Foreignization and Domestication in Legal Translation:

A Critical Comparison of Two Translations of the Dutch Civil Code

Thesis MA Linguistics: Translation in Theory and Practice (Dutch/English)

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Introduction

Many types of texts are the subject of translation, and one such type is the translation of legal texts. While legal translation itself is of course not a new phenomenon, the discussion of legal translation within translation studies seems to be a fairly recent development, with much of the research on legal translation coming from the field of comparative law, rather than translation studies. General translation studies theories often fail to address issues in legal translation, perhaps due to its highly specialized nature. Nevertheless, legal translation plays a vital role in communication in both national and international law, which is especially important in today's world.

When it comes to the translation of legal texts, the general strategy that translators tend to employ is to produce a foreignizing or source culture-oriented translation (e.g. Rayar 1997, xvii). This is done to prevent the reader from obtaining a false sense of security and thinking that the foreign legal system is the same as their legal system. One scholar of general translation theory who discussed the effects of foreignization and domestication on translations is Antoine Berman. Berman (2012) outlined a system of textual deformations, initially aimed at the translation of literary prose, which prevent translations from being what he called a “trial of the foreign”.

In this thesis I will compare two translations into English of the Dutch Civil Code. The first translation, by Haanappel (1990), employed a foreignizing translation strategy using predominantly Civil Law terminology. The second translation, by Warendorf, Thomas, and Curry-Sumner (2009), employed a more target culture-oriented translation, avoiding terminology which Common Law readers would be unfamiliar with. The comparison will not only discuss discrepancies between the two

translations with regards to the choice of legal terminology, but will also investigate to what extent Berman's deforming tendencies are present in either translation, and to what extent their presence actually affects the translation.

In Chapter 1, I will discuss existing theories on the nature of legal texts, legal language, differences between legal systems, and how these relate to legal translation. I will also go into what scholars have previously written about approaches to legal translation. Finally, I will outline Berman's deforming tendencies and discuss how these could relate to the translation of legal texts. In Chapter 2, which forms the bulk of this thesis, I will discuss the source text and the translations under comparison, and the approaches that the translators of both translations took. The rest of the chapter consists of the annotated comparison of the two translations. I will conclude with presenting my most important findings and discussing their implications.

1. Literature Review

1.1. Legal Texts, Legal Language, and Legal Systems

Cao (cited in Cornelius 2011, 124) states that legal translation is “the rendering of legal texts from the SL into the TL”. This is a rather simplistic definition that merely hints at the fact that legal translation is different from other types of translation and that leads one to believe there must be more going on. As Cornelius (2011, 124) notes, there exists a wide variety of legal texts, each of which are different in their scope, function, status, and effects.

But what makes legal texts so special? Šarčević (2006, 26) states that “a legal text can be regarded as a communicative occurrence between specialists intended to serve a particular function”. Harvey (2002, 178) disagrees with this statement, stating that legal texts are often in fact not restricted to specialists, but instead enable communication between specialists and non-specialists – for instance, documents such as contracts and judgments. According to Harvey, this communication between specialists and non-specialists is a feature that does not occur in many other types of special-purpose communication. Similarly, Hammel (cited in Burukina 2012, 583) distinguishes between 4 types of recipients: “legal practitioners whose background is known, clients whose identity is not known, a non-specialist audience [...], and a publication audience”. Each of these groups of possible recipients may require a different translation strategy – for example, translation for a non-specialist audience may require the translator to make the text easier to understand, whereas this would not be necessary in the case of a translation for legal practitioners.

When it comes to types of legal texts, Burukina (2012, 571) distinguishes between four types: (1) academic texts, (2) juridical texts covering court judgments or law reports, (3) legislative or statutory texts, and (4) legal texts in which form determines the content, such as wills, powers of attorney, certificates, etc. Šarčević (2006, 26) further states that legal texts can be divided into prescriptive texts – statutes, treaties, contracts, among others – and descriptive texts – parts of documents used in judicial proceedings – although the latter can contain prescriptive parts as well. Harvey (2002, 179) again disagrees with this division, noting that whether a text is prescriptive or descriptive in function depends first and foremost on the communicative situation. A statute is merely informative when it is consulted out of interest by someone outside of the area in which it is in effect – the same goes for other types of legal texts in other situations. Cornelius (2011, 125) similarly states that the purposes of translated legal texts can vary immensely. As such, the translation of any legal text will require a different approach depending on its intended function, or *skopos*.

One of the points often raised about the peculiarities of legal translation is the nature of legal language (e.g. Aodha 2014, Burukina 2012, Cornelius 2011). Aodha (2014, 210) states that in law, similarly to poetry, matter and form are so closely tied that they cannot be separated. Additionally, as in poetry, each word is semantically unique, "even the most banal, grammatically flattened parts of speech. Style is determined by the nature of the court and the genius of the language in question" (Aodha 2014, 216). Additionally, Tiersma (2006, 553) notes that legal language is often seen as different from ordinary speech, due to the use of technical terminology, archaic or formal vocabulary, nominalizations, impersonal and passive constructions, multiple negation, long and complex sentences, and redundancy. Legal language that contains

these features is often referred to as legalese. According to Holland and Webb (cited in Burukina 2013, 576), the purpose of legalese is to conceal rather than to enhance one's understanding of a legal system, despite the function of legal texts as a means of communication between specialists and non-specialists, as noted earlier. However, there have been calls to make legal language more understandable to lay readers – such as the Plain English movement (see, for example, Hammel 2008). Nevertheless, it is important, according to De Groot (1996, 11), that one translates from one legal language to another legal language, as opposed to translating from one general language to another general language.

Legal translation is more than just a linguistic transfer. It is the transfer of a message in one legal system and its corresponding legal language into another legal system and its corresponding legal language (Chroma 2014). These legal languages are highly specific to the legal system in which they operate, and this is often where the difficulty in legal translation lies – even within a single language there can be multiple legal systems and, consequently, legal languages – for instance, English for England and Wales, the United States, Canada, Scotland, Australia, and South Africa. Conversely, in countries such as Belgium, multiple legal languages may be used within a single legal system. As such, legal translation often involves comparative law – translators must compare the concepts behind legal terminology in one system and find equivalents in the target legal language. Indeed, De Groot considers comparative law to be the core activity of the translation process (2012, 538). Šarčević also notes that lawyers often consider the legal aspect to be the main part of the translation process (2006, 26). Other scholars (Botezat 2012, 642; Burukina 2012, 579) similarly note that competence in legal languages and cultures represent the most valuable skills for the translator.

As Cornelius (2011, 125) notes: “law is culture-dependent”. Each nation has a legal system with its own history, organization, and reasoning, designed to answer the needs of that particular nation. This inevitably leads to legal concepts between legal systems of different nations being incompatible (Botezat 2012, 641). This becomes especially relevant when translating into legal English. As Biel (cited in Burukina 2013, 580) notes: “Is the target text intended for the UK, US, Australian or Canadian audience? If for the UK audience, is it England or Scotland with its distinct legal system? [...] Another problem arises when ‘the translation is intended for some undefined European audience, for which English is not a native language but is a lingua franca used to access texts written in languages of limited diffusion’.”

De Groot (1996) argues that translators should always translate to one target legal culture and corresponding legal language only, due to the difference in meaning in similar legal terms between similar legal systems mentioned above. Foster (2009, X), while agreeing in principle, argues that translators should not be overly zealous about translating to a single legal system – claiming that a particular term is untranslatable has no application in practice, and neologisms may not always be understood. De Groot (1996, 25) does note that a term from a third legal system may be used as a neologism if necessary.

According to Aodha, the biggest obstacle in translation is “the absence of one-to-one equivalents between elements of different languages”, such as culture-specific terms that frequently occur in legal texts. Words referring to objects or institutions specific to the source culture are nearly always untranslatable (Aodha 2014, 210). Mincke (cited in Aodha 2014, 211) argues that translation does not involve the transposition of a word with its meaning in one language to another. Translatability

depends on “whether the subject in question can be explained with a sufficient degree of accuracy”. Botezat (2012, 645) claims there are three types of terms: (1) those that have a semantic equivalent – terms that have the same informational content as the source term and serve the same legal purpose, (2) those that have a functional equivalent – which Botezat describes as terms that have “conceptual adequacy”, and Weston (cited in De Groot 1997, 17) defines as terms which embody the nearest situationally equivalent concept, (3) and those that are untranslatable and usually require additional description and information. Additionally, as Burukina (2014, 575) notes, legal language is filled with terms that are borrowed from general language, but can come to mean something else entirely in a legal context. Moreover, De Groot (1996, 9) remarks that, even within the same legal system, a single term can have different meanings depending on the legal context in which it is used.

1.2. Approaches to Legal Translation

Leung states that “[t]he traditional approach to legal translation is founded on the principle of fidelity to the source text”. As such, a large emphasis was placed on literal translation, especially in the case of legislation. Harvey (2002, 180) notes that the debate over fidelity to the “letter” or the “spirit” in legal translation dates back as far as the days of the Roman empire when formal correspondence between source and target text was thought to be essential to preserve the meaning of legal (and Biblical) documents. According to Harvey, this tendency to strictly adhere to the original text lasted until the twentieth century, when a greater appreciation for the bi- or multilingual nature of law in countries such as Switzerland, Belgium, and Canada resulted in a

greater respect for the “genius” of the target language. Cornelius (2011, 134) notes that this change seems to coincide with a changing role of the legal translator as merely a “passive mediator” to a more active participant in the legislative process, although naturally this would only apply to the translation or parallel drafting of legislative texts.

There are authors who call for a more functional approach, as Harvey (2002, 180) notes – notably those influenced by Vermeer's *skopos* theory (Vermeer 2012). This theory, aimed more at general translation studies rather than solely at legal translation, states that a translation is predominantly determined by its *skopos* – meaning aim or purpose. As subordinate rules, a translation must be coherent with the receiver's situation – in other words, it must make sense to the receiver – and there must be fidelity to the ST information received by the translator. Note that this idea of fidelity is markedly different from the formal adherence to the source text mentioned above. Furthermore, these rules are in a hierarchical order, which means that the first concern of a translator should be to ensure that the translation fulfills its purpose, then ensure that the translation is coherent, and only after that ensure that the translation shows fidelity to the source text. This functionalist approach to legal translation may result in a more target-oriented translation – although this does not necessarily need to be the case. Similarly, according to Botezat (2012, 642), translation is a form of cultural interaction, where one replaces cultural elements in functional ways and adapts the text to the TC norms. For Botezat, the aim is to create communicative equivalence.

De Groot (1996, 15) notes that both the aim of the translation and its target audience are essential in determining whether differences between legal terms are relevant – for instance, De Groot would translate the term *rechter-plaatsvervanger* with *deputy judge* when translating a curriculum vitae, while merely translating with *judge*

would be deemed acceptable when translating a judgment, as the first translation would perhaps raise too many unnecessary questions. Similarly, Hammel (2008) argues that one of the core issues when deciding on a translation strategy is the target audience: "Take, for instance, the translation of a German rental contract into English, for a visiting businessperson or artist. Here, the premium is on clarity and jargon reduction, and the translator's freedom to trim and transpose at its zenith. These clients need to know what's expected of them, and have little interest in a faithful reproduction of the source language's grammatical structure or vocabulary." According to Hammel, translators should be allowed to make adjustments to the source text where necessary in order to create a more transparent and accessible translation, with the deciding factor being the audience of the translation.

