

## Translating the Abstruse: In poetry and tax law every translation is an interpretation

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Translation and interpretation go hand in hand. However, this statement generally refers to interpretation as the spoken version of translation. However, the word interpret carries a different meaning:

*"To expound the meaning of (something abstruse or mysterious); to render (words, writings, an author, etc.) clear or explicit; to elucidate; to explain."* [1]

This second meaning is quite distinct from the first in that its focus is on finding meaning. Interpretation is the primary function of the Court. It is the constitutional job of the Court to interpret law. In many states this principle is strongly protected as part of the separation of powers. Lawyers in practice also engage in interpretation. In doing this they are using their extensive legal training to anticipate the meaning that the Court would ultimately find in the event that the issue is placed before a court.

### Three principles arise from this:

1. Interpretation of law is the constitutionally protected jurisdiction of the Court,
2. Interpretation of law is the heart of legal practice and skills, and
3. Lawyers engaged in interpretation in legal practice are ultimately attempting to anticipate how the Court will interpret law in the event that the issue is before a Court.

Translation is becoming more and more important in the courts and legal practice around the world. This is a direct result of globalisation and the interaction of law systems this necessarily entails. One country's laws may play a part in determining outcomes in another country's laws or a Court in one country may need to apply the law of another country. In the latter case a contract may specify that Chinese contract law applies to a contract while the matter is being heard in a Western Australian court. In the former case, Australian tax law may require that a person's residence under Chinese law is determined.

In both the above cases, the Australian Court will be considering Chinese law and this law will be written in Chinese and not English. This means that the Chinese law will need to be translated into English, the language of the Court. It follows that Chinese law can be something that English speaking lawyers need to deal with in practice if they are giving advice in relation to situations such as the above or if they are simply engaged in due diligence or planning around similar cross border scenarios.

The language barrier problem is solved through the use of translation. Qualified translators are employed to translate laws for use in practice while Courts make use of registered translators to assist the Court and translate documents. In the contemporary environment some in practice may resort to translations prepared by non-qualified translators or even machine translation.

This use of translators assumes that translation is neutral. That is, it assumes that the law can be translated into English by a translator and then the Court or lawyer can get to the specialist work of interpretation on the English version.

This assumption is faulty and dangerous. This is because law by its nature is something abstruse or mysterious. JM Coetzee has argued that every translation of a poem is first an interpretation. This is because poetry is abstruse and mysterious. Before a person can translate a poem, they need to decide what it means. In doing this they interpret it. The implication of this is that those that are not skilled to interpret poetry are not likely to be good translators of poems regardless of their translation skills. It also means that the translator must select from many possible interpretations.

Law such as tax law may not seem as abstruse or mysterious as poetry on reading it. However, the abstruseness comes from the demands that are placed upon the words by legal practice. Words that are perfectly clear in the day to day conveyance of ideas between people can become highly abstruse when subject to the demands for clarity that law so often requires. The evidence of this is the immense litigation and argument about the interpretation of seemingly simple phrases such as "reside in Australia".

The outcome of this is that, just like with poetry, the translator of tax law must first interpret the law. Any translation necessarily represents an interpretation by the translator. The implications of this are significant. First, the translator is trespassing on the Court's jurisdiction. This is not the same as lawyers who advise on a meaning but do not interfere with the Court's interpretation. The translator gives the Court something that has already been interpreted. This means the Court in its interpretation may be looking at different issues of interpretation. Secondly, it must be questioned whether the translator has the skills that a lawyer would have in making their interpretation that they use for translation.

The conclusion is that the use of translation of abstruse law requires the translator to interpret the law first. This activity violates constitutional principles and raises issues of competence and qualification. At the very least the translator should possess the skills of a lawyer in the specialist area. This would at reduce some of the problems. However the constitutional issue remains and the legal fraternity should pay significantly more attention to the issue of translation.

[1] Oxford English Dictionary

