

Local vs. International Legal Cultures: The Linguistic Confrontation

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Abstract

Translating is an act of transfer of a word—or an expression—along with its internal meanings from a source language text to a target language text. But translating word for word can never be possible: every language has its own characteristics and its own autonomy. Worse is the translation between languages that do not belong to the same roots, as French vs. Arabic, or languages that are half cognates, as Anglo-Saxon vs. French, etc... Besides this difficulty, the field of specialization is another obstacle in translation, mainly for those who are specialized in a field but are not translators. My modest contribution raises the difficulties the translator faces in the field of legal system. Most legal systems are specific, particular and culture-based. Thus, there are some disparities between these systems all around the world. It is, therefore, a challenging field in the domain of translation because of its linguistic register. Then: How do we translate? What do we translate, mainly when the target language does not possess in its judicial system legal instances, as ‘barrister’, ‘advocate’, etc...? The register uncommonness makes the translator, who has no clear-cut knowledge of legal linguistic and semantic nature, imprisoned or handicapped.

Key Words: Legal System – Translation – Cultures – Register – Translation Difficulties

ملخص:

يهدف هذا البحث إلى تبيان الصعوبات التي تواجه المترجم أثناء ترجمته للنص القانوني، ذلك أنّ الأنظمة القانونية تختلف فيما بينها اختلافا كبيرا، وغالبا ما تكون مبنية على ثقافة محدّدة وهو ما يجعل من مهمة المترجم في هذا المجال عسيرة وشائكة جدًا.

Résumé :

Cette contribution soulève les difficultés auxquelles le traducteur est confronté au domaine de la traduction juridique. La plupart des systèmes juridiques sont spécifiques, et basés sur des cultures précises. Ainsi, des disparités entre ces systèmes existent, ce qui rend la traduction dans ce champ très difficile à cause de ses registres de langue.

Certainty lacks in translation; approximation is predominating. Transfer and juxtaposition are the fulcrum around which translation revolves. But the question that ever raises itself is: are we certain that what we are reading is what the text intended to or rather what the translator wants to communicate? It is so difficult to say: 'yes', but so stupid to say no and refuse any approximation! But is approximation relevant and effective, all the time, in giving answers to all problems of translation? The critic B. Latour in his book *Science in Action*, sticks to the word 'translation' and avoids the term 'integration/transfer' believing that the latter does not take into account the source text meaning, thus deviates from the SLT message. He claims that 'translation' refers to the semiotic processes associated with the movement of ideas and concepts across academic boundaries and the structures of authority that emerge through these migratory processes.(12) Integration or transfer, he maintains, suggests that ideas remain intact as they cross a specific register to another. In other words, the notion of translation suggests that ideas may be reshaped as they cross boundaries and become embedded in different institutional contexts and intellectual paradigms. (13) In the same context, Eugene Nida claims that: "Since no two languages are identical, either in the meanings given to corresponding symbols or in the ways in which such symbols are arranged in phrases and sentences, it stands to reason that there can be no absolute correspondence between languages. Subsequently, there can be no fully exact translations. The total impact of a translation may be reasonably close to the original, but there can be no identity in detail."(126) the critic translator, S. Lindroos-Hovinheimo, suggests that there is a dialogical relationship between the text and the translator. But the risk in translation is the renewal of the text, i.e., the text deviates from its core. He writes: "Translation is a dialogue possible with the help of a translator. The translator is the medium through which different texts, languages, sign and legal systems can interact. It is through the translator's work that texts get new lives in new places, not as mere copies, but as translations."(382)

My paper daringly delves within a very complex and complicated topic, which is that of Law: I mean the legal system and its problem of translation.

No one of us can deny how perilous it is to transfer a word or an expression from one language to another, namely when there is no equivalence! And so: what about legal text? Y. Maley states that: "Language is medium, process and product in the various arenas of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour. Once norms and proceedings are recorded, standardised and institutionalised, a special legal language develops, representing a predictable process and pattern of functional specialisation" (11) In the same vein, Guliana Garzone, in her article "Legal Translation and Functionalist Approaches: A Contradiction in Terms," maintains that: "Legal translation is certainly among the varieties of translations where the translator is subject to the heaviest semiotic constraints at all level: the language of law is typically formulaic, obscure, archaic; legal discourse is culturally mediated; legal texts have a special pragmatic states."(3) Moreover, Gotti asserts that:

