Archiv für Rechts- und Sozialphilosophie 446 at 459; R Sacco ‘Legal formants: a dynamic approach to comparative law’ (1991) American Journal of Comparative Law 1 at 19.

<sup>114</sup>Šarčević *New Approach to Legal Translation*, above n 37, p 257. See also Weston, above n 37, p 26.

<sup>115</sup>See eg de Groot ‘Legal translation’, above n 41, p 541.

<sup>116</sup>See above n 50.

<sup>117</sup>Eg the Scottish term ‘hypothec’ used as a translation of the French civil law term *hypothèque*.

<sup>118</sup>See further on this topic in BS Jackson *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives* (Liverpool: Deborah Charles Publications, 1995) p 11.

<sup>119</sup>De Groot ‘Legal translation’, above n 41, pp 542–543.

<sup>120</sup>Šarčević *New Approach to Legal Translation*, above n 37, p 259.

legal systems are more similar than in fact they are.<sup>121</sup> On the other hand, the impact of the length and complexity of the equivalent must be considered on the ease and manageability of its use in communication, as well as its susceptibility to ambiguous interpretation.<sup>122</sup>

Having regard to the recommended pragmatic approach to translation and the range of linguistic remedies available to achieve functional equivalence, translations of the above-mentioned concepts of a 'road traffic accident' and 'going equipped' will depend on: (1) the type of the recipient (eg the court, the client or a fellow lawyer); (2) their mother tongue (ie the same or different from the law practitioner's); and (3) level of fluency in the foreign language (ie basic, independent or proficient user<sup>123</sup>); (4) the law applicable to the facts of the case (ie domestic or foreign law); as well as (5) the purpose (eg for information, enforcement, etc); and (6) format (ie written or oral) of the communication. Of course, there may be different configurations of these variables in law practice, resulting in different requirements and multiple ways of translating the concepts from the source language into the target language. Arguably, the choice of a functional equivalent made by the law practitioner for the purposes of their own practice or communication with clients or fellow lawyers may be dictated by different considerations than the choice made by a translator or interpreter that assists them.

### 5. Benefits of applying interdisciplinary methods and skills in globalised law practice

The rationale for incorporating interdisciplinary methods and skills drawing on comparative law and legal translation in globalised law practice is fourfold: it would aid law (self-)study and practice, enhance the law practitioner's communication skills in both monolingual and unassisted bilingual legal communication, and improve their ability to communicate with the assistance of an interpreter or a translator. Each of the four practical benefits is addressed in further detail below.

First, when studying foreign law or practising law in a global context, lawyers mentally engage in the process of translation when dealing with foreign legal concepts or legal rules applicable to their services. The law practitioner's awareness of the spectrum of translation strategies and the imperfection of translation, which may lead to divergent renditions of domestic legal terminology in a foreign language or vice versa, would enhance their analytical and problem-solving skills. Greater linguistic discernment would aid the law practitioner's interpretation of foreign law: increased sensitivity to and more accurate perception of different nuances of meaning when construing foreign law concepts would prevent the lawyer from reliance on parallel domestic legal concepts and rules familiar to them in their translation.

Secondly, when both the law practitioner and their client speak the same first language and are familiar with the same legal system, yet foreign law applies to the client's matter, in the course of providing legal services to the client, the lawyer will, whether consciously or not, assume the role of a translator between the two legal cultures. In this context, awareness of translation techniques would allow the law practitioner to convey the meaning of foreign legal concepts to their client in a more accurate, precise and comprehensible manner, reducing or altogether eliminating communicative interference stemming from domestic law perspectives.

Thirdly, when the law practitioner provides legal services to a foreign client who can communicate without the assistance of an interpreter, yet is unfamiliar with the legal system within which the lawyer operates, enhanced linguistic competence of the latter would improve the communication process between the parties from the outset. As a result, the client would gain the correct understanding of the scope of the legal services provided, as well as the requirements, duration, potential outcomes and implications of the legal process, which would prevent, or at least minimise, any subsequent misunderstandings. The same applies to domestic law practice in a monolingual context, as clients are

<sup>121</sup>See eg Curran, above n 112, p 684.