Following Hammel, Burukina (2012, 587) who is also in favor of a more target-oriented approach to legal translation, argues that translators should be allowed to use some of the tenets of the Plain English movement – most importantly, controlling sentence length – to produce clearer and more useful translations. Especially given that more and more legal translation into English is aimed at non-native speakers of English, Burukina claims, the use of plain-English in legal translation might become more of a necessity. Similarly, Joseph (1995, 17) argues that translators sometimes should be allowed or even required to change the style of the original in order to more faithfully convey the sense of the original, “unless that style and manner were somehow directly implicated in a question of the interpretation of the meaning of the original.”

Šarčević, while in favor of a receiver-oriented translation, disagrees with Vermeer's functional approach, stating that it does not account for “the fact that legal texts are subject to legal rules governing their usage in the mechanism of the law”

(2000: 2). Similarly, De Groot also notes that functional equivalence alone is not enough – the legal context, the way in which terms are embedded into the legal system, also needs to be taken into account. According to Šarčević, legal considerations are the most important aspect when it comes to the selection of a translation strategy. For Šarčević, the goal is to produce a text that shows formal correspondence between the source and the target text, but rather one that expresses "the uniform intent of the single instrument", especially when the text is used by the courts (2000, 5).

Poon (cited in Leung 2014, 226) disagrees with Šarčević, arguing that "it is not easy for a translator to try to predict the way in which a text will be interpreted by the court and how the same legal effect might be achieved by the target text, especially given the indeterminacy of word meaning". According to Poon, translators should try to create a "semantically and syntactically literal" translation that is faithful to the meaning of the source text, and leave interpretation to the court. However, in a later article Šarčević (2006, 27) herself mentions that "[a]ccuracy is […] essential, and as much attention must be paid to the content as to the intention and all possible interpretations and misinterpretations of the text. Translators must understand the source text but not interpret it in the legal sense. In particular, they must avoid value judgments, taking care to convey what is said in the source text, not what they believe it ought to say". How this is to be reconciled with her previous statement that the translator must attempt to produce a translation that has the same legal effect is difficult to say. After all, how can one determine the legal effect of a text without interpreting it in a legal sense?

Many scholars disagree with Šarčević's claim that translators should avoid interpretation, stressing the importance of interpretation of the source text. Harvey (2002, 182) rightly points out that "translation, like any act of reading, necessarily

involves interpretation and that placing restrictions on this process prevents the translator from producing quality work". Gémar (cited in Harvey, 2002) even suggests that legal translators should first and foremost be trained to interpret texts. For Leung (2014, 226), any act of interpretation is a preliminary step of translation. Similarly, for Beaupré (cited in Cornelius 2011, 136) the effective translation of legislation is dependent on the ability of the legal translator to apply judicial methods of interpretation. Whether or not legal interpretation is required, the translator must always be able to understand what is conveyed in the source text.

Bednarek (cited in Cornelius 2011, 136) also emphasizes the importance of an analysis of the source text, stating that the translator should bear in mind that translation involves two kinds of transfer, namely intercultural transfer and legal transfer. The analysis of the source text is also important when it comes to selecting an appropriate translation strategy.

When it comes to dealing with ambiguities in the source text, Harvey (2002,181) notes that the translator does not necessarily need to resolve them. According to Harvey, ambiguities in contracts could be used to reach a compromise, or to purposefully create uncertainties which either of the parties will seek to exploit. Ambiguity can furthermore function as a diplomatic tactic in the case of international legislation. Harvey notes that legal texts are in this regard similar to literary texts, as ambiguity is seen "not a defect but as an inherent feature which should be retained in translation". In this respect, Harvey notes, interpretation of legal texts is required in order to identify these ambiguities, and consequently decide whether or not to maintain them in the translation.

There have been a few attempts to describe the general process and the steps that

translators should employ when it comes to legal translation. Li (2014,87 1) notes that translation process research in general translation studies generally is not useful with regards to legal translation. Li introduces the idea of *static equivalence*, which he contrasts to Eugene Nida's dynamic equivalence. According to Li, static equivalence is similar to “literal translation, semantic translation or foreignization in terms of preserving the literal or semantic meaning of the original”, although it is still quite different. (Li 2014, 188). Unfortunately, Li fails to specify exactly in what way static equivalence differs from the above approaches. He states that, by applying static equivalence, the translator can achieve “complete equivalence […] in terms of in-depth meaning, surface meaning, semantic meaning, structural compositions, style, register, and even linguistic format” – quite ambitious, indeed.

According to Li, the nature of legal texts demand for static equivalents, as legal language itself is static. By static, Li means that legal texts are often drafted on the basis of certain guidelines regarding sentence patterns, style, format, word choice, etc. Any translation needs to reflect this, or it will deviate from the original. Li states that this is especially important with regards to the translation of legal terms, as these terms reflect a specific meaning depending on their legal context. A dynamic translation will change this specific meaning, causing the translation to lose its authenticity, and deviate from the original. While Li's claims here may have some value with regards to the translation of legislative texts and contracts that will be used as authoritative texts themselves, we have already seen that some translations might allow for a more dynamic approach, depending on their communicative function.

Li's proposed model for achieving static equivalence entails 5 steps:

1. Browse the text to determine the text-type, target readership, translation principle, and strategies;
2. Peruse the text and decode the intent of the writer;
3. Conduct grammatical and operative analysis to determine the way of expression;
4. Cross-linguistic transfer; and
5. Equivalence check and back-translation.

(Li 2014, 203)

Of these steps, the equivalence check and back-translation is the most important, according to Li, as this is where any deviations from the source text will become the most apparent.

Chroma agrees with Li in that each legal system brings with it its own rules for legal language use, and determines the legal and linguistic elements that make a legal text valid. This should be taken into account when translating, according to Chroma. Furthermore, every legal text is subject to interpretation by its receiver, and when translated, this interpretation is diverted, i.e. the translator becomes both a secondary interpreter and receiver. The role of the translator is then to bridge the gap between the source law and legal language and the receiver (Chroma 2014, 122-123).

As such, legal translation does not only entail linguistic transfer, but also a transfer in legal systems, according to Chroma (2014, 124-125). Because of this, it is necessary for translators to compare the legal systems of the source language and the target language before they attempt a translation. Chroma describes the (simplified) process of legal translation as follows:

1. decoding SL message;
2. interpreting SL message in context;
3. encoding interpreted message into TL;
4. adapting TT to purpose and communicative function of translation.

(Chroma 2014, 126)

Judging from the process described above, Chroma puts a lot of emphasis on the message that is conveyed and the purpose of the ST and TT, and stresses the fact that the translation has to “make sense” to the receiver. In order to achieve this, the translator needs to be proficient in both the source language and legal system and the target language and legal system, so that they can produce a comparative analysis of those systems.

1.3. Berman's Deforming Tendencies

For Berman (2012), translation is “the trial of the foreign”. In other words, translations should reveal and accentuate the foreignness of a foreign work. However, according to Berman this aim has been skewed due to a distinction between two kinds of translations – “literary” and “non-literary” translations.

> “Whereas the latter perform only a semantic transfer and deal with texts that entertain a relation of exteriority or instrumentality to their language, the former are concerned with *works*, that is to say texts so bound to their

> language that the translating act inevitably becomes a manipulation of signifiers, where two languages enter into various forms of collision and somehow *couple*. This is undeniable, but not taken seriously."
>
> (Berman 2012, 241)

According to Berman the "non-literary" translation approach is so dominant that, even in literary translation, foreign aspects are naturalized.

Berman then sets forth a system of twelve deforming tendencies that he claims are present in every translation and prevent them from accentuating their foreignness.

The first of these is *rationalization*, which relates mainly to the syntactical structure of the source text. Elements such as repetition, punctuation, long sentences, or sentences without verbs are all at risk of rationalization, if they do not adhere to a certain idea of order (Berman 2012, 244).

The second deforming tendency, which Berman relates to the first one, is *clarification*. He notes that all translation comprises some degree of explicitation, although that can mean two different things: (1) the manifestation of something that is not apparent, but concealed in the original, shining new light on it, but it can also mean (2) the explicitation of something that is not meant to be made clear in the original.

The third tendency, *expansion*, comes somewhat as a result of the previous two tendencies, as both of them often require expanding the mass of the original text. However, according to Berman, such expansions are often empty, and add nothing to the translation, meaning they do not augment the original's way of speaking. Moreover, they stretch the original, disturbing its rhythm.

The fourth tendency is *ennoblement*. Berman calls ennoblement a "rewriting", a

"stylistic exercise" meant to produce a more "elegant" text based on the original. Ennoblement aims to make the translation more "readable", getting rid of the original clumsiness and complexity of the source text.

The fifth deforming tendency, *qualitative impoverishment*, refers to replacing terms, expressions, and figures in the source text with words in the target text that lack their "iconic" richness. According to Berman, a word is iconic when it "creates an image", in relation to its referent, when it manages to capture something of the referents physicality. When this replacement occurs throughout a work, it detracts from the works expressiveness, according to Berman.

The sixth tendency is *quantitative impoverishment*, and refers to lexical loss. According to Berman, works can contain multiple signifiers for the same signified, without justifying their choice in a particular instance Any translation that does not respect this variety makes the original work less recognizable.

The seventh deforming tendency is the *destruction of rhythms*. According to Berman, novels are no less rhythmic than poetry. Berman notes, however, that novels are less fragile in this respect than poems, although elements such as punctuation can still easily destroy the rhythm of a novel.

The eighth tendency is the *destruction of underlying networks of signification*. Berman states that literary works often contain an "underlying text", where signifiers link up and form certain networks. Furthermore, authors often choose to use certain words, and avoid the use of others (Berman 2012, 249). Translations that ignore these aspects of a text destroy its underlying rhythm.

The ninth tendency is the *destruction of linguistic patternings*, and refers to the systematic nature of the text with regards to the construction of sentences. Translators

who employ rationalization, clarification, expansion, and other approaches destroy this systematic nature, making the text more inconsistent, with different kinds of writing in the same text, causing the translation to lack the distinguishing features of the original.

The tenth deforming tendency is the *destruction of vernacular networks or their exoticization*. The translation of vernacular language, which occurs frequently in prose, is always problematic. Terms will either be replaced with a more general construction, which hurts the expressiveness of the original, or they may be exoticized, meaning the original term may be placed in italics, or it may be replaced with vernacular that is local to the target text. Neither of these is ideal, according to Berman, as vernacular is very much rooted in the location where it is used.

The eleventh deforming tendency is the *destruction of expressions and idioms*, and is in part related to the previous one, as expressions and idioms often derive from the vernacular language. The replacement of idioms and expressions with their equivalents in the target culture will create an absurd effect, where characters from the source culture will express themselves in images related to the target culture. According to Berman, one should not search for equivalents for idioms and expressions, as they do not necessarily *translate* them. Rather, Berman suggests there is such a thing as a *proverb consciousness* which will detect new proverbs as equivalents to the authentic ones in the target culture.

The twelfth and final deforming tendency is the *effacement of the superimposition of languages*, and deals with the relation between a dialect, sociolect, or idiolect and a common language, or two different kinds of common languages within a text. This difference between dialect and common language is often lost in translation, causing the translation to become more homogeneous than the original.

Because Berman's system of deforming tendencies was predominantly aimed at the translation of literary prose, not all of the deforming tendencies may be as relevant to the translation of legal texts. For example, due to the nature of legal texts and legal language, the final three tendencies – *destruction of vernacular networks*, the *destruction of expressions and idioms*, and the *effacement of the superimposition of languages* – might not need to be discussed at all.

According to Berman (2012, 252), the idea that translation is, first and foremost, the restitution of meaning, goes back to the Platonic figure of translation, in which meaning and the letter are separated. All translation as such is the destruction of the letter in favor of meaning. Berman, then, suggests that one should translate "to the letter", as this restores the signifying process of works, which is more than their meaning. However, Berman does not explicitly say whether or not one should sacrifice meaning in favor of the letter. On this subject, Joseph (1995, 17) argues that, in legal translation, departure from meaning – or "sense" – is unthinkable, as the consequences of doing so are qualitatively different from those in literary translation.

