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IS IT POSSIBLE TO OVERCOME THE PROBLEM OF LACK OF EQUIVALENCE IN THE TRANSLATION OF LEGAL TEXTS?

Özet

HUKUK METİNLERİNİ ÇEVİRMEDE EŞDEĞERLİK YOKLUĞU HAKKINDAKİ SORUNU AŞMAK MÜMKÜN MÜ?

Bir çevirmen, İngilizce bir hukuk metni Türkçe'ye çevirirken birtakım zorluklarla ve imkansızlıklarla karşılaşır. Hukuk çevirisi yapmanın genel zorlukları haricinde, bu sorunlar İngilizce'nin ve Türkçe'nin farklı yapılarından ve oldukça ayrıksı hukuk sistemlerinden kaynaklanır. Bu makale öncelikle hukuk çevirisinin kuramsal yaklaşımlarını ve bu bağlamda özellikle işlevselci yaklaşımı inceler. İlgili hukuk sistemleri bir hukuk metninin çevirisi için hem kaynak dili hem hedef dili etkilediği için, dünyadaki hukuk sistemleri belirli ölçütlere göre sınıflandırılır. Sınıflandırma esasen Anglosakson ve Kara Avrupası hukuk sistemlerine dayanır. Böylece, hukuk metinlerinin çevirisinde eşdeğerlik seviyesini belirlemek mümkün kılınır. Mevcut çalışma, sorunları ortaya koyduktan sonra, ayrıksı hukuk sistemleri nedeniyle hukuki terimlerde eşdeğerlik yokluğu olduğu hallerde bazı çözümler ortaya koyar.

Anahtar Sözcükler: Hukuk çevirisi, Türkçe, İngilizce, Kara Avrupası hukuku, Anglosakson hukuku, hukuk sistemi, eşdeğerlik yokluğu

Key Words: Legal translation, Turkish, English, civil law, common law, legal system, lack of equivalence

Introduction

One might face several challenges and thus difficulties when translating legal texts between English and Turkish. Leave aside the general problems of legal translation (e.g. ambiguity and the effects of translated legal texts), such

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problems arise also due to the different structures of the English and Turkish languages, and the apparently unrelated legal systems.

This paper analyzes firstly the theoretical approaches to legal translation and especially the functionalist approach in this respect. As the legal systems involved affect both the source language and the target language for the translation of a legal text, the legal systems should be classified according to some specific criteria. The classification is mainly done on the basis of the Anglo-American and continental legal families. This will enable us to determine the level of equivalence in translating the legal texts. The present study will also put forth some solutions where there is a lack of equivalence of the legal terms due to the unrelated legal systems. Such solutions are peculiar to legal translation as a highly specialized area of translation.

For most of the examples provided for in this study, I am indebted to the solutions and results found during a legal terminology project which was funded by the Ministry of Foreign Affairs of the Republic of Turkey and in which I was involved as a consultant.

Theoretical Basis for Legal Translation

The early theories of legal translation were based on word-for-word translation. Such theories were asserted by Dicker and Weisflog who claimed that a source text should be translated literally rather than conveying the sense thereof, thus based their analysis on the communication of the source text. Nevertheless, by adding that the legislation of a country may also be translated to inform the foreign lawyers and businessmen, Weisflog introduced the concepts regarding the function of text and the role of target reader for the methods to be opted for legal translation. This was the first time where the analysis of translation methods was based on the target culture and the target reader (Altay 110-111, Sarcevic 17).

As Brierley asserted correctly, legal translation is not only a terminology transfer from the source text to the target text; on the contrary, it is a transfer from a certain source legal system to a certain target legal system. The legal texts are those quite different from the scientific and technical texts and based completely on the cultural and national phenomena, thereby the legislation of every country contains its own special terminology, legal institutions, legal sources, legal system, approaches and socio-economic principles (Brierley 18).

The dissimilarity between a source legal system and a target legal system as well as the impossibility to directly transfer a legal system to another poses the most vital problem in translating the legal texts as the incompatibility of the source and target legal systems with each other.

Such a problem causes the approach of transferring a message from the source text to the target text to be inadequate and inappropriate for the legal translation. Thus, a new approach in the specialized field of legal translation had to be adopted together with the development of a "purpose" concept in translation. The concept leads, in short, to a view that a certain text may be translated via different methods for the different target readers.

