

Legal culture transfer: domestication Vs foreignization

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With the growing trend toward globalization; countries are exchanging businesses in different forms, multinational companies are a clear image of that mixture between two countries or more, each one having a specific business terms and conditions according to the business culture. One can not dissociate business from law since it is the basic element that preserves rights and duties of each part in any business exchange. In other words business is rooted to legal procedures.

This paper attempts to shed some light on the hard task of the legal translator when he stands in the middle of the crossing of two legal systems in order to preserve the rights and define duties. Many strategies are used in such a difficult position, especially when it involves legal culture transfer from one language to another. Adopting the idea that language is not an empty mould to fit any conceptions and definitions, translation as the transfer of the *fournitures* that constitute the source language world and placing them in the target language world can end to represent a confused image.

Legal translation necessitates extreme precision, hence legal language tends to be extremely culture dependent even in business papers. Any text belongs to a specific and probably a unique legal system or culture. Legal culture has been defined as people's conceptions of law combined with its practices. That means that the legal translator does not deal with legal culture in sense of the practices and behaviour by legal professionals such as lawyers and judges because his mission is to translate the legal text and not establish laws.

The transfer of culture takes place when the law of one country is moved to another, or when two legal systems come into contact. Sacco (1991) remarked that there are two fundamental causes of legal transplantation: imposition and prestige. Imposition of law is clearly shown in colonial situations where the dominant culture imposes its legal system on the indigenous population. For example the imposition of many French laws in Algeria in the colonialism period.

Law development is not a new phenomenon, most judicial systems have been influenced by more than one foreign system. According to Coulson¹ starting from the middle nineteenth century the Arab countries gradually started to adopt Western laws instead of their own based on Islamic law sometimes with the retention of Shari'ah principles. Egypt for

example adopted the codes of Napoleon in 1883 and became a civil law country; in 1937 Egypt directly adopted the Italian criminal law. Egyptian civil law was used later as a basis of its counterpart in Syria and Lebanon also. Sudan in 1899 promulgated a criminal law based on the Indian penal code which was influenced by the British code. Morocco, Algeria and Tunisia were late to adopt western laws despite the fact that they were under colonial rule for long periods.

Legal culture is the conceptual thinking snared by legal professionals. It is an essential component of any legal system. Two main strategies are followed by the translator when he has to deal with the transfer of legal culture: domestication or foreignization.

Domestication: The translator tends to achieve the goal of communication by naturalizing foreign texts in order to conform to domestic conventions, producing a translation that is representative of the TL culture. Merry provides a clear definition:

« Domestication is the cultural appropriation, it can be seen as the resistance to the imported culture which is changed in form and substance, becoming mixed with the indigenous culture. »²

Foreignization: This strategy promises a greater openness to cultural differences. It is the proper way to effect the transfer of the source culture as it allows the target language to be influenced and amplified by the source language.

« Foreignization in contrast with domestication necessitates the assimilation of legal concepts of foreign laws and the accommodation of the target culture to the alien concepts. »³

Thus translation as cultural transfer leaves the choice open to each translator: either he chooses foreignization preserving the alien elements in the target text or he chooses domestication ironing the cultural differences out to make the target text readily comprehensible to the reader.

Translation theorists have drawn the difference between these two strategies, in her article titled « de l'esprit des lois à l'émotion judiciaire » Christine Durieux argued:

... ainsi le traducteur se fixe pour tâche de rechercher notamment dans des dictionnaires bilingues et dans des banques de données terminologiques, des termes, phraséologismes et stéréotypes correspondant à ceux qui figurent dans le texte original... dans cet exercice, traduire c'est transcoder.⁴

This is a clear figure of the procedure followed by the translator when opting for foreignizing the legal culture. Scholars such Catford and Nida considered translation as an interlingual rather than a socio-cultural activity. However they didn't lose sight of the role that cultural elements play in the process of translating.

... c'est la toute la dimension adaptative de l'opération traduisante, qui peut aller jusqu'à la réécriture... que la lecture de celle-ci (traduction) suscite la même réaction chez le lecteur du texte original.⁵

In this situation the translator needs not only proficiency in two languages but also in both cultures in order to make the reader feel at home.

All large-scale cultural transfers begin in the absence of a readily usable language the first and most natural response of the native culture is to make an attempt to naturalize the foreign culture where it has a close affinity to the native culture, naturalization or minor adjustment may be adequate. But when it is one of great complexity; or radically different, the native culture will find it necessary at some point to change and adjust its language so as to make it suitable for assimilating it. Discussing cultural shock Vermeer likened the issue to the plantation of a tropical tree in a desert area:

... suppose you take a tree from a tropical climate to a temperate zone. Will it not need special care? Will it be considered something out of ordinary by whoever sees it?... with a translation it is not much different. One will have to decide before translating whether it is to be adapted... to target culture conditions... one will have to make a choice. In both cases the text will be « different » from what it was in its « normal » source-culture conditions, and its « effect » will be different.⁶

The legal translator should preserve the unity of a single instrument by striving to produce a text that should be interpreted and applied by the courts in same manner as the source text. In other words the legal translator should know how the rule was developed; about the underlying intentions of the legislative drafter, and about how the rule-maker wants the rule interpreted. This may place a heavy burden on the legal translator.