<sup>122</sup>Mattila, above n 10, p 93.

<sup>123</sup>Council of Europe 'Common European Framework of Reference for Languages (CEFR)', <https://www.coe.int/en/web/common-european-framework-reference-languages/table-1-cefr-3.3-common-reference-levels-global-scale>.

usually unfamiliar with the meaning of some legal terminology and require its intralingual translation from the language of the law (technolect) into the vernacular, preferably using plain language. With lawyers having a tendency to use technical terms (also referred to as 'legal jargon'), familiarity with translation strategies and techniques would thus likely improve the law practitioner's communication skills in general.

Finally, when using translated documents or being assisted by an interpreter during a legal consultation or court proceedings, the law practitioner's awareness of the spectrum of translation strategies and techniques available would enable them to brief the translator or interpreter effectively and communicate through them in a manner that facilitates more accurate rendition of the source text or speech in the target language. When instructing interpreters to 'translate word-for-word', as is often the case, law practitioners ignore the fact that the choice of translation strategy dictates the form of the message rendered in the target language and therefore affects the perception of its meaning by the recipient. On the other hand, word-for-word or literal translation may be resorted to by interpreters or translators of their own accord when they have lesser legal and/or linguistic competence, or by clients who communicate unassisted, despite their limited language competence. Familiarity with translation techniques and a greater awareness of linguistic issues in interlingual communication would allow the lawyer to appreciate the difficulties inherent in conveying legal concepts between different legal cultures, and provide essential information in relation to such concepts in order to aid the translation process and thus the recipient's comprehension of the intended message.

## Conclusion

This paper has attempted to demonstrate how comparative law and legal translation complement each other, and how, as a combination of interdisciplinary methods and skills, they would benefit law practice in a global context, not least by enhancing both inter- and intralingual communication. Ultimately, problem solving that lies at the heart of law practice is a series of decision-making processes, and in order to make correct decisions, the practitioner needs to have a full and accurate picture of the problem(s) to solve and the applicable law. When law practice crosses boundaries of legal cultures, translation precision is key to ensuring that the lawyer's decisions are informed in a full and accurate manner, and the best solution(s) to the legal problem(s) in question is sought for the client.

The question remains whether such interdisciplinary methods and skills could be taught as part of a law degree. Introduction of a standalone module drawing on comparative law and legal translation would be perhaps more suited to law and language students, who may wish to consider legal translation as a career option. Nevertheless, interdisciplinary skills could still be developed in a comparative law or legal methods and skills module, and further on as part of vocational legal training. Either way, given the ongoing need for the internalisation of the law curriculum, inclusion of linguistic, translation and comparative perspectives in law study would equip graduates with interdisciplinary tools invaluable to global law practice and communication.

It must be conceded, however, that there are routes to law practice other than legal education and, in any event, the above proposals would only benefit current or future law students. To address the issue retrospectively and inclusively of alternative routes, it would be desirable to offer continuous professional development (CPD) training to lawyers who are already qualified and those with no law degree. Such courses could be taught at various levels. Entry level courses could begin with the development of the practitioner's awareness of linguistic, cultural and comparative legal aspects of interjurisdictional law practice and proceed to an overview of techniques facilitating communication in that context. At more advanced levels, the CPD training could involve discussion of practical case studies, with examples of commonly used legal concepts within a particular practice area that lack equivalents in other (eg neighbouring or frequently interacted with) jurisdictions. Risks involved in miscommunication of such concepts could then be explained, followed by practical exercises involving comparative analysis of legal sources to illustrate conceptual incommensurability and application of translation techniques as a remedy thereto. Complementing the above-mentioned suggestions for adapting legal

education to the requirements of the globalised law market, such CPD training would enhance the practitioner's legal and communication skills further, as well as offer an opportunity to remain up-to-date with interdisciplinary advancements in the context of interjurisdictional law practice and communication.