Joseph (1995, 19) argues that translators of legal texts are often forced to adopt "conventional legal formulations of the target language with no acknowledgement of the differences in legal systems". According to Joseph, this is because legal texts, and especially legislative texts, depend for their authority on the fiction that they do not have a specific author, and consequently, the translator must disappear as well. Joseph (1995, 34) proposes, however, that translators should make themselves visible in the translation. They should do this by interpreting the source text, rather than merely translating it. They should intervene in texts semantically and stylistically, to the extent called for, in order to undo the absence of the author and the translator. Finally, while

translators should not ignore the importance of clear writing, the desire to provide easy reading should not sacrifice fully interpretative translation in favor of the simple legal conventions of the target language where the legal systems differ or where the source text includes connotations that a target language equivalent cannot capture.

2. Analysis

2.1. Texts

For this analysis, two published translations from Dutch to English of the Dutch Civil Code were selected. The first translation, published in 1990, by Haanappel, and the second translation, published in 2009, by Warendorf, Thomas, and Curry-Sumner.

The recodification of the Dutch Civil Code (Du. *Burgerlijk Wetboek*) was a long process which began in 1947, with the bulk of the New Civil Code entering into force in 1992. Whereas the old 1838 Civil Code was heavily influenced by the French Napoleonic Code, the New Civil Code (Du. *Nieuw Burgerlijk Wetboek*) saw some changes which are reminiscent of the German Civil Code model. This is reflected both in new terminology used – e.g. the term *rechtshandeling*, which did not appear in the 1838 Code and is similar to the German *Rechtsgeschäft* – and in its structure – as Bernstein (1989, 122-123) notes, civil codes relying on the German model often include rules on obligations, property, family law, and decedent's estates, preceded by a "General Part" which contains rules applicable to all subject matters of private law. While the structure of the Dutch New Civil Code as a whole still slightly differs from this, it is reflected in the structure of Books 3, 5, 6, and 7, with Book 3 constituting the general part of the *vermogensrecht*, which is then expanded upon in Books 5, 6, and 7.

The Dutch government has no established policy on the publication of English translations of Dutch Legislation, even though, as Warendorf et al. note, a significant amount of its people does not understand Dutch – notably those in the Netherlands Antilles. Furthermore, Warendorf et al note that English translations of the Dutch Civil

Code are often used in the codification of private law in countries such as China and countries which became independent after the dissolution of the USSR.

As mentioned above, the Haanappel translation was published in 1990, and was part of a project to translate Books 3, 5, 6, and 7 of the *Nieuw Burgerlijk Wetboek* into both English and French. The French translation was done by E.J. Mackaay, but falls outside the scope of this thesis and as such will not be discussed in much detail. The translation occurred at the same time as the publication of the Quebec Civil Code Revision Office's Report on the Civil Code of Quebec, which contained a complete English and French draft of the New Quebec Civil Code. As Haanappel notes, both the Civil Code of the Netherlands of 1838 and the Civil Code of Lower Canada (Quebec) of 1866 are based on the 1804 *Code civil des Français*. As such, the terminology of the Haanappel translation "relies heavily on the terminology used in French code of 1804, and Quebec code of 1866, and the 1977 Quebec Draft Civil Code, and various Quebec Bills and Draft Bills". Furthermore, the translator made a deliberate attempt to use terminology found in English civil law – as opposed to common law – such as those contained in the aforementioned texts, as well as sources found in English language civil law systems such as the State of Louisiana, Scotland, and South Africa. De Groot (1996, 26) notes that the reception of the Haanappel translation by English lawyers tends to be somewhat negative. De Groot disagrees however, noting that Haanappel indicated from the outset that the translation would use terms found in the Quebec legal system and that it does so consistently. However, De Groot does admit that, because of this, the translation is perhaps not as accessible for anyone not familiar with the Quebec legal system and language.

The translation by Warendorf, Thomas, and Curry-Sumner, which was a

translation of the complete Dutch Civil Code from Dutch to English, was first published in 2009, with a second edition published in 2013. The translation benefited from earlier translations of the Dutch Civil Code – notably the 1990 translation by Haanappel, but also a translation of Books 1 and 4 in Family Law and Legislation of the Netherlands by Curry-Sumner and Warendorf, Book 2 in Companies and Other Legal Persons under Netherlands and Netherlands Antilles Law by Warendorf and Thomas and an updated version of the original Haanappel translation from 1999-2007 by Haanappel, Mackaay, Warendorf and Thomas published in Netherlands Business Legislation. The aim was to create a translation that would be understandable for readers familiar with common law, with the translators noting they were forced to make many difficult decisions between common law and civil law terms. Finally, the translators generally tried to avoid the use of Latin legal terms, or specific civil law terms for which general common law readers would require a dictionary.

2.2. Selection Criteria

Obviously a comparison of the entire Dutch Civil Code translation would fall outside the scope of this thesis. As noted above, the Haanappel translation only covers Book 3, 5, 6, and 7, so a complete comparison would be impossible to begin with. Book 3 – which on its own spans 326 Articles – was selected as the area of *vermogensrecht* should contain a fair amount of discrepancies between Common Law and Civil Law with regards to legal concepts and terminology. Subsequently, a number of articles spread across Book 3 were selected in order to obtain a decent variety in legal terminology. However, because the analysis of Berman's deforming tendencies does

require some repetition, as they apply to texts as a whole, a certain extent of consistency in source text legal terminology was required. As such, a number of subsequent articles of the Title 1 of Book 3 were selected, as these contain many internal references.

The two different translations were selected first and foremost because they are both published translations that contain a translator's preface explaining the general approach the translators took. Judging a specific translation choice is difficult when one does not know what sort of translation strategy a translator employed. While the translation by Warendorf et al. does draw from the Haanappel translation, the fact that the Warendorf translation aims to be understandable to Common Law readers, while this does not seem to be a goal for the Haanappel translation, should make for the necessary differences between the two translations, at least with regards to the translation of legal terminology.

Another reason why these two translations were selected for comparison is due to the different receptions they both received. While, as noted earlier, the Haanappel translation received somewhat mixed responses, the translation by Warendorf et al. is considered authoritative by Dutch lawyers (Chroma, 2014 137). This is especially of note considering the fact that the Warendorf translation was drew from the Haanappel translation, as noted earlier.

2.3. Methodology

For this thesis, the two translations were put side by side and compared to the Dutch source text and to each other. The Haanappel translation is shown on the left, while the translation by Warendorf et al. is shown on the right. Terms or phrases reflecting

relevant issues with regards to legal translation or different approaches taken by the translators are emboldened and discussed in annotations directly below each section. Any terms or other parts of the translation that constitute any of Berman's deforming tendencies are also emboldened, with the deforming tendencies indicated between square brackets with the following numbers:

[1] – rationalization

[2] – clarification

[3] – expansion

[4] – ennoblement and popularization

[5] – qualitative impoverishment

[6] – quantitative impoverishment

[7] – the destruction of rhythms

[8] – the destruction of underlying networks of signification

[9] – the destruction of linguistic patterns

[10] – the destruction of vernacular networks or their exoticization

[11] – the destruction of expressions and idioms

[12] – the destruction of the superimposition of languages

Note that, while the full list of deforming tendencies is shown here, not all deforming tendencies may appear in the translation.

2.3. Annotated Comparison

Boek 3. Vermogensrecht in het algemeen [N.B.: In the Haanappel translation, this Book is titled "Algemene gedeelte van het verbintenissenrecht" – the same as Book 6. Whether this is a printing error or not is unknown to me.]

Patrimonial law in general	**The law of property, proprietary rights and interests[2][3][5]**

Patrimonial law: *Vermogensrecht* encompasses both the *goederenrecht* and the *verbintenissenrecht* (Loonstra 2009, 20). According to Fockema Andreae's Juridisch Woordenboek, it is the body of rules governing "*subjectieve vermogensrechten*", which in turn are roughly defined as "*eigendom en andere rechten*". A full definition can be found in Article 6 of Book 3 of the Dutch Civil Code. In Black's Law Dictionary, *patrimony* is defined as "[a]n estate inherited from one's father or other ancestor; legacy or heritage", from the Roman law *patrimonium*: "[p]roperty that is capable of being inherited; private property". An alternative definition of *patrimony*, specific to Civil Law, reads: "[a]ll of a person's assets and liabilities that are capable of monetary valuation and subject to execution for a creditor's benefit". The latter definition, which downplays the aspect of inheritance, seems to reflect the more current usage, which is further confirmed by the decision of the Supreme Court of Louisiana in *In re Howard Marshall Charitable Remainder Annuity Trust* (1998): "Under Louisiana law, the patrimony is a coherent mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. The patrimony, as a universality of rights and obligations, is ordinarily attached to a person until termination of personality". The term *patrimony*, however, is uncommon in Common Law

jurisdictions, resulting in a translation that has a foreignizing effect on many English readers.

The law of property, proprietary rights and interests: In the translation by Warendorf et al., the translators have chosen for a paraphrase of the source term, resulting in clarification and expansion, as the translation is a rough denotation of the meaning of the source text term. This results in a translation that can be traced back to neither Common Law nor Civil Law, as Common Law lacks a term that encompasses *vermogensrecht* as a whole. Unfortunately, other sources which contain the phrase seem to be lacking, although the individual terms do appear in Black's Law Dictionary. In Berman's terms, however, the phrase does not carry the "iconic richness" which is present in *vermogensrecht* – it is merely a denotation – resulting in qualitative impoverishment.

[…]

Artikel 1

Goederen zijn alle zaken en alle vermogensrechten.

Property **is comprised of [1][2][3]** all **things** and of all patrimonial rights.	Property **is comprised of[1][2][3]** all **things** and of all **proprietary rights and interests[2][3][5].**

is comprised of: Here, both translations use *is comprised* of as a translation for *zijn*. This results in rationalization, as it produces a translation which is more "natural" or idiomatic than a literal translation would have been. Consequently, the translation results in clarification, as it explains what is in the source text. As a result, the

translation is "stretched out" when compared to the original, resulting in expansion. It is of note here that the semantic relationship between the terms *goederen,* and *zaken* and *vermogensrechten* is hyponymous, i.e. *goederen* is a hypernym of *zaken* and *vermogensrechten*, which are its *hyponyms* – it could also more specifically be classified as a taxonomic relationship. In this sense, using a form of *to comprise* (Du. *omvatten*) is appropriate. To contrast this, in Article 2, for example, the relationship between the word *zaken* and the phrase "de voor menselijke beheersing vatbare stoffelijke objecten" is synonymous.

