

Original Paper

Law, Culture and Language: Challenges in Legal Term Translation from the Perspective of Comparative Legal Culture

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Received: August 29, 2024 Accepted: October 29, 2024 Online Published: November 08, 2024
doi:10.22158/eltls.v6n6p14 URL: <http://dx.doi.org/10.22158/eltls.v6n6p14>

Abstract

As a cross-cultural communication activity, legal translation inevitably involves law, culture and language. The accurate translation of legal terms plays a crucial role in facilitating the exchange between different legal cultures. Cultural factors, including language, legal systems, legal institutional structures and legal mindsets, have a major impact on legal translation. Failure to capture the discrepancies between different legal cultures causes errors in the translation of legal terms. To achieve optimal translation effects, translators not only need to possess a high level of language proficiency but also have a deep understanding of different legal systems and cultures. From the perspective of comparative legal culture, this paper analyzes how cultural factors influence the translation of legal terminology between Chinese and English and proposes corresponding translation strategies. When there are equivalent concepts in both the source and target legal systems, translators should employ corresponding legal equivalents in the translation. In cases where such equivalents are absent, translators may employ paraphrasing techniques or coin new terms to convey the intended meaning.

Keywords

comparative legal culture, legal term translation, legal cultural differences, translation strategies

1. Introduction

With the ever-developing trend of globalization, exchanges between countries in the legal field have increased. An in-depth discussion of the methods of translating legal concepts and principles in different legal cultures will help to promote mutual understanding among the international community, reduce misunderstandings and promote cross-cultural dialogue. Legal terminology is an important component of legal language and is the essence and the cornerstone in constructing legal language

system. As such, the importance of its translation accuracy cannot be overestimated. However, legal translation is faced with a number of challenges and problems, particularly in the domain of legal terminology translation. Many of these challenges stem from cultural disparities, as legal concepts embedded in the legal terminologies of one legal culture often diverge from those of another. Sarcevic (1997) pointed out that “the legal translation is a dual work of legal conversion and language conversion”. The cultural transfer that frequently occurs in the use of legal transplants poses a challenge for all legal systems. There is a dual risk involved in its adoption: jurists may misunderstand the new term, while non-jurists may not connect any concrete meaning with it (Chan & Galdia, 2023). Therefore, to master legal translation, translators should not only have advanced language skills but also a profound understanding of the cultural and historical contexts that shape the two legal languages. This paper aims to analyze challenges in legal term translation between Chinese and English from the perspective of comparative legal culture and proposes corresponding translation strategies.

2. The Definition of Legal Terms

Terminology refers to the specialized vocabulary and expressions utilized within distinct disciplines, each possessing its own unique set of terms and concepts. In general, a term should have exclusive meaning and be professional. Legal terminology specifically pertains to the specialized terms employed within the legal field. Adopting a formal and precise style, legal terminology captures the distinct phenomena and essential attributes relevant to the legal domain. Sarčević (1997) defines legal terms as the language used to represent “the objects, relationships, acts, and procedures that are peculiar to a particular nation system”. It is essential to accurately convey the original meaning of the source text through a well-articulated translation, thereby ensuring the transmission of the legal essence and the intended effect of the original terminology.

3. Cultural Factors Influencing the Translation of Legal Terminology and Challenges Brought by Them

Culture, or civilization, is that complex whole which includes knowledge, belief, art, moral, law, customs and many other capabilities and habits acquired or accepted by human beings as a member of the society (Tylor, 1871). Culture and language are intricately intertwined, mutually enhancing one another. The diverse cultural environments and backgrounds of nations give rise to different languages, including legal languages. In general terms, legal culture encompasses the entirety of cultural phenomena related to law. Friedman (1969) defines legal culture as “the network of values and attitudes relating to law, which determines when and why and where people turn to the law, or to government, or turn away”. This concept can be categorized into three levels: the structural level, institutional level, and perceptual level. At the structural level, legal culture is manifested through tangible legal institutional structures such as courts, prisons, and detention facilities. The institutional level of legal culture comprises legal systems, the rules and doctrines, while the perceptual level

encompasses the values of law, legal thinking, legal consciousness, moral sentiments, national characteristics, and more. This paper will analyze the discrepancies in legal cultures from lexical factors, legal systems, legal institutional structures and legal mindsets.