Legal writing is typically ritualistic and archaic, being subject to very strict stylistic conventions in terms of register and diction as well as highly codified genre structures. There are heavy constraints at all levels, from the macro-structure of texts, to paragraphs, sentences

and phrases, with systematic resort to standardized forms, of archaic and uncommon in ordinary text practice, stock phrases, rigid collocations and specialized cohesive devices for anaphoric and cataphoric as well as homophoric and intertextual reference. (GottiqtdGarzone4)

Despite the efforts made by states and nations to simplify or use plain language in legal system, the latter remains very confusing especially with those who have no requirements in this field: I mean common people. In his Article, "Legal English," RenataVystrcilova claims that: "The complexity of the legal register is most apparent in written documents which are often not easily understood by the general public, i.e., the consumers of legal services, and, subsequently, require a lawyer to explain the meaning of the 'legalese' to the consumer." (91)

The language nature of the legal text makes translation very difficult. The translator is confronted with a special jurisdiction register, and if he does not recourse to lawyers of the Source Language Text (S.L.T.) and the Target Language Text (T.L.T.), he will not come out with acceptable and correct results. Renata Vystrcilova maintains that:

Linguistic difficulties often arise when two legal cultures clash during translation. The root of these problems lies in their varying legal histories, cultures, and systems. The task of legal translator, like that of any technical translator, is to transfer one highly technical language, into another highly specialized language. Simultaneously, translators must acquire a basic knowledge of the legal systems of the source and target languages and always be sensitive to the fundamental differences of these systems. One of the principal difficulties in legal translation, regardless of the subject matter, is the question of conceptual differences between the two languages and the absence of equivalent terminology. (95)

But can a translator be permanently dependent on Lawyers? Or can he be himself a lawyer, so that he can translate? Translators are not lawyers. They have only acquired some theoretical background and some basic practices that enable them to translate in current life. But having legal texts as translation activity makes them face typical register and uncommon style. This force des choses puts them face to face with a special language, which constrains them to learn more about the judicial field so that they could respond skilfully to the unfamiliar words and expressions of legal language.

What is required in legal translation is the adaptation of terms and style in the target language softly without any linguistic or cultural constraints. In other words, the legal term has to be recycled and adapted to the target without any misleading variation: the correct translation is the one that looks like the original.

But if the translator refuses to disappear, the original becomes distorted and it cannot, in anyway, give the right and adequate translation. Margaret Marks underlines such matter in her article, "Translating and the Law." She maintains that the danger of such refusal to disappear makes the text rendition of the original look like a new one, far from its original source (par. 5). Furthermore, Anthony Pym recalls us to the danger that equivalence could beget in translation. According to him, equivalence is not always the solution. He writes: "

‘equivalence’ has been used and abused so many times that it is no longer equivalent to anything, and one quickly gets lost following the wanderings of ‘discourse’ and associated concepts.” (280)

The specificity of the legal text makes the text itself very rigid and does not accept any equivalence. So, the faithful translator is the one who fears manipulation and the use of forced terms to be made as equivalent. I mean cultural and political constraints make the text vague and lack precision. The translator critic C. Neal Tate assumes that, “Lawyers are word doctors, exhibiting a skill in the manipulation of ideas that make lay people nervous. One of the first lessons a law student learns is that precision in the use of language is important, not just in the presentation of ideas, but in the details of style and format” (69). In the same vein both authors, Judith N. Levi and Anne Graffam, state that form and formulation are very important in legal system. Besides, legal language holds some political and cultural insights. (69) So, the translator of the target language is, to some extent, culturally and politically biased. In the words of James Boyd White, “Judicial excellence lies less in the choice of doctrine than in what this doctrine chosen is made to mean.” (214). Furthermore, Charles Martin expands this view and develop his argument otherwise claiming that: “Translators need a more basic level of knowledge that enables them to understand underlying principles, do the research necessary to figure out what they don't understand, and find the right term in the target language. (par. 13) Someone, for instance, who translates legal documents, has not really to be a legalese, I mean specialized in legal law, but he does only need to have a background in legal system of both the source and the target.

So a legal translator has chosen a path littered with obstacles. Judicial texts are typical to each nation: modes of thoughts, belief, tradition, philosophy and culture are very different.