However, it should be noted that the phrase *is comprised of* itself is one that is the subject of some debate. According Merriam-Webster (2016), initial usage of *comprise* indicated that it means "to be made up of" – in passive form – with recent usage adding another definition in "to make up" – the latter often being used in the passive sense "to be comprised of", such as seen above. Additionally, the British National Corpus yields 883 results for "comprises", whereas "is comprised of" only yields 23 results. As such, while the way in which *comprised* is used is not necessarily wrong, it can be seen as risky, especially as the translators did not need to use the modulation from active to passive, and simply could have used *comprises*. Tying this back to Berman's deforming tendencies, while the clarification, using *to comprise* as a translation for *zijn* may have been necessary, the rewriting of active into passive, which appears to be mainly a choice with regards to style, is not only unnecessary, but perhaps even incorrect.

things: Fockema Andreae defines *zaak* as "voorwerp, voor menselijke beheersing vatbaar stoffelijk object; ingedeeld in roerend en onroerend". Black's Law Dictionary defines *things* as "[t]he subject matter of a right, whether it is a material object or not;

any subject matter of ownership within the sphere of proprietary or valuable rights". Furthermore, in the Lousiana Civil Code, *things* can notably be both *corporeal* and *incorporeal*, the latter of which is defined as "things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property". As such, there seems to be some discrepancy between the definition of *zaken* and that of *things*, where *zaken* are exclusively corporeal, while *things* can be both corporeal and incorporeal. For an alternative translation, we may turn to the French Law *biens*, which, according to Black's Law Dictionary, means "[g]oods, property. […] *Biens* includes real property in most civil-law jurisdictions", although here again the tangible aspect is not explicitized. Additionally, *biens* is a fairly obscure term which does not see a lot of use even in English language Civil Law systems – as can be seen above, the Louisiana Civil Code uses the term *things*. Furthermore, because the definition of *zaken* is found in Article 4, the translators may have decided that the discrepancy between the two terms was irrelevant, and that *things* could function as what Rayar (1997, xvii) calls a label for the Dutch term *zaken*.

Alternatively however, if the translators wished to use a term which is more accessible to Common Law readers, *chattels in possession* or *choses in possession* may have been an option. As Zwalve (2008, 190) notes, *chattels personal* are divided into *chattels in possession* and *chattels in action*, the first of which are corporeal objects, or tangibles, and thus come close to the definition of *zaken*.

proprietary rights and interests: Warendorf et al. here have chosen to translate with *proprietary rights* for *vermogensrechten*, the same term they used for their translation of *vermogensrecht* in the title of Book 3. It is important to note that, in Dutch law, a

vermogensrecht has two definitions (Loonstra 2009, 163-164): (1) all rights (and liabilities) which have monetary value – these can be either real rights (such as the right of ownership) or personal rights – in Dutch, *hét vermogensrecht*, which encompasses the *goederenrecht* and the *verbintenissenrecht*; or (2) a non-tangible object (as opposed to a tangible *thing*) that has financial value – the *vermogensrechten* which we are dealing with here, as defined in Article 6. The current translation does not reflect this, or is at least much more general. Black's Law Dictionary defines *proprietary rights* as "[a] right that is part of a person's estate, assets, or property, as opposed to a right arising from a person's legal status", while *interest* simply means "[a] legal share in something […]". This generalization results in qualitative impoverishment, in addition to not accurately reflecting the meaning of the source text term.

Artikel 2

Zaken zijn de voor menselijke beheersing vatbare stoffelijke objecten.

Things are corporeal objects susceptible of human control.	Things are corporeal objects which can be subject to human control.

[…]

Artikel 3

1 Onroerend zijn de grond, de nog niet gewonnen delfstoffen, de met de grond verenigde beplantingen, alsmede de gebouwen en werken die duurzaam met de grond zijn verenigd, hetzij rechtstreeks, hetzij door vereniging met andere gebouwen of werken.

1. **The following are immovable[1][2][3][9]**: land, unextracted minerals, plants attached to land, buildings and works **durably** united with land, either directly or through incorporation with other buildings or works.	1. **The following are immovable[1][2][3][9]**: land, unextracted minerals, **plants growing on land[1][2]**, buildings and works **durably** united with land, either directly or by incorporation with other buildings or works.

The following are immovable: Here both translators have chosen to adjust the sentence structure in order to create a more idiomatic translation, as this allowed them to maintain end focus. This rationalization in order to produce a more idiomatic translation subsequently leads to expansion and clarification, as the translators were forced to insert an additional subject into the first clause. Consequently, the parallelism between this paragraph and the following paragraph ("Onroerend zijn […]", "Roerend zijn […]") is lost – a destruction of linguistic patterns –although attempting to maintain this parallelism would arguably have led to an unnecessarily unidiomatic translation. In Berman's terms, the translators seemed to be concerned more with maintaining the meaning rather than the letter (form), although whether this is an issue is debatable – the legal interpretation of the translation when compared to the source text is unlikely to be affected.

plants growing on land: Here Warendorf et al. have chosen to give their interpretation to what is said in the source text, in order to produce a more "natural" translation. This choice results in rationalization and clarification. Apart from being a deformation, this could arguably cause the translation be interpreted differently from the source text – the two phrases do not necessarily have the same meaning, after all – although this would require a very literal interpretation.

durably: Here, both translators have chosen to translate *duurzaam* literally. While this does not necessarily result in a deformation – in fact, Berman would probably approve of such a literal translation – it is worth noting that, in the case of the Warendorf translation, which aims at producing a translation which is accessible to a Common Law audience, we may find a Common Law alternative in *permanently*. Even with regards to the Haanappel translation, which did not aim at using Common Law terminology, it is worth noting that both the Civil Code of Quebec and the Louisiana Civil Code use *permanently* (or *of a permanent nature* in case of the former).

2 Roerend zijn alle zaken die niet onroerend zijn.

2. **All things which are not immovable,[1] are movable.[1][9]**	2. **All things which are not immovable, are movable.[1][9]**

All things which are movable,: Here, the translators have chosen to use a comma where it is simply not necessary. Both translations, like the source text, contain a restrictive relative clause, which do not require the use of a comma either before or after the clause (as opposed to a non-restrictive relative clause). This seems to be a form of rationalization where the translators may have thought inserting a comma would improve the readability of the translation.

All things which are not immovable, are movable: In addition to the unnecessary use of punctuation, both translations contain changes to the structure of the source text in order to create a more idiomatic translation, destroying the linguistic patterns of the source text – i.e. the parallelism between Article3(1) and 3(2). It could be seen as a necessary change, as maintaining the sentence structure of the source text would result in a grammatically unusual translation. However, it would have been possible to alter

the sentence structure of this paragraph and the previous one in such a way that at least the parallelism between the two paragraphs would have been maintained.

Artikel 4

1 Al hetgeen volgens verkeersopvatting onderdeel van een zaak uitmaakt, is bestanddeel van die zaak.

1. **A component part of a thing is anything which, according to common opinion, forms part of that thing.[1]**	1. **A component part of a thing is anything commonly considered to form part of that thing.[1]**

component part: Here again, we see what seems to be a literal translation of the source text term, although it is also quite possible that Haanappel drew inspiration from the Louisiana Civil Code, which also contains the term *component part* (the Civil Code of Quebec uses *integral part*). Again, while this is not necessarily a deformation as Berman would see it, there is one point worth noting. Much like in previous cases (e.g. the translation of *duurzaam* discussed above), Warendorf et al. have followed the translation of Haanappel, despite the availability of a perfectly viable Common Law translation. In Black's Law Dictionary, *fixtures* is defined as "[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property […]". This definition coincides perfectly with the definition of *bestanddeel* found in Article 4(2) below. It seems strange that the translation by Warendorf et al., which was meant to be accessible to a Common Law audience, would use *component part* over *fixture*.

A component part of a thing is anything which, according to common opinion, forms part of that thing: Here we see another case of rationalization with regards to

sentence structure, with the two clauses being interchanged, although in this case it is arguably unnecessary. Maintaining the structure of the source text would have created a translation that is perfectly grammatically correct. On the other hand, if the aim of legal translation is to create a target text which expresses "uniform intent", as Šarčević argues, the existing translations are perfectly acceptable.

2 Een zaak die met een hoofdzaak zodanig verbonden wordt dat zij daarvan niet kan worden afgescheiden zonder dat beschadiging van betekenis wordt toegebracht aan een der zaken, wordt bestanddeel van de hoofdzaak.

2. A thing which is attached to a principal thing in such a manner that it cannot be separated therefrom without substantial damage being done to either,**[1]** becomes a component part of that thing.	2. A thing attached to a principal thing in such a manner that it cannot be separated therefrom without substantial damage being done to either,**[1]** becomes a component part of that thing.

A thing which is attached to a principal thing in such a manner that it cannot be separated therefrom without substantial damage being done to either: Another case of unnecessary use of commas. For a more detailed discussion, see the annotation under Article3(2).

[…]

Artikel 6

Rechten die, hetzij afzonderlijk hetzij tezamen met een ander recht, overdraagbaar zijn, of er toe strekken de rechthebbende stoffelijk voordeel te verschaffen, ofwel verkregen

zijn in ruil voor verstrekt of in het vooruitzicht gesteld stoffelijk voordeel, zijn vermogensrechten.

Patrimonial rights are those which, either separately or together with another right, are transferable; **rights[1][2][3]** which are intended to procure a material benefit to their holder; or **rights[1][2][3]** which have been acquired in exchange for actual expected material benefit.	**Proprietary rights[8]** are **any rights of a proprietary nature[1][2][3]** which, either separately or together with another right, are transferable; **rights[1][2][3]** which are intended to procure a tangible benefit to their holder, or **rights[1][2][3]** which have been acquired in exchange for actual or expected tangible benefit.

Proprietary rights: For the issue regarding the translation of *vermogensrechten* as *proprietary rights*, see the annotation under Article 1. What is of note here is that, in Article 1, Warendorf et al. translated *vermogensrechten* as “proprietary rights **and interests**” [emphasis mine], and here we see that the *interests* have suddenly disappeared. This is an example of the destruction of underlying networks of signification which undermines the internal references within the translation. Additionally, it leads readers to wonder what the actual significance of that term was. If a term is not important enough to include in the translation in subsequent appearances, one wonders why it was included in the first place.

any rights of a proprietary nature[1][2][3]: Warendorf et al. have chosen to explicitize the term *proprietary rights*, where the source text does not. However, it is debatable what purpose this serves – one would assume that the proprietary nature of proprietary rights is implicit in the term itself, as is also shown in the definition of *proprietary rights* in Black’s Law Dictionary: “[a] right that is part of a person’s estate,

assets, or property, as opposed to a right arising from the person's legal status".
Additionally, this attempt at clarification arguably does little to actually clarify the source text term, and merely leads to unnecessary expansion of the text.

rights: Here the word *rights* (Du. *rechten*) has been explicitized in each instance where it is omitted in the source text, resulting in expansion. One could argue that it is somewhat unnecessary, although it has no effect on the interpretation of the translation. On the other hand, it is a useful explicitation in that it divides the sentence up into separate pieces and reminds the reader of the topic each time, making for a translation which is more easily understandable.

Artikel 7

Een afhankelijk recht is een recht dat aan een ander recht zodanig verbonden is, dat het niet zonder dat andere recht kan bestaan.

A **dependent right** is one which is related to another right in such a fashion that it cannot exist independently **thereof [4]**.	A **dependent right** is one which is related to another right in such a way that it cannot exist independently **thereof [4]**.

dependent right: A literal translation of the source text term, *dependent right* does not appear in Black's Law Dictionary, nor in the Louisiana Civil Code or the Civil Code of Quebec, making it difficult to trace why the translators decided on this translation. As such, it could be described as a foreignizing translation choice, although, as mentioned above, neologisms may not always be understood. An alternative translation which is more common in English jurisdictions would be *accessory right*. Black's Law Dictionary defines *accessory right* as "[a] supplementary right that has been added to

the main right that is vested in the same owner”. Coincidentally, *accessory right* is used both in the Louisiana Civil Code and the Civil Code of Quebec.

thereof: Usage of pronominal adverb is a feature of legalese, although it arguably does not affect the readability of the target text too much in this case. However, this translation deforms the text in that it alters the style of the original to be more “elegant” or “refined”, which is unnecessary. An acceptable alternative translation which avoids both legalese and deformations would have been “[…] independently of that other right”. As an additional note, this deformation shows that Berman’s system of deforming tendencies might not be entirely complete. Whereas Berman lists clarification and expansion as deforming tendencies, this translation does exactly the opposite – it makes vague what is clear in the source text and compresses it. These deformations do not seem to appear in the system that Berman has laid out.