By claiming that sometimes, no equivalence in translation can be ensured and is even unnecessary to be ensured, Katharina Reiss introduced in 1971 the functionality concept for the relation between the source text and the target text. Her justification was that in some cases, the target text might have more different purposes than those of the source text, as the target reader might be different than the source reader. Therefore, the translator shall not act

according to the content of the source text, but base on the functionality of the target text for the target reader. Assumedly, textual equivalence and the text types need not to be regarded as criteria in the translation (Reiss 305).

Moreover, Hans J. Vermeer qualified translation as the communicative transfer of verbal and non-verbal indicators, thereby defined it as a "translational action" based on a source text containing both the verbal and non-verbal elements. Since every action has a purpose, the translation has also a purpose, which is called by Vermeer as *skopos*. In his view, the most important element determining the purpose of the translation is the target recipient. In compliance with the term *skopos*, this theory is entitled as the Skopos Theory (in German: Skopostheorie). The target text, rather than the source text, is considered important, in contrast with the other theories based on equivalence, in this theory (Nord 11-12). Vermeer applied the Skopos Theory on the translation of every text type, and *inter alia* on the translation of legal texts. As an example, he underlined that the translation of an insurance policy for information purposes only and the translation thereof as an evidence to be presented to a court would not be the same. However; as he assessed the translation of a legal text only on the basis of function, thereby disregarded the fact that the legal texts were subject to the special rules determining their usage in the legal mechanism, he was unable to convince the linguists who argued that the purpose of the source text was the same as that of the target text (Sarcevic 19).

Adding some elements to the Skopos Theory, Holz-Manttari deemed translation as a complex action covering every form of the intercultural transfer to achieve a specific purpose. Thus, in her opinion, the translators are those experts transferring messages having cultural and language barriers and thereby producing message transmitters in the intercultural and transcultural communication to surmount such barriers (Holz-Manttari 42).

Peculiar to legal translation, Newmark bisected the purposes of translating legal texts as information and usage in the target culture. According to Newmark, the semantic translation can be used in the information-purpose translation and the legal register of the target culture in the translation for purposes of usage in the target culture (Newmark 47).

Sarcevic added that although the factor of function was crucial for the translation of the legal texts, it was only one of the factors to be considered. As he has correctly put it, the legal texts can never be translated for information purposes (Sarcevic 71), since a translated legal text shall have the same effect as the original text. If we think of a constitution, for instance, it includes the fundamental rights and liberties of the citizens as well as the fundamental structure of the State. Therefore, the translation of the Constitution is like a Constitution in itself and do not inform about the Constitution. According to Sarcevic, the purpose of the target text, which is called "legal purpose", is determined by the producer of the target text. For example, it is the joint purposes of the contracting States in a treaty and the purpose of the parties in a contract. The purpose of the target text (translation) shall be the same as that of the source text. Consequently, the legal translator is expected to produce a text that both gives the same meaning and ensures the same legal effect (Sarcevic 72). To find the equivalents of the terms and translate the source text word-for-word would be an inaccurate and inadequate method. For the terms of reference of a translator will require him to know the purpose of the translation, whether it is just to inform someone or to realize a legal transaction therewith. If the source text is a valid power of attorney in Turkey, it shall be translated according to a

sample power of attorney of the United Kingdom to ensure a valid power of attorney in the United Kingdom.

In relation to equivalence, Katharina Reiss stated that the purpose of the translators was not equivalence but ensuring the adequacy so that the target text serves the communicational function in the source text (Sarcevic 47). On the contrary, Newmark claimed that the equivalence in translation could not be defined and could only exist to some extent. Consequently, equivalence on the basis of words between the source text and the target text is named as terminological equivalence and plays an important role in the legal translation as a specialized area.

Classification of Legal Systems

In terms of source, origin, and codification, legal systems, i.e. legal families, throughout the world can be classified as:

1) Continental (Civil) Law, including Romanistic, Germanic and Nordic legal systems
2) Common Law
3) Far Eastern Law
4) Islamic Law
5) Hindu Law
6) Socialist Law (David and Brierley 20-31, Cao 24, Kocbek 54-55)

Every legal system emerges with its own peculiarities, vocabulary, techniques (David and Brierley 19) as well as even its own branches, sources of law and historical development (Zweigert and Kötz 68-73). Due to such differences, the main challenge to the translator of a legal text will always be the lack of harmony between the elements of the legal system regarding the source text and those of the legal system regarding the target text.

Among these legal systems, the main ones are "continental law" to which France, Germany, Italy, Switzerland, Austria, Turkey, Latin American countries, Japan belong and "common law" to which England, Wales, the USA, Australia, New Zealand, Canada, Singapore, Nigeria, Kenya, Malaysia, Hong Kong belong. While common law is made by judges, amended by judges and based on the legal traditions of England (de Cruz 102-103); civil law is made by a parliament, amended by a parliament and based on Roman law (Cao 25). While precedents are only secondary sources in civil law, they are always binding as primary sources in common law (Tetley 702).