The prerequisite element that the translator should possess is his ability to communicate the core of the source text to the target. In his article, “Translation Error Analysis and the Interface with Language Teaching,” Anthony Pym compares the SLT and TLT to sheep and goat. Both are different, yet they form a harmony within the shepherd. He writes: “No matter how solid the conclusions reached, there will still be goats with the sheep, sheep with the goats, and no simple examination is going to sort them out or even put the competent sheep and goats together. If research is to address such contexts, it has to be more cunning than confrontational. Initial definitions and hypotheses have to be formulated very carefully.”(279) But are we able to give a fitful adaptation to the source text? Jean-Paul Vinay and Jean Darbelnet point out that: “The refusal to make an adaptation is invariably detected within a translation because it affects not only the syntactic structure, but also the development of ideas and how they are represented within the paragraph. Even though translators may produce a perfectly correct text without adaptation, the absence of adaptation may still be noticeable by an indefinable tone, something that does not sound quite right.” (91)

Being in a world dominated essentially by English language, besides international institutions that use frequently English, and to some extent French, it has become incentive for any country whatever is its culture and language to adopt English language as a means of communication between different and differing countries all around the world. Subsequently,

translating from and to English language has become a necessity, but at the same time, a real problem because of the specificities of each language. Then, how can we translate legal documentation, legislation, agreements, commercial contracts, arbitration, legal transactions and international legal issues, regulations into the target and vice versa? This problem of translating does not lie only between languages of different roots, but even between languages that have the same common roots as Anglo-Saxon, and Latin.

But English language has its own cultural background which widely rich and diversified. It is not only different from other's nations, but within the same community. Its legal system is derived namely from 'civil law' and 'common law', which are quite different from the French term 'droit commun.' In the words of Vystrcilova, civil law system traces its origins to Roman law [...] National legal systems emerged through the process known as codification. The common law systems have their roots in the British law and include all present and former members of the British Empire and also the United States of America. Although the common law and civil law systems share roots in Roman law, the evolution of the common law system has been much different from that of the civil law. The general principles of the common law grow not out of codification, but rather out of the judicial decisions in court cases by individual judges over a long period of time. The common law system concentrates big power in the courts and gives primary influence within the system to lawyers. Common law was originally unwritten and existed only in the memories of its legal practitioners. (91)

As pointed out, English has the privilege to be a common language in inter-cultural contexts. Having its own cultural context, how can a translator transfer the source to the target? Christopher Goddard maintains that: "the relationship between language and culture is both complex and intricate; in addition, communication problems may arise from cultural differences. Thus, although English can be described as a tool, which presents us with unprecedented possibilities for mutual understanding, it can also be argued that English can also act as a medium and subject of global misunderstanding. (173)

Legal concepts are characterized by unrelated legal systems, which challenge the translator to give relevant terms to the source text. I mean, there is an absence of equivalence. Goddard gives us an illustration from English and French: There are two terms to one French word: 'piège': 'pitfall' and 'booby trap' (176)

'Curatorship' is a confusing term because of its ambiguous meaning: does it mean just 'guardianship' (of a child or a disabled)? Does it mean 'caregiver'? Both terms are derived from the word 'care'. Another word 'curator' is the person, who takes care of a museum! 'in care' means in local authority 'care'. So this word brings confusion for the translator of any language namely languages of the same roots to choose which meaning? 'Curator' is the civil law equivalent of the common law 'guardian' - but both are legal representatives. This example, Goddard has given us, ends with a very vague conclusion. The text ends as follows: "I think I will use 'curatorship' and if the reader does not understand this, the Government will have to explain what they mean." SO, it's very problematic. There is no equivalent term for the civil expression 'curatorship' in the English common law. (See Goddard 187)

In his web-article, "Pitfalls in Legal Translation, the Italian translator Davide De Leo has underlined a series of equivalence between English, French and Italian languages. He gives us the following examples:

The first example is the translation from French into Italian. De Leo raises the problem in translation of the term 'loi.' He wonders: does it mean in Italian 'legge'? However, he doubts because they do not have the same roots. He claims that since these two terms do not have the same referent, they, subsequently, do not have the same meaning. De Loe states: "If I need to translate the French 'Loi' in Italian 'Legge', I am aware that the two terms are not identical in meaning. For instance, a French law is voted in by an institution (parliament) which is structured differently to its Italian equivalent; to be passed, the same law might need a different majority to that required in Italy." (par. 4)

The second example is between the English term 'death penalty' and in Italian 'pena di morte'. According to him, the expression is no doubt very clear. It is to sentence someone to death. But the problem raised is the following: does this term have equivalence in Italian legal system? He writes: "If I am confronted with the English term 'Death Penalty', I understand exactly what it means and how to translate it into Italian ('Pena di Morte'), even though this penalty does no longer exist in my country" (par. 5). What matters, according to De Leo, is the name of the institution which does not exist in the country of the target language. In other words, if De Leo is required to give the translated name of the institution, that is absent, in the T.L.T., what does he do? (par. 5).