Artikel 8

Een beperkt recht is een recht dat is afgeleid uit een meer omvattend recht, hetwelk met het beperkte recht is bezwaard.

A **dismembered right** is one which is derived from a more comprehensive right, the latter being encumbered with the dismembered right.	A **limited right** is one which is derived from a more comprehensive right which is encumbered with the limited right.

dismembered right/limited right: Fockema Andreae defines *beperkte rechten* as “dochterrechten, afgeleid uit meer omvattende (moeder)rechten die met [beperkte rechten] zijn bezwaard”. Loonstra (2009, 179-180) explains that, in many cases, the *moederrecht* is the right of ownership (Du. *eigendomsrecht*), and *beperkte rechten* may

be such rights as the right of usufruct (Du. *vruchtgebruik*) or easements (Du. *erfdienstbaarheid*). As such, the term *dismembered right* most likely refers to the *dismemberment of ownership*. According to Black's Law Dictionary, in Civil Law, "[t]he right of ownership may be dismembered and its components conveyed in the form of independent real rights, such as the right of use, the right of usufruct, and the right of security". The term also appears in the English version of the Civil Code of Quebec, which may have prompted the translators to choose this particular translation.

At first sight, *limited right* seems to be merely a literal translation of *beperkt recht*. Although it does not appear in Black's Law Dictionary, it can be found in a number of publications on property law – along with a variation of it: *limited property rights* (see, for example, Bouckaert 2010, 34). Although this term may be more difficult to find in other publications, one excuse for such a translation may be the fact that the term is defined in the text itself.

However, if we wish to find a Common Law alternative, we may turn to a term which both translations already seem to hint at, namely *encumbrance*. *Encumbrance* is defined in Black's Law Dictionary as "[a] claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage".

Artikel 9

1 Natuurlijke vruchten zijn zaken die volgens verkeersopvatting als vruchten van andere zaken worden aangemerkt.

1. **Natural fruits** are things which, according to common opinion, are considered to be fruits of other things.	1. **Natural fruits** are things which are commonly considered as fruits of other things.

Natural fruits: *Natural fruits* is a Civil Law term which Black's Law Dictionary defines as "[a] product of the land or of animals". This coincides with the definition of *natuurlijke vruchten*. The term is also used in the Louisiana Civil Code, although the Quebec Civil Code merely uses the term *fruits*. As it is very much a literal translation of the source text term, it does not result in any deformations.

2 Burgerlijke vruchten zijn rechten die volgens verkeersopvatting als vruchten van goederen worden aangemerkt.

2. **Civil fruits** are rights which, according to common opinion, are considered to be fruits of property	2. **Civil law fruits[2][3]** are rights which are commonly considered as **benefits[5][8]** from property.

Civil fruits: Fockema Andreae defines *burgerlijke vruchten* as "rechten die als opbrengsten van rechten worden aangemerkt, zoals dividenden". *Civil fruit* is defined in Black's Law Dictionary as "[r]evenue derived from a thing by operation of law or by reason of a juridical act, such as lease or interest payments, or certain corporate distributions". The Louisiana Civil Code also contains the term *civil fruits*, while the Civil Code of Quebec merely uses *fruits*. Much like the translation of *natuurlijke vruchten* above, this is a literal translation of the source text term, and as such does not result in any deformations.

Civil law fruits: One might ask themselves why Warendorf et al. chose to translate with *civil law fruits* here instead of *civil fruits*. The term *civil law fruits* does not appear in Black's Law Dictionary. Furthermore, a Google search reveals that *civil fruits* is used significantly more frequently than *civil law fruits*. Only three other sources found online contain the term *civil law fruits* – a book on the legal framework of Slovakia, a book on

Roman Private Law, and a book on Soviet Civil Law – and even in those cases, it appears only once or twice. Moreover, judging from the context of these sources, both terms seem to have the same meaning. Given that the translation by Warendorf et al. drew from the Haanappel translation, this decision to translate with a much more uncommon term is quite curious. In Berman's terms, it is an attempt at clarification, resulting in expansion, which arguably adds nothing meaningful to the translation.

benefits: Black's Law Dictionary points out that *fruits* – including the terms *natural fruits* and *civil fruits* – are Civil Law terms. Here the translators have chosen to avoid Civil Law terminology, translating instead with *benefits*, which Black's Law Dictionary defines as "[p]rofit or gain […]". This choice for a much more generalizing term is quite curious, as in previous instances the translators did decide to translate the term *vruchten* with *fruits*, leading to the destruction of underlying networks of signification – although this might be because the term *benefits* is part of the definition of the term *civil law fruits*, which serves as a label, and the translators may then have wanted to make the definition itself more easily understandable. Nevertheless, the term *benefits* lacks the Civil Law connotations and specificity of use that are present in the term *fruits*, and as such could be seen as qualitative impoverishment.

3 De afzonderlijke termijnen van een lijfrente gelden als vruchten van het recht op de lijfrente.

3. The individual **arrears[4]** of **life-rents** are deemed to be fruits of the right to the life-rent.	3. Each **annuity** instalment is deemed to be a fruit of the right to annuity.

arrears: *Arrear* is defined in Black's Law Dictionary as "[a]n unpaid or overdue debt".

This implication of unpaid or overdue debts does not appear in the definition of *termijnen* in Fockema Andreae, which merely states "tijdslimiet; […] uiterste limiet, waarbinnen een rechtshandeling of feitelijke handeling moet plaatsvinden". It is unclear why the translators have chosen to translate with a term which has a slightly different meaning here, although one it might simply be a matter of style – As Merriam-Webster (2016) notes, *arrears* finds it origins in the Anglo-French *arrere*, and the translators may have wanted to reflect the influence of French language Quebec law in their translation. As such, it could be seen as a type of stylistic ennoblement, or it could merely be interference from the French version of the translation.

life-rents: Fockema Andreae defines *lijfrente* as "periodieke uitkering verschuldigd gedurende het leven van een of meer bepaalde personen, of gedurende zekere tijd mits de betrokken persoon in leven is. Black's Law Dictionary contains a definition of *life-rent* (or *liferent*) that applies to Scots law: "[t]he right to use and enjoy during a lifetime the property of another (the fiar) without consuming its substance". This definition obviously differs from the definition of *lijfrente* in Fockema Andreae – it is more reminiscent of the term *usufruct* (Du. *vruchtgebruik*). Additionally, the term *life-rent* does not seem to appear in either the Louisiana Civil Code or the Civil Code of Quebec – curiously enough, however, both of these codes do use the term *annuity* (defined below). A more specific form of *annuity* which explicitizes the condition of the annuitant being alive can be found in Black's Law Dictionary – namely *life annuity*. I was unable to find any sources which use the term *life-rent* in a way similar to the Dutch *lijfrente*. While Berman would likely approve of such a literal translation, it simply does not help readers understand the source text term in any way.

annuity: Black's Law Dictionary defines *annuity* as "[a] fixed sum of money payable

periodically; specif., a particular amount of money that is paid each year to someone, usu. until death". An acceptable functional equivalent which is easily understandable to Common Law readers.

4 Een natuurlijke vrucht wordt een zelfstandige zaak door haar afscheiding, een burgerlijke vrucht een zelfstandig recht door haar opeisbaar worden.

4. **A natural fruit which is separated from a thing[1][9]** becomes an independent thing; a civil fruit becomes an independent right by becoming exigible.	4. **A natural fruit separated from a thing[1][9]** becomes an independent thing; a civil law fruit becomes an independent right **when it becomes exigible[1][9]**.

A natural fruit which is separated from a thing/A natural fruit separated from a thing: This paragraph forms a type of opposition, which describes how natural fruits and civil fruits become independent. Chroma (2014, 138) notes that in these cases a basic translational rule is that "language should be similar and divert only where the distinction is at issue". In both translations, rationalization occurs, as the order of the sentence is changed. As a result, the parallelism (the linguistic pattern) between the two clauses is lost, despite such a translation being perfectly possible, as we see in the second clause of the Haanappel translation, which is more or less a literal translation that reflects the structure of the source text. Although this translation will most likely not affect the legal interpretation of either translation, it is yet another instance where the translators seemed to have sacrificed form in favor of meaning (although there is arguably no gain in meaning either).

when it becomes exigible: This is a case of rationalization of the source text sentence structure into a more idiomatic target language expression. Additionally, as we have

seen in the above annotation, the linguistic pattern present in the source text – the parallelism between the two clauses – is lost. While Berman would perhaps argue that it is an unnecessary deformation of the source text structure, the relevance of this deformation is debatable, as the legal interpretation of the translation is most likely not affected.

Artikel 10

Registergoederen zijn goederen voor welker overdracht of vestiging inschrijving in daartoe bestemde openbare registers noodzakelijk is.

Registered property is property the transfer or creation of which requires entry in **the public registers, provided for that purpose[1]**.	Registered property is property the transfer or creation of which requires entry into **the appropriate public registers[1].**

the public registers, provided for that purpose/the appropriate public registers: The problem here lies in whether one should use a restrictive relative clause or a non-restrictive relative clause. It seems to be a case of rationalization, as Haanappel added a comma in his translation which is not present in the source text, perhaps in an attempt to make the translation more readable – however, in doing so, the meaning of the source text is changed. As the translation stands right now, the implication could be that there are public registers, provided for the purpose of recording the transfer or creation of registered property, and only those public registers. Given the structure of the source text, I think a restrictive relative clause would have been more appropriate here. Curiously enough, in Article 89 (1), the Haanappel translation does use a restrictive relative clause. The Warendorf et al. translation avoids the issue entirely, using an

adjective instead of a relative clause, although this also results in rationalization of the sentence structure.

Artikel 11

Goede trouw van een persoon, vereist voor enig rechtsgevolg, ontbreekt niet alleen, indien hij de feiten of het recht, waarop zijn goede trouw betrekking moet hebben, kende, maar ook indien hij ze in de gegeven omstandigheden behoorde te kennen. Onmogelijkheid van onderzoek belet niet dat degene die goede reden tot twijfel had, aangemerkt wordt als iemand die de feiten of het recht behoorde te kennen.

Where **good faith** of a person is required to produce a juridical effect, such person is not acting in good faith if he knew the facts or the law to which his good faith must relate or if, in the given circumstances, he should know them. Impossibility to inquire does not prevent **the person, who had good reasons to be in doubt,[1]** from being considered as someone who should know the facts or the law.	Where the **good faith** of a person is required to give **legal effect[8]** to something, such person does not act in good faith if he knew, or ought, in the circumstances, to have known, of the facts or the law to which his good faith must relate. The impossibility to make enquiries does not prevent a person with good reason to be in doubt from being **deemed[8]** to know the facts or the law.

good faith: Whereas good faith as a general principle is widely accepted in many Civil Law jurisdictions, it has been met with resistance in English Common Law, which generally frowns upon establishing such general principles, although it is of course not opposed to the idea of good faith in contracts itself (Forte 1999, 7). This again highlights a problem for the Warendorf translation, which aims to avoid Civil Law

terminology and to produce a translation which is accessible to Common Law readers – sometimes it is simply impossible to avoid the use of Civil Law terminology. As it is a literal translation, however, it does not lead to any deformations.

legal effect: This is a case of the destruction of underlying networks of signification. Warendorf et al. use the term *legal effect* as a translation for *rechtsgevolg* here, while *juridical effect* is used in Article 33. While both terms seem have the same general meaning – Black's Law Dictionary lists *legal* as an alternative for *juridical* – legal is perhaps more widely used, especially in Common Law jurisdictions – the British National Corpus lists 50 results for *legal effect*, and only 1 result for *juridical effect*. It should also be noted that both the Louisiana Civil Code and the Civil Code of Quebec use both the adjectives *legal* and *juridical* – although neither contain the phrase *legal effect* or *juridical effect* – this could mean that there is at least some difference in nuance or collocation. Nevertheless, the choice by Warendorf et al. to translate as *legal effect* in one instance, and *juridical effect* in another, is somewhat confusing.

the person, who had good reasons to be in doubt,: Here, the same issue as in Article 10 arises – the addition of a comma, perhaps in an attempt to produce a more readable translation, which changes a restrictive relative clause into a non-restrictive relative clause. The relative clause now merely functions as extra information rather than essential information and, as a result, the meaning of the translation when compared to the source text is changed. A restrictive relative clause – i.e. without the comma – would have been more appropriate here. This particular example perfectly demonstrates that disregarding the importance of punctuation can have fairly meaningful consequences.

deemed: Another case of the destruction of underlying networks of signification; the term *aangemerkt* is translated in all previous cases as *considered* in both translations,

but here Warendorf et al. suddenly switch to *deemed*. A curious, if minor, detail, although Berman would perhaps argue that the current translation disregards the underlying networks of the source text and leads to an unnecessary deformation.

