

Terminological Incongruency in Legal Dictionaries for Translation

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1. Introduction

In the field of law the corresponding terms of two legal systems are rarely identical at the conceptual level. Thus it is not surprising that terminological incongruency is the main preoccupation of bilingual legal lexicographers, many of whom have failed in their attempt to provide accurate translation equivalents. As a result, bilingual legal dictionaries often have a notorious reputation of being unreliable.

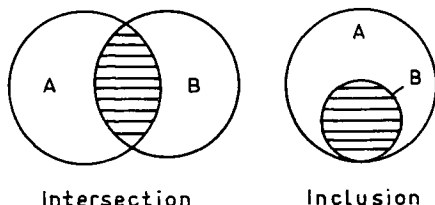
Although legal lexicographers have recently devised new methods of improving user reliability (see Šarčević 1988a: 308—311), there is still a long way to go. This paper explores the possibility of using conceptual analysis as a means of achieving greater accuracy in legal dictionaries for translation. To my knowledge, the *Internationales Institut für Rechts- und Verwaltungssprache* in Berlin was the first to use conceptual analysis to measure the degree of equivalence between corresponding word pairs in its series of bilingual glossaries (EUROPA-GLOSSAR DER RECHTS- UND VERWALTUNGSSPRACHE Bd. 1—29; see partial list in Lane 1982: 231). In this paper I propose that lexicographers now go a step further by attempting to use the results of conceptual analysis to correct terminological incongruency and provide guidelines to usage.

2. Terminological Incongruency in Legal Dictionaries

Similar to Hjelmslev's analysis of terminological incongruency in ordinary languages, it can be shown that the boundaries between the meanings of concepts of different legal systems are incongruent. Failing an identical concept in the TL, lexicographers tend to cite the closest analogous concept in the target legal system. This is known as a functional equivalent, i.e., a term in the TL designating a concept or institution, the function of which is the same as that of the source term. This practice, however, inevitably leads to inaccuracy: As a rule, the conceptual characteristics of functional equivalents are incongruent. In the majority of cases, functional equivalents are only partially equivalent (Šarčević 1988a: 307).

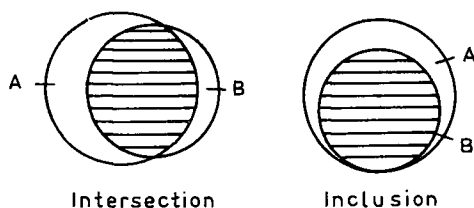
Generally speaking, there are two types of partial equivalence: intersection and inclusion. Intersection occurs when concepts A and B contain common characteristics but also additional characteristics not shared by the other concept. On the other hand, inclusion occurs when concept A contains all of the characteristics of concept B, plus one or more additional characteristics:

PARTIAL EQUIVALENCE



In both intersection and inclusion, the optimum degree of congruency (total characteristics shared by concepts A and B) is referred to as near equivalence. Near equivalence occurs when the conceptual overlap of A and B is significant or when the amount of additional characteristics contained in concept A is insignificant:

NEAR EQUIVALENCE



Although near equivalence rarely occurs between the functional equivalents of different legal systems, bilingual legal dictionaries can be regarded as reliable for translation only if near equivalence is guaranteed. This means that lexicographers who merely cite functional equivalents are predestined to fall short of their goal. Therefore, they should attempt to compensate for terminological incongruency by using the results of conceptual analysis to achieve near equivalence.

3. Conceptual Analysis of Legal Terms

The purpose of conceptual analysis is to establish the constituent characteristics or properties of concepts. Whereas the classification of conceptual characteristics provided by Eugen Wüster is useful for the natural sciences and technology, it cannot be consistently applied to the social sciences which are concerned primarily with concepts as opposed to material objects. In general, it has been proposed that the characteristics of concepts in the social sciences be divided into two groups: *essentialia* (vital, necessary) and *accidentalialia* (additional, possible, but not inevitable) (Dahlberg 1981: 19). Such classification permits flexibility in that a characteristic may change categories depending on the use of the term in context. For example, the concept of *lawful wedded wife* has certain essential characteristics in family law which are accidental in inheritance law although the concept remains the same (Picht/Draskau 1985: 48).