As a case study we have chosen the translation of common law into arabic. It is true that the linguistic and cultural differences between English and Arabic pose great difficulties in translating the Common law into Arabic. But according to Roebuck and Sin:

... law as a social institution is not dependent on language in the same way... it prescribes human

behaviour... human behaviours can be described with similarly sufficient precision in any language, the behaviour prescribed and regulated by common law is no exception.⁷

The crux of the issue lays in the cultural-religious gap between the English common law and the Arabic language. Legal concepts of the common law are specific to that system and are expressed by means of its specific legal terminology. When translated into Arabic this terminology poses serious problems to the translator. The main difficulty is encountered in partial equivalence cases, it means when a term of source language include fewer or broader characteristics of the concept of target language term.

The law of contract is the foundation of any commercial law regime. As in Roman law for law of contracts, Shari'a also contains an array of contract types; the most common are:

Bai': Sale

Rahn: pledge

Kafala: guarantee

Wakala: procurator

Ijar: lease

Musharaka: Partnership

Hiba: gift

« Unlike the common law the category of « aqd » include both unilateral and synallagmatic relationships ».

It is true that the understanding of these principles is a basic element for the comprehension of shari'a commercial concepts. As there was no explicit general law of contract in Shari'a the base was the respect of the principles of islam and the consequences flowing from them. It means that what is not forbidden is allowed. Thus islamic legal culture is the key to understand the commercial contracts it means that shari'a commercial principles are the referential system to understand a to transfert hem to another language.

Unlike English based common law, which does not recognise a principles of inequality of bargaining power, the Shari'a emphasises the idea of balance of counter values. Another point that makes the contrast stronger between Islamic commercial law and the common law; is to reduce the risk to the parties to an acceptable minimum, notably by the provision of adequate information regarding all the relevant circumstances of the potential transaction.

Aiming to acheive semantic equivalence the legal translator should import the source legal culture, an approach which requires linguistic and conceptual adjustments of the translating language.

In the same manner Arabic as the translating language can be expanded to include newly introduced cultural concepts of the common law. The vocabulary of the common law is multifarious including terms referring to legal institutions, terms referring to legal personnel, terms employed in different branches of law and of course words used in everyday life.

The language of the common law is a complex collection of linguistic habits that have been developed over many centuries, one that judges, lawyers, and other legal professionals have learned to use strategically. Its distinctive linguistic feature accordingly reflect the underlying conceptual of such users.

Translating the common law texts (legislation, case law) the translator uses a range of techniques, neologism, borrowing etc. To arrive at semantic equivalence, this still does not mean that Arabic text is capable of representing the culture of the common law as is the English version.

The environment in which the Islamic laws were formulated and developed was very different from the environment in which the English case law came into being. Indeed, there are a large number of Islamic legal terms which have not been and perhaps never will be translated into English, terms like:

talaq, zakat, haq, diyah... etc. The creation of arabic common law vocabulary for the rewriting of the common law in arabic will signify a large scale assimilation of the entire English legal tradition into Arabic culture.

It has been noted that legal translation as cultural transfer involves linguistic and conceptual adjustment of the translating language. Translating the common law into arabic is thus a paradigm of cultural transfer as foreignization and necessitates the importation of the common law legal concepts and legal principles into Arabic.

Even after new linguistic terms are brought into Arabic through translation, their referential objects continue to be found in English common law and not Arabic law, and need to be understood with reference to common law. As Sager noted:

« New terms are regularly introduced into the language either to fill a gap created by the introduction of a new concept or to replace an existing less efficient term. However, the translated common law cannot acquire its new meanings unless these are understood with reference to the English common law. »⁸

The legal translator can not recode in one stroke a text and the culture behind it. The target

legal culture has to be developed, yet the legal culture of the common law may exist in Arabic but it is embodied only in English.

It is clear that transferring the culture of common law into Arabic accomodates two levels:

- Linguistic transfer: which involves adjustment of arabic language.
- Conceptual transfer: at the metalinguistic level.

On this account, Sin proposed the following general principles in connection with translating the common law⁹:

1- Fixing the semantic reference system: the translation of the common law needs to be understood with reference to the common law system.

2- Adjusting the target language: adjustment on the linguistic level is a must, arabic language has to be amplified to accomodates new concepts.

3- Building metalinguistic devices: there are several ways of constructing a metalinguistic mechanism by which the conceptual gap could be bridged. For example:

a- Write commentaries or articles explaining why and how the translation was done including explanatory remarks and footnotes in the translated work.

b- Translation of related legal works into the target language.

Notes:

1- COULSON, N.J (1971): A history of Islamic law. Edinburg University Press, PP. 152-157.

2- MERRYMAN, J.H (1998): *Legal tradition: an introduction to the legal systems of Europe and Latin America*; Cl: Stanford University Press.

3- MERRYMAN (1985).

4- DURIEUX Christine, « De l'esprit des lois à l'émotion judiciaire » online.

5- Ibid.

6- VERMEER, H.J (1996): A skopos theory of translation. Heidelberg, Germany.

7- SIN, K K and ROEBUCK, D (1996): Language engineering of legal transplantation, in R. Harris (Ed) *Language and communication*, vol. 16 n°3, P. 127.

8- SAGER, J .C (1990): A practical course in terminology processing. Amsterdam and Philadelphia: John Benjamins Publishing company.

9- SIN, K.K (1989): The missing link between language and law, in: *proceedings from the sixth international conference on law and language*, N°36.

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