Artikel 12

Bij de vaststelling van wat redelijkheid en billijkheid eisen, moet rekening worden gehouden met algemeen erkende rechtsbeginselen, met de in Nederland levende rechtsovertuigingen en met de maatschappelijke en persoonlijke belangen, die bij het gegeven geval zijn betrokken.

In determining what reasonableness and **equity** require, reference must be made to generally accepted principles of law, to current judicial views in the Netherlands, and to the particular societal and private interests involved.	In determining what reasonableness and **fairness** require, generally accepted principles of law, current judicial views in the Netherlands and the societal and private interests involved in the case must be taken into account.

equity: The translation of *billijkheid* with *equity* is a rather risky one. While Black's Law Dictionary does have a definition for *equity* as "[f]airness, impartiality", equity also refers to "[t]he system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law […] when the two conflict". Barker (2014, 12) describes equity as a supplement on the Common Law, filling in the gaps and making the English legal system more complete. Equity does appear in both the Louisiana Civil Code and the Civil Code of Quebec, however, so that may have prompted this translation. However, given the strong connotations with the equity system in many Common Law jurisdictions, perhaps a more neutral translation would

have been more suitable.

This example shows that Berman's system of deforming tendencies is perhaps not entirely complete. Whereas qualitative impoverishment denotes translations which lack the "iconic richness" of the source text, this translation seems to do the opposite, replacing an arguably shallow source text language with a target language term which is far more "iconic".

fairness: Warendorf et al. have chosen for a more neutral translation. Barker (2014, 12) also notes: "[i]n a general sense equity means fairness". *Fairness*, however, does not have any connotations with the system of equity, which makes it a much safer translation.

Artikel 13

1 Degene aan wie een bevoegdheid toekomt, kan haar niet inroepen, voor zover hij haar misbruikt.

1. The holder of a right may not exercise it to the extent that **it is abused[1]**.	1. The holder of a right may not exercise it to the extent that **its exercise constitutes an abuse[1][2][3]**.

it is abused/its exercise constitutes an abuse: Here the subject in both translations is changed when compared to the source text, resulting in rationalization, as the translators may have thought it would make for a more idiomatic translation. Moreover, in the translation by Warendorf et al. we see that clarification occurs, as the translators explicitize what is not present in the source text, which in turn leads to expansion. Like many other deformations of the source text sentence structure, it is perhaps a somewhat unnecessary change, although unlikely to affect the legal interpretation of the translation

when compared to the source text.

2 Een bevoegdheid kan onder meer worden misbruikt door haar uit te oefenen met geen ander doel dan een ander te schaden of met een ander doel dan waarvoor zij is verleend of in geval men, in aanmerking nemende de onevenredigheid tussen het belang bij de uitoefening en het belang dat daardoor wordt geschaad, naar redelijkheid niet tot die uitoefening had kunnen komen.

2. Instances of abuse of right are the exercise of a right with the sole **intention[8]** of harming another or for a **purpose** other than that for which it was granted; or the exercise of a right where its holder could not reasonably have decided to exercise it, given the disproportion between the interest to exercise the right and the harm caused thereby.	2. Amongst other things, a right is abused where it is exercised for the sole purpose of harming another or for a purpose other than that for which it was granted or where its exercise was unreasonable, given the disproportion between the interests in its exercise and the harm caused thereby.

intention/purpose: Another case of the destruction of underlying networks of signification; in the Haanappel translation, *doel* is initially translated as *intention*, where in a later instance it is translated as *purpose*. Moreover, *intention* is used consistently as a translation for *wil* in Articles 33-35. There is a subtle difference between *intention* and *purpose*. According to Black's Law Dictionary *intention* is the "willingness to bring about something planned", while *purpose* is "[a]n objective, goal, or end", although whether this will lead to a different interpretation of the translation is questionable. The Warendorf et al. translation consistently uses the term *purpose*.

[...]

Titel 2. Rechtshandelingen

Title 2 **Juridical acts**	Title 2 **Juridical acts**

Juridical acts: According to Fockema Andreae, a *rechtshandeling* is “[een] instrument tot het gestalte geven aan rechtsbetrekkingen: handeling waarvan op grond van de context waarbinnen zij wordt verricht mag worden verondersteld dat de ‘handelende’ daarmee bepaalde rechtsgevolgen beoogd”. Common Law jurisdictions often have no term for the overarching concept of *juridical acts*, so translators are almost forced to turn to Civil Law terminology. Black’s Law Dictionary defines *juridical act* as “[a] lawful volitional act intended to have legal consequences”. It should be noted that the term *rechtshandeling* in Dutch law is relatively new – it did not appear, for instance in the 1838 Civil Code. The German Civil Code, which entered into force in 1900, does include a similar term in *Rechtsgeschäft* – which is also often translated as *juridical act* (Sefton-Green 2012, 38).

Artikel 32

1 Iedere natuurlijke persoon is bekwaam tot het verrichten van rechtshandelingen, voor zover de wet niet anders bepaalt.

1. Every natural person **has the capacity[1][3]** to perform juridical acts to the extent that the law does not provide otherwise.	1. Every natural person **has the capacity[1][3]** to perform juridical acts to the extent that the law does not provide otherwise.

has the capacity: Here an adjective phrase is changed into a verb phrase – an example

of rationalization resulting in minor expansion, as it requires the addition of a definite article. While it is a minor deformation with little to no consequences regarding the legal interpretation of the source text, a translation containing the same structure as the source text would have been viable: “Every natural person is capable of performing…”.

2 Een rechtshandeling van een onbekwame is vernietigbaar. Een eenzijdige rechtshandeling van een onbekwame, die niet tot een of meer bepaalde personen gericht was, is echter nietig.

2. A juridical act of an incapable person **may be annulled[1][9]**. A unilateral juridical act of an incapable person, however, is null where it is not addressed to one or more specifically determined persons.	2. A juridical act of an incapable person **may be annulled[1][9]**. A unilateral juridical act of an incapable person, however, shall be **null and void[3][4]** where it is not addressed to one or more specific persons.

may be annulled: Here again the source text contains a parallelism that both translations seem to ignore, leading to the destruction of linguistic patterns. A notable feature of the term *vernietigbaar*, according to Fockema Andreae, is that “in tegenstelling tot nietigheid blijven de rechtshandelingen van kracht totdat zij met succes worden aangevochten (vernietigd)”. A similar term in English would be *voidable*, which means “[v]alid until annulled”. Additionally, Black’s Law Dictionary notes (under *void*) that “[t]he distinction between *void* and *voidable* is often of great practical importance. Whenever technical accuracy is required, *void* can be properly applied only to those provisions that are of no effect whatsoever”. It can be argued that this distinction is definitely of importance here. While one might rightly argue that this is also implied in

the phrase *may be annulled*, the use of both *voidable* and *void*/*null* would also have allowed the translators to avoid this particular deformation and maintain the parallel structure present in the source text – i.e. “A juridical act (…) is voidable. A unilateral juridical act (…) is void/null”.

null and void: According to Fockema Andreae, *nietigheid* occurs in the case of a “rechtshandeling die de beoogde gevolgen ontbeert”. Black’s Law Dictionary states that *null* means “[h]aving no legal effect; without binding force”. Similarly, *void* means “[o]f no legal effect”. However, Black’s Law Dictionary (under *null*) states that “[t]he phrase *null and void* is a common redundancy”. De Groot (1996, 45), addressing the translation of legal doublets which are common in legal English, states that the best approach to translating legal doublets is to formulate them more concisely, in order to prevent that the reader gets the impression that they are dealing with a historical document. Here, however, the translators seem to have taken the exact opposite direction, inserting a legal doublet where none existed in the first place. It is a deformation – in this case an expansion of the mass of the source text which adds nothing to its meaning, and seems to be merely a stylistic choice. While this choice will most likely not have any consequences as to the legal interpretation of the translation, translating as either *null* or *void* would probably have been sufficient and perfectly understandable for any Common Law readers.

[…]

Artikel 34

1 Heeft iemand wiens geestvermogens blijvend of tijdelijk zijn gestoord, iets verklaard,

dan wordt een met de verklaring overeenstemmende wil geacht te ontbreken, indien de stoornis een redelijke waardering der bij de handeling betrokken belangen belette, of indien de verklaring onder invloed van die stoornis is gedaan. Een verklaring wordt vermoed onder invloed van de stoornis te zijn gedaan, indien de rechtshandeling voor de geestelijk gestoorde nadelig was, tenzij het nadeel op het tijdstip van de rechtshandeling redelijkerwijze niet was te voorzien.

1. Where a person whose mental faculties are permanently or temporarily **impaired** makes a declaration, the intention corresponding to that declaration is deemed to be lacking if the **impairment** prevented a reasonable appraisal of the interests involved or if the declaration was made under influence of that **disturbance[8]**. Unless prejudice was not reasonably foreseeable at the time of the juridical act, a declaration is presumed to have been made under the influence of the **disturbance[8],[1]** if the juridical act was prejudicial to the mentally **disturbed[8]** person.	1. Where a person whose mental faculties are permanently or temporarily **impaired** makes a declaration, the intention corresponding to that declaration is deemed to be absent if the **impairment** prevented a reasonable appraisal of the interests involved or if the declaration was made under the influence of that **disturbance[8]**. Unless the prejudice was not reasonably foreseeable at the time of the juridical act, a declaration is presumed to have been made under the influence of the **disturbance[8]** if the juridical act was prejudicial to the mentally **disturbed[8]** person.

impaired/impairment/disturbed/disturbance: While not necessarily an issue of legal translation, this is a strange case of a destruction of underlying networks of signification, notably within the same article. Whereas the Dutch text consistently uses

the term *stoornis*, both the translation by Haanappel and the translation by Warendorf et al. first use the terms *impaired*/*impairment*, and halfway through the article switch to using *disturbed* or *disturbance*.

,: Here again, we run into an issue of rationalization with regards to punctuation in the Haanappel translation – perhaps because of interference from the source text, or in an attempt to improve the readability of the translation. However, because the subordinate clause follows the main clause in this sentence, a comma is simply not necessary.

2 Een zodanig ontbreken van wil maakt een rechtshandeling vernietigbaar. Een eenzijdige rechtshandeling die niet tot een of meer bepaalde personen gericht was, wordt door het ontbreken van wil echter nietig.

