

# Translation as Intercultural Transfer: The Case of Law

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## Abstract

The Cultural Turn in Translation Studies has promoted the understanding of translating as a complex activity raising difficult questions about how to handle culture-specific assumptions.

Legal translators are confronted with the asymmetry of legal systems, the relativity of concepts, and have to deal with inconsistent categorizations and classifications. Their task as cultural mediators is to adequately communicate information about foreign law specifically taking into account the divergent previous knowledge of the target audience in order to avoid misunderstandings.

This article investigates more closely the relationship between law, culture, and communication. Exploring the consequences of mutual influences among legal traditions, we discuss the phenomenon of transculturation in the field of law and question how legal information is possibly altered by its transfer from one legal system and legal language to another. Showing how cultural embeddedness conditions legal translation, we suggest strategies of how to best meet the challenge of communicating law as culture.

## Introduction: The Cultural Turn in Translation Studies and Law

*The creation of legal meaning takes place always through an essentially cultural medium.*

(Robert Cover in: ROSEN, 2006: 1)

Since the Cultural Turn in Translation Studies, translation is viewed as a cultural transfer, strategies to render possible an effective communication between cultures. Law is a cultural domain, occupying an important place among the cultural practices of society. The roles of legal institutions cannot be fully comprehended if not seen as part of their culture and at the same time a culture cannot be fully understood without attending to its form of law.

The “Law as Culture” movement originating in the United States understands Legal Studies as Cultural Studies (cf. Leonhard/Ashe 1995, Naomi Mezey in Sarat/Simon: 2003: 37ff) and explains the particularities of a legal system as characteristic patterns of a national legal culture. For an international legal discourse understood as an intercultural expert communication in the field of law, this understanding has important implications for dealing with the divergent previous knowledge of lawyers coming from different legal systems or legal traditions and reinforces the general shift to meaning promoted by an increasing acceptance of purposive translation strategies also for legal texts. If therefore translation and law are forms of cultural analysis, in how far do they overlap, complement or simply differ from one another?

## **Defining “Legal Culture”**

Many refer to the cultural embeddedness of law (cf. Bracey 2006), but the notion of “legal culture” defies uniform definition (Cotterell, 2006: 81). Many different attempts at comprehensively defining “legal culture” exist, one of them describing it as the “ideas, attitudes, values, beliefs and behavior patterns about law and the legal system” (Cotterell, 2006, 81ff). It involves procedural and doctrinal structures and has to be distinguished from legal ideology and common culture. Law’s dependence on culture and culture’s dependence on law opens possibilities towards a potentially fruitful synthesis (Naomi Mezey in Sarat/Simon: 2003: 39). The “mentalité” (Legrand) of a legal culture arising out of common significant attitudes as well as a collective general outlook and the acceptance of law as a part of life.

Does the complex modern society require a more complex legal culture and in how far does legal cultural plurality influence the dialogue between national legal traditions? In how far does the element of tradition function as a connective element between law and culture? In the face of the coexistence of different concepts of culture, not necessarily inconsistent, but certainly diverse, legal translation seeks strategies to incorporate the input of this fragmented diversity of influences, experiences, understandings, environments, expectations, and constraints imposed by the law on the transfer of knowledge.

## **Specificity of Legal Language**

Legal language differs from other languages for special purpose in that the law is entirely created by humans. Some even claim that the law can express itself and is accessible only by way of language. In any case, by changing laws the legislator is in fact able to change the legal reality.

Law as a socio-cultural phenomenon is always linked to the culture of a particular society and jurisdiction. Consequently, national legal systems are deeply rooted in a specific legal tradition and legal culture. Legal terminology is system-bound, tied to the legal system rather than to language. Therefore, multiple legal languages can exist within the boundaries of a natural language, depending on how many legal orders make use of that same language. However, legal language is a technical language with particularly close ties to the common language, which significantly heightens its culture-specificity.

## **Legal Translation as Intercultural Communication**

Legal translators as mediators between legal cultures have the task of effectively communicating legal information across the barriers of legal traditions and languages. In this pursuit, their major goal has to be to avoid conceptual misunderstandings and achieve transparency.