3.1 Lexical Factors

3.1.1 The Misuse of General Expressions as Legal Terms

Legal language is highly professional, precise and rigor in its nature. One feature of legal language and of legal translation is the use of legal terms unique to law, the use of which distinguishes lawyers from non-lawyers (Mellinkoff, 1963). Numerous terms possess both a common everyday meaning and a specialized legal meaning. Consequently, one of the key responsibilities of a legal translator is to identify the legal meaning and differentiate it from the ordinary use to ensure accurate translation of the legal term (Cao, 2002). However, it is worth noting that the translation of legal terminology in China is not standardized. Many translators are not familiar with the linguistic characteristics of legal English, and translators often use common expressions instead of specialized terms in their translation. Such practices do not align with the rigorous and standardized nature of legal writing. For instance, in the English version of the Criminal Law of the People's Republic of China, some of the legal terms were inappropriately translated. In the English translation of Article 243, “捏造事实 *niezao shishi*” is translated as “fabricating stories” and “诬告陷害 *wugao xianhai*” is translated as “frame”. While the word “fabricate” does convey the general idea of creating or inventing something, “fabricate stories” is rather informal and may not capture the full legal implications or seriousness of “捏造事实 *niezao shishi*”, which refers specifically to the act of fabricating or concocting facts, typically with the intention to deceive or mislead. Therefore, a more accurate translation in a legal context could be “falsify/fabricate facts” to convey the gravity of the offense. Likewise, “frame” only implies “陷害 *xianhai*”; it cannot capture the full legal implications of “诬告陷害 *wugao xianhai*”. A better translation would be “make a false charge” or “malicious prosecution”.

Another feature of legal English is its extensive usage of Latin, Old English, and French terms. For instance, a large number of legal expressions in English have Latin origins, including *ad hoc* (specialized), *de facto* (in fact), *mens rea* (guilty mind), *actus reus* (guilty act) and etc. Similarly, many legal terms in English have French origins, such as *voir dire* (jury selection), *en banc* (full bench), *force majeure* (superior force), *in camera* (in private), *res judicata* (matters already judged), *tort* (civil wrong), *habeas corpus* (produce the body), and *bona fide* (in good faith). Furthermore, there are a great deal of legal terms derived from Old English, including *herein* (in this document), *whereby* (by which), *hereto* (to this), *aforesaid* (mentioned before), *heretofore* (before now), *hereinbefore* (before this), *hereinafter* (after this), and *aforementioned* (mentioned above). The English translation of Article 273 of the Maritime Code of the People's Republic of China is a typical case of non-standard translation:

ST: 船舶碰撞的损害赔偿·适用侵权行为地法律。船舶在公海上发生碰撞的损害赔偿·适用受理案件的法院所在地法律。同一国籍的船舶·不论碰撞发生于何地·碰撞船舶之间的损害赔偿适用

船旗国法律。

TT : The law of the place where the infringing act is committed shall apply to claims for damages arising from collision of ships. The law of the place where the court hearing the case is located shall apply to claims for damages arising from collision of ships on the high sea. If the colliding ships belong to the same country, no matter where the collision occurs, the law of the flag state shall apply to claims against one another for damages arising from such collision.

Here, the term “侵权行为地法律 *qinquan xingweidi falv*” is translated as “the law of the place where the infringing act is committed”, “法院所在地法律 *fayuan suozaidi falv*” is translated as “the law of the place where the court hearing the case is located”, and the term “船旗国法律 *chuanqiguo falv*” is translated as “the law of the flag state.” Although the translations of these three legal terms convey the correct meaning, they are contrary to the professional nature of legal terminology. The translator did not consider the linguistic characteristics of legal English and had an inadequate grasp of commonly used legal terminology. In fact, there are fully equivalent terms for these three legal terms in legal English. The Latin word “lex” is equivalent to the English term “law”, “loci” correspond to “place” and “delictus” means “tort” in English. In legal English, “lex loci delict” is fully equivalent to the Chinese term “行为地法律 *xingweidi falv*”. Likewise, “法院所在地法律 *fayuan suozaidi falv*” should be translated as “lex fori” and “船旗国法律 *chuanqiguo falv*” should be translated as “law of the flag”. It is essential to consider the characteristics of legal terms during the translation process. Equivalent legal terms should be adopted instead of using common expressions.

