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TRANSLATING LAW
BY DEBORAH CAO
FOREWORD
THE HON JUSTICE MICHAEL KIRBY AC CMG

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

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

We should not be surprised about such difficulties. In fact, the origins of language, even in societies in the most primitive state, and the enormous variety of languages (here are hundreds of dialects in Papua New-Guinea alone) indicate the miracle that is involved whenever one human mind sets out to convey meaning to another. Astonishing really that extremely complex concepts of morality, ethics, science and technology can somehow be put into verbal sounds and then cut up into little pieces known as words, sentences, paragraphs, chapters. Amazing that groups (sometimes

intercontinental groups such as those who speak the English or Spanish languages) can communicate with a fair degree of ease and at least get the general drift of what they are on about - linking brain synapses to those of others through the vehicle of language.

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

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

the most commonly spoken language in the world - simply the most intercontinental and universal of them.

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

Just when we were congratulating ourselves on having understood the added peril of translating words in a legal context, we began to realise the additional complications that Dr Cao has collected in this excellent book. The last forty years have seen a huge increase in international travel and communication, to a degree that would have seemed astonishing in 1950. In part, this was because of the rapid expansion of international physical travel following the development of civilian jet aircraft. But, in part, it also

arose out of the astonishing growth of telecommunications, the invention of the internet, the expansion of cyberspace and the electronic interconnection of human minds in every part of the world and far out into space.

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

As Dr Cao points out, Canada, from the time of confederation and even before, had to accommodate its basic bilingual character with its law and practice. Its statutes were written, accurately and succinctly, in English and French. The need to express words in the different languages was hard enough. But it was harder still when those words were addressed to a whole culture of legal assumptions compacted into a single sound-bite. There is a good illustration in this book of the use in one Canadian federal statute of the English word "court". Did this connote a "court" or a "tribunal" in the French language? Did it embrace the Human Rights Commission, which Anglophones might not think of as a "court" but which Francophones might view as a "tribunal", having regard to certain of its decision-making functions.

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

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

meaning from the standpoint of an entire legal culture, looking from the outside at expressions used by another?

Dr Cao, who has personal reasons to have grown up with these issues in her own family situation, is an excellent expositor of the complexities and challenges that are involved in translating legal notions. In fact, she has spent a lifetime thinking about this problem. We are most fortunate that she has now collected and explained her analysis of it. She has offered countless intriguing illustrations of the difficulty of translation of legal texts. She has done so by reference to private legal documents, domestic legislation and international legal instruments. Because the world of regional and global commerce and culture will continue to expand, the need for bridges of language will necessarily proliferate. Those bridges will be needed in and outside the legal sphere. Unless the bridges can be built, a culture of peace, understanding and mutual respect will be difficult to secure.

Law has a vital part to play in reinforcing communication between nations and peoples. Building the international rule of law is a mighty challenge for the 21st century. We cannot achieve this goal by simply talking away to ourselves, confined within in our own legal jurisdictions and linguistic groups. We must cross the barriers of language. For this we need expert translators of language. And, as Dr Cao points out, we must also be ready to cross the barriers erected by history, culture and institutions. We must hope that

when the bridges of understanding are built, there will yet be sufficient commonality to bind humanity together. Law has a part to play in the achievement of this goal. That is why this book addresses a problem of great importance for the future of law and life on this planet.

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

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Michael Kirby