In the field of law it is particularly important to distinguish between the intension and extension of terms. The intension of a term includes "the set of essential properties which determines the applicability of the term" (Lyons 1977: 159). The definitions of monolingual dictionaries usually list the characteristics constituting the intension. For example, the term *bankruptcy* in English law is defined as "the name given to a variety of judicial or quasi-judicial proceedings, having for their main object the distribution of the property of an insolvent person among his creditors" (JOWITT'S DICTIONARY OF ENGLISH LAW 1977: 183). On the other hand, the extension of a term is "the class of the things to which it is correctly applied" (Lyons 1977: 158). In legal methodology, the extension also includes types or classes of transactions, cases, situations or proceedings (cf. Wank 1985: 35). For example, the extensional definition of *bankruptcy* in English law includes the various types of insolvency proceedings such as compulsory winding-up, creditor voluntary winding-up, bankruptcy, administration, corporate voluntary arrangements and individual voluntary arrangements.

Since the number of characteristics constituting the intension of general terms is relatively small, it is not uncommon for the general terms of different legal systems to have the same intension but different extensions. For example, the German term *Konkurs* has the same intension as the English term *bankruptcy* (cf. CREIFELDS RECHTSWÖRTERBUCH 1986: 648); however, in German law there are only two types of insolvency proceedings: *Konkurs* and *Vergleichsverfahren*. In such cases the congruity is limited to intension. Conversely, it may occur that, as in Frege's example of the morning star and the evening star, the extension is the same but the intension differs. Especially in criminal law, it is possible that the same case or cases could be subsumed under different offenses in different legal systems. More often, however, incongruity occurs in both intension and extension.

4. Conceptual Analysis and Comparative Law

The analytical comparison of concepts of different legal systems requires not only considerable knowledge of the legal systems in question but also a mind well-trained in legal methodology. Thus the task of compiling bilingual legal dictionaries should be entrusted to a team of experienced jurilinguists. As in comparative law, one of the main problems in legal lexicography is how to establish the constituent characteristics of the concepts being analyzed. Whereas terminologists in the exact sciences rely primarily on the definitions of monolingual dictionaries (cf. Arntz/Picht 1982: 140), monolingual law dictionaries are usually insufficient for this purpose.

According to J.-L. Constantinesco, comparative terminologists can establish the constituent characteristics of concepts only by examining all the original sources of the particular law: legislation, doctrine and case law (1974: 135). Even then there is no guarantee that they will find ready definitions. On the one hand, there is a large number of indefinite or vague concepts which are undefined or inaccurately defined. More disturbing, however, is the fact that there are often no ready definitions of definite concepts. Although legislation is the primary source of such definitions, the number of statutory definitions is relatively small. Even if a statutory definition does exist, the courts are usually empowered to redefine the

concept or to extend the definition to another case by analogy. Moreover, the opinions of legal scholars (doctrine) are also influential in the continental European (civil law) systems and may indirectly affect existing definitions or lead to new definitions if accepted by the court. In the common law systems, it is primarily the judge who shapes, defines and redefines terms by broadening or restricting their scope at his own discretion and thus it follows that case law is of major importance as a source of law.

In order to uncover the essential and accidental characteristics of a concept, terminologists should proceed by legal analysis, posing a series of practical questions as if solving a legal problem. Here the linguist is obviously at a loss since he lacks the know-how to pose the proper questions. As I see it, the main difference between linguists and lawyers is in their approach. Whereas the linguist proceeds from the concept itself, the lawyer's approach is functional, i.e., he proceeds from the problem at hand. In the search for equivalents, for example, the linguist will ask: "What is the English equivalent of the French concept of *hypothèque*?" The lawyer on the other hand will investigate how security is pledged for the payment of a debt at common law. Secondly, since all legal concepts have an inherent normative function, the lawyer will instinctively investigate the legal effect(s) of the functional equivalent in the target legal system. Thirdly, the lawyer is structurally oriented. He will automatically place the problem in a legal category by characterizing it as a matter of contract law, property law, procedural law etc.