2. A juridical act without such intention may be annulled. However, the absence of intention renders a unilateral juridical act null **where it is not addressed to one or more specifically determined persons[1]**.	2. A juridical act without such intention may be annulled. However, the absence of intention renders a unilateral juridical act null and void **where it is not addressed to one or more specific persons[1]**.

where it is not addressed to one or more specific persons: Here, the sentence structure in both translations is changed. As Berman notes, rationalization often occurs when the structure of the source text does not adhere to target language conventions. In this case, the emboldened clause is moved towards the end of the sentence, where it was in initial position in the source text. This is because new information is often placed at the end of a sentence in English, while Dutch allows for more freedom in this regard (Hannay et al. 1996, 145). As such, it could be argued that this deformation is a necessary one.

Artikel 35

Tegen hem die eens anders verklaring of gedraging, overeenkomstig de zin die hij daaraan onder de gegeven omstandigheden redelijkerwijze mocht toekennen, heeft opgevat als een door die ander tot hem gerichte verklaring van een bepaalde strekking, kan geen beroep worden gedaan op het ontbreken van een met deze verklaring overeenstemmende wil.

The absence of intention in a declaration[1] cannot be invoked against a person who has interpreted another's declaration or conduct, in conformity with the sense which he could reasonably attribute to it in the circumstances, as a declaration of a particular tenor made to him by that other person.	**The absence of intention in a declaration[1]** cannot be invoked against a person who interpreted another's declaration or conduct in conformity with the sense which he could reasonably attribute to it in the circumstances as a declaration of a particular implication made to him by that other person.

The absence of intention in a declaration…: The source text here is an extremely long complex sentence, and it is no wonder that the translators have changed the structure in order to create a more fluent translation. Leaving the main clause at the end, as in the source text, would have created frontal overload and double orientation, which is acceptable in Dutch, but not in English. In that regard, while this may be a deformation of the sentence structure, it is arguably necessary from a viewpoint of effective writing.

[...]

Artikel 84

1 Voor overdracht van een goed wordt vereist een levering krachtens geldige titel, verricht door hem die bevoegd is over het goed te beschikken.

1. Transfer of property requires delivery pursuant to a **valid title** by the person who has the right to dispose of the property.	1. Transfer of property requires delivery pursuant to a **valid title** by the person who has the right to dispose of the property.

valid title: While this translation does not result in any of Berman's deforming tendencies, there are some legal issues which are relevant here. Fockema Andreae defines *titel* as: "juridische basis, […] oorzaak voor overdracht van een goed". Loonstra (2009, 181) further explains that the *titel* in the case of a purchase often means the *purchase agreement* (Du. *koopovereenkomst*), although in other cases it can also be a *schenking* or *ruilovereenkomst*. *Title*, on the other hand, is defined in Black's Law Dictionary as "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of the property; the legal link between a person who owns property and the property itself". Obviously there seems to be a discrepancy between these two definitions. The translation *title* most likely comes from the French *titre* – and indeed, the French translation uses *titre* – as the translator may have wanted to avoid the Common Law *consideration* which, according to Black's Law Dictionary, is "that which motivates a person to do something, esp. to engage in a legal act. Consideration […] is necessary for an agreement to be enforceable". While this decision may be understandable in the case of the Haanappel translation, which aimed at the use of Civil Law terminology – *title*, along with related expressions such as *by gratuitous title*, are used in the Louisiana Civil Code and the Civil Code of Quebec – the use of *title* in the translation by Warendorf et al. is somewhat confusing, especially

given the presence of a Common Law equivalent in *consideration*, and the vastly different definition of the term *title* in Common Law jurisdictions. Alternatively, Foster (2009) suggests *cause* or *causa*, which Black's Law Dictionary describes as: "the concept of cause as legal consideration is used to determine which transactions are binding and which ones are not: 'Cause is the reason why a party obligates himself'". This term seems to come closer to the definition of *titel* and avoids Common Law connotations.

2 Bij de titel moet het goed met voldoende bepaaldheid omschreven zijn.

2. **The title must describe the property in a sufficiently precise manner.[1]**	2. **The title must describe the property in a sufficiently precise manner.[1]**

The title must describe the property in a sufficiently precise manner: This is a case of rationalization, as the passive structure of the source text is changed into active. The change from active to passive is arguably a necessary one in this case, as literally translating "[b]ij de titel" in a passive construction in English would most likely have led to a grammatically unusual translation or would have required explicitation.

[...]

Artikel 86

1 Ondanks onbevoegdheid van de vervreemder is een overdracht overeenkomstig artikel 90, 91 of 93 van een roerende zaak, niet-registergoed, of een recht aan toonder of order geldig, indien de overdracht anders dan om niet geschiedt en de verkrijger te goeder trouw is.

1. Although an alienator lacks the right to dispose of the property, the transfer pursuant to articles 90, 91 or 93 of a moveable thing, unregistered property, or a right payable to bearer or order is valid, if the transfer is not **by gratuitous title** and if the acquirer is in good faith.	1. Although an alienator lacks the right to dispose of the property, the transfer pursuant to Article 90, 91 or 93 of a **moveable object[8]**, unregistered property, or a right to bearer or order is valid, if the transfer is not **by gratuitous title** and the acquirer acts in good faith.

moveable object: Here, again, we have a case of the destruction of underlying networks of signification. While Warendorf et al. previously translated *zaak* as *thing*, here, *roerende zaak* is translated as *moveable object*. Additionally, *object* was previously used as translation for the Dutch *object* – although, admittedly, there is some overlap between the terms as per the definition of *things* in Article 2. While this translation may not cause any major problems, it does come across as unnecessary and perhaps even somewhat careless. Moreover, in Article 90 and Article 236, *roerende zaak* is translated as *moveable thing*, which makes this translation choice here rather confusing.
by gratuitous title: For the issue regarding the translation of *titel* as *title*, see the annotation under Article 84. *Gratuitous* simply means ‘for no consideration’ – coincidentally, *for no consideration* is also the suggestion given by Foster (2009). Furthermore, unlike *by gratuitous title*, it will not cause confusion among Common Law readers.

[…]

3 Niettemin kan de eigenaar van een roerende zaak, die het bezit daarvan door diefstal

heeft verloren, deze gedurende drie jaren, te rekenen van de dag van de diefstal af, als zijn eigendom opeisen, tenzij:

3. Nevertheless, the owner of a moveable thing, who has lost its possession through theft, may **revendicate** it during a period of three years from the day of theft, unless	3. Nevertheless, the owner of a moveable object, who has lost its possession through theft, may **recover** it during a period of three years from the day of theft, unless:

revendicate: According to Black's Law Dictionary, *revendication*, in Civil Law, means "[a]n action to recover real rights in and possession of property that is wrongfully held by another". A lexical and semantical equivalent, *revindicatie*, appears in Fockema Andreae, although it is not used in the Dutch Civil Code itself. *Revendicate* is used in a similar context in the Civil Code of Quebec. As this concerns only the translation of a single term, it is difficult to make any statements on deforming tendencies.

recover: Warendorf et al. have chosen for a more neutral translation that is neither specific to Common Law nor Civil Law. Coincidentally, in the definition of *revendication*, Black's Law Dictionary does provide a suggestion for a Common Law equivalent, namely *replevin*: "[a]n action for the repossession of personal property wrongfully taken or detained by the defendant". However, *replevin* might not be as easily understandable to those not familiar with Common Law. *Recover* is a more accessible term, and is also used in a similar context in Article 524 of the Louisiana Civil Code.

[…]

Artikel 89

1 De voor overdracht van onroerende zaken vereiste levering geschiedt door een daartoe bestemde, tussen partijen opgemaakte notariële akte, gevolgd door de inschrijving daarvan in de daartoe bestemde openbare registers. Zowel de verkrijger als de vervreemder kan de akte doen inschrijven.

1. Delivery required for the transfer of immoveable things is made by **notarial deed** intended for that purpose and drawn up between the parties, followed by its entry in the public registers provided for that purpose. Either the acquirer or the alienator may have the deed registered.	1. Delivery required for the transfer of immoveable things is made by **notarial instrument** intended for that purpose and drawn up between the parties, followed by its entry into the appropriate public registers. Either the acquirer or the alienator may have the instrument registered.

notarial deed/notarial instrument: According to Fockema Andreae, a *notariële akte* is "[een] door een notaris verleden openbare akte". The cognates *notariële* – referring to *notaris* – and *notarial* might cause some problems, as *notary* also brings to mind the English *notary public*, which is different from the Dutch *notaris* in both function and training. The accepted translation for *notaris* is generally *civil-law notary* (e.g., Foster 2009), however, given that the nature of the text makes it clear that we are dealing with Dutch law, and for the sake of brevity, the decision of the translators to not employ an explicitizing translation is understandable. According to Fockema Andreae, *akten* are "ondertekende geschriften, bestemd om tot bewijs te dienen". *Akten* are divided into *authentieke akten* and *niet-athentieke akten*. *Authentieke akten*, then are "in de vereiste vorm en bevoegdelijk opgemaakt door ambtenaren, aan wie bij of krachtens de wet is

opgedragen op die wijze te doen blijken van de door hen gedane waarnemingen of verrichtingen. Als authentieke akte worden tevens beschouwd de akten, waarvan het opmaken aan ambtenaren is voorbehouden, doch waarvan de wet het opmaken in bepaalde gevallen aan anderen dan ambtenaren opdraagt" (Article 157(1) of the Dutch Code of Civil Procedure). The definition of *deed*, according to Black's Law Dictionary, is "any written instrument that is signed, sealed, and delivered and that conveys some interest in property", although Barker (2014, 113) notes that, at least in England, the requirement for sealing was abolished in 1989. Zwalve (2008, 483-484) notes that Common Law does not have *authentieke akten* – the deed must simply be signed by its maker, or in the maker's presence by two witnesses. Foster instead suggests *instrument*, which Black's Law Dictionary defines as "[a] written legal document that defines rights, duties, entitlements, or liabilities". This is a somewhat more general term which does not carry the connotations with Common Law that are present in *deed* .

2 De tot levering bestemde akte moet nauwkeurig de titel van overdracht vermelden; bijkomstige bedingen die niet de overdracht betreffen, kunnen in de akte worden weggelaten.

2. The deed intended for delivery must clearly specify the title of transfer; **accessory stipulations** which do not concern the transfer may be omitted in the deed.	2. The instrument intended for delivery must clearly specify the title of transfer; **ancillary provisions** which do not relate to the transfer may be omitted from the instrument.

accessory stipulations/ancillary provisions: According to the website of the *kadaster*, a *beding* is "een voorwaarde in een overeenkomst". Black's Law Dictionary defines

stipulation as “[a] material condition or requirement in an agreement”. *Accessory* means “[s]omething of secondary or subordinate importance”.

Black’s Law Dictionary defines *provision* as “[a] clause in a statue, contract, or other legal instrument. […] A stipulation made beforehand”. *Ancillary* means “[s]upplementary; subordinate”.

Going by the definitions, these terms seem to have roughly the same meaning, so it is unclear exactly where the difference lies. What is clear that an online search for *ancillary provisions* yields significantly more hits than *accessory stipulations* – additionally, the British National Corpus yields 4 results for *ancillary provisions*, whereas *accessory stipulations* yields no results at all – which may make the former a more accessible or domesticating translation, whereas the latter may have a slightly foreignizing effect.

3 Treedt bij een akte van levering iemand als gevolmachtigde van een der partijen op, dan moet in de akte de volmacht nauwkeurig worden vermeld.