As the controversial problems in legal translation arise due to the divergences between the continental law and the common law, these two legal systems are chosen for the study area of this paper to scrutinize the problem on lack of equivalence in legal translation.

The Problem of Lack of Equivalence in Translating Legal Texts

The legal language is a specialized language used for all written rules including laws, statutes and regulations as well as treaties, agreements, contracts and all such documents used during the proceedings. The translation of legal texts manifests its peculiarity in its cultural embeddedness. The problem on lack of equivalence in transferring a concept arises when a translator is translating a legal text from a distinct source culture to his/her own target language. Thus, the most apparent complexity in the legal translation is being able to transfer the conceptual differences precisely in the translation. For instance, the basis of the problem

in question concerning translation from English into Turkish or vice versa is the absence of legal concepts used or expressed by both the source and target cultures.

Methods in Overcoming the Problem of Lack of Equivalence in Translating Legal Texts

The methods proposed when translating between divergent legal systems can be summarized in 5 categories, which must be made use of according to the listed order. They may all be used in translating the same source text.

1. Word-for-word translation (literal translation, formal translation): Word-for-word translation is a classical method of translation in which the translator transfers a term or a concept in the source language to the target language by means of availing of the exact equivalents in the target language through the conventional grammar and other syntactic rules. For this method, the words in the concept or term are translated in the same order; and in the end, the number of the words in the source text are the same as the number of the words in the target text. Given the characteristics of the above-mentioned methods, it is the opposite of paraphrasing and finding the functional equivalent. Thus, it is the first translation method to be resorted in the legal translation (Newmark 75). However, in opposition to Weston's assertion (Weston 209), it shall not be the basic method for translating the legal texts. Although the legal systems may differ from one country to another, the concept corresponding the source term in the target language may sometimes convey the same concept in the target culture as in the source culture. The word-for-word translation of the "Minister of Foreign Affairs" as "Dışişleri Bakanı" in Turkish and the "Minister of Interior" as "İçişleri Bakanı" in Turkish exemplify such situation, as the posts have the same functions both in the UK and Turkey. However, special consideration must be given for the term in the USA, as the same concept corresponds to the "Secretary of State." The source concept and term may sometimes not express the same function as the target concept and term, which is the handicap of this method (Weston 208) causing the translators to approach very cautiously. Moreover, the source term may sometimes have no known equivalent concept in the target culture when the word-for-word translation method is used. For instance, names of the courts differ in common law and civil law countries. Although "The Crown Court" in the English legal system covers the jurisdiction (as to subject-matter) of both the criminal courts of first instance and the aggravated felony courts in the Turkish legal system, there is no such institution in the Turkish legal system, which is equivalent to the Crown Court (Yalçınkaya 117). Thus, "The Crown Court", "The Court of Chivalry" and "The Court of Protection" in the UK court structure can be translated into Turkish as "Taç Mahkemesi", "Şövalyelik Mahkemesi" and "Koruma Mahkemesi" (Altay 163-164) which do not have any equivalents in the court structure of Turkey. Yet, in accordance with the Skopos Theory, such names are translated literally for the lawyers, as they are familiar to the court names in the UK.

2. Finding the functional equivalent: This method requires providing the proximate functional equivalent of a concept not existing in the target culture, thereby in the target language. It is expressed by Nida and Taber as the dynamic equivalence (Nida and Taber 74). Through such a method, the legal translator ignores completely the equivalent of a concept in

the source language and translates it as another concept, which sounds the most meaningful to the target culture and is totally local. Therefore, it can be called as a semantic translation. However, the concept found as an equivalent must be sufficiently functional and adequate, which can be only satisfied through the competency of the legal translator's specialization area knowledge in both cultures. Not every word in the source language may be translated through finding its functional equivalent. This method should only be made use of when transferring the general terms with the determiner of "a" to a target language (Altay 158-159). Some examples where this method can be used is as follows:

a) A notary: A notary in common law means "a notary public" who authenticates some documents such as powers of attorney and deeds and drafts some documents such as wills and protests. In civil law, "a notary public" also performs the same functions. As Turkey is a civil law country, the functional equivalent of "a notary" in Turkish is "noter."