Particular challenges they are facing include the asymmetry of legal systems, the resulting relativity of legal terminology, inconsistent categorizations and classifications between the different branches and fields of law, distinguishing between the terminological and conceptual levels as well as the complexities of conceptual and terminological change.

The far-reaching implications of the complex legal-linguistic interaction mixed with autonomous developments of national legal cultures can best be observed when looking at the legal vocabulary of an emerging European legal culture (On perspectives on culture and EU law compare: Craufurd Smith: 2004). European legal terminology primarily aims at avoiding expressions too closely related to those of individual member states and opt to coin new terms when expressing new concepts (such as eg “*acquis communautaire*”, supranationality, etc).

While some for all these reasons consider legal texts generally untranslatable, the link to comparative legal analysis providing criteria of comparability for legal concepts may help to overcome seemingly unsurmountable difficulties, which challenge the basic assumption of translation, namely the striving for equivalence. Accepting the common cultural foundation of law and language may therefore open up new possibilities and potentials of cultural analysis in the field of law.

### **“Cultural Immersion” Approach**

The immersion approach in comparative legal analysis works places a high importance on the unique cultural context of any national legal system highlighting the significance of “trying to understand foreign legal cultures in an ‘untranslated’ form” (Grosswald Curran, 1998: 57), ie not filtered through the cultural background of the investigator thereby advocating “an expansion rather than an exchange” (ibid) of perspectives. Viewing the legal culture in original form while retaining stance as outsider even when acquiring an insider’s view well describes the position a legal translator/legal cultural mediator should take to fulfill his task.

### **Decisive Parameters for Effective Global Legal Communication**

Among the most decisive parameters for legal cultural communication are functionality and relevancy in the framework of contextualization. Interestingly, these basic principles can be found in both comparative law as well as legal translation methodologies albeit with several quite significant differences (cf. Pommer 2007-1).

#### **a) Functionality vs. Teleology**

Functionality is the basic principle of comparative law claiming that legal concepts are comparable only when they fulfill the same function. This “telos” of a legal rule must be carefully distinguished from the “skopos” of a translation in determining the communicative function as well as the limits of functionality (cf. Pommer 2007-1).

#### **b) Relevancy vs. Contextualization**

In the course of de- and recontextualization of the information to be communicated, a shift in focus occurs and due to incongruent classifications, hierarchization, and inconsistent interrelations of elements of content their legal as well as communicative relevancy often changes. Relevance theories in law, translation, and philosophy aim at supplying criteria for the presumption of relevancy and their impact on comprehension (cf. Pommer 2005-2).

### **c) Transfer vs. Transformation**

In the field of law, the very idea of translation as a form of transfer aiming at achieving equivalence between the source and target texts is severely challenged. The transmission of legal information about one's own or other (national, international, or supranational) legal systems much rather resembles a "dynamic transformation" than a mere transformative transfer of legal information with the potential of creating new cultural manifestations in the process of transculturation (as the phenomenon of merging and converging cultures) (cf. Pommer 2007-2).

### **Conclusion**

Today's international legal environment faces the challenges of legal pluralism and multilingualism as increasing legal interaction takes place on transnational and international levels which some believe to lead to a legal cultural convergence of the civil and common legal traditions (cf. Glenn, 1992, 66ff). Such a dynamic communicative environment requires appropriate and efficient communicative strategies to bridge legal cultural gaps.

Communicating law therefore has to be understood as a mix of practices of producing meanings and ways in which systems of meanings are negotiable in and across legal cultures. Here comparative legal analysis can provide insights for legal translation with regard to identifying crucial categories determining differences in legal cultural contexts.

The interrelatedness of law, language, and culture shape the communicative framework in which legal discourse takes place. It remains to be investigated to what extent the vague concept of "legal culture" proves useful for this sort of inquiry.

Globalization carries its own culture aiming at harmonizing and stabilizing conditions to be established and maintained in transnational environments. The notions of proximity and foreignness take new meaning also in the realm of law. "Law and translation as culture" as an approach to render possible communicating the specificities of law and clarifying as well as reconceptualizing the relations of law, language, and culture.

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