4.1. Functional Approach

In comparative law one of the methods of comparison which has found widespread support is the functional approach. Regarding law as a mechanism of social regulation, K. Zweigert claims that the concepts and institutions of different legal systems can be meaningfully compared only if they perform the same task, i.e., if they serve the same function. Accordingly, the concepts of different legal systems can be regarded as functional equivalents only if they are capable of solving the same factual problem (Zweigert/Kötz 1984: 48).

As mentioned above, functional equivalents are usually incongruent. One of the main reasons attributing to this incongruency is the fact that, although functional equivalents solve the same problem, this does not necessarily mean that their scope of application is identical. For example, concept A may also solve other problems which concept B is incapable of solving and vice versa (intersection), or concept A may solve the same problem(s) as concept B and additional problems as well (inclusion). The scope of application is of particular importance because it determines the extension of a concept. The use of a functional equivalent whose scope of application is significantly broader or narrower than that of the source concept can be misleading in translation and should be avoided in lexicography as well.

Coming back to the example of *hypothèque* and its common law counterpart *mortgage*, it should be pointed out that both are technical terms with the same general function; however, their scope of application differs. Although both terms denote a security for the payment of a debt, the scope of application of *mortgage* is broader than that of *hypothèque*. Whereas a *hypothèque* applies only to immovables, a *mortgage* can be pledged for both movables and immovables (personal and

real property). Despite the importance of this basic difference, no note of it is made in most bilingual dictionaries *DICTIONNAIRE JURIDIQUE* 1982: 161; *GLOSSAIRE DES COMMUNAUTÉS EUROPÉENNES* 1982: 17). Although Terminum, the term bank of the Canadian Federal Government, warns that the two terms are incongruent, no guidelines are provided to assist translators correct the incongruity.

In my opinion, lexicographers of dictionaries for translation should indicate any essential differences in the scope of application of a functional equivalent and its source term, thus enabling the translator to decide whether the equivalent is acceptable in a particular context. For example, if the dictionary entry mentions that a *hypothèque* applies only to immovables and a *mortgage* to both immovables and movables, this suffices as a guideline to usage. Theoretically, this means that the term *hypothèque* could be translated, as *mortgage* in all contexts, the term *mortgage* as *hypothèque* however only, in contexts pertaining to reality. This has been confirmed by the American translator of the French Civil Code who uses *mortgage* as a translation equivalent for *hypothèque*, as he points out, "with the contextual understanding that it is limited to realty" (The French Civil Code: 18).

4.2 Legal Effect

Although various legal systems solve the same problem in the same or similar manner, the result, i.e., the legal effect may be different. Thus, it has been emphasized that "it is necessary for the legal translator to understand not only what the words mean and what a sentence means, but also what legal effect it is supposed to have, and how to achieve that legal effect in the other language" (Schroth 1986: 55-56). Since not all functional equivalents lead to the same legal effect, an analysis of legal concepts should include at least their immediate legal effects.

Generally speaking, the meaning of legal concepts cannot be derived from one or even several statutory provisions or cases. As a result of the so-called relativity of legal concepts, their meaning can be grasped only as a process of interaction between fact and legal effect within the total mechanism of the particular legal system (see Wank 1985: 75-76). Consequently, legal concepts automatically imply certain legal effects within a given system. Since the same concept may have different legal effects under different circumstances and in different situations, lexicographers usually disregard these so-called legal connotations.

In numerous instances, however, the legal effect(s) of a concept are vital to its intension and thus are decisive in determining the acceptability of a functional equivalent. This is true, for example, in the case of the disputed word pair *hypothèque* and *mortgage*. In its strict sense, a mortgage effects the actual conveyance of legal title to the creditor, thus creating all the incidents of legal ownership, including the right to possession. Upon discharge of the mortgage, the property reverts to the debtor. On the contrary, a *hypothèque* creates merely a charge upon the property of the debtor, not a title to the property.