b) A solicitor: As Martin Weston has correctly asserted, "notaire" in French is the functional equivalent of "a solicitor" (Weston 208). The reason is that a "notaire", in other words a civil-law notary, studies law but does not acquire practicing certificate for attorneyship at the courts. Such qualification is similar to that of a solicitor in the UK as a common-law country. For the same reason, "danışma avukatı" in Turkish is the functional equivalent of "a solicitor."

c) A barrister: A barrister is a lawyer who are called to the bar association and qualified to practice at all of the courts, including the higher courts.[1] As it is a general term, it may have an approximate equivalency by transferring it as "duruşma avukatı."

d) A tribunal: As there is no equivalent for the word "a tribunal" in the Turkish legal system, its functional equivalent in Turkish is "mahkeme", the same one as the word-for-word translation of "a court."

e) Whereas: The lexical meaning of "whereas" in the daily language is "in contrast or comparison with the fact that." However, one of the remarkable characteristics of the legal language is that the words sometimes imply meanings other than the ones used in the daily language. As a result, "whereas" in the preamble of the international agreements or in the preamble of the *acquis communautaire* such as regulations or directives means "taking into consideration the fact that." Therefore, it should be translated into Turkish as "Aşağıdaki gerekçelerle."[2]

3. Paraphrasing: Paraphrasing method should be applicable, when a source concept or term cannot be translated into the target language through word-for-word translation or by finding the functional equivalent. As they are private terms without the determiner of "a", some institutional names may not have functional equivalents. Therefore, such terms and concepts peculiar to the common law should be transferred through paraphrasing method, which is called as "borrowing" by Martin Weston due to borrowing of the concept from a source culture. Paraphrasing involves explaining a source text term or concept unfamiliar to the target culture through a term or a concept familiar to the target language. As regards the legal translation, this method may be utilized either by (i) writing the source term exactly as in the source language, but in italics, underlined or in quotation marks along with its explanation in the target language in parentheses; or (ii) writing the explanation of the source term in the target language in quotation marks along with the source term as in the source

language, but in parentheses. In line with the Skopos theory, if the target text is for the experts of the relevant subject, then the first method will be more fit due to their information on the specialized area. However, if the target text is for the non-experts to read, then the second method shall be used as otherwise they will not understand the target term through the word in the source language (Weston 209). As the terms and concepts in common law are totally unfamiliar to those in Turkish law as a civil law system, translation of the former into Turkish mostly involves the paraphrasing method. An example where this method is availed of in legal translations from English into Turkish is as follows:

a) **Lord Chancellor:** This institution name belongs to the special structure of the common law. As it cannot take the determiner of "a" and thus is a private name, it cannot have a functional equivalent in the target language. There is no such a structure and concept in Turkish constitutional legal system, Turkish parliamentary system and in Turkish. Lord Chancellor serves as a Minister of Justice for the United Kingdom since the Constitutional Reform Act 2005. Consequently, it can be transferred as "Birleşik Krallık Adalet Bakanı" into Turkish, meaning the Minister of Justice of the United Kingdom.

4. **Borrowing:** Borrowing is transferring an established term or concept in the source language to the target language as it is but by adapting it to the spelling rules of the latter. Clearly, it is in fact not a translation method (Weston 210), but a method in the last resort. In the legal language, many Latin words are kept as they are in the source text, without any translation into the target text. *Ne bis in idem*, *sui generis*, *sine qua non* and *habeas corpus* are the most widely used Latin phrases in law. Since they are known by all lawyers throughout the world, the target text aiming at informing lawyers include Latin words that are kept as they are. Other than the Latin phrases, borrowing method is used also for the following English concepts when translating them into Turkish:

a) **Chancery Division:** The Chancery Division is a part of the High Court responsible for tax, bankruptcy, property, trusts, patents and companies. As there is no equivalent concept in Turkish law, it is translated into Turkish as "Chancery Dairesi" (Yalçınkaya 117) by borrowing the English word "Chancery" and adding the word "Daire" which means "Chamber."

b) **Coroner's Court:** The Coroner's Courts are responsible for inquiring into some of the death causes and the "ownership of treasure trove" (Slapper and Kelly 55). No such court is found in the court structure of Turkey as a civil law country. Again by borrowing the word "Coroner" and adding the word "Mahkeme" which means "Court", it is translated into Turkish as "Coroner Mahkemesi" (Yalçınkaya 117).

c) **Queen's Bench Division:** As a part of the High Court, Queen's Bench Division has the original, appellate and supervisory jurisdiction over many actions such as actions in tort and contract, shipping issues, insurance disputes, banking disputes, and some administrative actions. Queen's Bench Division is translated into Turkish as "Queen's Bench Dairesi" (Yalçınkaya 117) by borrowing the English phrase "Queen's Bench" and adding the word "Dairesi" which means "Chamber."

d) **Subsidiarity:** Being a concept widely known in the European Union law, subsidiarity does not have an equivalent concept in Turkish law. As a new term, it was translated by some Turkish translators as "Sübsidiarite"[3] through foreignization.