3.1.2 Mistranslation Caused by Near-Synonyms

The abundance of near synonymous terms in Chinese legal system can easily lead to confusion and errors in translation. For example, “被告 *beigao*” and “被告人 *beigaoren*”, “原告 *yuangao*” and “原告人 *yuangaoren*” are two pairs of near synonyms that are often mistranslated as they look almost the same and appear to have same meanings and connotations. However, in reality, these two pairs of terms are different. “原告 *yuangao*” and “被告 *beigao*” are civil law terms, whose equivalents in legal English are “plaintiff” and “defendant” respectively. On the other hand, “原告人 *yuangaoren*” and “被告人 *beigaoren*” are criminal law terms, whose equivalents in legal English are “the prosecutor” and “the accused/defendant” respectively. These terms cannot be used interchangeably, so translators should be very careful in choosing the correct terms. Another pair of near synonyms that often causes confusion is “定金 *dingjin*” and “订金 *dingjin*”. This pair has the same pronunciation and similar meanings, yet they actually mean different things in law and cannot be used interchangeably, which poses a great challenge for translators. Many translators mistakenly assume that these two terms are entirely equivalents and use the same translation for both. In fact, “定金 *dingjin*” refers to the money paid before or during the execution of a contract to guarantee its performance. If the contractual obligations are not fulfilled, this money may not be returned to the payer. On the contrary, “订金 *dingjin*” is a unilateral action that lacks a guarantee nature. It serves as a form of payment for the parties involved and functions as an advance payment. According to their definitions, the English

equivalent of “定金 *dingjin*” is “earnest money”, while “订金 *dingjin*” can be translated as “reservation fee”. Translators should utilize available resources to analyze the connotations of near synonymous legal terms, and then determine the translation that best suits each, avoiding the pitfalls of taking the words literally.

3.2 Discrepancies in Legal Systems

The two main legal systems prevalent in the world today are common law system and civil law system. Countries adopting common law system include the United States, Canada, Australia, New Zealand and so on, while the civil law system is adopted by countries like France, Italy, Germany, and Japan. China’s legal system falls under the latter but with socialist characteristics. These two legal systems exhibit significant differences in legislation and judiciary, and reflect distinct legal cultures and spirits. For example, the common law countries prioritize democracy, human rights and freedom. They adopt parity of power and responsibility and separate powers into legislative, executive and judicial divisions. These legal terms do not exist in Chinese legal system, hence the difficulty in translation.

The roles and responsibilities of legislative, executive and judicial staff in common law system and Chinese legal system also show great differences. Many translators translate “陪审员 *peishenyuan*” as “juror”. However, the role and responsibilities of a juror in the common law system differ from those of a “陪审员 *peishenyuan*” in China. They are not full equivalents. In common law system, a jury consists of ordinary citizens whose duty is to listen to witness testimonies, review evidence, and hear the arguments presented by the prosecution and defense. Once all the evidence has been presented and the jury has been instructed on relevant laws and principles, jurors are required to engage in deliberations to reach a verdict based on the facts and applicable law. The jury cannot decide the specific verdict or the penalty; they can only determine whether the defendant is guilty or not. In contrast, “陪审员 *peishenyuan*” in China plays a more active role in the trial process. They directly participate in the adjudication of cases, form a collegial panel with judges, and share the responsibility of making judgments, including determining whether the defendant is guilt or innocent and deciding the sentencing. Therefore, it is inaccurate to translate “陪审员 *peishenyuan*” as “juror”. It is more accurate to translate it as “lay assessor” or “people’s assessor” to highlight their more active involvement and decision-making role.