3. Where in a deed of delivery a person acts a **procurator** of one of the parties, the **procuration** must be clearly specified in the deed.	3. Where in an instrument of delivery a person acts as **attorney** of one of the parties, the **power of attorney** must be clearly specified in the instrument.

procurator/procuration: According to Fockema Andreae, a *volmacht* is “de bevoegdheid die een volmachtgever verleent aan een ander, de gevolmachtigde, om in zijn naam rechtshandelingen te verrichten”. Black’s Law Dictionary defines *procurator* as “[a]n agent or attorney-in-fact”, and *procuration* as “[t]he act of appointing someone as an agent or attorney-in-fact, so this translation seems like a perfectly acceptable

functional equivalent.

attorney/power of attorney: Black's Law Dictionary defines *attorney* and *power of attorney* as "[o]ne who is designated to transact business for another; a legal agent". And "[the ability] to act as agent or attorney-in-fact", respectively. While *attorney* is also used in the sense of "[s]omeone who practices law", when used in this sense it is often referred to as *attorney-at-law*, so the translation should not cause any major issues, although perhaps *attorney-in-fact* would have prevented any confusion from occurring in the first place.

4 Het in dit artikel bepaalde vindt overeenkomstige toepassing op de levering, vereist voor de overdracht van andere registergoederen.

4. The provisions of this article apply ***mutatis mutandis*[4]** to the delivery required for the transfer of other registered property.	4. The provisions of this article apply, ***mutatis mutandis*[4]**, to the delivery required for the transfer of other registered property.

***mutatis mutandis*:** The *Kenniscentrum Wetgeving en Juridische Zaken* indicates that *van overeenkomstige toepassing* is used "indien de bepaling waarnaar wordt verwezen, niet geheel letterlijk kan worden toegepast, maar misverstand over de toe te passen tekst uitgesloten is". *Mutatis mutandis* is a Latin term meaning "[a]ll necessary changes having been made; with the necessary changes". It is somewhat curious that Warendorf et al. use a Latin term here, despite their claim of aiming to avoid the use of Latin terms in the translation. Perhaps they thought the term was widely used enough that it would not pose a problem. The use of Latin here could, however, be seen as an exoticization, or ennoblement, as the source text makes no use of Latin.

[...]

Titel 9. Rechten van pand en hypotheek

Afdeling 1. Algemene bepalingen

Title 9 Rights of pledge and **hypothec** Section 1 General provisions	Title 9 Rights of pledge and **mortgage** Section 1 General provisions

hypothec: *Hypotheek* is defined in Fockema Andreae as "beperkt zekerheidsrecht op registergoederen, teneinde een vordering bij voorrang op het onderzette goed te verhalen; de schuldeiser is de hypotheeknemer, de schuldenaar de hypotheekgever". *Hypothec*, a Civil Law term, is defined in Black's Law Dictionary as "[a] mortgage given to a creditor on property to secure a debt". Purely going by this definition, the distinction between *hypothec* and *mortgage* (defined below) does not become immediately apparent. However, the distinction becomes clear when looking at the definition of *hypothecation*: "[t]he pledging of something as security without delivery of title or possession". As this is a foreignizing and literal translation of the source text term, it does not lead to any deformations.

mortgage: Black's Law Dictionary defines *mortgage* as "[a] conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance of the stipulated terms". The essential difference between *hypotheek* and *mortgage* is that a mortgage transfers title to the mortgagee, while a hypotheek does not – ownership stays with the *hypotheekgever*. If one wishes to avoid the use of the Civil Law *hypothec*, *equitable mortgage* might be a possible translation. Barker (2014, 280) notes that, in the case of an equitable mortgage, "the mortgagee receives merely an equitable interest in land". An argument in favor of

translating as *mortgage* would be that the term itself is defined in Article 227, thus *mortgage* could serve as what Rayar (1997, xvii) calls a label.

Artikel 227

1 Het recht van pand en het recht van hypotheek zijn beperkte rechten, strekkende om op de daaraan onderworpen goederen een vordering tot voldoening van een geldsom bij voorrang boven andere schuldeisers te verhalen. Is het recht op een registergoed gevestigd, dan is het een recht van hypotheek; is het recht op een ander goed gevestigd, dan is het een recht van pand.

1. The right of pledge and the right of hypothec are dismembered rights intended to provide recourse against the property subjected thereto for a claim for the payment of a sum of money, with preference over other creditors. Where such right has been established upon registered property, it is a hypothec; where it has been established upon other property, it is a pledge.	1. The right of pledge and the right of mortgage are limited rights intended to provide recourse against the property subject thereto for a claim for payment of a sum of money, with preference over other creditors. Where such a right has been **established over[8]** registered property, it is a mortgage; where it has been **established upon[8]** other property, it is a pledge.

established over/upon: Here Warendorf et al. have chosen to use a different preposition after two different instances of *established*, even though the term is used in the same context in both instances. This results in the destruction of underlying networks of signification. While it is not a major deformation in this instance, it is still a rather odd inconsistency that is difficult to explain, as it is difficult to find any sources that might

explain if there is any difference in meaning or use between these two collocations – although the British National Corpus yields 34 results for *established over* and only 3 results for *established upon*.

[...]

Artikel 236

1 Pandrecht op een roerende zaak, op een recht aan toonder of order, of op het vruchtgebruik van een zodanige zaak of recht, wordt gevestigd door de zaak of het toonder- of orderpapier te brengen in de macht van de pandhouder of van een derde omtrent wie partijen zijn overeengekomen. De vestiging van een pandrecht op een recht aan order of op het vruchtgebruik daarvan vereist tevens endossement.

1. The right of pledge on a moveable thing, on a right payable to bearer or order, or on the **usufruct** of such a thing or right, is established by bringing the thing or the document to bearer or order under the control of the pledgee or of a third person agreed upon by the parties. Furthermore, **endorsement** is required for the establishment of a right of pledge on a right payable to order or on the usufruct thereof.	1. The right of pledge on a moveable thing, on a right payable to bearer or order, or on the **usufruct** of such a thing or right, is established by bringing the thing or the paper to bearer or order under the control of the pledgee or of a third person agreed upon by the parties. Furthermore, **endorsement** is required for the establishment of a right of pledge on a right payable to order or on the usufruct thereof.

usufruct: Fockema Andreae defines *vruchtgebruik* as “beperkt recht om binnen het

kader van het beperkte recht eens anders goed te gebruiken en daarvan de vruchten te genieten”. According to Black’s Law Dictionary, *usufruct* is a Roman and Civil Law term meaning “[a] right for a certain period to use and enjoy the fruits of another’s property without damaging or diminishing it”. While this translation does not result in any deformations, it is important to note that, because Common Law has no full equivalents to *usufruct*, Warendorf et al. were forced to also use a Civil Law term here, which perhaps reveals a weakness in their translation strategy.

endorsement: Also called *indorsement*. According to Black’s Law Dictionary it is “[t]he placing of a signature, sometimes with additional annotation, on the back of a negotiable instrument to transfer or guarantee the instrument or to acknowledge payment”. This coincides with the definition of *endossement* in Fockema Andreae: “het overdragen (endosseren) van een wissel of cheque aan order, door de houder […] aan een geëndosseerde. Het endossement geschiedt door een verklaring op de achterzijde of op een allonge van de wissel.”

Conclusion

Of course the excerpts discussed in the comparison form only a minuscule part of the Dutch Civil Code and the translations. A more extensive comparison would have allowed for quantification of the results and provided more perspective on whether certain discrepancies were structural or incidental. This was simply outside the scope of this thesis, however.

With regards to Berman's deforming tendencies, it is fair to say that both translations contain a fair amount of rationalization, which in turn often leads to clarification, expansion, and the destruction of linguistic patterns. However, whether or not this is relevant with regards to the translation of legal texts is another matter entirely. While it could be argued that, just as the translation of legal terminology should remind readers that they are dealing with a different legal system, this should also be reflected in aspects such as sentence structure, in practice other factors often come into play as well. The nature of legal texts and their translation often rules out the possibility of annotations or translator's notes within the text itself. Furthermore, the aim of a translation and its target audience will always influence the strategy that a translator can employ and to what extent a text should be made more accessible. As noted earlier, translations do not always have the same aim as their source text counterparts. Whereas a legislative source text is primarily prescriptive, its translation might be more informative.

One specific deforming tendency which I think deserves additional attention is the destruction of underlying patterns of signification – or, in other words, the consistency with regards to the translation of terminology. The way in which specific terminology is translated, or not translated, is perhaps even more important in legal translation than it is

in literary translation. Ideally, if a single term in the source text is translated differently in different instances in the target text, one should be allowed to assume that the translator had good reason to do so. However, especially in the translation by Warendorf et al. it becomes apparent that consistency is sometimes lacking, even in instances where it seems unnecessary – for instance, the translation of *roerende zaak* as both *moveable thing* and *moveable object*. One factor which I feel might have contributed to this is the translation strategy employed by Warendorf et al. When attempting to produce a translation of a Civil Law legislative source text while at the same time aiming to avoid Civil Law terminology and to produce a text which is accessible to Common Law readers, one inevitably runs into problems, leading to Civil Law and Common Law terms being used interchangeably. This issue becomes most apparent in the use of the term *title*, which is used in its Civil Law sense in paragraph 1 of Article 84, while it is used in its Common Law sense paragraph 3 of the same Article. I suspect that this is further influenced by the fact that the Warendorf et al. translation drew from the Haanappel translation.

On the other hand, there were a few instances in the Haanappel translation that showed that the use of legal terms in their Civil Law sense might be risky, as these terms have significantly different denotations in a Common Law context. The most prominent example was the translation of *billijkheid* as *equity*, but also the use of the term *title* as a translation for *titel*.

Additionally, it is clear from the outset that the translators' focus was mainly on issues regarding the translation of legal terminology, judging by the translators' prefaces. This is a reflection of what one finds in the literature on legal translation – issues regarding the translation of legal terminology seem to attract the bulk of the attention. While this may be for good reason, it seems that questions of sentence structure and style are all but

ignored, at least judging by the translators' prefaces. This is reflected in deformations and inconsistencies in both translations with regards to sentence structure which become apparent by applying Berman's deforming tendencies to the translations, and additionally by multiple instances of unnecessary or incorrect use of punctuation. Moreover, many parallelisms which were present in the source text, often used to signify and emphasize essential differences, were lost in both translations. While it could be argued that many of these deformations do not affect the legal interpretation of the translation when compared to the source text, different legal languages often contain differences regarding style and the way in which texts are structured, and the fact that both translations ignore the issue entirely in their respective preface is telling (for a translation which does discuss these aspects, see, for instance, the preface to the English translation of the Dutch Penal Code by Rayar and Wadsworth (1997)).

Finally, Berman's list of deforming tendencies sometimes seem to fall short, or seems to be incomplete. Certain phenomena which could be seen as deformations, such as compression and generalization, cannot neatly be classified under any of the existing deforming tendencies. On the other hand, other deforming tendencies (such as the destruction of rhythm, the destruction of vernacular networks or their exoticization, the destruction of expressions and idioms, and the destruction of the superimposition of languages) did not appear in either translation and as such may simply not be relevant for the purpose of legal translation. Additionally, while Berman's system of deforming tendencies can at times point out where issues in the translation of specific legal terminology occur, it simply falls short at explaining them – for this, comparative law is required. This all points back to the issue raised in the beginning, namely that general translation studies often fail to address legal translation. While I agree with Harvey

(2002, 182-183) in that I do not think that this is because legal translation is inherently more challenging or complicated than other types of translation, there are a number of features which set it apart from the translation of literature or other types of special-purpose translation. The nature of legal language and terminology, the differences between legal systems, combined with the differing purposes of translations even within the field of legal translation all make it so that, as is often the case, general theories simply are not sufficient for special-purpose translation.

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