5. Neologism: Neologism is producing a completely new word, term or phrase in the target language for translating a source term or concept. Law is too conservative to produce new ideas necessitating new words. Therefore, neologism is not a widely used method when translating the legal texts both in English Weston 209) and in Turkish. Yet, neologism is used in Turkish for the following phrases:

a) Mortgage: Mortgage is the most common method of financing real estate transactions whereby an interest in land is transferred as security for a loan or other obligation.[4] As this legal concept is a introduced recently in Turkey through adaptation from the U.S. legal system, it is translated into Turkish as "konut finansman sistemi" meaning "residence financing system."

b) Custodial sentence: This is a concept regarding criminal procedural law and means a judicial punishment in which a punishment including mandatory detention due to a sentence of conviction is executed at a prison or a reformatory with maximum security or another closed therapy and/or educational institution. As it is a concept of common law and has no equivalence in civil law, this may be only translated as "hürriyeti bağlayıcı ceza" into Turkish. While custody in Turkish law is a measure whereby a person apprehended with criminal suspicion is held by a policeman with the order of the public prosecutor and is limited to maximum 48 hours, it implies all sorts of detention restricting freedom whether or not through the decision of a judge or whether before or after the sentence of conviction.

c) Principle of subsidiarity: As a principle mentioned mainly in the European Union law, some Turkish academicians[5] have domesticated subsidiarity as "katmanlı yetki ilkesi." Since there is no such principle in Turkish law, they have interpreted the meaning of subsidiarity in the European Union law and produced a phrase rendering such meaning. Subsidiarity is a main principle regarding the competences of the European Union, thus "yetki" is a translation of "competence." "Katmanlı" means layered, which explains the multi-layered system of competence in the European Union.[6]

Conclusion

As every country has a different and distinctive legal system, the legal translation has a socio-cultural dimension, thereby causing lack of equivalence. One dimension of the lack of equivalence in translating legal texts is the absence of the same institutions and the same administrative and judicial divisions in the legal systems of the different communities. The Crown Court in the English system may illustrate such a case. Thus, the difficulty in translating a legal text does not only involve the transfer of some terms of a source language into a target language, but also the transfer of a source legal text belonging to a different legal system into a target language and a target legal system. The communicative concerns do not, on their own, satisfy the need to determine the methods in translating legal texts. This is due to the fact that the concepts and terms of the legal systems, legislation, crimes and sanctions belong only to that community and culture and are unique. Legislation and the rules of procedure of every community vary from one community to another. Besides, the field of law is an arena where a unique manner of discourse finds an expression within a framework of a unique social norm, social order and culture with a unique system of terms. The terminology of the legal field belongs both to a specific culture and specific national borders.

NOTES:

1 Oxford Dictionaries, http://www.oxforddictionaries.com, access date: November 15, 2014.

2 see "AB'nin Bazı Hukuki Düzenlemelerinin Türkçe'ye Çevrilmesinde Kullanılacak Rehber", http://www.ab.gov.tr/files/ceb/ab_nin_bazi_hukuki_duzenlemelerinin_turkce_ye_cevrilmesinde_kullanilacak_rehber.pdf, access date: November 10, 2014.

3 see "Glossary for the European Union (English-Turkish)", http://www.ab.gov.tr/files/Sozluk/glossary_for_the_european_union.pdf, pp. 310, access date: November 15, 2014.

4 Wex Legal Dictionary, https://www.law.cornell.edu/wex/mortgage, access date: March 9, 2015.

5 see Sanem Baykal, "Avrupa Birliği'nde Malların Serbest Dolaşımı ve Çevrenin Korunması: Farklı Menfaatler Arasında Denge Arayışı", Ankara Avrupa Çalışmaları Dergisi, Volume: 5, No: 2, 2006, pp. 103-129, at 105; Bahar Varlı, "Lizbon Antlaşması Sonrasında Avrupa Birliği'nde Ulusal Parlamentoların Rolü ve TBMM Açısından bir Değerlendirme", *Yasama Dergisi*, No. 13, pp. 5-43, at 13.

6 For further information about competence in the European Union and subsidiarity, see J. H. H. Weiler. "The Transformation of Europe", *Yale Law Journal*, Volume: 100, No: 2403, 1991, pp. 2410-2431.

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