The third example is from Italian to English. How do we translate the expression 'appropriazione indebita' into English? De Leo was requested by the British legal authority to translate this expression into English. He fails to find an adequate equivalence to it. Nonetheless, he suggests 'Fraudulent conversion' whereas the English Magistrate suggests 'theft'. The Italian Magistrates agree upon the term 'Fraudulent Conversion', rather than 'theft.' "While the English Magistrate had some initial reservations about using a term he knew to be English," De Leo writes, "he eventually approved my choice" (par. 5).

The absence of equivalences also characterizes the English and French judicial systems. Due to the background of the English legal system, there are some terms that do not have equivalences in French language.

The English legal system has 'Barrister,' and 'Solicitor', but the French does not. Then, how could it be possible to translate or at least to find out an equivalent to these two terms? Do they mean 'avoué' and 'notaire'? It is problematic anyway because the term 'Barrister' literally means a lawyer, who has the right to speak and argue as an 'advocate' in higher law courts. But in England and Wales the term 'advocate' is not used, whereas in Scotland they do use it. In other words, though Scotland belongs to Great Britain along with Wales and England, it uses the term 'Advocate' instead of 'Barrister'. 'Advocate' literally means a person, who speaks in favour of somebody or a cause. In legal register, it means, a person who does this activity professionally in a court of law. It is equivalent to the term 'Barrister', but, nonetheless, not the same. What is really astonishing is that this term is absent in the U.S.A.

The second term, ‘Solicitor’, exists in both Great Britain and The U.S.A., but, it holds different meanings in both countries. In Great Britain, it means a lawyer, who prepares legal documents, e.g. wills, sale of land or buildings, and advises clients on legal matters and speaks on their behalf in lower courts. In the U.S.A., it holds a quite different meaning. ‘Solicitor’ is a person who solicits trade, support, etc...; he looks like a Canvasser, i.e., his job is to go from person to person and asks for votes, orders for goods, subscriptions, etc..., or learns about people’s views on a question. It is noticeable that these two terms are very confusing because they hold different meanings from one country to another, as the case of Great Britain and The U.S.A., and in the same country, as the case of England, Wales and Scotland, in United Kingdom

Then, the question is: how can we equate these two terms with its equivalent in French language, since they differ in meaning in the same language source? Do they mean ‘notaire’ or ‘avocat’ or ‘avoué’? It is very difficult to adopt any of the terms! Open a French-English Dictionary, and you will find the following meanings of the term ‘avocat’ in both English and American English:

*‘Avocat’ means in British English ‘British Jurisdiction Barrister’, whereas in American means ‘Attorney-at-law’.

*‘Avocat de defence’ means ‘counsel for the defence’ in British English, whereas in American it means ‘defence counsel’.

* ‘Avocat general’ means in British English ‘counsel for prosecution’, whereas in American it means ‘prosecuting attorney’.

Take the other term ‘notaire’, and you find the approximate-not even the equivalent meanings- ‘solicitor’, ‘lawyer’, or ‘barrister’. Compared to the aforementioned definitions, the term ‘notaire’ seems to be more general: Literally, ‘notaire’ means: Officier public titulaire d’un office ministériel, chargé de dresser des actes qui ont force authentique et force exécutoire. Dans le cadre de leur activité, les notaires ont un rôle essentiel pour conseiller les familles dans la gestion et la transmission de leur patrimoine et les entreprises dans leurs projets d’investissements et leurs opérations de crédits. “Notaire”.

Likewise, the term ‘avoué’ does not sound exact; it holds a partial meaning of solicitor. It means literally: “officier ministériel seul compétent pour présenter les parties devant les cours d’appel” (“Avoué”).

‘Solicitor’ is, in fact, a judicial officer, who is a ‘bias’ or ‘intermediary’ between the lawyer and the citizen. In French language, there are terms that could signify such meaning, but never in a complete manner: we have ‘avoué’, or ‘notaire’. Moreover, the English word ‘Solicitor’ is defined in French dictionary as ‘avoué’ or ‘notaire’: “Homme d’affaires anglais dont les fonctions s’apparentent à celles de l’avoué et du notaire français” (“Solicitor”).

To round off I would say that the theoretical background in translation is not enough; the translator needs to comprehend and understand the text on its entirety. Furthermore, lawyers and legal translators should be aware of their cultures and the cultures of others so

that they could not be trapped by pitfalls. Despite the similarities they share as a fundamental basis, they, nonetheless, vary in the cultural background of each system. So translating is transferring through culture the source to the target. In other words, law should not be isolated from its cultural origins.

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