Although a lot of criminal charges may seem comparable between common law system and civil law system, they actually have different scopes and connotations. If a translator lacks a profound understanding of both legal systems, errors can occur in the translation of legal terminology. For example, many translators translate the Chinese criminal offense “盗窃罪 *daoqiezu*” as “the crime of theft”. The English translation of Article 269 of the Criminal Law of the People’s Republic of China is an example of this:

第二百六十九条 犯盗窃、诈骗、抢夺罪，为窝藏赃物、抗拒抓捕或者毁灭罪证而当场使用暴力或者以暴力相威胁的，依照本法第二百六十三条的规定定罪处罚。

English version: Article 269 Whoever commits the crime of theft, fraud or forcible seizure of money or

property and uses violence on the spot or threatens to use violence in order to conceal the booty, resist arrest or destroy the criminal evidence shall be convicted and punished in accordance with the provisions of Article 263 of this Law.

The translation lacks accuracy as “盗窃罪 *daoqiezuì*” within Chinese criminal law differs significantly from “the crime of theft” in the common law system. Consequently, this translation has the potential to generate misunderstandings among readers familiar with common law systems. The scope of “the crime of theft” in common law system is very large, covering different criminal behaviors, including the crimes of larceny, embezzlement, false pretense, extortion and robbery. In China, “盗窃罪 *daoqiezuì*” refers to the act of stealing a relatively large amount of public or private property, committing theft several times, committing burglary, stealing or pickpocketing with a weapon. Robbery and embezzlement, among others, are not classified as crime of theft in China. Therefore, the accurate translation of the offense of “盗窃罪 *daoqiezuì*” in Chinese law should be “the crime of stealing” or “larceny” instead of “the crime of theft”.

“Manslaughter” is also a legal term that is easily mistranslated. Translators often translate it broadly as “杀人 *sharen*” or “过失杀人 *guoshi sharen*”, which is inaccurate. “杀人 *sharen*” is an umbrella term for all kinds of killing, hence an equivalent to homicide in the common law system. Its scope is larger than manslaughter and the scope of “过失杀人 *guoshi sharen*” is narrower than manslaughter. In fact, in common law, manslaughter includes voluntary manslaughter and involuntary manslaughter. Voluntary manslaughter refers to non-premeditated and unplanned killings, occurring in the heat of passion or out of self-defense in reasonable circumstances. The offender has mens rea but the killing is unplanned and non-premeditated. Involuntary manslaughter refers to non-premeditated and unintentional killings. In this case, the act of killing results from negligence, carelessness, or violations of legal obligations, and the offender does not have mens rea. This definition is closer to China’s definition of “过失杀人 *guoshi sharen*”. Therefore, translating manslaughter broadly as “杀人 *sharen*” or “过失杀人 *guoshi sharen*” is not accurate, “非预谋杀人 *feiyumou sharen*” (non-premeditated killing) is a more appropriate version.

3.3 Discrepancies in Legal Institutional Structures

Legal institutional structures refer to the organizational entities put in place to facilitate the effective operation of legal processes. In essence, legal institutional structures include entities such as courts, judicial bodies, law enforcement agencies, legislative bodies, regulatory bodies, and other relevant institutions responsible for interpreting, enforcing, and upholding the law. They contribute to the stability and fairness of legal systems, helping to maintain social order and ensure the smooth functioning of legal processes within a given jurisdiction. Take court system as an example. The court system in different countries are set up based on different levels. In China, the court system is based on a civil law tradition influenced by socialist legal principles. The court hierarchy consists of four levels: 基层人民法院 *jiceng renmin fayuan* (Basic People’s Courts), 中级人民法院 *zhongji renmin fayuan* (Intermediate People’s Courts), 高级人民法院 *gaoji renmin fayuan* (High People’s Courts) and 最高

人民法院 *zuigao renmin fayuan* (the Supreme People's Court). The United States follows a dual court system. The structure of the court system includes federal and state courts. At the federal level, there are district courts, circuit courts of appeals, and the Supreme Court. State courts vary in structure but generally have trial courts, appellate courts, and state supreme courts. The court system in the United Kingdom consists of multiple levels, including Magistrates' Courts, Crown Courts, and the Supreme Court. As such, there exists lexical gaps in the translation of these court systems, posing a great challenge for translators.