On the basis of this and the above simplified explanations of *hypothèque* and *mortgage*, the essential characteristics of the two concepts may be summarized as follows:

	FUNCTION	SCOPE OF APPLICATION		LEGAL EFFECT
	security for payment of debt	immovables	movables	conveyance of ownership
HYPOTHÈQUE	+	—	—	—
MORTGAGE	+	+	+	+

Since the difference in their scope of application may be corrected by use in context or delimitation of the broader term as illustrated above, this leaves us with the problem of correcting the incongruency resulting from the different legal effects. Since this difference could be vitally important for the interpretation of a translation, it should be corrected by lexical expansion. The use of lexical expansion to delimit or expand the sense of a term is commonly used in translation and can also be extremely useful in legal dictionaries. For example, in his *DICTIONNAIRE JURIDIQUE, français-anglais, anglais-français*, J.A.C. Smith proposes translating the term *mortgage* (in its common law sense) not just as *hypothèque* but as *hypothèque translatrice*, thus expanding the sense of *hypothèque* to include the conveyance of title.

4.3. Structural Orientation

Legal lexicographers must also think in terms of structure by taking account of the systematic classification of concepts and institutions, i.e., their division into branches of law. This is especially important in the case of polysemous terms. Whereas translators determine the sense of a polysemous term by its use in context, lexicographers may do so by identifying the branches of law in which the equivalents are used.

Such classification, however, is not purely a formal one. In legal analysis it automatically implies that a certain set of rules will be applicable and that others are to be excluded. Accordingly, if a functional equivalent and its source term are not structurally equivalent, the legal techniques used in solving the particular problem tend to be different. Thus it follows that translating source terms with functional equivalents which do not belong to the same branch of law should be avoided if possible. Since the branches of law are fundamentally the same in all countries of the Romano-Germanic family (legal systems based on Roman and Canon law), it is likely that functional equivalents which are also structurally equivalent can be found within the French, German, Italian, Dutch, Greek and Portuguese languages (cf. David/Brierley 1985: 84). This, however, is no longer true when one is dealing with other families of law such as common law, socialist law, Hindu law, Islamic law, African law and Far East law. When comparing French (Romano-Germanic = civil law) and English law (common law), David once said: "English legal structure is not the same as that of French law and it poses the greatest difficulty for a

continental jurist since it is, in fact, totally different from anything with which he is familiar" (David/Brierley 1985: 334).

Although this applies in particular to property law, changes have come about in the common law, reducing the divergencies between common law and civil law to a minimum as far as actions involving debts are concerned. As previously, a mortgage interest in land (common law) and a right *in rem* involving a *hypothèque* (civil law) are subsumed under property law. The main differences can still be found in the realm of movables. In civil law such debts are simply referred to as contractual debts since they are subsumed under contract law and resolved in actions for damages. In the common law, such debts, referred to as chattel mortgages, were originally associated with property law. Today, however, they have been incorporated into contract, thus resembling civil law although they have retained their independence from actions for damages.

5. Closing Remarks

In closing it can be said that conceptual analysis can be an invaluable tool for improving accuracy in legal dictionaries for translation. Plagued by the problem of terminological incongruency, legal lexicographers should use conceptual analysis to determine the conceptual differences and similarities between a functional equivalent and its source term. Attempts should then be made to correct terminological incongruency by using lexical expansion to delimit or expand the sense of a functional equivalent. Information on the scope of application of the functional equivalent and its source term should be included as a guideline to usage. Furthermore, the systematic classification of equivalents should be indicated, especially in the case of polysemous source terms. Finally, lexicographers should avoid functional equivalents which could be misleading due to significant structural differences. The same applies if the incongruency of a functional equivalent cannot be corrected to a satisfactory degree. In such cases, the functional equivalent should be rejected as non-equivalent and it is up to the lexicographer to provide an alternative equivalent. (On the use of alternative equivalents see arevi 1988a: 311; with emphasis on languages of limited diffusion in 1988b: 457—461).

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