The jail system also exhibit great differences in different countries. In the Chinese legal system, there are 拘留所 *juliushuo*, 看守所 *kanshousuo* and 监狱 *jianyu*. 拘留所 *juliushuo* is a facility managed by the public security authorities in China. It is mainly used for the temporary detention of individuals held under administrative detention. 看守所 *kanshousuo* is mainly used for the detention of criminal suspects as well as convicted criminals with a remaining sentence of less than one year. It is subject to the legal supervision of the People's Procuratorate. 监狱 *jianyu* refers to correctional facilities used for the long-term confinement of convicted offenders with relatively longer sentences. They are managed by the prison administration authorities and are responsible for the custody, management, and rehabilitation of prisoners. In the United States, jails are local facilities typically operated by county governments or local law enforcement agencies. They are used for the temporary detention of individuals after arrest, during the pre-trial phase, or for shorter sentences. Prisons are designed for the long-term confinement of individuals serving sentences for more serious crimes. The Police Custody Suite in the United Kingdom is similar to the concept of 看守所 *kanshousuo* in China; they are facilities within police stations used for the temporary detention of individuals arrested by the police. Prisons in the UK are used for the incarceration of individuals serving longer sentences after conviction, similar to the concept of 监狱 *jianyu* in China. While there are similarities in the concepts and functions of these facilities across different legal systems, it's important to note that the specific terminology, practices, and legal frameworks can vary between countries. It's not easy for translators to deal with the lexical gaps.

3.4 Discrepancies in Legal Mindsets

Legal mindset refers to a particular way of thinking and approaching issues or situations from a legal perspective; it is also about people's attitudes towards and understanding of law, which to a large extent affects legal practice. As the famous jurist and judge Oliver Wendell Holmes Jr. put it, "the life of the law has not been logic; it has been experience." An important principle of the common law system is *stare decisis*, which emphasizes the importance of following legal precedents. Precedents, along with customary practices, are important sources of law, and judges have the power to interpret laws. They guide the decisions and actions of legal practitioners, courts, and individuals, and provide a foundation for legal reasoning, ensuring fairness, consistency, and the application of established legal norms. The civil law system, on the other hand, is based on statutory law, and judges primarily rely on the explicit provisions of the law and apply deductive reasoning to determine the outcome of a case. Rather than

primarily relying on precedents, Chinese judges typically begin by examining the law itself when handling a case. They consider relevant legal provisions as the primary premise and the specific facts of the case as the secondary premise. Using deductive reasoning, they then draw a conclusion based on this analysis. The differences in legal thinking have led to differences in litigation procedures, resulting in a large number of different legal terms. It is difficult to find exact equivalents between the two legal systems, and this may easily lead to mistranslations. For example, the litigation systems in the common law countries and civil law countries differ greatly. The former adopts the adversary system, where two opposing parties present their cases before the judge or the jury. Each party advocates for their own position, presents evidence and arguments supporting their case, and confront the other party. The parties have the opportunity to cross-examine witnesses presented by the opposing side, challenge their credibility and the admissibility or relevance of evidence. This procedure is aimed at protecting human rights, reflecting the fundamental principles of democratic litigation. On the other hand, China's litigation style has gradually evolved over the years from the initial ultra-authoritarianism to the current mixed system that incorporates elements of both the adversary and inquisitorial systems, with the judge playing a central investigative role. While parties can present their arguments and evidence, the judge is responsible for examining witnesses, questioning parties, and conducting investigations to establish the facts of the case. The level of intensity and the extent of cross-examination in China's legal system is much weaker than the adversarial systems found in some common law countries. That's why many translators in China mistakenly translate cross-examination as “盘问 *panwen*”, which in fact cannot capture the essence of this procedure in the common law system. It would be better to render it as “交叉询问 *jiaocha xunwen*”.

4. Solutions

Sarcevic (1997) pointed out that legal translation is not a simple process of replacing the concepts and systems in the original legal system with the concepts and systems in the translated language, but a double decoding process including linguistic transcoding and legal transcoding. It can be seen that the translation of legal terminology is not an easy task, and the translator can only better convey the connotation of the original legal terminology under the premise of understanding the legal system and the legal culture of the source and target countries. Based on the above discussions, it can be seen that the challenges of legal term translation are usually brought by deficiency of linguistic knowledge, discrepancies in legal systems, legal institutional structures and legal mindsets. To address these problems, the following strategies are suggested.

4.1 Using Exact Equivalents when Concepts Are Equivalent

Terminologies should exhibit professionalism, accuracy, and standardization within its specialized domain, leaving no room for ambiguity. Translators should select the closest equivalent legal terms in the target language that represent and convey the original meanings in the source language (Cao, 2002) and avoid the use of general expressions. According to Sarcevic (1997), there are specific steps the

translator can follow to achieve better translation effects in the translation of legal terms. Translators first need to identify the nature of the problem, and then figure out how the legal system of the source language solves the problem. In this way, translators are able to find the closest equivalent legal terms in the target language that best capture the connotations and meanings of the source legal terms. Translators can make use of contextual clues, both extra-textual contexts and inter-textual contexts, both grammatical and meaning wise, to improve the translation effects (Cao, 2002).

For example, “无期徒刑 *wuqi tuxing*” is a penalty in Chinese legal system to deprive criminals of their life freedom. When translating it into English, the translator should figure out whether there is such punishment in common law system. Then the translator would find out that the corresponding concept is “life imprisonment” or “life sentence”, which refers to being put in prison for a very long time without an arranged time for release or until death. Therefore, these two can be used as the English version of “无期徒刑 *wuqi tuxing*”.

4.2 Paraphrase

Qu Wensheng (2012) pointed out that if there is no corresponding English legal term for certain Chinese legal term, we should first find out the similar legal system in the common law, and then take alternative means to translate them, so as to seek common ground while reserving differences. For example, “行政处分 *xingzheng chufen*” (a punishment given by a state administrative organ to its civil servant who commits violation of law or dereliction of duty) is often translated as administrative penalty or disciplinary sanction. However, these two terms are usually related to employee misconduct in the workplace and the punished subject is not limited to civil servants. The original concept and the translation version are not full equivalents but partial equivalents. In this case, it would be better to adopt the translation strategy of paraphrase. Therefore, “行政处分 *xingzheng chufen*” can be translated as “administrative disciplinary action for civil servants”.

4.3 Coining New Words

As it can be seen from the previous section, there are a large number of legal terms between different legal systems for which no equivalents can be found due to various cultural factors. When there are no similar concepts in the legal system of the translated language, Sarcevic (1997) suggests that translators can create new terms. For example, the terms “County Court” and “Queen’s Bench” in England have no equivalent concepts in China’s legal system, so new terms were created to translate them as “郡法院” and “王座庭” respectively. Likewise, there are no equivalent terms of “solicitor” and “barrister” in China’s legal system. Solicitors are mainly responsible for legal consultation and can only appear in lower courts when acting as a criminal defender, while barristers specialize in courtroom advocacy and litigation and can argue cases in courts and tribunals of different levels. There is no such distinction between lawyers in China, therefore two new terms “事务律师” and “出庭律师” are coined to represent the original English legal terms respectively. This method can enrich the legal vocabulary and show the charm of different legal cultures. It should be noted, however, that caution must be exercised when creating new terms, and this approach should only be considered when the source terms cannot

find its equivalents in the target legal system. As Du (2004) put it, legal language is different from ordinary language, it is a system with considerable authority and binding force, and newly coined legal terms must be subject to the constraints of the original legal language system.” Translators must carefully consider the connotations and nature of the original terminology, and do their best to retain the characteristics of the source language and reflect the cultural connotations behind it, rather than creating new words at random.

5. Conclusion

Mistranslation of legal terms can happen due to differences in language, legal systems, legal institutional structures and legal mindsets, which impede the exchange and understanding between different legal systems. Translators should not only have solid linguistic skills, but also be familiar with the important concepts of major legal systems in the world. When translating legal terms, translators should use standardized language, review and confirm the accuracy and correctness of the translated content. When there are equivalent terminologies and concepts in the source and target legal systems, translators should use the exact equivalents. When there are none, translators can use the methods of paraphrase and coining new words. They should delve beyond surface meanings and scrutinize the fundamental and supplementary attributes of legal concepts. By doing so, the difficulties associated with the untranslatability and conceptual disparities in translating legal terms can be effectively overcome.

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